Vermont Superior Court
Filed 09/03/26
Orange Unit

VERMONT SUPERIOR COURT
Orange Unit
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CIVIL DIVISION
Case No. 24-CV-00722

Westwardhos LLC v. Anatoly Glass LLC et al

ENTRY REGARDING MOTION

Title: Motion to Strike; Motion for Extension of Time; Motion to Stay ; to Appeal; Pending Appeal (Motion: 22; 23; 24)
Filer: Anatoly Kishinevski; Anatoly Kishinevski; Anatoly Kishinevski
Filed Date: September 03, 2026; September 03, 2026; September 03, 2026

The motions are DENIED.

Defendant Anatoly Kishinevski has filed four motions seeking reconsideration and to take an appeal of the Court's August 4, 2026 Order denying Plaintiff's motion for a default judgment under 55(c)(6) but ruling that Defendant's failure to attend the February 10,2025 jury draw in this matter constituted a waiver of his right to a jury trial and that such was an appropriate sanction for his non-appearance.

The Court will not take up the first motion for reconsideration without permitting Plaintiff an opportunity to respond As such, the Court defer on this issue until it can take this matter up as a preliminary issue at the bench trial scheduled in this matter for September 4, 2026.

As to the remaining three motions, the Court has reviewed them and finds the following. The remaining motions seek to (1) strike the August 4th ruling, (2) obtain this Court's permission to take an interlocutory appeal, and (3) obtain a stay pending this appeal.

As Defendant correctly notes, an interlocutory appeal is governed by Rule 5(b) of the Vermont Rules of Appellate Procedure. Within those rules, parties seeking to file an interlocutory appeal must file their notice of appeal within 14 days of the Court's order. V.R.A.P. 5(b)(5). Defendant concedes that his motion is untimely, but he argues that he is entitled to an enlargement of time to file his notice of appeal based on the fundamental issues involved (right to a jury) as well as his personal circumstances that led to the delay, namely his incarceration on August 12, 2026 and his inability to access his personal legal files until August 26, 2026.

Defendant cites Vermont Rule of Civil Procedure 6(b) as giving him permission to seek extension on the grounds of excusable neglect. Plaintiff contends that he should be excused because of his August 12th arrest and the resulting delays of his subsequent incarceration. It is not clear, however, that Rule 6(b) from the Rules of Civil Procedure governs or controls the time limits of the Rules of Appellate Procedure. Unlike a motion for extension under the Civil Rules, the Appellate Rules are a separate group of procedures, and the Court finds no basis to import the provisions of the Civil Rules to modify or alter the plain language of the Appellate Rules.

Furthermore, there are no provisions in the Appellate Rules that would either permit such extension or permit the importing of Civil Rule procedures into Appellate procedures.

To the extent that Defendant is making a novel argument that there is an implied or inherent right to an extension and that Defendant may obtain an extension upon a showing of excusable neglect, his argument fails as a matter of fact and law.

Vermont has adopted the federal standard for reviewing and determining whether excusable neglect exists. *In re Town of Killington*, 2003 VT 87A, ¶ 16. The standard for excusable neglect is a strict one. As the Vermont Supreme Court has noted:

> In *Pioneer,* the Court enunciated factors for evaluating a party's claim of excusable neglect under a number of federal rules, including Fed. R. App. P. 4. These factors include: "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. While this standard ostensibly represents a modest liberalization of the "excusable neglect" concept in the federal rules, several federal circuit courts of appeal have recognized that the *post-Pioneer* threshold remains high.

Id. (citing *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 392 (1993). The Vermont Supreme Court also noted that "[d]espite the existence of a four-factor [Pioneer] test, the appropriate focus is on the third factor: the reason for delay, including whether it was within the reasonable control of the movant." *Id*. Federal courts also emphasize the third factor because, "[i]n the typical case, the first two *Pioneer* factors will favor the moving party: delay always will be minimal in actual if not relative terms, and the prejudice to the non-movant will often be negligible ...." *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003).

The Vermont Supreme Court and many federal courts have taken a hard line when determining if neglect stemming from factors wholly within the control of a party are "excusable." See, e.g., *In re von Turkovich*, 2018 VT 57, ¶¶ 5, 6 (finding no excusable neglect where attorney's actions led to client not receiving notice of final decision); *Killington*, 2003 VT 87A, ¶ 19 (finding inattention to detail is not enough to extend the time for filing appeal).

While such results may seem harsh, 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."' *Id.* at ¶ 17. As the Second Circuit has noted:

> We operate in an environment ... in which substantial rights may be, and often are, forfeited if they are not asserted within time limits established by law. Judges, of course, make mistakes. We, like the district court, have considerable sympathy for those who, through mistakes—counsel's inadvertence or their own—lose substantial rights in that way.... [However,] 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 enforcing the [time] bar.

Silivanch, 333 F.3d at 367-68 (alteration in original).

In the present case, the facts demonstrate that Defendant was aware of the Court's ruling on August 4, 2026. He was present in the courtroom when the Court made its determination and provided its reasoning during the duly notice hearing on how to proceed with this matter in light of the Vermont Supreme Court's remand. The Court later memorialized its decision in a written order issued on the same day. Defendant was incarcerated eight days later in a separate criminal matter. Defendant does not allege that any specific or unique part of his incarceration prevented him from drafting or making a filing with the Court. There is no indication that he was or is being held in a manner that prevented him from drafting or preparing legal filings. Defendant also does not contend that the incarceration prevented him from consulting with counsel as Defendant is self-represented in both the present civil and criminal matters. In fact, Defendant avers that he had begun drafting and had all but completed the present motion on August 12th when he was arrested. Defendant contends, however, that his arrest and subsequent incarceration kept him from his files and that he had no way to access his legal files until August 26, 2026 when he was at the Orange County Superior Court for a hearing and obtained copies of the orders in this case.

A litigant should not be treated any better or any worse than another party because of his or her incarceration. *Jones v. Phipps*, 39 F.3d 158, 163 (7th Cir. 1994) (collecting cases). As the 7th Circuit notes:

> Thus neither simple incarceration nor lack of legal counsel on the particular matter at issue, by themselves, provide the requisite good cause for defaulting. Perhaps the presence of these and other extraordinary circumstances, such as the confluence of being placed in solitary confinement without access to any means of communication and lacking legal counsel might justify—or rather excuse—dereliction of litigation duties. See *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949) (setting aside default judgment under Rule 60(b)(6) because party was ill, incarcerated and without counsel for four years); *United States v. Forty–Eight Thousand, Five Hundred Ninety–Five Dollars*, 705 F.2d 909, 913 (7th Cir.1983) (setting aside default judgment under Rule 60(b)(1) because defendant lacked funds, was imprisoned in foreign country and lacked legal counsel when default granted); *Hicks v. Secretary of the Air Force*, 594 F.Supp. 690, 691 (D.Me.1984) (setting aside default judgment because defendant was incarcerated, did not receive notice of default until after judgment entered, and defendant responded within seven days of entry of judgment).

Id. at 163–64; see also *Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (denying excusable neglect due to incarceration); *Vermont League of Cities v. Vandriel*, Dckt. No. 490-9-06 Rdcv, 2008 WL 11592721, at *2 (Jul.1, 2008) (Teachout, J.) (denying excusable neglect where defendant was incarcerated while a deadline expired).

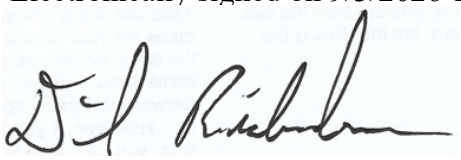
In this case, the facts show none of the special circumstances as described in *Jones*. Defendant was arrested and held without bail beginning on August 12, 2026. While he claims he was separated from his legal filings, there is nothing in Defendant's affidavit or the facts of this motion that indicate why his request and notice of appeal were not filed in a timely manner. To the extent that Defendant needed the original order to flush out his arguments for interlocutory appeal and was unable to obtain it from friends or from the court prior to August 26th, there is no reason why he could not have provided the Court with a timely motion to supplement based on his circumstances. Effectively, Defendant seeks to use the fact of his incarceration as the sole basis for his excusable neglect and for effectively waiting to the eve of his bench trial to raise the interlocutory issue for which he seeks to base the further delay of this trial.[1]

Such choices were in Defendant's control, and the general fact of incarceration is not sufficient to create excusable neglect. Based on these facts within the standards articulated by *Jones* and other similar federal and Vermont cases, the Court concludes that Defendant has not met the standard for excusable neglect in this case. Thus, even to the extent that Defendant would be eligible for an extension of his time to file an interlocutory appeal under V.R.C.P. 6, he has not shown the legal or factual basis for such under the high bar under this standard.

ORDER

For these reasons, the Court finds that there is no excusable neglect in the present case, and the motion for interlocutory appeal is untimely. V.R.A.P. 5(b)(5). For these reasons, Defendant's motion for an interlocutory appeal is **Denied.** By extension, Defendant's motion for a stay is **Denied as Moot.** The Court will take up Defendant's remaining motions to reconsider and to strike at the September 4, 2026 bench trial in this matter as a preliminary issue and give Plaintiff an opportunity to respond and offer any argument or analysis that it wishes to present.

Electronically signed on 9/3/2026 12:51 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge

[1] While the issue of timeliness is dispositive in this case, and the Court does not reach the issue of good faith, the Court will note that Defendant has consistently filed late and last-minute motions in this case seeking delays of hearings and final trials. See Entry Regarding Motion for Interlocutory Appeal on Motion to Compel Discovery *Westwardhos, LLC v. Anatoly Glass, LLC*, Dckt. No. 24-CV-722, at 1–3 (Feb. 9, 2026) (Richardson, J.) (detailing the pre-trial history of the case before the February 10, 2025 jury draw).