

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

DESIGN BASICS, LLC, PLAN PROS, INC.,)
and PRIME DESIGNS INC.,)
)
Plaintiffs,)
)
v.)
)
KERSTIENS HOME & DESIGNS, INC.,)
T-KERSTIENS HOMES CORP., KERSTIENS)
REALTY, INC., KERSTIENS MANAGEMENT)
CORP., KERSTIENS LEASING CORP.,)
KERSTIENS HOLDING CORP., and)
KERSTIENS DEVELOPMENT INC.,)
)
Defendants.)

Case No. 1:16-cv-00726-TWP-DLP

ORDER ON PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO FILE APPEAL

This matter is before the Court on Plaintiffs Plan Pros, Inc.'s and Prime Designs, Inc.'s Motion for Extension of Time to File Appeal ([Filing No. 271](#)). Plan Pros and Prime Designs ask the Court pursuant to Federal Rule of Appellate Procedure 4(a)(5)(A) to extend their time to file a notice of appeal from this Court's September 30, 2019 Order ([Filing No. 263](#)) awarding attorney's fees to Defendants against Plaintiffs. For the reasons explained below, the Motion is **granted**.

I. DISCUSSION

This Court granted summary judgment in favor of the Defendants on September 19, 2018 ([Filing No. 232](#)). Plaintiffs Design Basics, LLC, Plan Pros, Inc., and Prime Designs, Inc., all represented by the same counsel, filed a timely notice of appeal from that decision on October 15, 2018 ([Filing No. 238](#)). Defendants then filed a notice of cross-appeal on October 23, 2018 ([Filing No. 244](#)). The Seventh Circuit Court of Appeals consolidated those two appeals and stayed briefing pending further order.

On September 30, 2019, this Court granted Defendants’ motion for attorney’s fees ([Filing No. 263](#)). On October 25, 2019, Plaintiffs timely filed a Notice of Appeal from the Court’s Order awarding attorney’s fees ([Filing No. 265](#)). The caption of the Notice of Appeal referred to Plaintiffs collectively as “Design Basics, LLC, *et al.*,” but Plaintiffs’ counsel neglected to explicitly name Plan Pros and Prime Designs as appellants in the body of the Notice of Appeal. Then on November 15, 2019, Defendants-Appellees filed their docketing statement in Appeal No. 19-3118, pointing out that only Design Basics, LLC was named as an appellant in Plaintiffs’ October 25, 2019 Notice of Appeal. The Seventh Circuit ordered Design Basics, LLC, to file a response addressing the claim that “[n]ot all plaintiffs appealed the award of attorney’s fee; according to the Notice of Appeal, Design Basics, LLC is the sole appellant.” Plaintiffs explain that these filings were the first time that they realized Plan Pros and Prime Designs had been inadvertently omitted from the body of the October 25, 2019 Notice of Appeal.

Plaintiffs explain,

The district court may extend the time to file a notice of appeal if:

- (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
- (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

Fed. R. App. P. 4(a)(5)(A). Plaintiffs argue that they satisfy both requirements for an extension of time to file their Notice of Appeal. The Motion was filed within thirty days of “the time prescribed by this Rule 4(a).”

Concerning the second prong, Plaintiffs assert “excusable neglect” may include “instance[s] of an inadvertent or negligent omission.” *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 394 (1993). The Supreme Court explained that deciding whether the

neglect is “excusable” is an equitable determination, and courts consider “the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Id.* at 395.

Regarding these factors, Plaintiffs argue that their failure to specifically list Plan Pros and Prime Designs in the body of the Notice of Appeal qualifies as “excusable neglect” because it was inadvertent and an obvious oversight by Plaintiffs’ counsel. Plaintiffs argue there is no prejudice to Defendants because Plan Pros and Prime Designs, as well as Design Basics, LLC, appealed the underlying judgment in this matter and will ask the Seventh Circuit to vacate that judgment, which would also vacate the September 30, 2019 fee award (the subject of this Motion and Notice of Appeal).

Plaintiffs contend that they learned of their inadvertent omission on Friday, November 15, 2019, and then immediately sought an extension of time on the next business day, November 18, 2019. Plaintiffs assert the length of the small delay is insignificant to any proceedings before this Court or the Seventh Circuit. The appeal in question is an appeal on the collateral issue of attorney’s fees, and the Seventh Circuit already has consolidated it with the earlier appeal on the merits and the Defendants’ cross-appeal, which already includes Plan Pros and Prime Designs as parties. Further, the briefing schedule on the consolidated appeal is stayed pending further order. Thus, the only difference if this Court grants the Motion for Time will be that Plan Pros and Prime Designs are included on the docket for this appeal as well as the consolidated appeal. In addition, Plaintiffs argue there is no possible suggestion that Plan Pros and Prime Designs acted in anything other than good faith. They had no reason not to appeal the attorney’s fee award against both them

and Design Basics, LLC to challenge the award and the calculation of reasonable fees. It was an excusable neglect.

Defendants briefly respond that the Plaintiffs' Motion fails to establish any excusable neglect, and, furthermore, the Motion is not accompanied by any declaration or affidavit by Plaintiffs or their counsel establishing any facts. In reply, Plaintiffs assert that their error amounts to a scrivener's error by Plaintiffs' counsel that creates an inconsistency between the caption and the body of the Notice of Appeal, which courts often determine to be an "excusable neglect." Plaintiffs also submitted a sworn declaration from their counsel to support the facts asserted in the Motion ([Filing No. 277-1](#)).

The Court is persuaded that Plaintiffs' Motion for Extension of Time to File Appeal ([Filing No. 271](#)) should be **granted**. The reason for the requested extension of time is an inadvertent oversight by Plaintiffs' counsel in failing to list Plan Pros and Prime Designs separately in the body of the Notice of Appeal. Plaintiffs did not overlook the thirty-day appeal deadline and the Notice of Appeal was timely. Both Plan Pros and Prime Designs license their plans through Design Basics and Design Basics has taken the lead in litigating this matter. Plaintiffs' counsel has routinely referred to all Plaintiffs in this matter as "Design Basics" and there is no evidence of bad faith. The arguments presented by Plaintiffs are well-taken, and the facts noted above concerning each of the factors to show excusable neglect support the Court's finding.

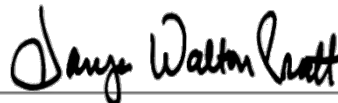
II. CONCLUSION

Plaintiffs' Motion for Extension of Time to File Appeal ([Filing No. 271](#)) is **GRANTED**. The Motion was timely filed, and excusable neglect exists; therefore, Plaintiffs are granted an extension of time to file their Notice of Appeal of the Court's September 30, 2019 attorney's fee

Order. Plaintiffs are **ordered** to file their Notice of Appeal within **seven (7) days** of the date of this Order.

SO ORDERED.

Date: 3/26/2020



TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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