DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Eleanor Abraham, *et al*.,	)	
	)	
Plaintiffs,	)	
v.	)	**CIVIL NO. 12-cv-11**
	)	
St. Croix Renaissance Group, LLLP,	)	ACTION FOR DAMAGES
	)	
Defendant.	)	JURY TRIAL DEMANDED
	)	

DEFENDANT ST. CROIX RENAISSANCE GROUP L.L.L.P.'S OPPOSITION TO PLAINTIFFS' SECOND UNTIMELY MOTION FOR EXTENSION

While SCRG did not oppose the Plaintiffs' first motion for an extension of time to respond to the two pending motions filed by SCRG, the Plaintiffs' second motion for an extension of time raises concerns that require a response.

I. The Proffered Excuses

On September 12, 2012, Defendant SCRG filed a motion to deem conceded two prior motions (to sever and for a more definite statement.) [D.E. 25] That motion was predicated on two points: (1) Plaintiff's had missed the time set by the rules to file an opposition to SCRG's two motions and (2) that the time sought in the Plaintiffs' first motion for an extension "until September 10, 2012" had also expired.

In response, the Plaintiffs raised a whole new list of reasons in seeking another extension (as discussed below, reasons that this Court has previously admonished counsel about), and also attempt to incorrectly rely on the three day extension provision available under Rules 6(d) and 5(B)(2)(E). [D.E. 26]

First, the Rule 6(d) extension is not available because September 10, 2012 was not a date by which an opposition was due to be *served* by rule -- it was the date the **Plaintiffs' counsel promised she would *file* these opposition** memoranda.

Second, Plaintiffs contend that the reason the oppositions were not filed on the 10th as promised is because:

> Due to an apparent calendaring error this item was not correctly calendared and **undersigned counsel** who is off island due to complications associated with his wife's pregnancy, did not become aware of this fact until sometime after Defendant filed its Motion to Deem Conceded. Plaintiffs herein request for reasons of good cause and excusable neglect that Plaintiffs be permitted to file their Opposition to Defendants Motion for a More Definite Statement Pursuant to Rule 12(e) and Motion for Severance Pursuant to Rule 21 and Supporting Memorandum of Law on September 19, 2012.

However, undersigned counsel is Attorney Rohn -- there is no mention of (or affidavit from) some other attorney in her office. Moreover, even if there were, this "blame the associate to get an extension" routine where Attorney Rohn clearly is at the reins (having been the only attorney to sign this and the only attorney of record) has similarly been criticized by this Court as being an insufficient basis for this type of an extension.

The situation is simple. On August 1, 2012, this Court issued an Order granting Plaintiffs' motion to file an amended complaint. [D.E. 14] Plaintiffs filed the Amended Complaint as directed. On August 6, 2012, Defendant, St. Croix Renaissance Group LLLP ("SCRG") moved: (1) pursuant to *Fed.R.Civ.P*. 21, to sever all but one of the 538 Plaintiffs' claims, requiring the 537 remaining individuals to re-file individual complaints as separate cases -- as the Amended Complaint is a "shot-gun" pleading where

unrelated parties and separate claims have been misjoined[1]; and (2) for a more definite statement from all of those Plaintiffs pursuant to Rule 12(e). [D.E. 16 & 17 and 18 & 19 respectively.] As set forth in *LRCi* 7.3:

> (1) A party shall file a response within fourteen (14) days after service of the motion. For good cause shown, parties may be required to file a response and supporting documents, including brief, within such shorter period of time as the Court may specify, or may be given additional time upon request made to the Court.
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> * * * *
>
> (4) The time period for any response and reply to a motion filed under Federal Rule of Civil Procedure 12 shall be as provided in LRCi 12.1. . . .

LRCi 12.1(2)(b) then provides that a party has 20 days to respond to a Rule 12 motion. Thus, the due date to respond to the Defendant's August 6th Rule 21 motion to sever was August 20, 2012, while the due date to respond to the Defendant's Rule 12(e) motion was August 27, 2012.

It is uncontested that the Plaintiffs missed both dates -- as no responses were filed by either date. Instead, a day after the opposition on the motion to sever was due, on August 21, 2012, the Plaintiffs filed two motions for an extension of time as to both of Defendant's motions, seeking 20 day extensions from the date of that motion to respond to both of SCRG's motions -- with the Plaintiffs EXPLICITLY STATING THAT PLAINTIFFS would *FILE* THEIR OPPOSITIONS by September 10, 2012. [D.E. 23 and 24] Thus, It is uncontested that (1) the first motion for an extension was not granted, and (2) even if it had been, filing by the 10th has not occurred, so Plaintiffs are out of time again.

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[1] SCRG had filed almost identical motions to sever and for a more definite statement regarding the initial Complaint, which was pending but is now moot because of the filing of the Amended Complaint.

With regard to the "reasons" for both the first and second requested extensions, the stated reasons have been specifically criticized and warned about by this Court and the Third Circuit. They can be described as:

(1) we're too busy to follow your orders, and

(2) the associate erred.

With regard to the first proffered reason, this Court has addressed this excuse in prior rulings in *Acosta v. Hovensa, LLC*, 2012 WL 1848391, 1 (D.V.I 2012) and *Clarke v. Marriott International, Inc.*, 2012 WL 2285188, 3 (D.V.I June 18, 2012). With regard to the second proffered reason, the associate's errors, the Court is referred to the Third Circuit's recent decision in *Ragguette v. Premier Wines & Spirits*, WL 3346313, 11 -14 (3d Cir. 2012).

> Initially, the District Court found that the failure to file the notice of appeal was caused by attorney inadvertence—specifically Rohn's own failure "to complete an additional step in the computer process in her office," which meant that "her staff never received the instructions to perfect an appeal." *Ragguette,* 2011 WL 2359920, at *1. We add that it appears highly doubtful that the firm's relatively new motions or appellate attorney would have understood that she was to have prepared and filed a notice of appeal based on the following cursory comment on the annotated memorandum opinion: " **Scan in as 'thoughts Re appeal'.*" (A357 .) In fact, the associate apparently did exactly what the comment told her to do—she had the document scanned. It is also unclear when exactly Cameron left the firm and how long her replacement had been working there by the time the notice of appeal had to be filed. In any case, we believe that a reasonably competent attorney would have exercised more supervision and control over a purportedly new and inexperienced subordinate. Rohn, at the very least, should have done more than make a number of vague annotations on the district court's ruling and should have anticipated that a relatively new employee would need more direction. We also are troubled by the fact that Rohn essentially and rather conveniently sought to shift at least some of the blame from herself to another person (who actually was no longer with the firm by the time of the Rule 4(a)(5) hearing, did not submit any declaration in support of the motion, and did not appear at the hearing itself).

*12 Rohn likewise acknowledged that she personally failed to create the requisite “computer task” as per her firm's usual practices. She thereby clearly carried at least partial responsibility for the breakdown in her firm's internal procedures. In fact, the failure to create the critical computer task meant that this system was never really triggered in the first place.

We add that the firm's own procedures had some serious deficiencies of their own. As noted above, the proper completion of a computer task was evidently necessary to trigger this computer tracking system in the first place. Turning to the more significant matter of the ECF system, we do acknowledge that attorneys, especially well-established lawyers like Rohn, could have difficulties adjusting to this mechanism of electronic case filing (as well as other computer procedures). However, it is also undisputed that Rohn herself had previously registered as an ECF user sometime before the beginning of 2010. Rohn (or at least someone in her office using her ECF account) has actually filed numerous documents in this heavily litigated case via the ECF system since September 2007. If a notice of appeal had actually been filed (as Rohn evidently believed it had been), a notice of such a filing would have immediately been sent via e-mail to any and all attorneys who had previously entered an appearance in the District Court proceeding. Accordingly, Rohn should have known that no notice of appeal had been filed because neither Rohn nor any other attorneys from her firm who had entered an appearance in this case ever received any notice of such a filing. Having not received such a notice, any reasonably competent attorney would have looked into whether a notice of appeal had been properly filed—especially where such a critical task had been assigned to a relatively new subordinate.

At the Rule 4(a)(5) hearing, Rohn actually acknowledged that “all the ECF filings in my office, even directed to me internally through technology, go to the attorney who is actually in charge of monitoring those,” and that Rohn herself “wouldn't have gotten an ECF back.” (A440.) At the very least, we believe that such an arrangement was highly problematic. In particular, a reasonably competent attorney who did not personally receive or otherwise look at ECF notices would have to set up some sort of additional method of keeping track of filings, especially those filings submitted under her own ECF account as well as critical filings like a notice of appeal. Such an attorney would at least attempt to make sure that a notice of appeal had been filed within the applicable 30–day period by, for example, simply asking the subordinate whether—and when—she had filed this critical document.

* * * *

*13 [5] It is well established that a busy caseload generally does not constitute a basis for a finding of excusable neglect. *See, e.g., Pedereaux v. Doe,* 767 F.2d 50, 52 (3d Cir.1985) ("That counsel spent much of the latter period preparing for the trial of other matters does not excuse the failure to attend to the insubstantial task of filing a notice of appeal."). Ragguette accordingly denies ever advancing such a theory in the first place. But he also continues to highlight his counsel's busy schedule during the relevant time period. For example, Rohn raised the issue of her own caseload at the hearing, purportedly in order to provide an explanation as to why she would not necessarily have seen a notice of appeal before its filing and why she would not have known that no such notice had been prepared and filed. We believe that Ragguette's attorney thereby attempted to draw too fine of a distinction. Simply put, the busy caseload was essentially offered as an "excuse" for "the failure to attend to the insubstantial task of filing a notice of appeal." *Id.* We also believe that a reasonably competent attorney would have better managed her own caseload and would have done more to make sure that the critical task of properly filing a notice of appeal was completed despite how busy she may have been at the time.

We likewise determine that Rohn clearly failed to exercise reasonable diligence in uncovering the fact that no notice of appeal had been filed and then bringing this mistake to the attention of the opposing party and the District Court. This Court previously rejected the "contention that Rule 4(a)(5) provides an absolute 30 day grace period" and held that " 'excusable neglect' must be shown up to the actual time the motion to extend is filed." *Id.* at 51. "It simply is not overly burdensome to require a putative appellant, who has already missed the 30 day ... mandatory appeal date of Rule 4(a)(1) because of 'excusable neglect,' to file immediately a Rule 4(a)(5) motion to extend when the excuse no longer exists." *Id.* at 52. In this case, a reasonably diligent attorney certainly could have—and should have—discovered the fact that no notice of appeal had been filed (or at least taken steps to investigate the matter) when: (1) Premier filed its original fee motion on January 13, 2010; (2) Ragguette's opposition to this fee motion was filed (via the ECF system under Rohn's own account) on January 28, 2010; (3) the District Court entered an order on February 8, 2010 scheduling a hearing on the fee motion for February 23, 2010; (4) on February 24, 2010, the District Court rescheduled the fee hearing for March 1, 2010; (5) no ECF notice was ever received indicating the filing of a notice of appeal; (6) no ECF notices were ever received with respect to a number of documents sent out by the District Court's Clerk (a receipt for payment of the requisite filing fee for an appeal) as well as the Third Circuit's Clerk (the initial case opening letter and the assignment of the case caption) immediately after the filing of a notice of appeal; and (7) similarly, no ECF notices (or hard copies of the documents themselves)

> were ever received indicating that the parties filed various documents due shortly after the commencement of an appeal (i.e., entry of appearance, disclosure statement, civil appeal information statement, concise summary of the case, and transcript purchase order).[FN4] Yet Rohn purportedly did not discover that no notice of appeal had been filed until her preparation for the March 1, 2010 fee hearing—approximately a month after the deadline for filing a notice of appeal and approximately two months after the District Court's summary judgment order. Nevertheless, she still did not even mention the mistake or the possibility of an appeal at the hearing conducted on March 1, 2010. Even though she claimed that that she did do so because she wanted to obtain verification, we must reject such an excuse given her prior—and extensive—lack of due diligence. We also note that a reasonably competent attorney-having just discovered that a notice of appeal had not been filed almost a month after the deadline had already expired and immediately before a previously scheduled hearing—would have exercised more diligence in obtaining verification prior to the hearing and would have then brought this critical matter to the immediate attention of opposing counsel and the judge.

II. Prejudice -- There will be no prejudice in deeming the motions conceded

While this Court allows certain counsel to endlessly continue late filings, it has stated that it does so with grave reservations, and only because it does not want to visit the effects of not doing so on the actual parties, which is certainly understandable. However, the granting of these motions does not deny any individual Plaintiff access to the Court or prejudice their case in any manner. No relief is denied or even altered. These are purely procedural motions. As set forth in defendant's motions, each plaintiff would benefit by being able to have his or her own "day in court" with all of the rights and protections that attend an individual trial.

On the other hand, SCRG would be severely prejudiced if it had to try what would be a confusing "mega-case" lasting for more than a year, as noted in its Rule 21 motion.

III. Conclusion

In short, it is respectfully submitted that relief under Rule 21 is clearly appropriate in this case for all of the foregoing reasons, allowing one plaintiff to proceed and then dismissing the other claims without prejudice due to their misjoinder (with leave to re-file on a timely basis without prejudice). As for the motion for more definite statement, no dismissal is sought -- all that is being requested is basic information.

Thus, Plaintiffs' counsel should be required to name one plaintiff who would remain as the named plaintiff in this case. Each of the other remaining plaintiffs should then be allowed to re-file their respective case as a separate claims without prejudice. *See, e.g., Aaberg v. Acands Inc.,* 152 F.R.D. 498, 501 (D.Md.1994)(alleged exposure to asbestos, without any attempt at individualization of the particular circumstances and exposures of the individual plaintiffs, warrants dismissal of all claims under Rule 21 except the first named plaintiff).

Moreover, the remaining plaintiff should, at that time, be required to provide the basic facts relevant to his or her own claim, so that the Defendant has sufficient information about that claim so as to be able to respond to it.

Dated: September 13, 2012

/s/

Carl J. Hartmann III, Esq.
Counsel for Defendant SCRG
5000 Estate Coakley Bay, L-6
Christiansted, St. Croix
U.S. Virgin Islands 00820
Telephone: (340) 719-8941
Email: carl@carlhartmann.com

Dated: September 13, 2012

/s/

Joel H. Holt, Esq.
Counsel for Defendant SCRG
Law Offices of Joel H. Holt
2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820
Telephone: (340) 773-8709
Email: holtvi@aol.com

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2012, I filed the foregoing with the Clerk of the Court, and delivered by ECF to the following:

Lee J. Rohn, Esq.
Law Office of Rohn and Carpenter, LLC
1101 King St.
Christiansted, VI 00820
Counsel for the Plaintiffs

/s/

CARL J. HARTMANN III