FILED
United States Court of Appeals
Tenth Circuit

November 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TODD LOPEZ, as personal representative of the wrongful death estate of Clara Mae Cook,

Plaintiff - Appellee,

v.

CANTEX HEALTH CARE CENTERS II, LLC; FARMINGTON HEALTH CARE CENTER, LTD CO., d/b/a Cedar Ridge Inn,

Defendants - Appellants.

No. 23-2038
(D.C. No. 1:22-CV-00825-KWR-JMR)
(D. N.M.)

TODD LOPEZ, as personal representative of the wrongful death estate of Don Begay,

Plaintiff - Appellee,

v.

CANTEX HEALTH CARE CENTERS II, LLC; FARMINGTON HEALTH CARE CENTER, LTD CO., d/b/a Cedar Ridge Inn,

Defendants - Appellants.

No. 23-2039
(D.C. No. 1:22-CV-00822-KWR-JMR)
(D. N.M.)

TODD LOPEZ, as personal representative of the wrongful death estate of Raymond Gabehart,

Plaintiff - Appellee,

v.

CANTEX HEALTH CARE CENTERS II, LLC; FARMINGTON HEALTH CARE CENTER, LTD CO., d/b/a Cedar Ridge Inn,

Defendants - Appellants.

No. 23-2040
(D.C. No. 1:22-CV-00826-KWR-JMR)
(D. N.M.)

TODD LOPEZ, as personal representative of the wrongful death estate of Eva Hunt,

Plaintiff - Appellee,

v.

CANTEX HEALTH CARE CENTERS II, LLC; FARMINGTON HEALTH CARE CENTER, LTD CO., d/b/a Cedar Ridge Inn,

Defendants - Appellants.

No. 23-2041
(D.C. No. 1:22-CV-00831-KWR-JMR)
(D. N.M.)

DENNIS MURPHY, as personal representative of the wrongful death estate of Joe A. James,

Plaintiff - Appellee,

v.

CANTEX HEALTH CARE CENTERS II, LLC; FARMINGTON HEALTH CARE CENTER, LTD CO., d/b/a Cedar Ridge Inn,

No. 23-2042
(D.C. No. 1:22-CV-00832-KWR-JMR)
(D. N.M.)

Defendants - Appellants.

TODD LOPEZ, as personal representative of the wrongful death estate of Gladys Pioche,

Plaintiff - Appellee,

v.

CANTEX HEALTH CARE CENTERS II, LLC; FARMINGTON HEALTH CARE CENTER, LTD CO., d/b/a Cedar Ridge Inn,

Defendants - Appellants.

No. 23-2043
(D.C. No. 1:22-CV-00824-KWR-JMR)
(D. N.M.)

TODD LOPEZ, as personal representative of the wrongful death estate of Robert Lewis,

Plaintiff - Appellee,

v.

CANTEX HEALTH CARE CENTERS II, LLC; FARMINGTON HEALTH CARE CENTER, LTD CO., d/b/a Cedar Ridge Inn,

Defendants - Appellants.

No. 23-2044
(D.C. No. 1:22-CV-00834-KWR-JMR)
(D. N.M.)

TODD LOPEZ, as personal representative of the wrongful death estate of Nellie Harwood,

Plaintiff - Appellee,

v. CANTEX HEALTH CARE CENTERS II, LLC; FARMINGTON HEALTH CARE CENTER, LTD CO., d/b/a Cedar Ridge Inn, Defendants - Appellants.	No. 23-2045 (D.C. No. 1:22-CV-00827-KWR-JMR) (D. N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **MATHESON**, and **CARSON**, Circuit Judges.

Appellants Cantex Health Care Centers II, LLC and Farmington Health Care Center LTD Co., d/b/a Cedar Ridge Inn, appeal the district court's order denying their motion for an extension of time and granting Appellees' motion to remand to the New Mexico state court. Exercising jurisdiction under 28 U.S.C. § 1447(d), we affirm.[1]

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] As further explained below, Plaintiffs-Appellees filed motions to remand in each of eight cases. Defendant-Appellants then filed eight motions for extension of time to respond to the remand motions. The district court, in a consolidated order, denied the motions for extension and granted the motions to remand. Like the district court, we consolidate the cases on appeal. And for ease of reference, we refer to the two sets of motions—to remand and for extension of time—in the singular.

I. BACKGROUND

Plaintiffs-Appellees, personal representatives of eight individuals who died during the COVID-19 pandemic in nursing and long-term care facilities, sued Defendants-Appellants, the owners of the facilities, in New Mexico state court. The complaints alleged negligence resulting in wrongful death, violations of the New Mexico Unfair Practices Act, civil conspiracy, and joint venture.

On November 2, 2022, Appellants filed a notice of removal in the United States District Court for the District of New Mexico. On December 1, Appellees filed a motion to remand to New Mexico state court. The District of New Mexico Local Rules provide that "[a] response must be served and filed within fourteen (14) calendar days after service of [any] motion." D.N.M.LR-Civ. 7.4(a). Appellants did not file a timely response.

On December 20, four days after the response was due, Appellants filed a motion for extension of time to respond to the remand motion, asserting:

> [D]ue to a clerical error in the calendaring of the response deadline, the deadline was not calendared properly by staff. Defense counsel has had several staff members out with illness and others filling in and working overtime, and thus, it was overlooked given the sheer number of other filings in the eight cases filed by [Appellees] against [Appellants] following the initial Notice of Removal pleading.

App., Vol. VIII at 152. While the motion for extension was pending, Appellants also filed an untimely response to the motion for remand. Appellees opposed the motion for an extension of time and replied to Appellants' opposition to remand.

The district court denied Appellants' motion for extension of time and granted Appellees' motion for remand. In its order, the court found that Appellants had failed to show their delay in filing a response to the motion for remand due to "excusable neglect" under Federal Rule of Civil Procedure 6(b)(1)(B).

The district court found "that the cursory, vague facts in [Appellants' motion was] insufficient to establish excusable neglect." App., Vol. VIII at 218. It noted that Appellants did "not explain how the alleged illness caused the miscalendaring" and that Appellants did not "submit [] evidence, aside from e-mails to opposing counsel which are largely irrelevant to excusable neglect." *Id.* The court also found that Appellants' delay "was more likely than not based on a misunderstanding of the local rules." *Id.* at 219.

Based on its denial of the motion for extension of time, the district court struck Appellees' response to the motion to remand and remanded the consolidated cases to the state court because the motion to remand was (1) unopposed or, alternatively, (2) meritorious.

Appellants timely appealed.

II. **APPELLATE JURISDICTION**

As a threshold matter, Appellees argue that we lack jurisdiction to review this appeal under 28 U.S.C. § 1447(d). We disagree.

Title 28, § 1447(d) of the United States Code provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

Section 1442 confers federal jurisdiction for civil and criminal actions commenced in state court against federal officers or agencies. 28 U.S.C. § 1442. Addressing §§ 1442 and 1447(d) in *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532 (2021), the Supreme Court held that a removal notice asserting federal-officer jurisdiction under § 1442 was sufficient to obtain appellate review of a remand order under § 1447(d). Further, "[o]nce [a notice of removal cites § 1442 as one of its grounds for removal] and the district court order[s] the case remanded to state court, the whole of its order bec[omes] reviewable on appeal." *Id.* at 1538.

Thus, when an appellate court reviews removal based on federal-officer jurisdiction, it may also review other theories of removal. *Id.*; *see Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1250 (10th Cir. 2022) (explaining *BP* held "that when a removal action is appealed under the limited grounds listed in 28 U.S.C. § 1447(d), the appellate court has subject-matter jurisdiction over all grounds for removal addressed in the district court's order."), *cert. denied*, 143 S. Ct. 1795 (2023).

Appellees argue our jurisdiction under §§ 1442 and 1447(d) is improper because the district court found Appellants' federal-officer removal theory frivolous. *See* Aplee. Br. at 60-64. But in *BP*, the Supreme Court noted that § 1447(d) confers appellate review even when parties "frivolously" asserted removal based on § 1442. 141 S. Ct. at 1542; *see also id.* at 1538, 1543. Because Appellants asserted § 1442 as a ground for removal, we have jurisdiction to review the remand order.

III. DISCUSSION

A. *Motion for Extension of Time*

Appellants assert the district court erred in denying their motion for an extension of time. We review a district court's denial of a motion for extension of time for abuse of discretion. *Quigley v. Rosenthal*, 427 F.3d 1232, 1237 (10th Cir. 2005). "A district court abuses its discretion when it issues an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007) (quotations omitted). Because Appellants have not shown that the district court abused its discretion, we affirm the denial of Appellants' motion for extension of time and the district court's grant of the motion to remand as unopposed.

1. **Legal Background**

Federal Rule of Civil Procedure 6(b)(1)(B) provides:

> When an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect.

"Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect, it is clear that excusable neglect under Rule 6(b) is a somewhat elastic concept and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392 (1993) (quotations omitted). The determination of whether neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395.

In *Pioneer*, the Supreme Court said courts should determine whether a movant has shown excusable neglect by balancing "[1] the danger of prejudice to the [non-moving party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.*

"[T]he most important [*Pioneer*] factor" is the third. *Perez v. El Tequila, LLC*, 847 F.3d 1247, 1253 (10th Cir. 2017). "[A]n inadequate explanation for delay may, by itself, be sufficient to reject a finding of excusable neglect." *Id.*; *see also United States v. Torres*, 372 F.3d 1159, 1162-64 (10th Cir. 2004) (finding no excusable neglect where three lesser factors weighed in movant's favor but reason for delay did not).

2. **Application**

Appellants argue the district court abused its discretion in weighing the *Pioneer* factors. They assert that (1) the delay did not prejudice the Appellees, (2) the delay was not long enough to affect the proceedings, (3) the district court "arbitrarily rejected [Appellants' proffered] reason for the delay" by finding Appellants had not shown how staff illness caused Appellants' failure to file by the due date, and (4) reversal is particularly appropriate because the district court found Appellants did not act in bad faith. Aplt. Br. at 43-45.

These arguments fail because the third *Pioneer* factor is dispositive here. *See Perez*, 847 F.3d at 1253 ("[A]n inadequate explanation for delay may, by itself, be sufficient to reject a finding of excusable neglect."). As explained below, we discern no abuse of discretion in the district court's determination that the Appellants' explanations

for the delay—clerical errors in miscalendaring the deadline and staff sickness—were adequate to show excusable neglect.

a. *Miscalendaring*

Appellants assert that a clerical error caused a "miscalendaring" of the appropriate deadline. Aplt. Br. at 45. But "inadvertence . . . do[es] not usually constitute excusable neglect." *Pioneer*, 507 U.S. at 392 (quotations omitted). We have found no abuse of discretion when a district court determined counsel's "failure to calendar the answer's due date" was not excusable neglect. *Perez*, 847 F.3d at 1253. The district court's determination here similarly was not an abuse of discretion.[2]

b. *Staff sickness*

Appellants argue the district court "arbitrarily rejected [their] reason for the delay on the basis that [they] did not present the District Court with evidence . . . that detailed how a staff member's illness caused the miscalendaring." Aplt. Br. at 45.[3] Appellants assert that the district court should not have denied the motion for lack of evidence because, by signing the motion, Appellants' counsel represented to the court that their

[2] Appellants cite *Jennings v. Rivers*, 394 F.3d 850 (10th Cir. 2005), to argue the district court abused its discretion. Aplt. Br. at 42. In *Jennings*, we noted that "[a] court *may* take into account whether the mistake was a single unintentional incident (as opposed to a pattern of deliberate dilatoriness and delay), and whether the attorney attempted to correct his action promptly after discovering the mistake." 394 F.3d at 857 (emphasis added). But *Jennings* did not say a court must do so.

[3] It is unclear whether Appellants assert that one or multiple staff members' sickness caused the delay. *Compare* App., Vol. VIII at 152 ("[Appellants' counsel] had several staff members out with illness and others filling in and working overtime"), *with* Aplt. Br. at 45 ("a staff member's illness caused the miscalendaring").

factual assertions had evidentiary support. *Id.* (citing Fed. R. Civ. P. 11(b)(3)). We disagree. Appellants' had the burden to show excusable neglect, and the district court did not abuse its discretion in finding their cursory explanation lacking.

Our leading case considering whether sickness can be excusable neglect under Rule 6(b) is *United States v. Ruth*, 946 F.2d 110 (10th Cir. 1991). *See Perez,* 847 F.3d at 1253 (citing *Ruth* for proposition that "[a] lawyer's medical problems or serious health challenges may be . . . sufficient for a finding of excusable neglect."). There, the defendant-appellant's attorney, who was "an insulin-dependent diabetic [and] was pregnant . . . and . . . experiencing pregnancy problems [while] under continuous medical supervision," had filed a notice of appeal one day late. 946 F.2d at 112 n.2. On appeal, we accepted the government's concession that the district court erred in denying the attorney's motion to file an untimely notice of appeal for lack of excusable neglect. *Id.*

This case falls short of *Ruth.* In *Ruth*, an attorney—not a staff member—missed a filing deadline by one day and asserted that specific and serious medical issues impeded her ability to file a timely notice. *Id.* Here, Appellants assert that a staff member's unspecified sickness contributed to a longer delay.

* * * *

In sum, Appellants have not shown the district court's denial of their motion for an extension of time was an abuse of discretion.

B. ***Motion to Remand***

"We review the district court's ruling on the propriety of removal de novo." *Suncor*, 25 F.4th at 1250 (quotations omitted). Appellants argue the district court erred

when it granted the motion to remand as unopposed because the motion was a "dispositive [one] that should be addressed on its merits." Aplt. Br. at 47. We are not persuaded.

Apart from the fact that a remand order is not a merits disposition because the case will continue in state court, a district court is not precluded from granting an unopposed motion to dismiss just because dismissal is dispositive.[4] For example, we have affirmed dismissal for lack of jurisdiction based on the application of local rules permitting district courts to grant motions as uncontested following a party's failure to respond. In *Parker v. Comm'r, SSA*, 845 F. App'x 786 (10th Cir. 2021) (unpublished), we said a Rule 12(b)(1) dismissal was not an abuse of discretion when the local rule provided a court

[4] Appellants, citing *Issa v. Comp USA*, 354 F.3d 1174, 1177 (10th Cir. 2003), assert that "a district court may not grant [] a dispositive motion because a party failed to file a timely response." Aplt. Br. at 17; *see* Aplt. Reply Br. at 9. But *Issa* concerned summary judgment, where "[t]he movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303, 1309 (10th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the movant has met the initial burden, and the non-movant does not respond, the court may grant summary judgment. *See* Fed. R. Civ. P. 56(e)(3); *Celotex*, 477 U.S. at 323. Here, by contrast, the Appellants—the non-moving parties invoking federal jurisdiction—had the burden to show removal jurisdiction is proper in response to a motion to remand. *See Karnes v. Boeing Co.*, 335 F.3d 1189, 1194 (10th Cir. 2003).

Appellants' reliance on *First Union Mortg. Corp. v. Smith*, 229 F.3d 992 (10th Cir. 2000), is likewise misplaced. In *First Union*, we held that a "magistrate judge lacked the authority to issue [a] remand order" under 28 U.S.C. § 636 because the order was dispositive. *Id.* at 997. But we did not say, and it does not follow, that a district court may not grant a remand motion as unopposed because it is dispositive.

"will consider and decide the motion [as] uncontested" if opposing party failed to file a timely response. *Id.* at 787-88 (quotations omitted).[5] The same approach applies here.

District of New Mexico Local Civil Rule 7.1(b) provides that "[t]he failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion." The district court's decision to grant the motion to remand based on Appellants' failure to file a timely response complied with the local rule.

The district court denied Appellants' motion for extension of time as untimely and therefore struck their response to the motion to remand. The court then treated the motion to remand as unopposed. Without a properly filed opposition response to the motion to remand, Appellants failed to show the district court had jurisdiction. *See Karnes v. Boeing Co.*, 335 F.3d 1189, 1194 (10th Cir. 2003) (emphasizing the burden is on the party opposing a motion to remand to state court to show jurisdiction by a preponderance of the evidence); *Conn. State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337, 1343 (11th Cir. 2009) ("On a motion to remand, the removing party bears the burden of showing the existence of federal subject matter jurisdiction.").

The district court thus did not err when it granted the motion to remand as unopposed.

[5] Cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)).

IV. **CONCLUSION**

We affirm.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge