

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WESLEY RUSCH,
Appellant,

vs.

THE MARTIN CONDOMINIUM UNIT
OWNERS' ASSOCIATION,
Respondent.

No. 85821 -COA

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RESPONDENT'S MOTION FOR EXTENSION OF TIME

Marc S. Cwik
Nevada Bar No. 6946
Marc.Cwik@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
(702) 893-3383
*Attorney for Respondent,
The Martin Condominium Unit Owners' Association*

MEMORANDUM OF POINTS AND AUTHORITIES

I.

PERTINENT PROCEDURAL HISTORY

The present appeal arises out of entry of summary judgment in favor of Appellee The Martin Condominium Unit Owners’ Association (“Martin CUOA”) and against Appellant Wesley Rusch (“Rusch”) and his partner, Oliver Longboy (“Longboy”) (who is not an Appellant), in Rusch and Longboy’s lawsuit against Martin CUOA in the District Court, Clark County, Nevada (Eighth Judicial District), Case No. A-21-840526-C, by the Honorable Judge Nancy L. Allf of Department 27. All appellate briefing has concluded under NRAP 28 and Rusch’s appeal is awaiting decision by the Court of Appeals of the State of Nevada (this “Court”).

Since appellate briefing concluded, Rusch has been filing motions that are improperly filed in this Court. The first two were denied by this Court. The third motion, which is the subject of the present Motion for Extension of Time, is Rusch’s “Proper Person Motion – Request to Nullify Sale Based on Violation of Nevada Law and Constitutional Right of Due Process and Restore Possession of the Condo to It’s Rightful Owner Rusch and Longboy and Reversed UD Request for Hearing” (hereinafter the “Request”). Rusch never personally served this Request on Martin CUOA. Without Proof of Service, the Clerk of this Court filed the Request on December 11, 2023 and issued a Notice to Provide Proof of Service to Rusch on the same date. Since Martin CUOA has counsel of record, it’s counsel, Marc S. Cwik

of Lewis Brisbois Bisgaard & Smith LLP, received email notice of Rusch’s Request. Rusch, however, as of the date of the present Motion for Extension of Time, has still never personally served Martin CUOA with his request. As explained below, counsel for Martin CUOA inadvertently misinterpreted certain language of the Notice to Provide Proof of Service to Rusch in assessing when an Opposition would be due to Rusch’s Request for calendaring. Therefore, upon grounds of excusable neglect, Martin CUOA requests an extension of time for filing of Martin CUOA’s Opposition.

II.

ARGUMENT

NRAP 27(a)(1) indicates that “[a] motion must be in writing and be accompanied by proof of service.” Apparently premised upon this rule, the Clerk’s Notice to Provide Proof of Service to Rusch filed on December 11, 2023 indicates the following in the text: “the court will not take any action on any such papers...until an acknowledgment of proof of service is filed. NRAP 25(d)(3).” Counsel for Martin CUOA interpreted this statement to mean that because Rusch never personally served Martin CUOA and had not filed a corresponding Proof of Service, Rusch’s Request was deemed to be procedurally defective and held in abeyance, which further meant that Martin CUOA had no obligation to file a response, and that the time to compute the Opposition deadline would begin to run

when the Request was operative and not procedurally defective (i.e., when Proof of Service was filed by Rusch). This interpretation by Martin CUOA flowed from the general principle of law that the time for a party to respond to a pleading or motion, or take certain action, typically begins to run at the time service becomes proper. *See, e.g.*, NRCPC 12(a)(1)(A)(i); EDCR 2.20(e); NRAP 4(a)(1). Rusch himself had not personally served Martin CUOA and filed a Proof of Service, hence, counsel's application of this principle to the language in the Notice.

In any event, since Rusch has a long history in the underlying consolidated action of not personally serving Martin CUOA with his filings, Martin CUOA decided to file on December 19, 2023 a response to Rusch's Request without waiting for Proof of Service to be filed so as to protect the court record and to provide this Court with pertinent information to address Rusch's improper filings. *See* Opposition at Footnote No. 1. Unexpectedly, on December 20, 2023, the Clerk of this Court issued a Notice of Rejection of Filed Document, indicating it deemed Martin CUOA's Opposition untimely. In reviewing the Notice and the NRAP in general, counsel for Martin CUOA now realizes he incorrectly interpreted the Clerk's prior Notice to Provide Proof of Service to Rusch to effect the calendaring of the response due date and that a response date should have been calendared as December 18, 2023. Counsel's misinterpretation was not intentional, but rather a

good-faith misreading of the effect of the Notice. Thus, Martin CUOA requests that the time for filing its Opposition be extended for excusable neglect.

Courts look at 4 factors in determining excusable neglect: (1) the danger of prejudice to the opposing 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 party, and (4) whether the party acted in good faith. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). All four of these factors weigh in favor of finding excusable neglect here upon the following facts. First, Martin CUOA's Opposition was filed 8 days after the Clerk filed Rusch's Request so the Opposition, so it was initially submitted for filing only one day late and there is no meaningful adverse effect on these judicial proceedings as a result. Second, a copy of the Opposition was served on Rusch on the same date, so he was immediately put on notice of the Opposition for filing. Third, since the Clerk rejected filing Martin CUOA's Opposition and directed Martin CUOA to file a Motion for Extension of Time, any prejudice to Rusch, which could only be *de minimus* if at all, would be mooted altogether by granting an extension of time, as the Opposition has already been served on Rusch, the Opposition will be re-served, and the Reply deadline will accordingly be reset, which means Rusch actually would have in all far more time than the original 7 days contemplated by NRAP 27(a)(4) to prepare any Reply at his discretion for filing.

Finally, the reason for the miscalculation of the due date for the Opposition is based upon a reasonable and inadvertent reading of the Clerk's Notice to Provide Proof of Service to Rusch, based upon general principles of law governing ripeness of response obligations. There was no bad faith on the part of counsel for Martin CUOA.

III.

CONCLUSION

As demonstrated above, Martin CUOA's filing of its Opposition to Rusch's Request one day late was caused by an inadvertent misreading of the language of the Clerk's Notice to Provide Proof of Service to Rusch by counsel for Martin CUOA. All factors which courts looks at in determining excusable neglect are established in this matter.

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WHEREFORE, Martin CUOA respectfully requests an extension of time be granted for the filing of Martin CUOA's Opposition, and that that the same be accepted for filing.

DATED this 20th day of December, 2023.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Marc S. Cwik

Marc S. Cwik

Nevada Bar No. 6946

Marc.Cwik@lewisbrisbois.com

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

(702) 893-3383

Attorney for Respondent,

*The Martin Condominium Unit Owners'
Association*

CERTIFICATE OF SERVICE

I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and that on this 20th day of December, 2023, I did cause a true copy of the foregoing **RESPONDENT’S MOTION FOR EXTENSION OF TIME** to be served via the Court’s electronic filing and U.S. Mail to all parties on the current service list.

Wesley Rusch in Pro Se
BOX 30907
Las Vegas, Nevada 89173

By /s/ Adrina Harris
An Employee of Lewis Brisbois Bisgaard
& Smith LLP