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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6 SAN JOSE DIVISION
7

8 CECIL EUGENE SHAW,

9 Plaintiff,

10 v.

11 RANDY KELLEY, et al.,

12 Defendants.

Case No.16-cv-03768-VKD

**ORDER DENYING PLAINTIFF'S
MOTION TO STRIKE**

Re: Dkt. No. 66

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14 On October 29, 2018, plaintiff Cecil Eugene Shaw moved for summary judgment and
15 noticed the motion for a December 4, 2018 hearing. Dkt. No. 59. The Court subsequently granted
16 the parties' joint request to continue the motion hearing to December 11, 2018 due to defense
17 counsel's trial calendar. Dkt. Nos. 61, 63. The briefing deadlines, however, were not altered or
18 amended, and defendants did not file a response to Mr. Shaw's summary judgment motion by the
19 November 13, 2018 deadline. Civ. L.R. 7-3(a). Believing that defendants did not intend to
20 oppose his motion for summary judgment, Mr. Shaw requested that the Court vacate the
21 December 11 motion hearing and grant his motion for summary judgment on the papers. Dkt.
22 No. 64. On November 29, defendants filed a belated opposition to Mr. Shaw's motion for
23 summary judgment. Dkt. No. 65.

24 Mr. Shaw now moves for an order striking defendants' opposition as untimely. Dkt. No.
25 66. Defendants maintain that their tardy filing was due to excusable neglect under Rule 6(b) of the
26 Federal Rules of Civil Procedure. They say that in view of the length of Mr. Shaw's summary
27 judgment papers, and because of defendants' and defense counsel's conflicting schedules over the
28 Thanksgiving holiday, they were unable to timely finalize and file their opposition. Dkt. No. 67.

1 Rule 6(b) provides that, “on motion made after the time has expired,” the Court may
2 extend the time for performing an act “if the party failed to act because of excusable neglect.”
3 Fed. R. Civ. P. 6(b)(1)(B). For purposes of Rule 6(b), “excusable neglect” is judged by the
4 standard set out in *Pioneer Investment Servs. Co. v. Brunswick Associates Ltd. Partnership*, 507
5 U.S. 380 (1993). See *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997)
6 (observing that the Pioneer standard applies to Rule 6(b)). The “determination of whether neglect
7 is excusable is an equitable one that depends on at least four factors: (1) the danger of prejudice to
8 the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the
9 reason for the delay; and (4) whether the movant acted in good faith.” *Bateman v. U.S. Postal*
10 *Serv.*, 231 F.3d 1220, 1223-24 (9th Cir. 2000) (citing *Pioneer*, 507 U.S. at 395). “Although
11 inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute
12 ‘excusable’ neglect, it is clear that ‘excusable neglect’ under Rule 6(b) is a somewhat ‘elastic
13 concept’ and is not limited strictly to omissions caused by circumstances beyond the control of the
14 movant.” *Pioneer*, 507 U.S. at 392. Courts may, “where appropriate, . . . accept late filings
15 caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond
16 the party’s control.” *Id.* at 388.


17 In the present matter, the Court is skeptical of defendants’ proffered explanation for their
18 delay. As noted by Mr. Shaw, if defendants needed more time to file their opposition, prudent
19 counsel should have requested an extension before the filing deadline lapsed. Prior to filing their
20 opposition, defendants did not ask for an extension and did not even seek leave to file their tardy
21 opposition. The record instead suggests that defense counsel erroneously believed that the time
22 for filing an opposition was extended when the motion hearing was continued (Dkt. No. 66-1) or
23 that defendants’ belated filing may have been prompted by Mr. Shaw’s request to vacate the
24 December 11 motion hearing. At the same time, however, the length of defendants’ delay (16
25 days) and the potential impact on the judicial proceedings is minimal. This matter currently is
26 scheduled for a February 27, 2019 final pretrial conference and a three-day bench trial starting
27 April 1, 2019. Further, “summary judgment cannot be granted by default even if there is a
28 complete failure to respond to the motion” Fed. R. Civ. P. 56 advisory committee’s note to

1 2010 amendment; see also *Heinemann v. Satterberg*, 731 F.3d 914, 916 (9th Cir. 2013) (same).
2 Thus, Mr. Shaw would not be entitled to summary judgment unless the Court concluded that the
3 record supported it. Mr. Shaw does not say how he has been prejudiced, if at all, by defendants’
4 delay, and the prejudice to Mr. Shaw of having to defend his claims on the merits is minimal. See
5 *Bateman*, 231 F.3d at 1224-25 (noting that the opposing party “would have lost a quick victory
6 and, should it ultimately have lost the summary judgment motion on the merits, would have had to
7 reschedule the trial date,” but that such prejudice was insufficient to justify the denial of a request
8 to set aside a judgment). Given the potentially dispositive nature of summary judgment, and
9 because the Court would be aided by full briefing on the matter, and in view of the fact that the
10 case schedule can accommodate a modest continuance, the Court concludes that the interests of
11 justice would be best served by accepting defendants’ belated opposition.

12 Accordingly, Mr. Shaw’s motion to strike is denied. Mr. Shaw may file a summary
13 judgment reply by December 13, 2018. The hearing on Mr. Shaw’s motion for summary
14 judgment is continued to **December 18, 2018, 10:00 a.m.**

15 **IT IS SO ORDERED.**

16 Dated: December 7, 2018

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19 VIRGINIA K. DEMARCHI
20 United States Magistrate Judge
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