

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

KIMBERLY McELROY,	:	
	:	C.A. No. K11C-02-007 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
MULTI-RESIDENTIAL-M, LLC,	:	
VINTAGE PROPERTIES, LLC,	:	
and SOVEREIGN PROPERTY	:	
MANAGEMENT, LLC.,	:	
	:	
Defendants.	:	

Submitted: March 8, 2013

Decided: March 18, 2013

ORDER

Upon Plaintiff's Motion to Vacate
Rule 41(e) Dismissal. *Denied.*

Charles E. Whitehurst, Jr., Esquire of Young Malmberg & Howard, P.A., Dover,
Delaware; attorney for Plaintiff.

Wade A. Adams, III, Esquire of Chrissinger & Baumberger, Wilmington, Delaware;
attorney for Defendant Vintage Properties, LLC.

WITHAM, R.J.

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Before the Court is Plaintiff's Motion to Vacate this Court's December 24, 2012 Order dismissing the case pursuant to Superior Court Rule 41(e).

FACTS

This is a personal injury action arising from injuries Kimberly McElroy ("Plaintiff") sustained in a slip-and-fall accident at the WoodMill Apartments in Dover, Delaware on or about February 3, 2009. Plaintiff commenced this action on February 3, 2011 against Multi-Residential-M, LLC; Vintage Properties, L.L.C.; and Sovereign Property Management, L.L.C. ("Defendants"), the alleged owners and managers of the aforementioned apartment complex. Service on all three Defendants was attempted on February 15, 2011, but the writs to Defendants Multi-Residential-M, L.L.C., and Vintage Properties, L.L.C., were returned *non est inventus*. The service on Sovereign Property Management, L.L.C., was accomplished by leaving the writ with John Reardon, the entity's comptroller. On September 19, 2011, Plaintiff moved to extend time for service. This Court granted Plaintiff's motion on September 22, 2011, and gave Plaintiff until January 17, 2012 to perfect service the remaining Defendants. The Court granted no additional extensions of time for Plaintiff to perfect service. Despite having obtained authority for appointment of a process server in September, 2011, the Plaintiff has done nothing to perfect service.¹

Vintage Properties filed an answer and cross-claim on March 26, 2011. Thereafter, the case languished for nearly eight months before the Court issued a

¹ Although Defendant Vintage Properties has filed an answer and cross-claim in this case, it raises improper service of process as an affirmative defense. The remaining Defendants have not been served or answered the complaint to date.

notice (“41(e) notice”) on November 20, 2012, pursuant to Superior Court Civil Rule 41(e), advising the parties that the case would be dismissed if no proceedings were initiated within 30 days. Plaintiff’s counsel alleges that he inadvertently overlooked the Court’s 41(e) notice, and did not learn of the notice until December 24, 2011, the same day that this Court entered an order of dismissal for failure to prosecute. Despite his inadvertence, Plaintiff’s counsel inexplicably waited until January 31, 2013 to file the instant Motion to Vacate. The Court will now address the merits of Plaintiff’s motion.

Discussion

Plaintiff brings this motion under Superior Court Civil Rule 60(b) (“Rule 60(b)”), which provides, in pertinent part: “On motion and upon such terms as are just, the Court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for ... [m]istake, inadvertence, surprise, or excusable neglect[.]”² Plaintiff’s counsel maintains that, through his own inadvertence, he did not discover the Court’s 41(e) notice until December 24, 2012, more than a month after it was issued. This oversight, Plaintiff argues, constitutes excusable neglect within the meaning of Rule 60(b)(1) and justifies the vacation of this Court’s December 24, 2012 dismissal order. “A motion to set aside a judgment pursuant to Rule 60(b) lies within the reasoned discretion of the Court.”³ The exercise of this

² Super. Ct. Civ. R. 60(b)(1).

³ *Young v. Reynoso*, 2001 WL 880128, at *2 (Del. Super. Ct. July 25, 2001) (citing *Model Fin. Co. v. Barton*, 188 A.2d 233, 234 (1963)).

discretion requires the Court to weigh the facts and circumstances of each case.⁴ This Court has consistently favored a liberal application of Rule 60(b) to advance “the underlying policy which favors a trial on the merits to a judgment based on a default.”⁵

If judgment is sought to be reopened on the ground of excusable neglect, such excusable neglect is demonstrated when the conduct of the moving party is “that which might have been the act of a reasonably prudent person under the circumstances.”⁶ Carelessness or negligence, however, are not necessarily “excusable neglect.”⁷ To the contrary, a “mere showing of negligence or carelessness without a valid reason may be deemed insufficient.”⁸ “Whether a party’s failure to act constitutes excusable neglect is a matter of judicial discretion.”⁹ Mistake of counsel may be grounds for remedial action under Rule 60(b) if timely action and justice permit.¹⁰ Although Rule 60(b) does not provide a specific time limit within which a party must request relief from judgment, the law requires a party seeking to reopen

⁴ *Bachtle v. Bachtle*, 494 A.2d 1253, 1256 (Del. 1985).

⁵ *Battaglia v. Wilmington Sav. Fund Soc’y*, 379 A.2d 1132, 1135 (Del. 1977).

⁶ *Cohen v. Brandywine Raceway Assoc.*, 238 A.2d 320, 325 (Del. 1968).

⁷ *Id.*

⁸ *Id.*

⁹ *Young*, 2001 WL 880128, at *2 (quoting *Radzewicz v. Neuberger*, 490 A.2d 588, 591 (Del. Super. Ct. 1985)).

¹⁰ *Nashold v. Giles & Ransome, Inc.*, 245 A.2d 175, 176 (Del. 1968).

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a judgment to act without unreasonable delay.¹¹

In this case Plaintiff's counsel has no excuse for failing to file a timely response to the Court's Rule 41(e) notice and to ignore it for over 30 days before filing a motion to vacate the dismissal. I cannot find excusable neglect when counsel tells the Court - "I don't know why I didn't open it". There is insufficient evidence for the Court to find that excusable neglect exists.

It is clear that our case law requires more than a mere showing of negligence or carelessness to meet the standard of "excusable neglect." Whether counsel's mistake or inadvertence amounts to "excusable neglect" is a matter left to the discretion of the Court. Based on the facts presented in this case, I find that Plaintiff's delay was unreasonable and does not indicate that she pursued her claim in the manner expected of a reasonably prudent person. Therefore, for the foregoing reasons, Plaintiff's Motion to Vacate this Court's Rule 41(e) Dismissal must be **DENIED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

¹¹ *Schremp v. Marvel*, 405 A.2d 119, 120 (Del. 1979).