Not to Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LARRY D. BUTLER, Plaintiff, vs. SMITHWAY MOTOR EXPRESS, INC., Defendant.	No. C 02-3032-MWB **MEMORANDUM OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT BASED ON EXCUSABLE NEGLECT**

This matter, in which plaintiff Larry Butler alleged discriminatory discharge from his position as a truck driver with defendant Smithway Motor Express, Inc. (SMX), comes before the court pursuant to Butler's March 5, 2004, Motion For Relief From Judgment Based On Excusable Neglect (docket no. 20). Butler seeks relief from a judgment entered on March 5, 2003, dismissing this action as a sanction for his failure to comply with the court's October 10, 2002, order compelling responses to discovery requests. SMX resisted the motion for relief from judgment on March 9, 2004.

Butler, who is an over-the-road truck driver, asserts that in November 2002, while this action was pending, his truck was stolen, along with all of the documents and information concerning SMX's outstanding discovery requests. Consequently, he contends that he was stranded, without means to communicate with the court, and without the materials necessary to respond to outstanding discovery requests, and, to make matters worse, authorities apparently considered him a suspect in the theft of his truck, which further hampered his ability to prosecute this lawsuit. Butler contends that, as a result of

these circumstances, he was not adequately notified of the developments in this case prior to its dismissal. He specifically contests the suggestion, in United States Magistrate Judge Paul A. Zoss's January 27, 2003, Report and Recommendation recommending dismissal of this action, that he intimated to opposing counsel in late 2002 that he was unwilling to go forward with his lawsuit without his missing papers. He seeks reinstatement of his case pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure on the basis of "excusable neglect," because he contends that there is no prejudice to SMX, the merits of his claim are not yet at issue, and his inability to prosecute this action was owing to factors beyond his control.

SMX responds that Butler has shown no "excusable" neglect. After recounting the procedural history that led to dismissal of Butler's suit, SMX points out that there is no indication that Butler was not aware *at the time* of the outstanding discovery requests made in the summer and fall of 2002, the court orders compelling responses in the fall of 2002, the January 27, 2003, Report and Recommendation recommending dismissal of his action as a sanction for failure to respond to an order compelling discovery, the extended 30-day period granted by the magistrate judge in his report and recommendation for Butler to object to the Report and Recommendation, or the filing of the undersigned's order on March 5, 2003, dismissing the case. SMX also points out that Butler had previously filed two motions for extensions of time or continuances, so that he was capable of requesting further extensions of time to respond to discovery requests or orders of the court, but he failed to do so. SMX also notes that Butler is still using the same address on his present motion for relief from judgment as he had used previously in this litigation, so that there is no reason to believe that prior mailings concerning the status of his case failed to reach him. SMX argues that a motion for relief from judgment based on "excusable neglect" filed on the last possible day for such a motion is not timely, where there is no showing

of a reason for the delay. Finally, SMX argues that it is prejudiced by the delay in prosecution of this lawsuit, because after the dismissal in March 2003, its CEO, Mr. Smith, was diagnosed with cancer, and he is no longer available to testify. SMX explains that no attempts were made to perpetuate Mr. Smith's testimony, because this case had already been dismissed. Therefore, SMX asserts that it is prejudiced in its ability to present its defense in this action.

"Under [Rule] 60(b)(1) [of the Federal Rules of Civil Procedure], a district court may grant relief from a default [or other final] judgment because of 'mistake, inadvertence, surprise, or excusable neglect.'" *Union Pac. R. Co. v. Progress Rail Servs. Corp.*, 256 F.3d 781, 782 (8th Cir. 2001) (quoting Rule 60(b)). "A district court should grant a Rule 60(b) motion 'only upon an adequate showing of exceptional circumstances.'" *United States v. Tracts 10 & 11 of Lakeview Heights*, 51 F.3d 117, 120 (8th Cir. 1995) (quoting *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986)). A district court's denial of a motion for post-judgment relief under Rule 60(b)(1) is reviewed for abuse of discretion. *See Richards v. Aramark Services, Inc.*, 108 F.3d 925, 927 (8th Cir. 1997).

Here, Butler specifically invokes "excusable neglect" as the ground for his Rule 60(b) motion for relief from the March 5, 2003, judgment. As the Eighth Circuit Court of Appeals has explained, "The term 'excusable neglect' in this rule 'is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.'" *Union Pac. R. Co.*, 256 F.3d at 782 (quoting *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 394 (1993)). The "critical question" is whether a particular negligent act "ought to be deemed 'excusable.'" *Id.*

> In deciding whether to set aside a default judgment for "excusable neglect," a district court ought not to focus

> narrowly on the negligent act that caused the default and ask whether the act was itself in some sense excusable. Instead, the court should take account of "all relevant circumstances surrounding the party's omission," *Pioneer Investment*, 507 U.S. at 395, 113 S. Ct. 1489. The inquiry is essentially an equitable one, and the district court is required to engage in a careful balancing of multiple considerations, including "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith," *id.* We have applied these principles regularly since the Supreme Court laid them out in *Pioneer Investment*. *See, e.g., Johnson v. Dayton Electric Manufacturing Co.*, 140 F.3d 781, 784 (8th Cir. 1998); *see also In re Payless Cashways Inc.*, 230 B.R. 120, 137-39 (B.A.P. 8th Cir. 1999), *aff'd*, 203 F.3d 1081 (8th Cir. 2000). We have also concluded that "the existence of a meritorious defense continues to be a relevant factor," *Johnson*, 140 F.3d at 784, in deciding these kinds of cases after *Pioneer Investment*.

Union Pac. R. Co., 256 F.3d at 782-83; *accord Ceridian Corp. v. SCSC Corp.*, 212 F.3d 398, 403 (8th Cir. 2000).

While there is no doubt that various circumstances hampered Butler's ability to respond to the discovery requests and the court order compelling discovery, and may have hampered his ability to respond to the motion to dismiss and the Report and Recommendation recommending dismissal, this is not a case in which Butler "committed a single, simple error that left [him] unaware of" the status of his lawsuit. *Cf. id.* at 783. Rather, it is clear from the record that Butler "act[ed] negligently over a long period of time despite receiving warnings about [his] omission." *Compare id.* 783 (distinguishing the circumstances in that case, involving a single error, from a long period of neglect

despite warnings). Butler had shown that he was capable of moving for extensions of time or continuances of deadlines during the course of the litigation, and has not shown that his circumstances in late 2002 and early 2003 prevented him from even that little exertion to sustain his lawsuit. Butler's *pro se* status also "'d[oes] not entitle him to disregard the Federal Rules of Civil Procedure,' even without affirmative notice of the application of the rules to his case." *Bennett v. Dr. Pepper/Seven Up, Inc.*, 295 F.3d 805, 808 (8th Cir. 2002). Moreover, in this case, the record shows that Judge Zoss made every reasonable attempt to give notice to Butler of the consequences of his failure to respond to the order compelling discovery and his failure to file timely objections to the Report and Recommendation recommending dismissal of the case. Even assuming that Butler did not receive the warnings about possible dismissal of his lawsuit until *after* the suit had already been dismissed, there is no indication that Butler then made a timely and diligent effort to get his lawsuit reinstated, where he makes no showing of when, in the last year, he learned of dismissal of his action. Consequently, it appears that only the looming one-year deadline for a Rule 60(b) motion based on "excusable neglect," *see* FED. R. CIV. P. 60(b) ("The motion shall be made within a reasonable time, and for [excusable neglect] not more than one year after the judgment, order, or proceeding was entered or taken."), prompted the present motion for relief from judgment.

Under these circumstances, the other equitable considerations also do not weigh significantly in favor of granting Butler relief from the March 5, 2003, judgment. *See Union Pac. R. Co.*, 256 F.3d at 783 (other equitable considerations may be significant under the circumstances, although the reason for a party's mistake or delay is "a key consideration" in determining whether negligence is "excusable"). Again, those factors include "'the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, . . . and whether the movant acted in good

faith.'" *Id.* at 782 (quoting *Pioneer Investment*, 507 U.S. at 395). This is not a situation in which the delay has been brief, but one in which Butler's default had continued for about six months prior to judgment and another entire year has expired since judgment was entered. Moreover, there is some merit to SMX's argument that it has been prejudiced by the delay, because it otherwise would have taken reasonable steps to preserve the testimony of Mr. Smith. Judicial proceedings have also been significantly disrupted, not only because evidence was not preserved and discovery remains incomplete, but also because of loss of the scheduled trial date in a crowded docket. Thus, notwithstanding Butler's apparent "good faith," and the possible merits of his claim—something that cannot be determined from the record developed prior to dismissal, where discover remained incomplete and no dispositive motions had been filed or considered by the court—other equitable considerations also weigh in favor of letting the March 5, 2003, judgment stand. This simply is not a case involving "'an adequate showing of exceptional circumstances'" warranting relief from a year-old judgment. *Tracts 10 & 11 of Lakeview Heights*, 51 F.3d at 120 (quoting *Young*, 806 F.2d at 806).

THEREFORE, plaintiff Butler's March 5, 2004, Motion For Relief From Judgment Based On Excusable Neglect (docket no. 20) is **denied.** The judgment of dismissal entered on March 5, 2003, shall stand.

IT IS SO ORDERED.

DATED this 22nd day of March, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA