

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

IN RE MICHAEL NEMEE, et al.

1:12-CV-02048-LJO-SKO

Debtors

ORDER ON MOTION FOR RELIEF FROM JUDGMENT

(Doc. 10)

MICHAEL NEMEE, et al.,

Plaintiffs,

V.

BRENT HARRINGTON, et al.,

Defendants.

PRELIMINARY STATEMENT TO PARTIES AND COUNSEL

Judges in the Eastern District of California carry the heaviest caseloads in the nation, and this Court is unable to devote inordinate time and resources to individual cases and matters. Given the shortage of district judges and staff, this Court addresses only the arguments, evidence, and matters necessary to reach the decision in this order. The parties and counsel are encouraged to contact the offices of United States Senators Diane Feinstein and Barbara Boxer to address this Court's inability to accommodate the parties and this action. The parties are required to reconsider consent to conduct all further proceedings before a Magistrate Judge, whose schedules are far more realistic and accommodating to parties than that of U.S. District Judge Lawrence J. O'Neill, who must prioritize criminal and older civil cases.

Civil trials set before Judge O'Neill trail until he becomes available and are subject to suspension mid-trial to accommodate criminal matters. Civil trials are no longer reset to a later date if

1 Judge O'Neill is unavailable on the original date set for trial. Moreover, this Court's Fresno Division
2 randomly and without advance notice reassigned civil actions to U.S. District Judges throughout the
3 nation to serve as visiting judges. In the absence of Magistrate Judge consent, this action is subject to
4 reassignment to a U.S. District Judge from outside the Eastern District of California.

5 **INTRODUCTION**

6 Plaintiffs Kenneth and Michelle Nemee ("Plaintiffs") seek reconsideration to set aside
7 dismissal of this action due to their attorney Kenneth Foley's ("Mr. Foley's") failure to comply with
8 this Court's order for a status report to address continued stay of this action. Defendants Calaveras
9 County and three of its employees (collectively "Defendants") oppose reconsideration on the basis of
10 lack of evidence of excusable neglect by Plaintiffs' attorneys. For the reasons discussed below, this
11 Court CONDITIONALLY GRANTS reconsideration and sets aside this action's dismissal.

12 **BACKGROUND**

13 **Facts and Procedural History**

14 Plaintiffs initiated action in this Court to withdraw the bankruptcy reference of their
15 adversary proceeding and to transfer the adversary proceeding to this Court as a civil action separate
16 from their completed Chapter 7 bankruptcy. This Court's January 8, 2013 order ("January 8 order")
17 granted Plaintiffs' motion to withdraw, transferred the adversary proceeding to this Court as this
18 action, and stayed this action pending appeal of a related action. The January 8 order further required
19 the parties "no later than March 21, 2013 and every 60 days thereafter, to file a joint status report to
20 address the status of the appeal" of the related matter and the need to continue stay of this action. The
21 January 8 order was electronically mailed to Mr. Foley at two different email addresses and Plaintiff's
22 other counsel of record Malcolm Gross ("Mr. Gross") at his email address separate from Mr. Foley's
23 email addresses.

24 After the parties failed to file a timely status report, this Court's March 25, 2013 notice
25 ("March 25 notice") advised the parties that "this Court will dismiss and close this action, unless no
26 later than April 1, 2013, a joint status report or other papers are filed showing good cause not to
27 dismiss and close this action." The March 25 notice as electronically mailed to Mr. Foley at his two
28 email addresses and to Mr. Gross at his separate email address.

1 By his March 25, 2013 email, defense counsel forwarded the March 25 notice to Mr. Foley
2 and requested Mr. Foley to “prepare a joint status report discussing your intent with respect to the case
3 and forward it to me for comment.” On April 1, 2013, defense counsel filed his declaration to indicate
4 inability to contact Mr. Foley to prepare a joint status report. Defense counsel’s email was
5 electronically mailed to Mr. Foley at his two email addresses and to Mr. Gross at his separate email
6 address.

7 This Court’s April 2, 2013 order (“April 2 order”) dismissed this action based on Plaintiffs’
8 failure to comply with both the January 8 order to file a status report and the March 25 notice that
9 provided another opportunity to file a status report. An April 2, 2013 judgment was entered. On April
10 16, 2013, Plaintiffs filed the instant motion for reconsideration of the dismissal on the basis of
11 excusable neglect pursuant to Fed. R. Civ. P. 60(b). Defendants filed an opposition on May 6, 2013,
12 and Plaintiffs filed a reply on May 13, 2013.

13 **Noncompliance with this Court’s March 25 Notice**

14 The declarations of Mr. Foley and his secretary Melissa Gibson (“Ms. Gibson”) in support of
15 Plaintiffs’ motion for reconsideration address Mr. Foley’s failure to file a status report in that:

- 16 1. Mr. Foley had a hip replacement on January 28, 2013 and did not return to work
17 full time until early March 2013;
- 18 2. Mr. Foley’s 99-year-old father was hospitalized after a fall and suffered
19 pneumonia;
- 20 3. To care for his father, Mr. Foley traveled to New Jersey during March 25, 2013 to
21 April 2, 2013;
- 22 4. After Mr. Foley left for New Jersey, his office experienced “internet connection
23 problems” and his email account was frozen until service was restored on April 2,
24 2013;
- 25 5. While Mr. Foley was traveling, he was unable to read emails received prior to
26 March 27, 2013;
- 27 6. On April 3, 2013, Mr. Foley saw the April 2 order to dismiss;
- 28 7. Mr. Foley first saw the March 25 notice on April 7, 2013 after he was able to

1 review downloaded emails, including the Court’s email of the March 25 notice;

2 and

3 8. Mr. Foley had never seen the March 25 notice until after dismissal.

4 **DISCUSSION**

5 **Fed. R. Civ. P. 60(b) Motion for Relief from Final Judgment**

6 **A. Legal Standard**

7 Plaintiffs seek to set aside dismissal by arguing that Mr. Foley’s neglect that resulted in
8 Plaintiffs’ noncompliance with this Court’s March 25 notice was excusable. Defendants fault
9 plaintiffs’ failure to establish excusable neglect of Mr. Foley and Mr. Gross.

10 Under Fed. R. Civ. P. 60(b)(1), courts are permitted “to reopen judgments for reasons of
11 ‘mistake, inadvertence, surprise, or excusable neglect,’ but only on motion made within one year of the
12 judgment.” *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P’ship*, 507 U.S. 380, 393 (1993).
13 “[F]or purposes of Rule 60(b), ‘excusable neglect’ is understood to encompass situations in which the
14 failure to comply with a filing deadline is attributable to negligence,” and includes “omissions caused
15 by negligence.” *Id.* at 394, 388. The determination of whether neglect is excusable “is at bottom an
16 equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Id.* The
17 Supreme Court in *Pioneer* affirmed the Sixth Circuit Court of Appeals’ identification of four factors
18 used to make this determination: (1) “the danger of prejudice to the [opposing party],” (2) “the length
19 of the delay and its potential impact on judicial proceedings,” (3) “the reason for the delay, including
20 whether it was within the reasonable control of the movant,” and (4) “whether the movant acted in
21 good faith.” *Id.* (citing *In re Pioneer Inv. Servs. Co.*, 943 F.2d 673, 677 (6th Cir. 1991)).

22 The Ninth Circuit adopted the *Pioneer* equitable test for Fed. R. Civ. P. 60(b) cases in
23 *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997). (“We now hold that the
24 equitable test set out in *Pioneer* applies to Rule 60(b) as well.”). The Ninth Circuit, in interpreting
25 *Pioneer*, has recognized that, “In *Pioneer* itself, the Court adopted a broader and more flexible test for
26 excusable neglect.” *Pincay v. Andrews*, 389 F.3d 853, 856 (9th Cir. 2004). “A narrower test existed in
27 many circuits before *Pioneer* that limited excusable neglect to situations that were beyond the control
28 of the movant for an extension[.]” *Id.* In particular, the Ninth Circuit acknowledges that “*Pioneer* had

1 worked a change in our circuit's law as to what constitutes excusable neglect," in that "our 'strict
2 standard,' which required both a showing of extraordinary circumstances that prevented timely filing
3 and injustice resulting from denying an extension, gave way to an equitable determination that
4 involves consideration of the four *Pioneer* factors." *Id.* (internal citations omitted). In addition, the
5 Ninth Circuit has expressly admonished lower courts to conform our analyses to the four factors
6 identified by the Supreme Court. *Lemoge v. United States*, 587 F.3d 1188, 1193-94 (9th Cir. 2009)
7 ("[W]hen a Supreme Court case identifies explicitly just four factors to be considered in assessing a
8 type of problem, then whatever else is discussed, the analysis of the lower court should normally
9 address the factors that the Supreme Court has identified.").

10 Finally, even where the neglect resulting in dismissal is attributable to a party's counsel,
11 "clients must be held accountable for the acts and omissions of their attorneys," such that "the proper
12 focus is upon whether the neglect of [the party] *and their counsel* was excusable." *Pioneer*, 507 U.S.
13 at 396 (emphasis in the original).

14 With these standard in mind, the Court turns to the parties' arguments.

15 **B. Analysis**

16 The Court will address each *Pioneer* factor in turn as it applies to the instant case.

17 **1. Danger of Prejudice to Opposing Party**

18 Neither party attempts to argue that granting Plaintiffs relief from the dismissal here would
19 result in prejudice to Defendants. The Court likewise perceives no danger of prejudice to Defendants.
20 Indeed, Plaintiffs brought this action to withdraw the bankruptcy reference of their adversary
21 proceeding and to transfer the adversary proceeding to this Court as a civil action. This Court had
22 already granted Plaintiff's motion to withdraw reference and transfer the case over Defendants'
23 objections before any delay occurred. Therefore, granting Plaintiffs relief from the dismissal places
24 Defendants in the same position they were in following the Court's January 8 order.

25 This factor does not weigh against granting Plaintiffs' motion for reconsideration.

26 **2. Length of Delay and Potential Impact on Judicial Proceedings**

27 Although Plaintiffs twice failed to comply with the Court's express instructions to file a
28 status report, the length of delay is not unreasonable under the circumstances. The Federal Rules of

1 Civil Procedure require that a Rule 60(b) motion be made “within a reasonable time” and “no more
2 than a year after the entry of the judgment or order or the date of the proceeding.” The Court first
3 ordered the parties to file a joint status report by March 21, 2013. The Court then extended to the
4 Plaintiffs a second chance to file the status report by April 1, 2013. Mr. Foley returned to full-time
5 practice in early March 2013 following hip replacement surgery and traveled for a family medical
6 emergency from March 25, 2013 through April 2, 2013. After missing both deadlines, in spite of this
7 Court’s admonishing the parties to comply, Plaintiffs filed this motion for reconsideration explaining
8 the delay on April 16, 2013. At most, the delay amounted to less than four weeks – the time elapsed
9 between the Court’s original deadline and Plaintiffs’ filing of this motion. This delay is not
10 unreasonable under the circumstances. It is understandable that Mr. Foley, as a sole practitioner,
11 required time to catch up on the status of his cases while recovering from surgery and caring for his ill
12 father. *See, Lemoge*, 587 F.3d at 1197 (Granting plaintiffs’ Fed. R. Civ. P. 60(b) motion when it was
13 filed seven months after dismissal due to counsel’s medical issues). Further, a delay of this length is
14 “not long enough to justify denying relief,” and there is no evidence that proceedings “have been
15 postponed for an inordinate amount of time.” *Bateman v. United States Postal Service*, 231 F.3d 1220,
16 1225 (9th Cir. 2000) (Granting plaintiffs’ Fed. R. Civ. P. 60(b) motion where counsel’s negligence
17 resulted in a delay of over one month).

18 Therefore, this factor weighs in favor of granting Plaintiffs’ motion for reconsideration.

19 **3. Reason for Delay**

20 The only *Pioneer* factor disputed by the parties is the reason for the delay. Defendants set
21 forth two main arguments as to the insufficiency of Plaintiffs’ purported reason for the delay. First,
22 Defendants argue that Plaintiffs do not account for the failure of Mr. Gross to comply with the Court’s
23 orders. Second, Defendants argue that the reasons given for Mr. Foley’s delay are inadequate.

24 Mr. Foley stated in his declaration that Mr. Gross’ name was included as an attorney of
25 record for Plaintiffs because Mr. Gross was, at one time, the attorney of record in Plaintiffs’
26 bankruptcy proceeding. However, Mr. Gross has had no involvement with the current action in this
27 Court.

28 Plaintiffs allege that the delay occurred because of Mr. Foley’s recovery from hip

1 replacement surgery, his travel for a family medical emergency, and the internet connection problems
2 Mr. Foley's office experienced while he was traveling. Defendants argue that Plaintiffs' assertions as
3 to the reason for the delay, even if taken as true, are not evidence of excusable neglect.

4 The Ninth Circuit has found counsel's medical problems to be a valid reason for delay in the
5 context of Fed. R. Civ. P. 60(b)(1). In *Lemoge*, the plaintiffs' attorney failed to timely respond to an
6 order to show cause due to medical complications, including suffering a staph infection and
7 undergoing surgery. 587 F.3d at 1191. The district court dismissed the plaintiffs' action and denied
8 their Rule 60(b)(1) motion. *Id.* at 1196-97. In reversing the district court's denial of Rule 60(b)(1)
9 relief, the Ninth Circuit found that, "the district court erred in its conclusion that [plaintiffs' counsel]
10 did not provide adequate reasons for the delay" because plaintiffs' counsel's medical problems explain
11 "why he did not respond to the district court's order to show cause, and why he did not file the Motion
12 until seven months after the case had been dismissed." *Id.* at 1197. The Ninth Circuit further stated
13 that, "[t]here is no question that [counsel] could have handled his practice better, but under the
14 circumstances, [he] provided adequate reasons for the delay." *Id.*

15 The Ninth Circuit also has recognized grounds for Rule 60(b) relief where counsel missed
16 filing deadlines due to travel for family emergencies. In *Bateman*, the plaintiffs' attorney traveled to
17 Nigeria for a family emergency, and, as a result, failed to file a response to the defendants' motion for
18 summary judgment. 231 F.3d at 1222. The district court granted the defendants' motion as unopposed
19 and denied the plaintiffs' Rule 60(b) motion. The Ninth Circuit reversed the district court's denial and
20 stated that counsel's reasons for delay, although "admittedly[] weak," establish that his actions leading
21 to the delay "resulted from negligence and carelessness, not from deviousness or willfulness." *Id.* at
22 1225. Thus, the reason for delay was found to be sufficient where there was no evidence of bad faith.

23 Here, Mr. Foley suffered medical problems *and* traveled for a family emergency. In
24 addition, his office experienced internet connection problems that also contributed to the delay. While
25 Mr. Foley "should have arranged for someone to handle his cases while he was away," and "could
26 have handled his practice better," his errors resulted from negligence rather than deviousness, and he
27 has provided adequate reasons for the delay under the circumstances. *Lemoge*, 587 F.3d at 1197;
28 *Bateman*, 231 F.3d at 1225. Indeed, as the Ninth Circuit has recognized, "*Pioneer* made clear that the

1 standard is a balancing test, meaning that a delay might be excused even where the reasons for the
2 delay are not particularly compelling.” *Pincay*, 389 F.3d at 858 (quoting *United States v. Brown*, 133
3 F.3d 993, 997 (7th Cir.1998)).

4 **4. Whether Movant Acted in Good Faith**

5 There is no evidence that Mr. Foley acted with anything less than good faith. Indeed,
6 Defendants do not question Mr. Foley’s assertions in the instant motion or in his declaration that he
7 acted with good faith. This Court likewise finds no basis to doubt whether Mr. Foley acted in good
8 faith.

9 This Court finds that Mr. Foley repeatedly “showed a lack of regard for his client’s interests
10 and the court’s docket” by failing to comply with not one but two consecutive orders by this Court.
11 *Bateman*, 231 F.3d at 1225. However, “a district court may find neglect ‘excusable’ if it is caught
12 quickly, hurts no one, and is a real mistake, rather than one feigned for some tactical reason – even if
13 no decent lawyer would have made that error.” *Pincay*, 389 F.3d at 860 (Berzon, J. concurring).
14 Because Mr. Foley acted in good faith, provided acceptable reasons for the delay, and did not cause an
15 unreasonable delay, and there is no risk of prejudice to Defendants, the Court CONDITIONALLY
16 GRANTS Plaintiffs’ motion for reconsideration.

17 **REIMBURSEMENT SANCTIONS AS A CONDITION OF GRANTING RELIEF**

18 This Court finds that defendants should not have had to waste their time and resources
19 opposing or participating in the motion for reconsideration. As the motion was brought, it was
20 reasonable for Defendants to oppose. As such, plaintiffs’ reimbursement of defense fees to prepare
21 papers to oppose plaintiffs’ motion is a condition to grant plaintiffs’ requested relief. No later than 28,
22 2013, defense counsel, unless he agrees to waive reimbursement sanctions, must file a declaration
23 indicating the reasonable cost to defendants to prepare papers to oppose the motion. No later than May
24 31, 2013, plaintiffs’ counsel may file legitimate objections to the amount noted by defense counsel.

25 This Court will rule on objections filed and order the amount owed to Defendants. If no
26 timely objection is filed, the condition will be established.

27 Within 10 court days after the condition is settled, either through no objections being filed or
28 the Court’s ruling on objections, plaintiffs’ counsel must file a declaration to indicate that the

1 reimbursement has been paid to defense counsel. If no such timely declaration is filed, the condition
2 will not have been met and this action will remain DISMISSED.

3 **CONCLUSION AND ORDER**

4 For the reasons discussed above, the Court:

- 5 1. CONDITIONALLY GRANTS Plaintiffs Kenneth and Michelle Nemee's Fed. R.
6 Civ. P. 60(b) motion for relief from the Court's April 2, 2013 order;
- 7 2. CONDITIONALLY SETS ASIDE judgment;
- 8 3. DIRECTS the Clerk to reopen this action until the Court determines, within 30
9 court days, whether the condition has been met; and
- 10 4. If the condition is met, ORDERS the parties, no later than July 12, 2013, and every
11 60 days thereafter, to file status reports to address appeal of the related matter and
12 continued stay of this action; or
- 13 5. If the condition is not met, DENIES relief and ORDERS that this action remain
14 dismissed.

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17 IT IS SO ORDERED.

18 Dated: May 20, 2013

19 /s/ Lawrence J. O'Neill

20 UNITED STATES DISTRICT JUDGE

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