

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

JOHN DOE 2,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09C-07-042 PLA
)	
CATHOLIC DIOCESE OF)	
WILMINGTON, INC.,)	
a Delaware corporation;)	
ST. EDMOND’S ACADEMY, INC.,)	
a Delaware corporation;)	
JOHN FLEMING, an individual; and)	
BROTHERS OF THE HOLY CROSS))	
OF THE EASTERN PROVINCE)	
OF THE UNITED STATES)	
OF AMERICA, INC.,)	
a New York corporation,)	
)	
Defendants.)	

UPON PLAINTIFF’S MOTION
PURSUANT TO RULE 60(b) AND RULE 60(a)
DENIED

Submitted: September 28, 2010
Decided: October 25, 2010

This 25th day of October, 2010, it appears to the Court that:

1. Before the Court is a Motion for Relief from Judgment pursuant to Superior Court Civil Rule 60, wherein Plaintiff John Doe (“Doe”) seeks to re-open an order entered by this Court on August 24, 2010, which granted a motion to dismiss brought by Defendants Saint Edmond’s Academy, Inc. (“St. Edmond’s”)

and Brothers of Holy Cross of the Eastern Province of the United States of America, Inc. (“Holy Cross”). St. Edmond’s and Holy Cross sought dismissal on the basis that Doe failed to comply with Rule 4(j) because they were not served with process within the 120-day time period set forth in that rule. The Court granted dismissal as a result of Doe’s failure to file a response by the deadline set by the Court. In the absence of a response from the plaintiff, the Court deemed the motion to dismiss unopposed and therefore dismissed Doe’s claims against St. Edmond’s and Holy Cross.

2. In the instant motion, Plaintiff seeks to reopen the Court’s judgment on the basis of excusable neglect under subsection (b)(1) of Rule 60.¹ Plaintiff’s counsel submits that while he was on vacation during the time the response to the motion was due, he was under the impression that his law and business partner would handle the matter in his absence—a belief which he contends was particularly reasonable because his response to a similar motion had been filed in this case with respect to Defendant Fleming. Plaintiff’s counsel asserts that, upon his return from vacation, he learned that his partner had relocated his office without fulfilling his promise to file a response. Based upon these circumstances, Doe’s counsel requests an additional ten days from the Court’s ruling on this

¹ Although Plaintiff also cites Rule 60(a) as an alternative basis for relief, this subsection of Rule 60 enables the Court to remedy “[c]lerical mistakes in judgments, order or other parts of the record.” The Court is hard-pressed to identify how its order, which was based upon Plaintiff’s failure to respond to a pending motion, can be considered a clerical mistake.

motion to file a responsive pleading to St. Edmond's and Holy Cross's Motion to Dismiss.

3. St. Edmond's and Holy Cross have filed a response opposing Plaintiff's motion for relief, arguing that the Court has already received and considered a response to a motion to dismiss (*i.e.*, the motion filed by Fleming) setting forth the same legal arguments that Doe now seeks to have the Court reconsider.

4. Rule 60(b)(1) provides that "upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" for "[m]istake, inadvertence, surprise, or excusable neglect." Although Rule 60(b) is given a liberal construction, "the burden is upon the movant to establish the basis for relief."² Excusable neglect under Rule 60(b)(1) occurs when the moving party has committed "neglect which might have been the act of a reasonably prudent person under the circumstances."³ A motion to vacate judgment on the basis of excusable neglect will be granted only where the moving party can further demonstrate the possibility of a meritorious defense and a lack of substantial prejudice to the non-moving party.⁴

² *Phillips v. Siano*, 1999 WL 1225245, at *2 (Del. Super. Oct. 29, 1999)

³ *Hardy v. Harvell*, 930 A.2d 928, 2007 WL 1933158, at *2 (Del. July 3, 2007) (TABLE) (quoting *Battaglia v. Wilm. Sav. Fund Soc'y*, 379 A.2d 1132, 1135 n.4 (Del. 1977)).

⁴ *Keith v. Melvin L. Joseph Constr. Co.*, 451 A.2d 842, 846 Del. Super. 1982); *Lost Creek Land and Cattle Co. v. Wilson*, 2002 WL 31478004 (Del. Super. Oct. 16, 2002).

5. Unfortunately for Plaintiff, the Court has considered and rejected the same arguments he seeks to assert against St. Edmond's and Holy Cross in its opinion issued today granting Fleming's motion to dismiss on the basis of its recent decision in *Jane Doe v. Catholic Diocese of Wilmington, Inc.*⁵ To the extent that the contentions and facts presented here are virtually identical to those that were the subject of those decisions, as well as the Court's earlier ruling in *Jane Doe* granting an individual defendant's motion to dismiss for failure to timely effect service,⁶ it would be futile to reopen the instant judgment.

6. Thus, while the Court sympathizes with the unusual predicament in which Plaintiff's counsel found himself upon his return from vacation—a circumstance which the Court would consider excusable neglect—Plaintiff has not established the possibility of a different outcome if the Court vacated its prior order. The relief Plaintiff seeks in requesting the opportunity to file a response to St. Edmond's and Holy Cross's motion to dismiss would amount to yet another attempt to advance an argument that has twice been rejected. Furthermore, in light of the fact that Plaintiff did have the opportunity to present essentially indistinguishable arguments on the merits with respect to the motion filed by

⁵ *Doe v. Catholic Diocese of Wilm., Inc.*, 2010 WL 3946280 (Del. Super. Sept. 28, 2010).

⁶ *Doe v. Catholic Diocese of Wilm., Inc.*, 2010 WL 2106181 (Del. Super. May 26, 2010).

Defendant Fleming, the Court does not consider his counsel's failure to respond to be "extraordinary circumstances" justifying relief under Rule 60(b)(6).

7. While counsel's failure to file a timely response to the Motion to Dismiss could be considered excusable neglect, the underlying failure on Plaintiff's part to effect timely service upon St. Edmond's and Holy Cross cannot. Accordingly, Plaintiff's Motion Pursuant to Rule 60(b) and Rule 60(a) is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Thomas P. Conaty, IV, Esquire
James S. Green, Esquire
Jared T. Green, Esquire
Anthony Flynn, Esquire
Jennifer M. Kinkus, Esquire
John Fleming