

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

MARY M. RIFFEL, Individually and)
as Administratrix of the Estate of)
RONALD R. RIFFEL,)

Plaintiff,)

v.)

C.A. No.: N13C-07-386 FWW)

BRIAN H. SARTER, M.D.,)
CARDIOLOGY PHYSICIANS, P.A.)
MARK WHITAKER, M.D.,)
AMERICAN RADIOLOGY)
SERVICES OF DELAWARE, INC.,)
and AMERICAN RADIOLOGY)
SERVICES, LLC, AMERICAN)
RADIOLOGY ASSOCIATES, P.A.,)
and AMERICAN RADIOLOGY)
ASSOCIATES of DELAWARE, P.A.,)

Defendants.)

Submitted: April 13, 2015

Decided: May 1, 2015

Upon Plaintiff's Motion to Strike and to Oppose Defendants' Application for
Enlargement of Time

DENIED.

Upon Defendants' Application for Enlargement of Time

GRANTED.

ORDER

David G. Culley, Esquire (argued), Dennis J. Menton, Esquire, Tybout, Redfearn & Pell, 750 Shipyard Drive, Suite 400, P.O. Box 2092, Wilmington, DE 19899-2092, Attorneys for Plaintiff Mary M. Riffel, Individually and as Administratrix of the Estate of Ronald R. Riffel.

Richard Galperin, Esquire, Courtney R. Hamilton, Esquire (argued), Morris James LLP, 500 Delaware Avenue, Suite 1500, P.O. Box 2306, Wilmington, DE 19899-2306, Attorneys for Defendants Mark Whitaker, M.D., American Radiology Services of Delaware, Inc., American Radiology Services, LLC., American Radiology Associates, P.A., and American Radiology Associates of Delaware, P.A.

Bradley J. Goewert, Esquire, Thomas J. Marcoz, Jr., Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, 1007 N. Orange Street, #600, P.O. 8888, Wilmington, DE 19899-8888, Attorneys for Defendants Brian H. Sarter, M.D. and Cardiology Physicians, P.A.

WHARTON, J.

This 1st day of May, 2015, upon consideration of Defendants American Radiology Services of Delaware, Inc. and American Radiology Services, LLC's letter application for extension of time,¹ Plaintiff's Motion to Strike and to Oppose Defendant's Application for Enlargement of Time, Defendants Mark Whitaker, M.D., American Radiology Services, LLC, and American Radiology Associates, P.A.'s Response and oral argument, it appears to the Court that:

1. Plaintiff Mary Riffel ("Riffel") initiated this action on July 31, 2013 against certain health care providers as a result her late husband's death from lung cancer.² Riffel alleges generally that all of the Defendants failed to properly inform Mr. Riffel of findings suggestive of lung cancer on an October 26, 2010 chest X-ray.³
2. On August 7, 2014, this Court entered a Trial Scheduling Order ("TSO").⁴ The TSO established a trial date of June 15, 2015.⁵ The dispositive motions deadline was set for March 20, 2015⁶ as was the

¹ The application for an extension of time to file a motion for summary judgment was made on behalf of Defendants American Radiology Services of Delaware, Inc. and American Radiology Services LLC. On April 29, 2015 the parties filed an Interim Status Report, D.I. 122. In that report, the parties represent that Defendant American Radiology Services of Delaware, Inc. as well as American Radiology Associates of Delaware, P.A. "have been or will be dismissed."

² D.I. 1

³ *Id.*

⁴ D.I. 66.

⁵ *Id.* at ¶ 1.

⁶ *Id.* at ¶ 5.

date by which alternative dispute resolution (“ADR”) was to be conducted.⁷

3. On March 19, 2015, counsel for defendants Brian H. Sarter, M.D. and Cardiology Associates, P.A. (the “Cardiology Defendants”) emailed Plaintiff’s attorney and counsel for the remaining defendants (the “Radiology Defendants”) noting that the dispositive motions deadline was the next day and suggesting an extension of that deadline by stipulation.⁸ After an exchange of emails, Plaintiff’s counsel objected to moving the deadline for dispositive motions.⁹ No stipulation was ever filed and the next day the Cardiology Defendants filed a timely Motion for Summary Judgment raising statute of limitations issues.¹⁰ The Radiology Defendants did not file any dispositive motions by the deadline. Instead, On March 24, 2015, Defendants Mark Whitaker, M.D., American Radiological Services, LLC and American Radiological Associates, P.A. filed a “Joinder” in the Cardiology Defendants summary judgment motion.¹¹

⁷ *Id.* at ¶ 4.

⁸ Pltf.’s Mot. to Strike, D.I. 111 at ¶ 3 and Ex. C.

⁹ *Id.*

¹⁰ D.I. 101.

¹¹ D.I. 107.

4. As mentioned, the TSO ordered the parties to complete ADR by March 20th.¹² For reasons that are not clear to the Court, the parties scheduled a mediation conference for March 24th.¹³ Without leave of the Court to by-pass ADR, counsel for the Radiology Defendants informed the mediator and the remaining parties that the Radiology Defendants would not be participating in the mediation conference.¹⁴
5. While the mediation conference was not successful, counsel for Plaintiff reported at oral argument that the conference laid the groundwork for a settlement agreement between Plaintiff and the Cardiology Defendants.¹⁵ Accordingly the Cardiology Defendants have withdrawn their Motion for Summary Judgment.¹⁶ Whether the “Joinder” survives the withdrawal is at issue here.
6. On March 26th, counsel for the Radiology Defendants filed a letter application with the Court seeking an extension of the dispositive

¹² D.I. 66 at ¶ 4.

¹³ Pltf.’s Motion to Strike, *supra*, at ¶ 5.

¹⁴ *Id.* Apparently, the Radiology Defendants had determined not to contribute any funds toward settlement, and so, elected not to appear. *See* email dated March 20, 2015 from Courtney Hamilton, Esquire to the mediator and counsel, attached as Exhibit F to the Motion to Strike. The Court does not approve of this practice, to the extent it is a practice among attorneys. The TSO is plain – the parties were to engage in ADR. Further, any amendments to the TSO “must be by Order of the Court on appropriate motion or stipulation of the parties.” D.I. 66 at 12. Had the Radiology Defendants appeared at the mediation conference, any misunderstanding about the Radiology Defendants’ summary judgment plans and any influence those plans might have had on Plaintiff’s settlement decision could have been resolved.

¹⁵ A Stipulation to Dismiss Less than All Parties was filed on April 27, 2015 dismissing Defendant Brian Sarter, M.D., D.I. 121.

¹⁶ D.I. 113.

motion deadline in order to file a separate summary judgment motion as to Defendants American Radiology Services of Delaware, Inc. and American Radiology Services, LLC.¹⁷ The goal of the contemplated summary judgment motion is to “eliminate a party that is not relevant to the litigation (their only role was to provide billing services, and did not provide or otherwise oversee any of the medical care that is at issue).”¹⁸ Plaintiff has moved to strike the “Joinder” as to the Cardiology Defendants’ now withdrawn Motion for Summary Judgment as being untimely, as well as to deny the Radiology Defendants’ request for enlargement of time to file an additional dispositive motion.¹⁹

7. Plaintiff’s Motion to Strike is straightforward. It correctly asserts that the Radiology Defendants’ “Joinder” was untimely by four days.²⁰ Plaintiff also alleges that the timing of the Radiology Defendants’ late “Joinder” and March 26th letter application for an extension of the

¹⁷ D.I. 109.

¹⁸ *Id.* It is unclear to the Court if the goal of the contemplated motion for summary judgment has been wholly, or only partially achieved as a result of the agreement to dismiss Defendant American Radiology Services of Delaware, Inc. as reported in the Interim Status Report, D.I. 118.

¹⁹ D.I. 111.

²⁰ Pltf’s Mot. to Strike, *supra*, at ¶ 4.

dispositive motions deadline prejudiced her in her settlement negotiations with the Cardiology Defendants.²¹

8. Radiology Defendants oppose the Motion to Strike arguing that the missed deadline was due to excusable neglect on counsel's part and that Plaintiff suffered no prejudice as a result of the delay.²² More particularly, counsel for the Radiology Defendants explains that her error in missing the dispositive motions deadline was due to her focus on other aspects of the case involving her various clients, including preparing for the upcoming mediation and discussing with Plaintiff's counsel the continued presence in the case of American Radiology Services, LLC.²³ In addition, in their Response, the Radiology Defendants for the first time ask the Court to expand the March 26th letter to include requests to include the "Joinder" in their request for enlargement of time and to consider the "Joinder" to be a timely motion for summary judgment on behalf of the Radiology Defendants.²⁴
9. A more orderly way to approach the issues raised here, once the Radiology Defendants realized that they had missed the dispositive motions deadline, would have been for counsel to move under Rule

²¹ *Id.* at ¶¶ 9-10.

²² Defs.' Resp to Pltf.'s Mot. to Strike, D.I. 115 at ¶¶ 9-11.

²³ *Id.* at ¶¶ 1-4.

²⁴ *Id.* at ¶ 8.

6(b)(2) for an enlargement of time to file a motion for summary judgment. The summary judgment motion then would raise both the statute of limitations issue independently and the issue contemplated in the March 26th letter. Nevertheless, the Court believes that parties have had a fair opportunity to be heard on all of these matters and will proceed as if the Radiology Defendants had moved for an enlargement of time to file a single out of time motion for summary judgment.

10. Superior Court Civil Rule 6(b)(2) addresses applications for enlargement of time after the time for doing an act has expired. The Court “for cause shown may at any time in its discretion...(2) upon motion made after the expiration of the specified time permit the act to be done where the failure to act was the result of excusable neglect.”²⁵ “Excusable neglect” is “neglect that might have been the act of a reasonably prudent person under the circumstances.”²⁶
11. The Court appreciates counsel’s forthright acceptance of responsibility for her failure to meet the dispositive motion deadline. The fact that such a candid acceptance of responsibility is expected of all Delaware lawyers does not mitigate the embarrassment to the lawyer when it is required.

²⁵ Sup. Ct. Civ. R. 6(b)(2).

²⁶ *Madison v. Edison*, 723 A.2d 397 (Del. 1998).

12. Nonetheless, counsel did neglect to adhere to the Court's dispositive motions deadline. The question for the Court is whether or not such neglect is excusable. In the exercise of its discretion, the Court finds that it is. The Court makes that finding primarily because there was no bad faith on counsel's part and she has tendered "some reasonable basis for non-compliance."²⁷ The Court further believes that considerations of judicial economy and a preference for resolving issues on their merits warrant entertaining dispositive motions at this time.
13. The Court is mindful of Plaintiff's claim that the failure of the Radiology Defendants to file a timely dispositive motion prejudiced her in her settlement negotiations with the Cardiology Defendants. That failure gave her the incorrect impression that she had a clear path to trial with the Radiology Defendants unencumbered by any dispositive motions. Still, any prejudice, if it exists at all, is speculative at best. First, Plaintiff became aware of the Radiology Defendants intention to file motions for summary judgment prior to settling with the Cardiology Defendants. Second, the outcome of the Radiology Defendants' summary judgment motions is unknown. Should Plaintiff prevail, she would be in the same position as she was when she thought

²⁷ *Dunning v. McCloskey*, 2006 WL 1133568 (Del. Super Ct. Mar. 23, 2006) at *2.

no motions would be filed. Finally, it is impossible for the Court to monetize the claimed prejudice. For those reasons, the Court finds that granting an enlargement of time to the Radiology Defendants would not cause undue prejudice to Plaintiff.²⁸

Therefore, because this Court finds that the Radiology Defendants failure to comply with the Court's dispositive motions deadline was due to excusable neglect, Plaintiff's Motion to Strike and to Oppose Defendant's Application for Enlargement of Time is hereby **DENIED**. The Radiology Defendants' applications to enlarge the dispositive motions deadline to make the "Joinder" a timely independent dispositive motion and to allow an additional five (5) days from the date of this Order to file a motion regarding the dismissal of American Radiology Services, LLC is **GRANTED**.

IT IS SO ORDERED.

/s/Ferris W. Wharton, J.

²⁸ *Id.*