

BACE LAW REPORT

LEGAL NEWSLETTER

VOLUME 4, NO. 3 - MARCH 2010

Default Judgment and Defining Excusable Neglect

After the filing and proper service of a lawsuit, the Defendant has a period of 20-days to serve her answer upon the plaintiff. With the mounting numbers of consumers facing litigation based on consumer credit cards or other personal loans, the quantity of default judgments continues to increase as well. Individuals often disregard the lawsuit, ignore calls from the plaintiff's attorney, move from their residence without leaving a forwarding address, or misinterpret the summons that demands they serve the answer. The result is a default judgment; the plaintiff "wins" the lawsuit as a result of the defendant's failure to respond. There is an avenue for relief, albeit unpredictable – a motion for relief, which asks the court to remove the Judgment and reopen the otherwise completed case.

The Massachusetts Rules of Civil Procedure allow relief from judgment under one of six of the following substantive grounds:

- ▶ Mistake, inadvertence, surprise, or excusable neglect;
- ▶ Newly discovered evidence, which by due diligence could not have been discovered in time

- ▶ to move for a new trial under Rule 59(b);
- ▶ Fraud, misrepresentation, or other misconduct of an adverse party;
- ▶ The judgment is void;
- ▶ The judgment has been satisfied, released, or discharged; or,
- ▶ Any other reason justifying relief. *Mass.R.Civ.P. 60(b)*

The most common and regularly invoked, especially when attempting to remove a default judgment for failure to answer, is to ask the court to remove the judgment based on "excusable neglect," pursuant to Rule 60(b)(1). Defining neglect that is excusable, and that which is not, is a case-by-case assessment. The Supreme Judicial Court ("SJC"), the Commonwealth's highest, remains surprisingly silent on the definition of excusable neglect, issues only the broad framework, and the Appellate Courts are still flushing out the definition.

Reasonable Time Requirement

In general, motions for relief must be made within a reasonable time but cannot *exceed* one year after Judgment has entered. *Bushnell v. Bushnell*, 393 Mass. 462, 474 n. 25 (1984). This one year time limit is absolute, and may not be extended. *Chavoor v. Lewis*, 383 Mass. 801 (1981). But what exactly is a *reasonable* time to wait before asking the court for relief? This question is solely in the Judge's wise discretion, as long as the time does not exceed one year. *Id.* at 805 n. 4. The moving party bears the burden, a *considerable* burden, of showing that the

mistake was indeed excusable and not due to her own carelessness. *Gath v. M/A-Com Inc.*, 440 Mass. 482, 497 (2003).

As above, the SJC is surprisingly silent, and the determination as to whether or not the neglect is excusable likely depends on the facts and circumstances of each matter. According to the court in *Chu Tai*, “Excusable neglect, at least in theory, is something other than, ‘Oops, I forgot.’ It is meant to apply to circumstances that are unique or extraordinary, not any ‘garden-variety oversight.’” *Chu Tai v. City of Boston*, 45 Mass. App. Ct. 220 (1998). Greater guidance on the issue, and an argument for relief, will likely rely on the appellate case law below.

Excusable Neglect Factors

While they are not conditions precedent to the granting of relief, or a requirement, the courts have outlined a number of factors to be considered by the trial judge when determining whether the neglect is excusable. The judge should consider (1) whether the offending party has acted promptly after entry of judgment to assert his claim for relief therefrom; (2) whether there is a showing either by way of affidavit, or otherwise apparent on the record, that the claim sought to be revived has merit; (3) whether the neglectful conduct occurs before trial, as opposed to during, or after trial; (4) whether the neglect was the product of a consciously chosen course of conduct on the part of counsel; (5) whether prejudice has resulted to the other party; and (6) whether the error is chargeable to the party's legal representative, rather than to the party himself. *Berube v. McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426, 430-431 (1979).

Examples of Excusable Neglect

Where the defendant's attorney fails to notify the court of her new address, and default judgment enters because the defendant never receives notice of any of the subsequent hearings, the court found that neglect excusable. *Sruett v. Arlington Trust Co.*, 23 Mass. App. Ct. 152 (1986). Where the plaintiff fails to serve the defendant with a copy of her request for default, default judgment enters, *and* the defendant averred that he believed a check he sent to the plaintiff was a final settlement, the neglect was deemed excusable. *Forster Lumber Corp. v. Noiseux*, 1982 Mass. App. Div. 200. If the defendant has a meritorious defense, and her attorney is the source of the neglect, it is likely excusable. *Ruma Enterprise, Inc. v. Big Mac's Packing, Inc.*, 1994 Mass. App. Div. 110. If the defendant's attorney is unable to answer the litigation due to an illness, that is likely excusable. *Tateosian v. Chakarian*, 1999 Mass. App. Div. 144.

Defining what constitutes excusable neglect is not an exact science. There exist strict and absolute deadlines for filing the motion for relief, and only an attorney licensed in the Commonwealth can sufficiently prepare that motion. In the event judgment has entered against you, contact an attorney without delay. Ignoring the service of a lawsuit, a potential dispute, or correspondence from a law office will almost never yield a positive result.

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