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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12	BABAK SOBHANI, an)	CV 14-6022 RSWL (MANx)
13	individual, and JANINE)	
14	TANG, an individual,)	ORDER Re: PLAINTIFF'S
15)	MOTION FOR
16)	RECONSIDERATION [15]
17	Plaintiffs,)	
18)	
19	v.)	
20)	
21	UNITED STATES OF AMERICA,)	
22)	
23	Defendant.)	
24)	
25)	
26)	
27)	
28)	

Currently before the Court is Plaintiffs Babak Sobhani and Janine Tang's ("Plaintiffs") Motion for Reconsideration [15]. Having considered all the arguments presented, the Court now **FINDS AND RULES AS FOLLOWS:** Plaintiffs' Motion is **GRANTED.**

1 **I. BACKGROUND**

2 On March 13, 2013, a NASA employee allegedly struck
3 Plaintiffs Sobhani and Tang with a motor vehicle as
4 Plaintiffs were crossing the street in Santa Monica,
5 California. Mot. 6:6-10. Pursuant to the Federal Tort
6 Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b); 2671,
7 "Plaintiffs filed administrative tort claims with NASA
8 on December 23, 2013." Mot. 3:6-10. Because
9 Plaintiffs never received a response from NASA
10 regarding the claim, Plaintiffs' administrative
11 remedies were thereby exhausted on June 21, 2014. Mot.
12 3:12-16.

13 Plaintiffs filed the initial Complaint [1] on July
14 31, 2014. Mot. 3:18-19. Plaintiffs attempted to serve
15 Defendant United States a letter dated August 7, 2014
16 however, Plaintiffs improperly addressed the letter,
17 and as a result, Defendant denied service. Mot. 3:19-
18 21. In response to the improper service, the United
19 States Attorney's Office sent a letter to Plaintiffs,
20 which provided the proper address for service. Mot.
21 3:21-24. Service of the original Complaint was due by
22 November 28, 2014. Mot. 6:17-19 Plaintiffs filed
23 their First Amended Complaint [9] on September 3, 2014.
24 Mot. 3:24-25. Plaintiffs claim to have served
25 Defendant on December 29, 2014, Mot. 6:19-20, and
26 filed their Proof of Service [12] on January 2, 2015.
27 Around the service deadline, November 28, 2014,
28 Plaintiffs changed counsel from the Law Offices of

1 Anthony Koushan to their current counsel, Girardi &
2 Keese. Mot. 3:27-28; Mot. 6:21-24. The Court
3 dismissed the Action on January 12, 2015 for failure to
4 prosecute. Mot. 4:5-6; Amended Order Dismissing
5 Complaint 2:1-2 (dismissing this Action without
6 prejudice for failure to prosecute pursuant to Federal
7 Rule of Civil Procedure 4(m) and 41(b)) [14].
8 Plaintiffs filed this Motion for Reconsideration [15].
9

10 II. DISCUSSION

11 A. Legal Standard

12 Relief from Final Judgment

13 Rule 60(b) permits a court to, "on motion and just
14 terms," "relieve a party . . . from a final judgment,
15 order, or proceeding for the following reasons:"

16 (1) mistake, inadvertence, surprise, or
17 excusable neglect;

18 (2) newly discovered evidence that, with
19 reasonable diligence, could not have been
20 discovered in time to move for a new trial under
21 Rule 59(b);

22 (3) fraud (whether previously called intrinsic
23 or extrinsic), misrepresentation, or misconduct
24 by an opposing party;

25 (4) the judgment is void;

26 (5) the judgment has been satisfied, released or
27 discharged; it is based on an earlier judgment
28 that has been reversed or vacated; or applying

1 it prospectively is no longer equitable; or
2 (6) any other reason that justifies relief.
3 Fed. R. Civ. P. 60(b)(1)-(6).

4 **B. Analysis**

5 1. Relief from Final Judgment

6 Rule 60(b) permits a court to, "on motion and just
7 terms," "relieve a party . . . from a final judgment,
8 order, or proceeding" for reasons including excusable
9 neglect. Fed. R. Civ. P. 60(b)(1). "Excusable neglect
10 encompass[es] situations in which the failure to comply
11 with a filing deadline is attributable to negligence
12 and includes omissions caused by carelessness." Lemoge
13 v. United States, 587 F.3d 1188, 1192 (9th Cir. 2009)
14 (alteration in original) (citations omitted) (quoting
15 Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., 507
16 U.S. 380, 394-95 (1993)) (internal quotation marks
17 omitted). Furthermore,

18 the determination of whether neglect is
19 excusable is an equitable one that depends on
20 at least four factors: (1) the danger of
21 prejudice to the opposing party; (2) the length
22 of the delay and its potential impact on the
23 proceedings; (3) the reason for the delay; and
24 (4) whether the movant acted in good faith.
25 Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1223-24

1 (9th Cir. 2000) (citing Pioneer, 507 U.S. at 395).¹

2 Here, Plaintiffs argue that their failure to serve
3 and file proof of service within the prescribed one
4 hundred-twenty days was due to excusable neglect. Mot.
5 8:25. The Court thus analyzes the Pioneer factors to
6 determine whether the delinquent filing of proof of
7 service, due to the change in counsel, is excusable
8 neglect.

9 a. *The Danger of Prejudice to the Opposing*
10 *Party*

11 There is a presumption of prejudice against the
12 non-moving party unless the movant provides a non-
13 frivolous justification for the delay. Hernandez v.
14 City of El Monte, 138 F.3d 393, 401 (9th Cir. 1998).
15 Here, Plaintiffs' justification for their delay was the
16 change in counsel. Mot. 6:21-24. Once a "plaintiff
17 has come forth with an excuse for his delay that is
18 anything but frivolous, the burden of production shifts
19 to the defendant to show at least some actual
20 prejudice." Nealey v. Transportacion Maritima
21 Mexicana, S. A., 662 F.2d 1275, 1281 (9th Cir. 1980).
22 Therefore, this factor weighs in favor of finding
23 excusable neglect because Defendant has not opposed the
24 Motion to Reconsider.

25
26
27 ¹ Although Pioneer, 507 U.S. at 395 addressed bankruptcy
28 law, the Ninth Circuit also uses the Pioneer standard to analyze
excusable neglect under Federal Rule of Civil Procedure 60(b)(1).
See Lemoge, 587 F.3d at 1192.

1 Moreover, “[a] defendant losing the benefit of
2 expiration of the statute of limitations has been found
3 not to constitute prejudice within the meaning of Fed.
4 R. Civ. P. 4(m).” Alamzad v. Lufthansa Consulting
5 GMBH, 2005 U.S. Dist. LEXIS 43529, at *7 (N.D. Cal.
6 Aug. 4, 2005) (citing Boley v. Kaymark, 123 F.3d 756,
7 758 (3rd Cir. 1997)). Plaintiff’s delinquent service
8 did not prejudice Defendant, especially, because by at
9 least August 19, 2014, Defendant received and
10 “presumably possessed a copy of the original complaint
11 based on their acknowledgment of its technically
12 improper address.” Mot. 7:24-8:2; c.f. Gabaldon v.
13 City of Peoria, 2013 U.S. Dist. LEXIS 139379, at *18
14 (D. Ariz. Sept. 27, 2013) (finding that the plaintiff’s
15 failure to serve, and the court’s extension of time to
16 effectuate service, was not unduly prejudicial to
17 Defendant). As such, this factor weighs in favor of
18 finding excusable neglect.

19 *b. Length of Delay and Impact*

20 Pursuant to Federal Rule of Civil Procedure 60(c),
21 a motion under Rule 60(b)(1) must be made “within a
22 reasonable time” and “no more than a year after the
23 entry of the judgment or order” Fed. R. Civ.
24 P. 60(c). Here, Plaintiff’s Motion for Reconsideration
25 was filed nine days after the Order dismissing the
26 Action was entered. See Dckt ## 14, 15. Therefore,
27 assuming that excusable neglect could exist, the delay
28 caused by the filing of the instant motion is minimal

1 and reasonable. See Tung Tai Group v. Oblon, 2010 U.S.
2 Dist. LEXIS 76828, at *7-*8 (N.D. Cal. July 6, 2010)

3 The second factor considers the "length of the
4 delay and its potential impact on judicial
5 proceedings." Pioneer, 507 U.S. at 395. Here, the
6 nine day delay caused by filing this motion should not
7 greatly impact this Action. See e.g., Bateman, 231
8 F.3d at 1225 (finding that the filing of a Rule
9 60(b)(1) motion a little over a month after judgment
10 was entered weighed in favor of finding excusable
11 neglect). Furthermore, because this Action is in its
12 infancy, this factor weighs in favor of excusable
13 neglect. See Trueman v. Johnson, 2011 U.S. Dist. LEXIS
14 147314, at *16-*17 (D. Ariz. Dec. 21, 2011).

15 *c. Reason for the Delay*

16 "Analysis of the reason for a delay includes
17 'whether it was within the reasonable control of the
18 movant.'" Tung Tai, 2010 U.S. Dist. LEXIS 76828, at *8
19 (citing Pioneer, 507 U.S. at 395). Plaintiffs' reason
20 for delay was their substitution of counsel around the
21 time of the filing deadline. Mot. 6:21-23. Plaintiffs
22 cite to Laurino, 279 F.3d at 761, where the Ninth
23 Circuit reversed a trial court's dismissal of a case
24 when the plaintiff, who was changing counsel, failed to
25 comply with a court order to appear, to support their
26 case.

27 In Laurino, the plaintiff filed an affidavit
28 explaining that the plaintiff had no counsel at date

1 plaintiff was ordered to appear, and that plaintiff had
2 not retained counsel until after the action was
3 dismissed. 279 F.3d at 752-53. Here, Plaintiffs have
4 explained that "there was a change of counsel which
5 occurred around the time the 120 days expired." Mot.
6 6:22-24. Furthermore, Plaintiff retained counsel prior
7 to responding to the Court's Order to Show Cause. See
8 Dckt. ## 11, 12. Although Plaintiffs' brief
9 explanation is vague, the facts of this Action are
10 sufficiently similar to Laurino, 279 F.3d at 754. As
11 such, this factor weighs in favor of finding excusable
12 neglect. See Laurino, 279 F.3d at 754.

13 d. *Good Faith*

14 Plaintiffs failed to effectuate service because
15 Plaintiffs delivered a copy of the Summons and
16 Complaint to Defendant by letter dated August 7, 2014,
17 but failed to provide the proper address. Mot. 3:19-
18 21; see also Dckt. # 15-2. Plaintiffs received a
19 letter from the United States Attorney's Office stating
20 that the address was incorrect; thus, presumably,
21 Defendant received the copy of the Summons and
22 Complaint. Mot. 7:24-28. Subsequently, Plaintiffs
23 underwent a change of counsel, which Plaintiffs argue,
24 is the reason for the delinquent service. Mot. 6:22-
25 24. "There is no evidence that [Plaintiffs] acted with
26 anything less than good faith. [Plaintiffs'] errors
27 resulted from negligence and carelessness, not from
28 deviousness or willfulness." Bateman, 231 F.3d at

1 1225. Therefore, this factor also weighs in favor of
2 finding excusable neglect.

3 All four Pioneer factors weigh in favor of finding
4 excusable neglect. Thus, the Court finds that
5 Plaintiffs' delinquent filing proof of service was due
6 to excusable neglect sufficient to merit relief from
7 judgment under Fed. R. Civ. P. 60.

8 2. Rule 4(m)

9 Plaintiffs assert that the extension of time to
10 file proof of service of the Summons and First Amended
11 Complaint is an adequate alternative to dismissal
12 without prejudice. Mot. 9:27-10:1. Pursuant to
13 Federal Rule of Civil Procedure 4(m), "if the plaintiff
14 shows good cause for the failure, the court must extend
15 the time for service for an appropriate period." Fed.
16 R. Civ. P. 4(m). To show good cause, Plaintiffs must
17 show that "(a) the party to be served received actual
18 notice of the lawsuit; (b) the defendant would suffer
19 no prejudice; and (c) plaintiff would be severely
20 prejudiced if his complaint were dismissed." In re
21 Sheehan, 253 F.3d 507, 512 (9th Cir. 2001) (citing Hart
22 v. United States, 817 F.2d 78, 80-81 (9th Cir. 1987)).
23 The Court also has discretion to extend the time period
24 to effectuate service, upon a finding of excusable
25 neglect, even if Plaintiffs fail to prove good cause.
26 Lemoge, 587 F.3d at 1198 (citing In re Sheehan, 253
27 F.3d at 512, 514).

28 a. *Actual Notice*

1 "Actual notice requires that defendants who have
2 not been served with process demonstrate in some way
3 that they personally received actual notice of the
4 complaint during the 120-day period." Vertin v.
5 Goddard, 2013 U.S. Dist. LEXIS 65627, at *12 (D. Ariz.
6 May 8, 2013) (citing Lemoge, 587 F.3d at 1198). Here,
7 Defendant received actual service of the Summons and
8 Complaint, and even responded to Plaintiffs stating
9 that service was ineffective because the letter was
10 incorrectly addressed. See Dckt. # 15-2. Therefore,
11 this factor weighs in favor of finding good cause.

12 *b. Prejudice to Defendant*

13 While excusable neglect and good cause are two
14 distinct legal standards, the two standards overlap
15 when it comes to analysis of the prejudice to the
16 defendants. Golf Sav. Bank v. Walsh, 2010 U.S. Dist.
17 LEXIS 83606, at *6 (D. Or. Aug. 13, 2010). As
18 discussed previously in the excusable neglect context,
19 the absence of prejudice to Defendant in this case
20 supports a finding of good cause. See Vertin, 2013
21 U.S. Dist. LEXIS 65627, at *12.

22 *c. Prejudice to Plaintiffs*

23 Where a dismissal without prejudice would severely
24 prejudice a plaintiff because the statute of
25 limitations would bar its claim, relief may be
26 appropriate. Trueman, 2011 U.S. Dist. LEXIS 147314, at
27 *10; see also Mann v. Am. Airlines, 324 F.3d 1088, 1091
28 (9th Cir. 2003) ("Relief may be justified, for example,

1 if the applicable statute of limitations would bar the
2 re-filed action."). Thus, this factor weighs for
3 finding good cause.

4 All three factors weigh in favor of finding good
5 cause. Because the Court has found excusable neglect
6 and good cause, the Court will extend time for
7 Plaintiffs to file proof of service.

8 **III. CONCLUSION**

9 For the foregoing reasons, the Court finds
10 excusable neglect under Fed. R. Civ. P. 60(b)
11 sufficient to relieve Plaintiffs from the final
12 judgment issued in this case [14]. Plaintiff shall
13 have sixty days from the issuance of this order to
14 effect service of process.

15 **IT IS SO ORDERED.**

16
17 DATED: May 27, 2015

RONALD S.W. LEW
HONORABLE RONALD S.W. LEW
Senior U.S. District Judge