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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ELIZABETH A. WILLIS,

Plaintiff,

v.

JP MORGAN CHASE BANK, N.A.;
and DOES 1-20 inclusive,

Defendants.

CIV. NO. 2:17-00366 WBS AC

MEMORANDUM AND ORDER RE: MOTION
TO SET ASIDE JUDGMENT

Before the court is plaintiff's request for relief under Federal Rule of Civil Procedure 60(b). (Pl.'s Mot. (Docket No. 15).) The Motion requests that the court set aside its Final Judgment entered on May 5, 2017, (Docket No. 14) and grant leave to file plaintiff's proposed First Amended Complaint. (Id.)

On January 12, 2017, plaintiff Elizabeth A. Willis filed a Complaint in state court against JPMorgan Chase Bank, N.A. for violation of the California Homeowner's Bill of Rights and negligence arising out of defendant's alleged mishandling of plaintiff's loan modification requests. (Def.'s Notice of Removal Ex. A.) On April 5, 2017, upon defendant's motion, the

1 court dismissed plaintiff's Complaint without prejudice to
2 refiling an amended complaint within twenty days from the date
3 the Order was signed. (Mem. and Order Re: Mot. to Dismiss
4 (Docket No. 12).) On May 4, 2017, the court ordered the case
5 closed based on plaintiff's failure to file an amended complaint
6 by the court's deadline. (Minute Order (Docket No. 13).)

7 Plaintiff's counsel ("plaintiff") asks the court to
8 reopen the judgment because she made an inadvertent error that
9 led to her failure to file the proposed First Amended Complaint
10 by the court ordered deadline. (Pl.'s Mot. at 4.) Plaintiff
11 states she was out of town on a family emergency when the court
12 granted defendant's Motion to dismiss. (Id.) She states that
13 because of a change in staff, the office manager was not on the
14 "serve list" and thus, the deadline to file the First Amended
15 Complaint was not calendared and the proposed amended complaint
16 was not filed. (Id.) Plaintiff argues this chain of events
17 constitutes excusable neglect warranting the setting aside of the
18 judgment under Federal Rule of Civil Procedure 60(b) ("Rule
19 60(b)"). (Id.)

20 Rule 60(b) states, in relevant part, "on motion and
21 just terms, the court may relieve a party or its legal
22 representative from a final judgment, order, or proceeding for .
23 . . (1) mistake, inadvertence, surprise, or excusable neglect . .
24 . ." Fed. R. Civ. P. 60(b)(1). The determination of whether a
25 party's neglect of a deadline is excusable "is at bottom an
26 equitable one, taking account of all relevant circumstances
27 surrounding the party's omission." Pioneer Inv. Servs. Co. v.
28 Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993). In

1 determining whether the party's neglect of a deadline is
2 excusable the court considers the following factors: "the danger
3 of prejudice to the [opposing party], the length of the delay and
4 its potential impact on judicial proceedings, the reason for the
5 delay, including whether it was within the reasonable control of
6 the movant, and whether the movant acted in good faith." Id.;
7 Briones v. Riviera Hotel & Casino, 116 F.3d 379, 381 (9th Cir.
8 1997).¹

9 It appears the failure to file the First Amended
10 Complaint was negligent, but the question is whether the neglect
11 was excusable. See Briones, 116 F.3d at 382 ("Under Rule 60(b) .
12 . . a party's failure to file on time is not "neglect" if the
13 cause is beyond its control. . . . ") (citing Pioneer, 507 U.S. at
14 393-95). Ordinarily, a late filing will not be excused by
15 negligence. Id. The court does not see how a change in staff,
16 without more, constitutes "excusable" neglect. See Pioneer Inv.
17 Servs. Co., 507 U.S. at 398. ("In assessing the culpability of
18 respondents' counsel, we give little weight to the fact that
19 counsel was experiencing upheaval in his law practice at the time

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21 ¹ Excusable neglect covers negligence on the part of
22 counsel. See Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1223
23 (9th Cir. 2000) (citing Pioneer, 507 U.S. at 395.) Before
24 Pioneer, the Ninth Circuit held that "ignorance of court rules
25 does not constitute excusable neglect and had applied a per se
26 rule against the granting of relief when a party failed to comply
27 with a deadline." Id. (citations and quotations omitted).
28 After Pioneer, the Ninth Circuit recognized that excusable
neglect "covers cases of negligence, carelessness and inadvertent
mistake." Id. (citation omitted). The Pioneer court instructed
district courts to apply an equitable test to determine whether
the neglect was "excusable" under Rule 60(b)(1). See id. at
1224-25.

1 of the bar date.”)

2 Further, it is counsel’s duty to monitor the court’s
3 docket to stay informed of the court’s orders and filing
4 deadlines.² See In re Sweet Transfer & Storage, Inc., 896 F.2d
5 1189, 1193 (9th Cir. 1990) (“[P]arties must monitor the dockets
6 to inform themselves of the entry of orders they may wish to
7 appeal.”). Moreover, “[a]s a general rule, parties are bound by
8 the actions of their lawyers, and alleged attorney malpractice
9 does not usually provide a basis to set aside a judgment pursuant
10 to Rule 60(b)(1).” Casey v. Albertson’s Inc., 362 F.3d 1254,
11 1260 (9th Cir. 2004) (citation omitted).

12 Thus, counsel’s carelessness and error in not checking
13 the court docket to calendar the deadline to file an amended
14 complaint does not constitute “excusable” neglect. See Allmerica
15 Fin. Life Ins. & Annuity Co. v. Llewellyn, 139 F.3d 664, 666 (9th
16 Cir. 1997) (stating “attorney error is insufficient grounds for
17 relief under both Rule 60(b)(1) and (6)” and “[n]either
18 ignorance nor carelessness on the part of the litigant or his
19 attorney provide grounds for relief under Rule 60(b)(1).”))
20 (citations and internal quotations omitted). See also Yeschick
21 v. Mineta, 675 F.3d 622, 629-30 (6th Cir. 2012) (finding

22
23 ² The court notes the minimal burden on counsel to
24 monitor the court’s docket. See Yeschick v. Mineta, 675 F.3d
25 622, 629 (6th Cir. 2012) (“Now that electronic dockets are widely
26 available, the burden imposed by this affirmative duty is
27 minimal. Attorneys may monitor the docket from the comfort of
28 their offices; they simply need to log-on to the CM/ECF system
from a computer.”) (citation omitted). The court further notes
that the April 4, 2017, Order (Docket No. 12) was served on
counsel’s email address. (See Notice of Electronic Filing for
Docket No. 12.)

1 counsel's neglect in checking the docket was not excusable where
2 counsel did not monitor the docket, did not receive notice of the
3 electronic filings because he failed to update his email address
4 on file with the clerk, and did not check the docket until more
5 than one month after he learned that his email address was no
6 longer working.)

7 The court must also consider the length of the delay in
8 the context of the reason for plaintiff's delay in bringing this
9 motion. See Souliotes v. City of Modesto, Civ. No. 115-00556,
10 2017 WL 1273824, at *3 (E.D. Cal. Jan. 20, 2017) (O'Neill, J.)
11 (explaining "the length of delay in and of itself is not
12 dispositive, but must be considered in the context of the reason
13 for the delay."). Here, the court entered judgment in May, but
14 counsel waited five months to ask the court to set aside the
15 judgment and allow her to file her First Amended Complaint. The
16 court finds this delay to be significant and weighs against
17 granting plaintiff's motion. See id. (finding a "52-day delay
18 between Plaintiff's missed deadline and his Rule 60 motion to be
19 significant, and [] weighs against granting th[e] motion.");
20 United States v. 242.93 Acres of Land, Civ. No. 10-1133 BEN
21 (CAB), 2011 WL 13128803, at *2 (S.D. Cal. Apr. 8, 2011)
22 ("Defendants' six-month delay in filing their Answer weighs
23 against a finding of excusable neglect."). Moreover, the reason
24 given for the delay--the change in staff, which resulted in the
25 office manager not being on the serve list--does not explain why
26 plaintiff took five months to file the Motion now before the
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1 court.³

2 IT IS THEREFORE ORDERED that plaintiff's Motion to set
3 aside the judgment under Federal Rule of Civil Procedure 60(b)
4 (Docket No. 15) be, and the same hereby is, DENIED.

5 Dated: November 27, 2017



6 **WILLIAM B. SHUBB**
7 **UNITED STATES DISTRICT JUDGE**

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³ Because the court finds that plaintiff's counsel's conduct was not excusable neglect, it expresses no opinion as to whether the proposed First Amended Complaint cures the deficiencies of plaintiff's original Complaint.