

Appellate Practice Corner

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Seventh Circuit Factors in Attorney's Experience In Determining "Excusable Neglect"

***McCarty v. Astrue*, 2008 U.S. App. LEXIS 12694 (7th Cir. 2008)**

On June 16, 2008, the United States Court of Appeals for the Seventh Circuit held that "excusable neglect," as used within Federal Rule of Appellate Procedure 4(a)(5)(A)(ii), did not apply to an experienced federal practitioner who had filed his notice of appeal three days after the deadline. The attorney claimed that he had misread what is now Federal Rule of Civil Procedure 6(d). Federal Rule of Appellate Procedure 4(a)(5), which governs extensions of time for filing a notice of appeal, provides:

- (5) Motion for Extension of Time.
 - (A) The district court may extend the time to file a notice of appeal if:
 - (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
 - (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.
 - (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.
 - (C) No extension under this Rule 4(a)(5) may 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

Whether such a motion is granted is within the district court's discretion.

In *McCarty v. Astrue*, 2008 U.S. App. LEXIS 12694 (7th Cir. 2008), the plaintiff-appellant, Janet McCarty, filed for Social Security Disability benefits after being hit by a car. An Administrative Law Judge (ALJ) reviewed McCarty's request and medical records and heard testimony. The ALJ then denied her claim, finding that she did not meet the requirements for disability and that she was capable of doing light-duty work. The Appeals Council denied her Request for Review, which was upheld by the United States District Court for the Southern District of Indiana in a final order, entered on March 9, 2007.

McCarty filed her notice of appeal on May 11, 2007, sixty-three days after the date of the order affirming the Social Security Commission decision. According to Federal Rule of Appellate Procedure 4(a)(1)(B), a notice of appeal must be filed within 60 days of the order appealed from. Shortly after the filing, the Seventh Circuit Court of Appeals asked McCarty to file a memorandum explaining why the case should not be

dismissed for lack of jurisdiction and to further explain the status of any motion for an extension filed with the district court.

McCarty responded to that request with a motion requesting that the district court grant her a three-day extension to file her notice of appeal. McCarty cited to the Administrative Policies and Procedures Manual for the Southern District of Indiana, which contained a provision for service of electronically filed documents purporting to grant an additional three days to file a notice of appeal as provided in Federal Rule of Civil Procedure 6(e). According to Rule 6(e) at the time of the events of the case, “whenever a party must or may act within a proscribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the proscribed period would otherwise expire under subdivision (a).” Fed. R. Civ. P. 6(e) (currently Rule 6(d)). Over opposition, the district court granted extension request and signed the suggested order submitted by McCarty.

The Seventh Circuit, while noting that Federal Rule of Appellate Procedure 4(a) (5)(A)(ii) permits additional time for filing a notice of appeal where the movant establishes “excusable neglect,” held that the extension was improperly granted. The definition of neglect is narrower under Federal Rule of Appellate Procedure 4(a)(5)(A)(ii) than under Federal Rule of Civil Procedure 60(b), which has been applied in circumstances of attorney carelessness and mistake. *See Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 357-361 (7th Cir. 1997).

Noting that the district court judge’s decision was discretionary, the court reiterated that:

The standard for reviewing whether neglect was “excusable” is an equitable one, taking into consideration relevant circumstances, including: (1) the danger of prejudice to the non-moving party; (2) the length of the delay and its impact on judicial proceedings; (3) the reason for the delay (i.e., whether it was within the reasonable control of the movant); and (4) whether the movant acted in good faith. *Pioneer Inv. Serv. Corp. v. Brunswick Assocs.*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993); *Marquez v. Mineta*, 424 F.3d 539] at 541 [(7th Cir. 2005)].

McCarty, 2008 U.S. App. LEXIS at *5.

Commenting on this standard for interpreting what constitutes “excusable neglect,” the court stated that: “The term ‘excusable neglect’ as used in *Rule 4(a)(5)* refers to the missing of a deadline as a result of things such as misrepresentations by judicial officers, lost mail, and plausible misinterpretations of ambiguous rules.” *Id.*

The court observed that the Federal Rules, while complex, should be understandable to experienced litigators, who should be held to strict compliance. “A simple case of miscalculating a deadline is not a sufficient reason to extend time, and judges do not have ‘carte blanche’ authority to allow untimely appeals.” *McCarty*, *Id.* at *6.

Despite the district court’s conclusion that the delay did not prejudice the litigation, the Seventh Circuit reversed, finding that the district court judge had abused his discretion in allowing the motion for extension of time.

While the district court was correct in considering the prejudicial effect of the delay, it was incorrect in determining that the absence of any harm meant the attorney’s mistake was excusable. This Court has repeatedly noted that there is unlikely ever to be harm in the rule 4(a)(5) setting, because the neglectful appellant has a limited time to request relief – in this case, sixty days – hence, there will never be a terribly long delay.

Id. at *7-8.

According to the Seventh Circuit, to adopt the district court's reasoning in this case – and thereby translate excusable neglect into a mere absence of harm – would be to read the word “excusable” out of the rule. *Id.* at *8. The court also criticized the district court's conclusion that the attorney's error was a “relatively minor mistake,” noting that a timely notice of appeal is a mandatory prerequisite to appellate jurisdiction.

Finally, the court took issue with an experienced practitioner's misinterpretation of a federal rule, here Federal Rule of Civil Procedure 6(e). “The attorney's understanding that *Federal Rule of Civil Procedure 6(e)* provided him with three extra days to file a notice of appeal is inexcusable. An unaccountable lapse in basic legal knowledge is not excusable neglect.” *Id.* at *9.

Concerning Rule 6(e), the court commented that the provision “only enlarges the filing time when the period for acting runs from the service of a notice, not when the time for acting is designated from the entry of judgment.” *Id.* at *8-9. Because the distinction between “entry of judgment” and “service of a notice” is unambiguous, the alleged misinterpretation of Rule 6(e) could not be deemed a “plausible misinterpretation of an ambiguous rule.” Moreover, it was noted that Rule 6(e) applied only to documents served on opposing counsel, not to legal pleadings that must be filed in court. *Id.* at *9, citing *Johnson v. McBride*, 381 F.3d 587, 589 (7th Cir. 2004).

The *McCarty* decision highlights the importance of complying with deadlines, particularly in the federal courts, and appears to be in line with prior Seventh Circuit rulings in similar cases. For example, in *Marquez*, the court reversed a district court's ruling granting a one-day extension of time for the filing of a notice of appeal where the attorney had miscalculated the filing deadline. There, the offending party had filed his notice of appeal on the sixty-first day after entry of the district court's judgment order and sought leave of court for a one-day extension, citing his own miscalculation. The request was allowed. The court of appeals reversed and found it lacked jurisdiction, stating that “a ‘simple case of miscalculation’ regarding deadlines is not a sufficient reason to extend times. . . .” *Marquez*, 424 F.3d at 542. In so doing, the court rejected the claim that any delay was necessarily harmless.

McCarty and *Marquez* reaffirm the Seventh Circuit's narrow interpretation of Rule 6(e) – errors by counsel, whether by inadvertence or miscalculation or rule misinterpretation, will likely *not* provide a basis for an extension of time to file a late notice of appeal. This rule is compounded where the attorney is deemed “experienced in federal practice.” *Cf. United States v. Brown*, 2008 WL 239530 (N.D. Ill. January 29, 2008) (excusable negligence not shown where *pro se* prisoner unable to file due to lock-down; lockdown did not begin until after time for filing notice of appeal had commenced; and court found the prisoner could have worked on and finished the notice prior to the time the lock-down began); *but see United States v. Johnson*, 2008 WL 1774995 (S.D. Ill. April 17, 2008) (*pro se* prisoner allowed extension of time based on “excusable neglect” where he delayed filing notice of appeal while awaiting the formal order of the district court.).

Looking back at prior case law, it is interesting to note that the Seventh Circuit has previously held that an attorney's reputation for excellence – *i.e.*, his history of punctual compliance with court rules and deadlines – is not to be considered *dispositive* in whether that attorney's conduct constituted excusable negligence. *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 362-63 (7th Cir. 1997). The *McCarty* decision, with its focus on the experience of *McCarty*'s counsel, seems to hold otherwise.

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