

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 MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE
LATE ANSWERS**

Defendants George Hulme (“Hulme”), in his individual and official capacities, and the Trustees of the Boston Public Library (“Trustees”) (collectively, “Defendants”) hereby submit this memorandum of law in support of their Motion for Leave to File Late Answers pursuant to Federal Rule of Civil Procedure 6(b)(1)(B). Answers for both Defendants, which were previously filed with this court, are attached to this Motion as Exhibits A and B, respectively.

Defendants’ late answers are due entirely to a misinterpretation by defense counsel of this Court’s prior Order and Memorandum regarding Defendants’ Motion to Dismiss. *See* Memorandum and Order at 26, Docket Entry No. 16 (C.A. No. 12-11117-MLW) (hereinafter “Order”). As such, Defendants’ delay is attributable to excusable neglect and has not caused any harm to the Plaintiff, who has admitted to waiting for further action in this matter. *See* Plaintiff’s Motion to Strike Docket Entry No. 22, at para. 5 (C.A. No. 12-11117-MLW) (hereinafter “Motion to Strike”).

ARGUMENT

The Supreme Court has found that the individual circumstances of each case determine whether or not excusable neglect may exist. *See Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 381 (1993). Overall, the term “excusable neglect” is interpreted flexibly. *Id.* at 389; *Benitez-Garcia v. Gonzalez-Vega*, 468 F.3d 1, 6 n.8 (1st Cir. 2006). Thus, district courts “enjoy great leeway in granting or refusing enlargements.” *See Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 583-84 (1st Cir. 1994).

Multiple factors contribute to a decision pursuant to Rule 6(b)(1)(B). These include: consideration of potential prejudice to the non-moving party, the length of delay and its potential impact on the proceedings, the reason for the delay, and whether the movant acted in good faith. *See Pioneer Inv. Servs. Co.*, 507 U.S. at 396.

Here, the potential prejudice to the non-moving party is refuted by Plaintiff’s Motion to Strike, which states that Plaintiff was “wait[ing] to see what was going on,” rather than filing a motion to default or taking other action. *See* Motion to Strike, ¶ 5. Unlike cases where a delay could cause a severe detriment to a party’s interest, Defendants’ delay does not appear to have harmed Plaintiff’s interests. *See, e.g., In re New England Mutual Life Ins. Cp. Sales Practices Litigation*, 204 F.R.D. 6, 13-14 (D.Mass. 2001) (declining to find excusable neglect on a Rule 60(b) motion where plaintiff’s delay affected defendants’ liability). Rather, if this Court strikes Defendants’ Answers, the Defendants would likely face immense difficulty in establishing their defense.

As for the length of the delay and the reasons behind it, the delay is attributable entirely to counsel who misinterpreted the court’s order, and moved to correct her failure by filing Answers as soon as she discovered her error. While defense counsel acknowledges that this

Court has previously declined to find excusable neglect based purely on mistake or claims of an overwhelming caseload, the present case is distinguishable. *See Deo-Agbasi v. Parthenon Group*, 229 F.R.D. 348, 352-354 (D.Mass. 2005)(discussing rejection of other “excusable neglect” claims due to missed deadlines or preoccupation with other matters); *see also, Crevier v. Town of Spencer*, 05-40184-FDS, 2007 WL 120237, at *4 (D.Mass. Jan. 12, 2007) (noting that “the four factors in *Pioneer* factors do not carry equal weight... the reason-for-delay factor will always be critical to the inquiry”).

At this juncture, defense counsel does not claim to be overwhelmed with work or to have lost track of a deadline. Counsel’s error is due to her interpretation of the following sentence from the Order: “After the issue of whether [Plaintiff] will be represented by counsel is resolved, the court will establish a schedule for the remainder of this case.” *See Order*, at 26. Having reviewed the court’s Order, which contained a lengthy analysis of the issues present in this litigation, counsel understood the court’s final sentence to mean that *all* deadlines going forward, including a date for filing answers would be set by this Court.¹

In retrospect, defense counsel should not have overlooked the fourteen (14) day deadline for filing answers per Rule 12(a)(4)(A), but should have sought clarification from the court regarding its Order. Counsel’s mistake was not made with any intent to delay these proceedings nor committed in bad faith. Moreover, if any harm was done to the Plaintiff, Defendants have not received any notice of such harm and cannot foresee how this delay would cause undue prejudice to Plaintiff’s interests at this stage of the litigation.

¹A brief review of the docket in this matter will reveal that defense counsel has been actively engaged in this matter and met all other deadlines.

CONCLUSION

For the reasons stated above, Defendants, the Trustees of the Boston Public Library and George Hulme, respectfully request that this Court grant their Motion for Leave to File Late Answers.

Respectfully submitted,

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

William Sinnott
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Date: June 27, 2013

LOCAL RULE 7.1 CERTIFICATION

I certify that on June 26, 2013, I attempted to contact Plaintiff via email to consult with him regarding the relief sought in this motion. As of the time of filing, Plaintiff has not responded to my email. I also 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