

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DBMP LLC

Plaintiff,

v.

MANVILLE TRUST MATCHING
CLAIMANTS, *et al.*,

Defendants.

Case No. 22-300 (JCW)
(Transferred from the Eastern
District of Virginia)

**MEMORANDUM IN SUPPORT OF MOTION
FOR EXTENSION OF TIME TO FILE APPEAL**

The Manville Trust Matching Claimants (the “Matching Claimants”), through the undersigned counsel, hereby submit this Memorandum in support of the *Motion for Extension of Time to File Appeal* filed contemporaneously herewith (the “Extension Motion”), which seeks an extension of the time to appeal the *Order Denying Manville Matching Claimants’ Motion to Proceed Anonymously* (the “Claimant Anonymity Order”) [Dkt. No. 23] entered by the Court on September 8, 2022, pursuant to Rule 8002(d)(1)(B) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of the Extension Motion, the Matching Claimants respectfully state as follows:

FACTUAL AND PROCEDURAL BACKGROUND

On January 23, 2020, DBMP LLC (“DBMP”) filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*, commencing Case No. 20-30080 (the “Bankruptcy Case”) before this Court.

On February 17, 2022, the Court entered the *Order Granting Debtor's Motion for Bankruptcy Rule 2004 Examination of Asbestos Trusts and Governing Confidentiality of Information Provided in Response* (the "Trust Subpoena Order")

The Matching Claimants are more than 13,000 mesothelioma victims, whose highly personal information is sought as nonparties through a subpoena (the "Manville Trust Subpoena") served by DBMP, pursuant to the Trust Subpoena Order, on the Manville Personal Injury Settlement Trust (the "Manville Trust") and its Virginia-based administrator Claims Resolution Management Corporation ("CRMC").

On April 21, 2022, the Matching Claimants commenced a miscellaneous proceeding in the United States District Court for the Eastern District of Virginia (the "Virginia Court") by filing a motion, pursuant to Civil Rule 45, to quash or modify the Manville Trust Subpoena (the "Motion to Quash"). The filing of the Motion to Quash initiated Case No. 1:22-mc-00009-LMB-TCB (the "Virginia Proceedings") before the Virginia Court.

On May 5, 2022, the Matching Claimants filed a motion to proceed anonymously with the prosecution of the Motion to Quash, seeking authority to prosecute the motion without being required to disclose their personally-identifiable information, which would otherwise moot the relief sought in the Motion to Quash (the "Motion to Proceed Anonymously").

On May 31, 2022, the Virginia Court entered the order transferring the Virginia Proceedings to this Court.

On July 7, 2022, the above-captioned miscellaneous proceeding commenced before this Court. The Matching Claimants, represented by David I. Bledsoe ("Lead Counsel"), retained the firm of Waldrep Wall Babcock & Bailey PLLC ("Local Counsel") as local counsel, who filed the motion for admission *pro hac vice* of Local Counsel on August 3, 2022. [Dkt. No. 1528].

On August 11, 2022, this Court held the hearing on the Motion to Quash and the Motion to Proceed Anonymously, denying both motions, and requiring orders to be submitted to the Court by September 12, 2022.

On September 8, 2022, this Court entered two orders: the order denying the Motion to Quash (the “Order Denying Motion to Quash”) [Dkt. No. 22] and the order denying the Motion to Proceed Anonymously (the “Order Denying Anonymity Motion”) [Dkt. No. 23].

The Order Denying Anonymity Motion provided that its effect would be stayed thirty-one (31) days after its entry to permit the Matching Claimants the opportunity to seek a stay pending appeal from the District Court.

On September 20, 2022, Lead Counsel requested that Local Counsel provide him with a sample notice of appeal from this district. On September 21, 2022, Local Counsel provided Lead Counsel with a sample notice of appeal.

On September 22, 2022, the deadline to file a timely appeal, Lead Counsel returned the notice of appeal, which had the Order Denying Motion to Quash attached as the exhibit to said notice. September 22, 2022, was the deadline to appeal an order entered September 8, 2022 pursuant to Bankruptcy Rule 8002(a)(1).

Lead Counsel has been dealing with an ongoing medical emergency involving the health of an immediate family member. Unfortunately, this situation has been a significant burden for Lead Counsel, which contributed to the inadvertent appeal of the wrong order.

On September 22, 2022, Local Counsel filed the notice of appeal (the “Notice of Appeal”) as provided by Lead Counsel. [Dkt. No. 25]. On September 26, 2022, Local Counsel confirmed with Lead Counsel that the incorrect order was attached to the Notice of Appeal; the Matching Claimants had intended to appeal the Order Denying Anonymity Motion.

The Matching Claimants filed the Extension Motion contemporaneous with the filing of this Memorandum.

RELIEF REQUESTED

The Matching Claimants respectfully request entry of an order extending the deadline for them to appeal the Claimant Anonymity Order until (i) three (3) business days after the entry of an order ruling upon this Motion or (ii) the twenty-first day following the prescribed deadline to appeal the Claimant Anonymity Order, October 13, 2022, whichever is earlier.

ARGUMENT

Bankruptcy Rule 8002(d)(1)(B) authorizes a bankruptcy court to extend the time to file a notice of appeal within twenty-one (21) days of the deadline prescribed by Bankruptcy Rule 8002(a)(1), provided the movant demonstrates excusable neglect.

The phrase “excusable neglect” is not defined by the Bankruptcy Code or the Bankruptcy Rules. In the context of motions to extend deadlines under Bankruptcy Rule 9006(b), the United States Supreme Court defined excusable neglect as an elastic concept, permitting late filings caused by “inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.” Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship et al., 507 U.S. 380, 388 (1993). Bankruptcy courts and bankruptcy appellate panels, including courts within the Fourth Circuit, have applied Pioneer to other Bankruptcy Rules discussing “excusable neglect,” including motions to extend deadlines to appeal pursuant to Bankruptcy Rule 8002. See, e.g., In re Pelle, 571 B.R. 846, 848–49 (Bankr. C.D. Cal. 2017) (analyzing Pioneer for a motion to file a late appeal); In re Edwards, Case No. 17-8028, 2018 WL 2717237, at *4–5 (B.A.P. 6th Cir. June 5, 2018) (same); In re Wilson, Case No. 10-01218-HB, Adv. Pro. No. 14-80054-HB, 2015 WL 3528226, at *1 (Bankr. D.S.C. June 3, 2015) (same).

In Pioneer, the Supreme Court established a four-factor test for determining whether neglect would be “excusable,” comprised of the following: (i) danger of prejudice to the non-moving party; (ii) the length of delay and impact on judicial proceedings; (iii) the reason for the delay, including whether the reason was within the moving party’s control; and (iv) whether the moving party was acting in good faith. 507 U.S. at 395. While no single factor is dispositive, courts generally give the third factor—reason—the greatest weight when evaluating motions asserting “excusable neglect.” See, e.g., In re Sheedy, 875 F.3d 740, 744 (1st Cir. 2017); In re Am. Classic Voyages co., 405 F.3d 127, 133–34 (3d Cir. 2005); Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 463 (8th Cir. 2000); In re Spiegel, Inc., 385 B.R. 35, 40 (S.D.N.Y. 2008); In re Bayer, 527 B.R. 202, 210 (Bankr. E.D. Pa. 2015).

In applying Pioneer, courts have typically found “excusable” reasons to arise under circumstances outside of the party or attorney’s control, such as serious or sudden illnesses, death, or disability of an attorney, party, or a family member of either. In re Schultz, 254 B.R. 149, 154 (B.A.P. 6th Cir. 2000) (citing examples from the Ninth Circuit, Southern District of New York, and District of New Jersey). In civil litigation, two federal circuit courts have applied Pioneer to find “excusable neglect” when attorneys delegated staff to calendar management duties, causing the attorneys to miss appellate deadlines or hearings. See Keane v. HSBC Bank USA for Ellington Trust, Series 2007-2, 873 F.3d 763, 764, 767 (1st Cir. 2017) (finding excusable neglect when a sole practitioner’s staff left for maternity leave but failed to calendar a hearing deadline); Pincay v. Andrews, 389 F.3d 853, 855, 860 (9th Cir. 2004) (affirming district court’s finding of excusable neglect where a paralegal mis calendared an appellate deadline and the attorney promptly sought extension of the deadline).

Here, the Pioneer factors weigh in favor of extending the deadline as requested.

i. Prejudice to the Non-moving Party

DBMP will not be prejudiced by the requested relief. The relevant prejudice is not from the prosecution of the appeal but from the minimal prejudice caused by the late filing of the appeal. In re Enron Corp., 364 B.R. 482, 486–87 (S.D.N.Y. 2007). The Matching Claimants did not intend to appeal the Order Denying Motion to Quash and will soon be filing a withdrawal of the Notice of Appeal. Discovery from the Manville Trust and CRMC would be able to proceed pursuant to the Order Denying Motion to Quash whether this appeal was taken timely or if an appeal is permitted by the Court.

Moreover, on September 22, 2022, DBMP filed a motion to establish a bar date and procedures for the filing of asbestos claimant proofs of claims [Bankruptcy Case, Dkt. No. 1583]. So, while DBMP may not receive the full scope of the information that it sought in the Trust Subpoena, it is clearly exploring alternative options for establishing the scope of its liabilities necessary to propose an asbestos personal injury trust under Section 524(g) of the Bankruptcy Code.

The Court's Order Denying Anonymity Motion anticipated that the Matching Claimants might seek a stay pending appeal of that order from the district court. As such, there is nothing on the record to indicate that a brief extension, only to the extent necessary to rectify the appeal of the incorrect order, would prejudice DBMP. This factor weighs in favor of a finding of excusable neglect.

ii. Length of the Delay and Impact on Judicial Proceedings

The delay here is, as of the filing of this Motion, only five days – just three business days -- from the prescribed deadline to appeal the Order Denying Anonymity Motion. As stated above, DBMP will be able to obtain non-confidential information sought pursuant to the Trust Subpoena

and is already exploring alternatives to determine the scope of its current and future liabilities. The delay and impact of extending the deadline to appeal are minimal, weighing in favor of a finding of excusable neglect.

iii. The Reason for the Delay, Including Whether it Was in the Movant's Control

The Matching Claimants' delay was caused by the distraction of Lead Counsel caused by a serious and ongoing medical emergency involving an immediate family member. These circumstances, in light of the compressed timeline in which Local Counsel had to file the Notice of Appeal received from Lead Counsel, goes beyond simple ignorance of the applicable Bankruptcy Rules or court orders and is analogous to the serious illnesses, death, or disability of an attorney, a party, or a family member that the Schulz court and others have recognized as excusable neglect. In re Schulz, 254 B.R. 149, 154 (B.A.P. 6th Cir. 2000). In fact, just as in the Schulz case, Lead Counsel could not delegate the task of caring for a family member with a serious illness. Id. See also In re Zorns, No. 12-62741, 2013 WL 5964006 (Bankr. N.D. Ohio Nov. 8, 2013) (excusable neglect existed when creditor's attorney did not timely appeal because he was caring for two seriously ill family members).

There is a strong preference that federal litigation be resolved on its merits, not decided by technicalities. See Keane v. HSBC Bank USA for Ellington Trust, Series 2007-2, 873 F.3d 763, 765 (1st Cir. 2017) (citing Ortiz-Anglada v. Ortiz-Perez, 183 F.3d 65, 66 (1st Cir. 1999)). This factor weighs in favor of a finding of excusable neglect.

iv. Whether the Movant Acted in Good Faith

The Extension Motion is not interposed for the purpose of delay. Nothing on the record demonstrates that the filing of this Motion is a dilatory tactic. The Matching Claimants have acted, through counsel, promptly in order to resolve an erroneous Notice of Appeal. The need for this

Motion does not arise from a “general disregard” for procedural and fundamental rules, but from the circumstances set forth herein. See In re Enron corp., 364 B.R. 482, 488 (S.D.N.Y. 2007). This factor weighs in favor of a finding of excusable neglect.

CONCLUSION

For the reasons set forth, the Matching Claimants respectfully submit that the Pioneer factors weigh in favor of finding excusable neglect, authorizing an extension of time to appeal under Bankruptcy Rule 8002(d)(1)(B). The Matching Claimants respectfully request entry of an order extending the deadline for them to appeal the Claimant Anonymity Order until (i) three (3) business days after the entry of an order ruling upon this Motion or (ii) the twenty-first day following the prescribed deadline to appeal the Claimant Anonymity Order, October 13, 2022, whichever is earlier.

Respectfully submitted, this the 27th day of September, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO FILE APPEAL** was filed electronically in accordance with the Local Rules and served upon all parties entitled to receive service thereof through the CM/ECF system.

Via CM/ECF

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This, the 27th day of September, 2022.

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