

VERMONT SUPERIOR COURT  
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CIVIL DIVISION  
Case No. 23-CV-00991

<p>Hans P. Fleischner, Plaintiff</p> <p>v.</p> <p>William Andrew Lighthart, M.D., The Rutland Hospital, Inc., and Killington Resort and Pico Mountain, Defendants</p>	<p>DECISION ON MOTIONS</p>
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### RULING ON MOTION TO DISMISS AND PENDING MOTIONS

This is a negligence and medical malpractice case. Plaintiff Hans P. Fleischner alleges that in March 2020, he was injured while skiing at Defendant Killington Resort. Fleischner asserts he had surgery for his injuries performed by Defendant Dr. Andrew Lighthart at Rutland Hospital and as a result of Defendants' negligence, he has a permanent deformity of his leg. He is seeking to recover damages for his medical expenses, physical injuries and limitations, and pain and suffering. Defendants have filed a motion to dismiss for insufficiency of service of process pursuant to Rule 12(b)(5) of the Vermont Rules of Civil Procedure, arguing that they were not served within 60 days of the filing of this action. Plaintiff opposes the motion, asserting that he attempted to make timely service and to file a motion for an extension of the service deadline. He has also filed a motion for extension of time "nunc pro tunc." For the reasons discussed below, Defendants' motion is GRANTED and Plaintiff's motion is DENIED.

### Factual and Procedural Background

On March 8, 2023, Mr. Fleischner commenced this action by filing his Complaint with the Court through the Odyssey e-filing system. Under Rule 3 of the Vermont Rules of Civil Procedure, Defendants Lighthart and Rutland Hospital must be served with the Summons and Complaint within 60 days of filing, or by May 8, 2023. According to Fleischner, realizing that this deadline was upon him and service not having been effected, he filed a motion to extend the time for service until June 30, 2023, again using the Court's Odyssey e-filing system. However, that filing was rejected the following day (May 9, 2023) and an email notification was sent to Fleischner, instructing him to refile after making the necessary corrections. The email was directed to Fleischner's "spam folder," and apparently he did not read it when it was received.

On June 20, 2023, the Court sent Fleischner a Notice of Possible Dismissal – No Service, alerting him that the Court had not received proof of service as to Defendants and advising him to file proof of service within 14 days to prevent dismissal of the action. On July 13, 2023, Fleischner filed two Returns of Service indicating Lighthart and Rutland Hospital were served by the Rutland County Deputy Sheriff through Attorney John Zawistoski on June 14, 2023.

On July 14, Lighthart and Rutland Hospital filed their motion to dismiss, arguing the Complaint should be dismissed due to Fleischner’s lack of timely service. Fleischner opposes the motion, contending that he was given incorrect information by a process server which delayed his service efforts, and he had attempted to file a timely motion to extend the service deadline. In addition, on July 28, 2023, filed a Motion to Extend Time for Service of Summons Nunc Pro Tunc. The motion seeks to retroactively extend the deadline for serving Lighthart and Rutland Hospital through June 30, 2023. Lighthart and Rutland Hospital oppose the motion, contending that Fleischner has failed to demonstrate excusable neglect.

### Discussion

Rule 12(b)(5) provides for dismissal of a complaint if it has not been properly or timely served. *See* Vt. R. Civ. P. 12(b)(5); *see also* 61A Am. Jur. 2d Pleading § 461 (May 2023 update) (noting that a Rule 12(b)(5) motion “challenges the sufficiency of the service of the process on the defendant or the mode or lack of delivery”). Pursuant to Rule 3, if “service is not timely made . . . the action may be dismissed on motion.” Vt. R. Civ. P. 3(a). “On a Rule 12(b)(5) motion to dismiss, the plaintiff bears the burden of establishing that service was sufficient.” *Wolfe v. Enochian BioSciences Denmark ApS*, No. 2:21-CV-00053, 2022 WL 656747, at \*4 (D. Vt. Mar. 3, 2022) (citing *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 (2d Cir. 2005)). Here, there is no dispute that Lighthart and Rutland Hospital were not served until after the expiration of Rule 3’s 60-day deadline. Rather, the critical question is whether the Court should grant Fleischner’s motion to retroactively extend the deadline in order to render service timely. As Fleischner correctly notes in his motion, such extensions of time are governed by Rule 6(b).

Rule 6(b)(1)(B) provides that where, as here, a request to extend a deadline comes after it has expired, the moving party must establish excusable neglect. Vt. R. Civ. P. 6(b)(1)(B). “The factors to be considered in evaluating whether excusable neglect exists in a case are: ‘the danger of prejudice to the nonmovant, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.’ The standard is flexible, but the reason for the delay is the focus and has the greatest import.” *Taft-Blakely v. Reinhart Foodservice, LLC*, No. 2015-314, 2016 WL 3248841, at \*2 (Vt. June 2016) (unpub. mem.) (quoting *In re Town of Killington*, 2003 VT 87A, ¶ 16).<sup>1</sup> In this case, as in so many others, three of the factors

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<sup>1</sup> Trial courts are free to “consider three-justice decisions from [the Vermont Supreme] Court for their persuasive value, even though such decisions are not controlling precedent.” *Washburn v. Fowlkes*, Docket No. 2015-089, 2015 WL 4771613, at \*3 (Vt. Aug. 2015) (unpub. mem.) (citing V.R.A.P. 33.1(d), which provides that an “unpublished decision by a three-justice panel

appear to favor Plaintiff.<sup>2</sup> As to the most important factor, however, the Court finds that Fleischner has failed to demonstrate that the missed deadline was beyond his control and therefore constitutes excusable neglect.

Fleischner explains that he was initially delayed in arranging for service by the “press of business,” and then received incorrect advice from a “civil process server” in Rutland regarding who is permitted to serve a complaint under Vermont law. When he ultimately learned that service could only be made by certain authorized people, including the county sheriff’s office, Fleischner was almost out of time. Therefore, he filed a motion to extend the service deadline with the Court, using the Odyssey e-filing system. However, that filing was rejected for containing a document in non-compliant format, and was returned for further action. The Court’s email notice was delivered to Fleischner’s “spam folder,” which apparently was not checked frequently. Fleischner never corrected the defect, and so the motion was never filed with the Court.

Fleischner has cited no authority that would support the assertion that such circumstances constitute excusable neglect. On the contrary, it is well settled that “ignorance of the law or inattention to detail would rarely constitute excusable neglect.” *In re Lund*, 2004 VT 55, ¶ 5 (mem.); *see also In re von Turkovich*, 2018 VT 57, ¶ 6 (holding that delay in receiving notice of decision due to failure to update mailing address, despite taking other step to ensure mail forwarding, “was within attorney’s control and is analogous to a breakdown in internal office procedures, which we repeatedly have found is not excusable neglect”); *Bergeron v. Boyle*, 2003 VT 89, ¶ 22 (“Plaintiffs’ excuse that an attorney’s vacation and a related breakdown in internal office procedures resulted in the late filing is insufficient to warrant a finding of excusable neglect.”); *Town of Killington*, 2003 VT 87A, ¶ 19 (holding that an “internal office procedure breakdown” is not excusable neglect). Thus, the fact that Fleischner was preoccupied with other business or was unaware of the rules governing service in Vermont does not meet the strict standard.

Nor can the Court conclude that Fleischner’s failure to properly file his first motion to extend the service deadline warrants a finding of excusable neglect. As Lighthart and Rutland Hospital point out, Rule 5 of the Vermont Rules for Electronic Filing provides that if an e-filer submits a corrected filing within seven days of receiving the notice of rejection, the filing will be considered filed on the original date. *See* V.R.E.F. 5(d)(3), (4). However, Fleischner did not correct the defect in his motion, and therefore the filing was never accepted as part of the official record or the Court’s file in this action. We note that as a self-represented litigant, Fleischner is not required to register for e-filing, but if he does so, he is responsible for all electronic filings

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may be cited as persuasive authority but is not controlling precedent,” except under limited circumstances).

<sup>2</sup> In particular, Defendants argue that because Fleischner failed to effect timely service, the statute of limitations has expired and his claims are now time-barred, which would certainly result in prejudice to him. On the other hand, Fleischner asserts (based on facts not alleged in the complaint) that that statute of limitations has not run because Defendants’ negligence was not discovered until March 2021. Further, in light of the Court’s ruling on the Rule 12(b)(5) motion, the Court need not, and does not, reach the statute of limitations question.

made from his account, and is presumed to know and understand the rules. *See* V.R.E.F. 3(d)(1), 4(b).

While this conclusion may seem harsh, the Supreme Court has cautioned that courts must take “an appropriately hard line when it comes to determining when neglect that stems from factors totally within the control of a party or its attorney is ‘excusable.’” *Town of Killington*, 2003 VT 87A, ¶ 17. This is because “the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced – where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of the time bar.” *Id.* (quoting *Silivanch v. Celebrity Cruises, Inc.*, 333 F. 3d 355, 368 (2d Cir. 2003)). Here, the Court finds that the factors that led to the missed service deadline were entirely within Fleischner’s control, and therefore do not rise to the level of excusable neglect.

Order

For the foregoing reasons, Plaintiff’s Motion to Extend the Time for Service Nunc Pro Tunc (Motion 3) is DENIED. Defendants’ Rule 12(b)(5) Motion to Dismiss (Motion 2) is GRANTED. This matter is DISMISSED as to Defendants Lighthart and Rutland Hospital.

Electronically signed on September 20, 2023 at 9:34 AM pursuant to V.R.E.F. 9(d).



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Megan J. Shafritz  
Superior Court Judge