

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BARBARA TOUGAS, :
Plaintiff, :
 :
v. : CA 08-478 S
 :
FEDERAL DEPOSIT INSURANCE :
CORPORATION, ET AL., :
Defendants. :

MEMORANDUM AND ORDER
GRANTING MOTION FOR ENLARGEMENT

Before the Court is the Motion for Enlargement of Time to File the Record of the State Court Proceeding (Doc. #6) ("Motion for Enlargement" or "Motion") filed by Defendant Federal Deposit Insurance Corporation (the "FDIC"). Plaintiff Barbara Tougas ("Plaintiff") has filed an objection to the Motion. See Plaintiff's Objection to Defendant's Motion for Enlargement of Time to File the Record of the State Court Proceeding (Doc. #7) ("Objection"). A hearing was held on September 17, 2009. For the reasons stated herein, the Motion is granted.

I. Facts and Travel

On February 26, 2008, Plaintiff filed her Complaint in the Washington County Superior Court. See State Court Record (Doc. #8) at 2. IndyMac Bank, F.S.B. ("IndyMac Bank"), was among the named Defendants. See Notice of Removal (Doc. #1), Exhibit ("Ex.") A (Verified Complaint) at 1. On July 11, 2008, the Director of the Office of Thrift Supervision closed IndyMac Bank

and appointed the FDIC as its receiver. See Notice of Removal at 3. The FDIC removed the action to this Court on December 8, 2008, by filing the Notice of Removal. See Docket.

On August 4, 2009, District Judge William E. Smith issued a Show Cause Order (Doc. #4) requiring the FDIC to show cause in writing on or before September 8, 2009, why the action should not be dismissed for failure to comply with District of Rhode Island Local Rule ("DRI LR") Cv 81(b).¹ Under the version of the Local Rules then in effect, the Rule required that the state court record had to be filed within ten days of the filing of the Notice of Removal. See id.

The FDIC responded to the Show Cause Order on August 31, 2009. See Docket; see also Response of Defendant Federal Deposit Insurance Corporation to Show Cause Order (Doc. #5) ("Response"). In its Response, the FDIC stated the following. On December 9, 2008, counsel for the FDIC filed a copy of the Notice of Removal

¹ Prior to the December 1, 2009, Amendment, Local Rule Cv 81(b) stated:

(b) Filing of State Court Record. Within ten (10) days after filing a notice of removal, the party filing the notice shall file certified or attested copies of the docket sheets and all documents filed in the case being removed arranged in the following order:

(1) the docket sheet(s); and

(2) the documents filed in the court from which the case is being removed, arranged in the same order as they appear on the docket sheet. Each document shall be numerically tabbed.

DRI LR Cv 81(b).

in the Washington County Superior Court. See Response at 1. He discussed the removal of the court papers from that court to this Court with one of the superior court clerks. See id. The clerk stated that the clerk's office would send the court file to this Court. See id. Based on this conversation, counsel for the FDIC believed that the clerk of the state court would be sending the certified copy of the state court record to the Clerk of this Court. See id. The FDIC's counsel remained under this impression until he learned of the Show Cause Order on August 25, 2009.² See id. On the following day, August 26, 2009, the FDIC's counsel contacted the Washington County Superior Court clerk's office and inquired why the record had not been transmitted to the federal court. See id. at 2. He was advised that before the record could be transmitted he would have to pay to have the pages of the state court record certified. See id. He was further advised that the charge was \$3.00 per page. See id. In a subsequent telephone conversation, the clerk told counsel that the record consisted of 275 pages and that the total cost for certifying the record would be \$825.00. See id. The clerk further told counsel that it would be necessary for him to come to the state court clerk's office and make the copies

² Counsel for the FDIC states that he did not receive a copy of the Show Cause Order. See Response at 1 ("[D]efense counsel did not receive a copy of the notice from the federal court. The issuance of the [Show Cause] Order was made known to the defense counsel in a chance meeting with one of the other attorneys involved in this litigation on August 25, 2009.").

himself. See id. The Response concluded by stating that the state court record would be filed in this Court by September 8, 2009, the date specified in the Show Cause Order.³

Along with the Response, the FDIC filed the instant Motion for Enlargement pursuant to Fed. R. Civ. P. 6.⁴ See Docket. The Motion restates the information provided in the Response regarding the reasons why the state court record was not timely filed in this Court. See Motion. By way of relief, the Motion requests an extension of time to file the state court record in this Court. See id. at 2.

On September 3, 2009, Plaintiff filed her Objection to the Motion. In the Objection, Plaintiff states that the FDIC was appointed receiver of IndyMac Bank on July 11, 2008, and that

³ The docket reflects that the state court record was filed on September 4, 2009. See Docket.

⁴ Fed. R. Civ. P. 6(b) provides in relevant part:

(b) Extending Time.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of **excusable neglect**.

(2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

Fed. R. Civ. P. 6(b) (bold added).

pursuant to 28 U.S.C. § 1446(b)⁵ the FDIC had thirty days to remove the action to this Court. Objection at 1. Plaintiff further states that the action was not removed within this time frame and that the reasons advanced by the FDIC for an enlargement failed to take into account the FDIC's failure to satisfy the rules for removal. See id. at 1-2. Plaintiff prays that the Motion be denied and the matter be remanded to the Superior Court for further proceedings. See id.

II. Discussion

A. Waiver

Plaintiff objects to the Motion on the ground that the FDIC did not remove the action to this Court within the thirty days

⁵ 28 U.S.C. § 1446(b) states:

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b).

specified in 28 U.S.C. § 1446(b). See Objection at 1 (noting that FDIC had thirty days to remove action to this Court and failed to do so). However, this objection is waived because Plaintiff failed to file a motion for remand within the thirty days prescribed by 28 U.S.C. § 1447(c).⁶ See York v. Day Transfer Co., 525 F.Supp.2d 289, 296 (D.R.I. 2007) (holding that by failing to seek remand within thirty days defendant waived any statutory objection to improper removal); Rosciti Constr., Inc. v. Lot 10 of East Greenwich Town Assessor's Plat 14, 754 F.Supp. 14, 16 (D.R.I. 1991) (finding that because plaintiff missed time limit for filing motion to remand it waived objections to defendant's removal procedures); id. at 16-17 ("Title 28 U.S.C. § 1447(c) requires that a motion to remand based on a defect in removal procedure be made within 30 days after the filing of the notice of removal under section 1446(a)."); see also Loftis v. United Parcel Serv., Inc., 342 F.3d 509, 516 (6th Cir. 2003)

⁶ 28 U.S.C. § 1447(c) states:

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1447(c).

("[T]echnical defects in the removal procedure ... may not be raised *sua sponte*, and must be raised by the party within thirty days of removal or they are waived."); Armistead v. C & M Transp., Inc., 49 F.3d 43, 47 (1st Cir. 1995) ("objections based on a defect in removal procedure must be made within thirty days of the removal") (internal quotation marks omitted).⁷

B. Issue Presented

Thus, the issue presented by the Motion is whether the FDIC's failure to file certified copies of the state court record within the ten days prescribed by DRI LR Cv 81(b) constitutes "excusable neglect" within the meaning of Fed. R. Civ. P. 6(b). Cf. Dimmitt v. Ockenfels, 407 F.3d 21, 24 (1st Cir. 2005) (applying Fed. R. Civ. P. 6(b) "excusable neglect" standard to failure to comply with local rule).

1. Law

In Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993), the Supreme Court articulated a list of factors relevant to

⁷ Plaintiff also objects to the Motion on the ground that the FDIC "failed to certify the record of the Superior Court to this [C]ourt within the time required by 28 USC 1446." Objection at 1 (underlining omitted). No time period is specified in § 1446 for the certification of the state court record to the federal court. However, the Court will assume that Plaintiff intended to object on the ground that the FDIC has not shown "excusable neglect," Fed. R. Civ. P. 6(b), which showing is required for enlargement of time when the motion is made after the time for doing an act has already expired.

determining whether a party proffering an untimely submission has made a showing of excusable neglect. Id. at 395, 113 S.Ct. 1489; United States v. Union Bank for Sav. & Inv. (Jordan), 487 F.3d 8, 24 (1st Cir. 2007) (citing Pioneer). Although Pioneer involved a matter of bankruptcy practice, Pratt v. Philbrook, 109 F.3d 18, 19 (1st Cir. 1997), since Pioneer, courts have concluded that the Pioneer standard of "excusable neglect" should apply to Fed. R. Civ. P. 6(b), id. at 19 n.1; see also 44 Liguormart, Inc. v. Rhode Island, 940 F.Supp. 437, 440 n.2 (D.R.I. 1996) (noting that language of bankruptcy rule at issue in Pioneer "is almost identical to the language of Rule 6(b)"); cf. Benitez-Garcia v. Gonzalez-Vega, 468 F.3d 1, 7 n.8 (1st Cir. 2006) ("This court has held that Pioneer was meant to apply more broadly, in other circumstances in which the party who missed the deadline argues excusable neglect.").

The Pioneer factors include the danger of prejudice to the opposing party, 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. Pioneer, 507 U.S. at 395, 113 S.Ct. 1489; Union Bank, 487 F.3d at 24. Among these factors, by far the most critical is the asserted reason for the mistake. Dimmitt 407 F.3d at 24.

In addition, a court should bear in mind that "excusable

neglect" under Rule 6(b) is a somewhat "elastic concept" and is not limited strictly to omissions beyond the control of the movant. Pioneer, 507 U.S. at 392, 113 S.Ct. 1489 (footnotes omitted); see also Dimmitt, 407 F.3d at 23 (citing Pioneer). At bottom, the determination is an equitable one, taking account of all relevant circumstances surrounding the party's omission. Pioneer, 507 U.S. at 395, 113 S.Ct. 1489; see also Perry v. Wolaver, 506 F.3d 48, 56 n.10 (1st Cir. 2007) ("Whether a given error is excusable 'has a significant equitable component and must give due regard to the totality of the relevant circumstances.'" (quoting Bennett v. City of Holyoke, 362 F.3d 1, 5 (1st Cir. 2004))).

2. Application

a. Danger of Prejudice to Plaintiff

Although Plaintiff objects to the Motion, the Court fails to see how she is prejudiced if the FDIC is permitted to file the state court record beyond the time specified in DRI LR Cv 81(b). The filing will allow her to prosecute her claims in this Court. On the other hand, if the Motion is denied, it seems a virtual certainty that, pursuant to the language of the Show Cause Order, the action will be dismissed without prejudice. See Show Cause Order. Plaintiff will then have to commence her action anew, assuming that it is not barred by the statute of limitations. Thus, I find that there is no danger of prejudice to Plaintiff if

the Motion is granted.⁸

b. Length of Delay

The length of the delay here is substantial. Under the version of DRI LR Cv 81(b) in effect at the time the FDIC removed the action to this Court, the FDIC was required to file the state court record within ten days of its filing of the Notice of Removal on December 8, 2008.⁹ The record was not filed until September 4, 2009. See Docket. Even excluding intermediate Saturdays and Sundays, see Fed. R. Civ. P. 6(a)(2) (prior to Dec. 1, 2009, Amendment), the delay here is more than eight months.

With respect to the delay's potential impact on judicial

⁸ Plaintiff in her objection asks that the Court deny the Motion and "further remand this matter to the Superior Court for further proceedings." Objection at 2. Although at least one older case holds that a court may *sua sponte* remand a case which procedurally has not been properly removed, see Waverly Stone & Gravel Co. v. Waterloo, C.F. & N. Ry. Co., 239 F. 561, 567 (N.D. Iowa 1917) ("the court may and should remand the cause upon its own motion, if the case, though a removable one, is not properly removed"), more recent cases hold that a court lacks *sua sponte* authority to remand based on procedural defects, see Loftis v. United Parcel Serv., Inc., 342 F.3d 509, 516 17 (6th Cir. 2003) ("[T]echnical defects in the removal procedure ... may not be raised *sua sponte*, and must be raised by a party within thirty days of removal or they are waived."); Luckow v. AXA Equitable Life Ins. Co., No. 08 CV 10475, 2008 WL 1766645 (E.D. Mich. Apr. 15, 2008) (citing Page v. City of Southfield, 45 F.3d 128, 133 (6th Cir. 1995)). Here, Plaintiff failed to raise her procedural objection (that the FDIC had not timely filed the state court record) by moving to remand the action within the thirty days prescribed by 28 U.S.C. § 1447(c). Thus, because Plaintiff waived her right to request remand on this basis, see Rosciti Constr., Inc. v. Lot 10 of East Greenwich Town Assessor's Plat 14, 754 F.Supp. 14, 16 (D.R.I. 1991) (finding that because plaintiff missed time limit for filing motion to remand it waived objections to defendant's removal procedures), Plaintiff is precluding from achieving indirectly what she cannot achieve directly.

⁹ The time period has been increased to fourteen days as of December 1, 2009. See DRI LR Cv 81(b).

proceedings, the fact that the Court found it necessary to issue the Show Cause Order is evidence that the delay had some negative impact. Somewhat ameliorating this impact is the fact that the record was filed on September 4, 2009, and there is no suggestion that the delay has affected the completeness or integrity of the state court record.

c. Reason for the Delay

As discussed more fully in the Facts and Travel section supra at 2-4, the reason for the delay was that counsel for the FDIC was under the impression that after he filed the Notice of Removal the Washington County Superior Court Clerk's Office would send the state court record to this Court. See Motion at 1. The basis for his belief was a statement by a clerk with whom he spoke when he filed the Notice of Removal. See id. He remained under this impression until he learned of the issuance of the Show Cause Order. See id.

Bearing in mind that the reason for the delay is the most critical factor, Dimmitt, 407 F.3d at 24, the Court reproduces below the portion of the Motion which set forth the FDIC's explanation:

The attorney for the Defendant FDIC personally appeared at the clerk's office in the Washington County Superior Court with the documents. He also discussed with the clerk of the court that the court papers from the Superior Court needed to be transmitted to the United States District Court. That clerk specifically stated that the clerk's office would send the court file to the United States District Court. At that time the

undersigned attorney understood that the clerk of the state court would be sending the certified copy of the state court record to the clerk of the United States District Court.

Motion at 1.

The above excerpt explains why the state court record was not timely filed. Given that the FDIC's counsel was advised by the state court clerk's office that the record would be sent, it is understandable that the FDIC's counsel would assume this would occur. Less understandable, however, is the fact that, as the months passed and counsel heard nothing from either court about the case, he did not at some point check to confirm that the record had in fact been filed. Certainly, at the six month mark, counsel should have been prompted by the lack of any activity in the case to make inquiry. Thus, with respect to the reason for the delay, the Court finds that it was due initially to the erroneous information which was given to counsel for the FDIC and later to counsel's failure to make inquiry to confirm that the state court record had been transmitted.

d. Good Faith

There is no suggestion that the FDIC and its counsel have not acted in good faith. The Court accepts the representation of the FDIC's counsel regarding what the state court clerk advised him with regard to the transmittal of the state court record. Although the Court finds that counsel's failure to make inquiry after several months of hearing nothing about the case

constitutes neglect, there is no reason to believe that counsel purposefully refrained from making such inquiries in order to gain a tactical advantage over Plaintiff. When counsel learned that the record had not been filed, he immediately took steps to insure its prompt transmission, including paying \$825.00 to photocopy the record.¹⁰

3. Analysis

Balancing the above factors with particular attentiveness to the reason for the delay, the Court concludes that the FDIC has shown, albeit just barely, that its failure to file the state court record within the prescribed time was due to excusable neglect. Plaintiff will not be prejudiced by the granting of the Motion. To the contrary, Plaintiff will be harmed if the Motion is denied and the action is dismissed pursuant to the language of the Show Cause Order. While the length of the delay is substantial,¹¹ it was due initially to the erroneous information which the state court clerk provided to counsel for the FDIC, cf. Lincoln Mine Operating Co. v. Mfrs. Trust Co., 17 F.Supp. 499, 500 (D. Idaho 1936) (denying motion to remand where short delay

¹⁰ The size of the state court record in this case may have played some role in what happened. It is at least plausible to the Court that a state court clerk, under the impression that the record was relatively small, could make the statement recounted by counsel for the FDIC, but then take a different view upon discovering the extent of the task involved.

¹¹ Indeed, it is the length of the delay plus counsel's failure after the passage of several months to confirm the filing of the state court record that makes this ruling a close call.

was caused by clerk in not being able to certify the record in time and such showing was a sufficient justification for not complying with the statute and granting request to file record), and it was not unreasonable for the FDIC's counsel to rely upon what the state clerk told him. Counsel's failure to make inquiry regarding the status of this case by at least the beginning of the summer in 2009 is less reasonable, but there is no evidence that the FDIC or its counsel have not been acting in good faith.

In summary, the lack of prejudice to Plaintiff, the fact that more than half of the delay is due to the FDIC's counsel's understandable reliance on the statement of the state court clerk, and the unquestioned good faith of the FDIC and its counsel tip the scales slightly in favor of finding excusable neglect. See Perry v. Wolaver, 506 F.3d at 56 n.10 (noting that district court was persuaded to allow late filing because "(1) [defendants] had not missed any previous deadlines; (2) [defendants] had responded promptly upon learning of their error; (3) there was no hint of bad faith or intent to delay, and (4) there was no prejudice to [plaintiff]"). Accordingly, the Court finds that the FDIC's failure to file the state court record within the time specified by DRI LR Cv 81(b) was due to "excusable neglect," Fed. R. Civ. P. 6(b)(1), and the Motion should be granted.

III. Conclusion

For the reasons stated above, the Motion for Enlargement filed by the FDIC is GRANTED.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
December 23, 2009