

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 12-11117-MLW

FRIEDRICH LU,
Plaintiff,

v.

GEORGE HULME, in his individual
capacity and in his official capacity,
TRUSTEES OF THE BOSTON PUBLIC
LIBRARY,
Defendants.

**DEFENDANTS GEORGE HULME AND THE TRUSTEES OF THE BOSTON PUBLIC
LIBRARY'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE**

Defendants George Hulme (“Hulme”), in his individual and official capacities, and the Trustees of the Boston Public Library (“Trustees”) (collectively, “Defendants”) hereby submit this Opposition to Plaintiff’s Motion to Strike. Plaintiff claims that because the Defendants failed to file Answers within fourteen (14) days of the denial of their Motion to Dismiss, their Answers should not be permitted. The Defendants’ delayed response is due to a misunderstanding that the Court intended to set a schedule for the next phase of this matter as indicated in its Order and Memorandum regarding the Motion to Dismiss. *See* Memorandum and Order at 26, Docket Entry No. 16 (C.A. No. 12-11117-MLW) (hereinafter “Order”). Furthermore, it is well established that an extension of time due to excusable neglect is an “elastic concept” that considers all relevant factors, including those in this case. Because Defendants’ delay was made in good faith and clearly due to excusable neglect, Defendants respectfully ask that this Court deny Plaintiff’s Motion to Strike.

ARGUMENT

Generally, courts use their discretionary power to grant motions to strike cautiously and view such motions unfavorably:

“Both because striking a portion of a pleading is a drastic remedy and because it often is sought by the movant simply as a dilatory or harassing tactic, numerous judicial decisions make it clear that motions under Rule 12(f) are viewed with disfavor by the federal courts and are infrequently granted.” 5C Wright & Miller, § 1380 at 394 (2004).

With this in mind, Defendants urge the Court to consider the procedural and substantive history of this matter before taking the drastic remedy of striking Defendants’ Answers. Indeed, “motions to strike are rarely granted absent a showing of prejudice to the moving party.” *See Dennison v. LaPointe*, CIV.A. 06-40100-FDS, 2006 WL 3827516 (D. Mass. Dec. 29, 2006).

In the instant case, there has not been any action since March 30, 2013. Likewise, Plaintiff has made no indication whatsoever that the delay in the filing of answers caused any hardship or prejudice to him, nor did he file a motion for default. Rather than claiming some level of adversity, Plaintiff has stated in his Motion that he had “waited to see what was going on.” *See* Plaintiff’s Motion to Strike, paragraph 5.

On page 26 of the court’s decision on Defendants’ motion to dismiss, the court indicated that it “[would] establish a schedule for the remainder of the case.” *See* Order at 26. Having read the court’s Order, Defendants reasonably believed that such a schedule would include a forthcoming date for the filing of any Answers. *See* Email exchange between counsel for Defendants and Plaintiff, dated June 13, 2013, attached hereto as Exhibit A.

In prior cases, this court has permitted late answers where the state of the pleadings was muddled and understandable confusion delayed the answer. *Chiang v. Bank of Am.*, CIV.A. 08-11908-RWZ, 2011 WL 901030 (D. Mass. Mar. 11, 2011). Indeed, federal courts have shown

lenience in circumstances where one party has been active prior to being late with an answer. *See, e.g., Moore v. J.T. Roofing, Inc.*, 94 Fed. Appx. 377 (7th Cir. 2004) (affirming that the denial of a motion for default was proper where a party had participated in all prior proceedings).

Here, Defendants have been active and attentive throughout this litigation, including addressing the many motions already filed in this case. The delay in filing their Answers was due to procedural uncertainty, and the recent filing of their Answers in no way jeopardizes the Plaintiff's ability to proceed with this matter. If anything, the Answers may help frame the Plaintiff's likely discovery requests. Alternatively, if this Court strikes Defendants' Answers, the Defendants would likely face immeasurable difficulty in presenting their defense.

Moreover, Rule 6(b) of the Federal Rules of Civil Procedure allows for the extension of "time on a motion made after the time has expired if a party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b). The U.S. Supreme Court has held that the term "excusable neglect" is understood to be an "elastic concept" that takes into consideration factors such as whether "granting the delay will prejudice the debtor... the impact on efficient court administration... and whether the creditor acted in good faith" as well as the reason for the delay. *See Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 381, 113 S. Ct. 1489, 1491 (1993). With this concept in mind, Defendants' behavior constitutes excusable neglect because the late filing of their Answers came as a result of a good faith misunderstanding and has not prejudiced Plaintiff. Because the Defendants have acted reasonably, their Answers, which provide balance to the allegations in Plaintiff's Verified Complaint, should be permitted by the court.

CONCLUSION

For the reasons stated above, Defendants, the Trustees of the Boston Public

Library and George Hulme, respectfully request that this Court deny Plaintiff's Motion to Strike.

Respectfully submitted,

DEFENDANTS GEORGE HULME, in his individual capacity and in his official capacity and TRUSTEES OF THE BOSTON PUBLIC LIBRARY

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Date: June 27, 2013

LOCAL RULE 7.1 CERTIFICATION

I certify that on June 27, 2013, I filed this document through the Court's CM/ECF system and that an electronic copy will be sent via email to those identified as non-registered participants per agreement with Plaintiff.

/s/Caroline O. Driscoll
Caroline O. Driscoll