

IN THE UTAH COURT OF APPEALS

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Charles Berg,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellant,)	
)	Case No. 20080794-CA
v.)	
)	
<u>Flying J, Inc.</u> ; Burger King;)	F I L E D
John and/or Jane Does 1-10;)	(December 26, 2008)
and ABC Company(s) 1-10,)	
)	2008 UT App 468
Defendants and Appellee.)	

Fifth District, St. George Department, 080500496
The Honorable Eric A. Ludlow

Attorneys: Richard M. Hutchins, St. George, for Appellant
Rick L. Rose and Kristine M. Larsen, Salt Lake City,
for Appellee

Before Judges Thorne, Bench, and McHugh.

PER CURIAM:

Plaintiff Charles Berg appeals the dismissal of his complaint for failure to serve the summons and complaint within 120 days after filing of the complaint, as required by rule 4(b) of the Utah Rules of Civil Procedure. This case is before us on a sua sponte motion for summary affirmance and on Defendant Flying J, Inc.'s motion for summary disposition.

Although rule 4(b) allows the district court to extend the time for service for good cause shown, Berg did not obtain an extension prior to the expiration of the 120-day period for service under rule 4. See Utah R. Civ. P. 4(b). Instead, Berg sought an extension under rule 6(b) of the Utah Rules of Civil Procedure after the time for service had expired. See generally Utah R. Civ. P. 6(b). Under rule 6, "the district court has the discretion to grant a motion to enlarge time after the time for doing the act has expired 'where the failure to act was the result of excusable neglect.'" Stoddard v. Smith, 2001 UT 47, ¶ 22, 27 P.3d 546 (quoting Utah R. Civ. P. 6). Absent an abuse of discretion, we affirm the district court's order denying a motion to extend the time under rule 6(b). See id.

In his rule 6(b) motion, Berg contended that counsel's failure to take into account that 2008 was a leap year when calculating the expiration of the time for service was excusable neglect. The district court rejected the claim of excusable neglect on its merits but also noted that this was the second time in this case that Berg failed to serve Flying J with a complaint within the allotted time. The district court did not abuse its discretion in weighing the particular facts of this case in rejecting the claim of excusable neglect.

After denying the extension of the time to accomplish service, the district court granted Flying J's motion to dismiss. Rule 4(b)(i) of the Utah Rules of Civil Procedure requires that a summons and a copy of the complaint "shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice." Utah R. Civ. P. 4(b)(i). In opposing the motion to dismiss, Berg essentially reargued the rule 6(b) motion to extend that the district court had denied. Berg attached orders granting extensions in two other cases in which Berg's counsel failed to effect timely service based on the same inaccurate calculations. Berg argued that "leap year is an uncustomary event" that can be easily overlooked in making calculations.

Despite the mandatory language of rule 4(b), Berg argues that the district court should have denied Flying J's motion to dismiss and extended the time for service for excusable neglect under rule 6(b). "[E]xcusable neglect . . . is an admittedly neglectful delay that is nevertheless excused by special circumstances." Reisbeck v. HCA Health Servs., 2000 UT 48, ¶ 13, 1 P.3d 447. "[W]here a party or a party's attorney was concededly neglectful, the court must determine whether that neglect should, on balance, be excused. . . . The trial court's inquiry is fundamentally equitable in nature and entails broad discretion." Id. ¶ 15. The district court did not agree that Berg's counsel's failure to consult a 2008 calendar in calculating the expiration date for service of the complaint constituted excusable neglect under the circumstances of this case. The court further noted that Berg had twice failed to timely serve Flying J, noting that it should not have been difficult to accomplish service at corporate headquarters. The district court did not abuse its broad discretion in rejecting the excusable neglect claim under rule 6(b) of the Utah Rules of

Civil Procedure and in dismissing Berg's complaint under rule 4(b) of the Utah Rules of Civil Procedure.

We therefore affirm.

William A. Thorne Jr.,
Associate Presiding Judge

Russell W. Bench, Judge

Carolyn B. McHugh, Judge