IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

KUM NAN C. YOUNG,	:	
	:	
Plaintiff,	:	
	:	C.A. No. 97C-07-013
5.	:	
	:	
KATTY A. REYNOSO and NIKKO L. LEE,	:	
	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: June 15, 2001
Date of Decision: July 25, 2001

Brian F. Dolan, Esquire, Stumpf Vickers & Sandy, 8 West Market Street, P.O. Box 754, Georgetown, Delaware 19947, attorney for Plaintiff;

Kathleen M. Miller, Esquire, Smith, Katzenstein & Furlow, LLP, 800 Delaware Avenue, P.O. Box 410, Wilmington, Delaware 19899, attorney for Defendants.

BRADLEY, J.

In this case, the Court is asked to decide whether to allow a Motion to Reopen and Request for Extension of Time for Service of Process.

PROCEDURAL HISTORY

On August 25, 1995, Kum Nan C. Young ("Plaintiff") was crossing the parking lot of a McDonald's restaurant located in Seaford, Delaware, when Katty A. Reynoso ("Defendant") allegedly struck her with an automobile owned and by Nikko L. Lee ("Lee").

In a Complaint filed on July 22, 1997, Plaintiff alleged that negligence on the part of Defendant and Lee had resulted in pain, suffering, medical expenses, and lost wages to the Plaintiff. The original summons addressed to Defendant was returned non est in July 24, 1997. Plaintiff failed to effectuate service of process upon Defendant thereafter. Lee was properly served, but the claim against her was dismissed by the Court in November 1997, on the grounds that 21 Del.C. §6106, the basis for the suit against Lee, applied only to accidents occurring upon the highway.

On October 29, 1998, the Office of the Prothonotary issued a Superior Court Civil Rule 41(e) ("Rule 41(e)")[1] notice to Plaintiff's attorney, informing her that Plaintiff's

[1] Rule 41(e) reads in relevant part as follows:

> (e) Upon notice of the Court. The Court may order an action dismissed, sua sponte, upon notice of the Court, for failure of a party diligently to prosecute the action, for failure to comply with any rule, statute, or order of the Court, or for any other reason deemed by the Court to be appropriate....If no proceedings are taken in the action within a period of thirty (30) days after the mailing of such notice, it shall thereupon be dismissed by the Court as of course for want of prosecution.

case had been pending for more than six months and that no proceedings had been taken in that time. The notice further warned that if no proceedings were initiated within 30 days from the issuance of the notice, the Court would dismiss the case for failure to prosecute. No further action was taken and, accordingly, the Court dismissed the case by order dated December 15, 1998.

On December 18, 1998, Plaintiff filed a Motion for Special Process Server for the purpose of serving Defendant. The Motion was granted by the Court on January 8, 1999, however, Plaintiff made no efforts to serve Defendant. By letter dated May 24, 2000, the Court advised Defendant's counsel that it would consider the matter dismissed unless and until a proper Motion to Reopen was filed.

On June 15, 2001, almost four years after the initial complaint was filed and two and a half years after the Court dismissed the case, Plaintiff, represented by new counsel, filed a Motion to Reopen the case and Request for Extension of Time for Service of Process. Plaintiff alleges that her former attorney negligently and carelessly failed to take measures to prevent the Court's dismissal of her action. Plaintiff asserts that the dismissal can be attributed to excusable neglect since the matter was dismissed through no fault of Plaintiff. The Court must now decide whether to grant Plaintiff's Motion.

DISCUSSION

I. Whether the Court should grant Plaintiff's Motion to Reopen?

Although Plaintiff cites no specific Rule through which she seeks to have her case reopened, she appears to be proceeding through Rule 60(b)(1). Rule 60(b)(1) reads in

relevant part as follows:

> (b) Mistake; inadvertence; excusable neglect....On motion and 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 the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect....

A motion to set aside a judgment pursuant to Rule 60(b) lies within the reasoned discretion of the Court. Battaglia v. Wilmington Savings Fund Society, Del. Super., 379 A.2d 1132 (1977); Model Finance Co. v. Barton, Del. Supr., 188 A.2d 233 (1963). However, liberality is highly favored where the opening of default judgments is concerned because of a basic underlying policy preferring determination of an action on the merits. Keystone Fuel Oil Co. v. Del-Way Petroleum, Del. Super., 364 A.2d 826 (1976).

If a judgment is sought to be reopened on the ground of excusable neglect, such excusable neglect is demonstrated when the conduct of the moving party is the conduct of a reasonably prudent person. Keith v. Melvin L. Joseph Construction Co., Del. Super., 451 A.2d 842 (1982). Plaintiff maintains that the negligent omissions of her former attorney in failing to safeguard against the dismissal of her claim constitute excusable neglect because the action was dismissed through no fault of Plaintiff. "Excusable neglect" has been defined as "that neglect which might have been the act of a reasonably prudent person under the circumstances." Cohen v. Brandywine Raceway Assoc., Del. Super., 238 A.2d 320, 325 (1968). Mere negligence or carelessness without a valid reason does not necessarily constitute excusable neglect. Id. "Whether a party's failure

to act constitutes excusable neglect is a matter of judicial discretion." Radzewicz v. Neuberger, Del. Super., 490 A.2d 588, 591 (1985). Mistake of counsel may be grounds for remedial action under Rule 60(b) if timely action and justice permit. Nashold v. Giles & Ransome, Inc., Del. Supr., 245 A.2d 175, 176 (1968). Although Rule 60(b) does not provide a specific time limit within which a party must request relief from judgment, the law requires a party seeking to reopen a judgment to act without unreasonable delay. Schremp v. Marvel, Del. Supr., 405 A.2d 119, 120 (1979); Ramirez v. Rackley, Del. Super., 70 A.2d 18, 21 (1949).

This Court finds that Plaintiff's failure to act to protect her interests at the time she was served with notice of the impending dismissal of her case does not evidence the behavior of a reasonably prudent person. In this case, Plaintiff allowed two and a half years to pass before she sought to have the case reopened. While the Court may sympathize with a Plaintiff who her attorney has poorly represented, under certain circumstances our system imposes upon a party the consequences of her chosen attorney's course of conduct. Gebhart v. Ernest DiSabatino & Sons, Inc., Del. Supr., 264 A.2d 157 (1970). (Counsel's repeated disregard for various pre-trial orders of the Court resulted in the dismissal with prejudice of plaintiff's case.)

In Nanticoke Memorial Hosp., Inc. v. Uhde, Del. Supr., 498 A.2d 1071 (1985) ("Uhde"), the Court found that pursuant to Rule 60(b)(6), extraordinary circumstances existed that allowed the case to be reopened three years after it was dismissed under Rule 41(e). The first, and only, shared characteristic between the Uhde case and the instant

matter is the existence of gross negligence on the part of the plaintiff's attorney. In addition to this factor, the Uhde Court based its decision to reopen the case on its findings that, even after the dismissal of the case, the parties continued to pursue settlement negotiations as if the case were still going forward, the notice of impending dismissal required by Rules 41(e) and 77(d) was never actually forwarded by the Prothonotary, and the passage of time did not appear to have been prejudicial to the defense. None of these additional factors have been established in the instant case, and it is therefore distinguishable from Uhde.

The Court, in general, is more apt to find that a plaintiff who allowed two years worth of dust to settle on her claim failed to diligently prosecute her claim, and is therefor not entitled to reopen the matter. In Schremp v. Marvel, 405 A.2d 119, the Court affirmed a judgment when the plaintiff, seeking to reopen, waited two months after learning his case was dismissed to request 60(b) relief. The Court found that none of the delay was chargeable to the defendant, and that plaintiff's real complaint was against his attorney for stipulating to a dismissal without proper authority to do so. Id. at 121. The Court reached a similar result in Vechery v. McCabe, Del. Super., 100 A.2d 460 (1953). There the Court found that a defendant who was served with notice that he must answer a suit within twenty days or suffer a default judgment, and who did nothing thereafter for six weeks, was not entitled to have the judgment vacated. The Court reasoned that "there comes a time when negligence may be so gross as to amount to sheer indifference." Id. at 461.

The Court must examine the facts of each case to determine whether the moving party acted reasonably, Lewes Dairy, Inc. v. Walpole, Del. Super., C.A. No. 93C-04-025, Terry, J. (January 5, 1996). In this case, the Court refuses to grant Plaintiff's request for reopening when such request was made two and a half years after the dismissal of her case. Plaintiff has provided no excuse or justification for the delay other than negligence on the part of her previous attorney. "A litigant has a duty to see that a matter is diligently pursued." Park Centre Condo. Council v. Epps, Del. Super., 723 A.2d 1195, 1199 (1998). The Court finds that Plaintiff's delay was unreasonable and does not indicate that she pursued her claim either diligently, or in the manner expected of a reasonably prudent person.

Having determined that Plaintiff is not entitled to have her case reopened, the Court need not address whether Plaintiff is entitled to have the time for service of process enlarged pursuant to Super. Ct. Civ. R. 6(b).[2]

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[2] Super. Ct. Civ. R. 6(b) reads in relevant part as follows:
Enlargement. When by these Rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the Court for cause shown may at any time in its discretion (1) with or without motion of notice order the period enlarged

if request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect....

CONCLUSION

The Court finds that by allowing two and a half years to pass before seeking relief from the dismissal of her case, Plaintiff unreasonably delayed the litigation, thereby preventing this Court from exercising its discretion in her favor. For the reasons stated above, the Court denies Plaintiff's Motion to Reopen and Request for Extension of Time for Service of Process.

IT IS SO ORDERED.