



*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

MARCH TERM, 2022

Mark Kelty* v. Keith Davis	}	APPEALED FROM:
	}	Superior Court, Orange Unit,
	}	Civil Division
	}	CASE NO. 21-CV-00107
		Trial Judge: Thomas A. Zonay

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the court’s dismissal of his complaint for lack of service. We affirm.

Plaintiff filed this personal injury action against defendant on January 22, 2021, related to an accident that allegedly occurred on January 24, 2018. Plaintiff had difficulty locating defendant to serve him and filed a motion requesting an extension of time to serve on March 19, 2021. The court granted the extension and ordered plaintiff to complete service by May 21, 2021. On May 24, 2021, three days after the time to serve elapsed, plaintiff filed another motion to extend time for service. Plaintiff’s counsel averred that he made several attempts to serve defendant, but the local sheriff was unable to serve defendant at either location plaintiff tried. Plaintiff also moved for permission to serve by publication.

The trial court noted that plaintiff’s motion was filed after the time expired for effectuating service and invited plaintiff to submit a memorandum on the court’s authority to further extend the time for service. In response, plaintiff argued that he made good-faith efforts to locate defendant and that the additional extension was filed just one business day after the deadline set for service.

The trial court denied the motion to extend time. The court concluded that plaintiff had not demonstrated the excusable neglect necessary to retroactively extend the time to serve defendant. Therefore, the court dismissed the action for failure to serve within the allotted time. Plaintiff appeals.\*

On appeal, plaintiff argues that the court abused its discretion in denying his request to retroactively extend time to serve defendant. When an action is commenced by filing, the summons and complaint must be served on a defendant within sixty days of filing the complaint. V.R.C.P. 3(a). If the complaint is filed within the statutory limitations period, then service may

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\* Defendant was not served with the notice of appeal and has not appeared in this appeal.

occur after the limitations period expires if it complies with the service rule. Clark v. Baker, 2016 VT 42, ¶ 15, 201 Vt. 610. In general, when a party requests to extend a period of time after the time has passed, it must show excusable neglect. V.R.C.P. 6(b)(1)(B). To determine if the excusable-neglect standard is met, courts consider several factors, including the danger of prejudice to the opposing party, the length of delay and 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.” Baker, 2016 VT 42, ¶ 18 (quotation omitted). The standard is flexible, but “the appropriate focus is on the third factor: the reason for delay, including whether it was within the reasonable control of the movant.” In re Town of Killington, 2003 VT 87A, ¶ 16, 176 Vt. 60. The standard for excusable neglect is high, “particularly when neglect stems from factors totally within the control of a party or its attorney.” In re von Turkovich, 2018 VT 57, ¶ 5, 207 Vt. 545 (quotation omitted). “The decision of the trial court in deciding whether there has been excusable neglect is discretionary, and our review is for abuse of discretion.” Baker, 2016 VT 42, ¶ 20.

Plaintiff contends that the trial court abused its discretion in denying his motion and urges this Court to allow the case to be decided on its merits. Plaintiff focuses on the facts that the delay in asking for an extension was minimal, that there was no prejudice to defendant and no negative impact on the judicial proceedings, and that plaintiff acted in good faith.

We conclude that the trial court acted within its discretion in finding there was no excusable neglect. The court found that the delay would not prejudice defendant or significantly impact the judicial proceeding, and that plaintiff acted in good faith. However, the court found that on the most important factor—the reason for the delay—plaintiff had not provided any explanation for the delay in seeking an extension before the time period elapsed beyond the fact that it was challenging to locate defendant. The court’s assessment was well within its discretion. Although some factors weighed in favor of plaintiff, the primary focus in the excusable-neglect assessment is on the reason for the delay, and in this case, the delay was entirely within plaintiff’s control and plaintiff provided no excuse for the late request.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice