UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4217

BRIMSTONE INDUSTRIES, INC.,

Plaintiff-Appellant,

versus

OCCIDENTAL CHEMICAL CORP.,

Defendant-Appellee.

* * * * * * * * * * * * * *

No. 93-4274

BRIMSTONE INDUSTRIES, INC.,

Plaintiff-Appellee,

versus

OCCIDENTAL CHEMICAL CORP.,

Defendant-Appellant.

Appeals from the United States District Court for the
Western District of Louisiana
(90-CV-2278)

(September 30, 1994)

Before POLITZ, Chief Judge, GARWOOD and PARKER,* Circuit Judges.**

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* When this case was orally argued, Judge Parker was Chief

GARWOOD, Circuit Judge:

Plaintiff-appellant Brimstone Industries, Inc. (Brimstone) appeals the district court's grant of summary judgment to defendant-appellee Occidental Chemical Corporation (Occidental) in Brimstone's suit against Occidental seeking payment for pipe fabrication performed by Brimstone. Occidental claims that Brimstone's notice of appeal is late because the district court erred in extending the time for filing the notice, and Occidental also defends the summary judgment on its merits. We vacate the grant of summary judgment and remand.[1]

Facts and Proceedings Below

In the spring of 1989, Occidental solicited bids for the fabrication of several hundred sections of pipe (spools) for installation at a debottlenecking project (the Project) in Lake Charles, Louisiana. On May 2, 1989, Brimstone's Vice-President and Operations Manager, Douglas J. Laundry (Laundry), submitted a written bid (hereinafter the Proposal) to Occidental. The Proposal was based on the number of operational tasks to be performed. The

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Judge of the Eastern District of Texas sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] Actually, we are presented with two consolidated appeals. Our No. 93-4217 is Brimstone's appeal of the summary judgment. Our No. 93-4274 is Occidental's appeal from the district court's order extending the time within which Brimstone could file its notice of appeal, which would otherwise have been untimely. The two appeals have been consolidated, and we treat them as one case.

price for each task was based on the Word Industries Price Index. According to Laundry, on or about May 2, 1989, Phillip Sledge (Sledge), Occidental's Purchasing Agent, verbally authorized Brimstone to proceed with the work described in the Proposal. Shortly thereafter, Brimstone began work on the spools in accordance with its Proposal and the verbal authorization from Sledge.[2]

In early June 1989, Brimstone received a written purchase order (the Purchase Order) from Occidental. The Purchase Order listed $350,000 as the estimated cost of the fabrication work and stated "[v]endor must call Oxy Purchasing for additional authorization for work above the estimated cost before proceeding with the work." Later Occidental issued two supplements to the Purchase Order for (1) the fabrication of 96 more spools for an estimated cost of $200,000 and (2) overtime and short-run materials for an estimated cost of $300,000. The supplements raised the total estimated cost per the Purchase Order to $850,000.

On December 24, 1989, Occidental received an invoice from Brimstone for $1,186,723.[3] Due to the discrepancy between Brimstone's invoiced cost and the estimated cost per the Purchase Order, Occidental hired Brown & Root to audit Brimstone's billing and work. After the audit by Brown & Root, Occidental increased its payment to Brimstone to a total of $881,505, about $31,000 in excess of its Purchase Order as supplemented. Thereafter,

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[2] Occidental insists, however, that the work did not start until later, after the delivery of its purchase order.

[3] Brimstone later increased its invoice to $1,295,000.

Occidental refused to remit any further payments to Brimstone.

On September 18, 1990, Brimstone filed this lawsuit in Louisiana state court against Occidental for breach of contract. Occidental removed the case to the district court below on October 22, 1990, based on diversity of citizenship. On December 16, 1991, the district court instructed both parties to file summary judgment motions, and both did so. Thereafter, on April 3, 1992, the court concluded that there were disputed issues of material fact and issued an order denying both motions. Subsequently, however, in a letter dated December 14, 1992, the court informed the parties of its decision to reconsider the previously denied summary judgment motions and invited the parties to file briefs on the issue by January 1, 1993. No further hearing was held. Upon reconsideration of the issue, the district court, in a memorandum opinion dated December 30, 1992, and entered January 4, 1993, concluded that the Purchase Order was a valid enforceable contract and granted Occidental's motion for summary judgment. Judgment for Occidental was entered on January 4, 1993.

On February 16, 1993, counsel for Occidental telephoned counsel for Brimstone regarding the status of the lawsuit. It was not until this telephone conversation that Brimstone's counsel became aware of the judgment for Occidental or the memorandum opinion granting Occidental's motion for summary judgment.[4] On February 24, 1993, several days after the time limit for filing a

[4] Both parties acknowledge that Brimstone's counsel was unaware of the judgment and opinion until the February 16, 1993, phone conversation. Immediately after the conversation, Occidental faxed Brimstone a copy of the judgment.

notice of appeal had expired, Brimstone submitted a motion to extend time (Motion to Extend) for filing its notice of appeal.

Brimstone's counsel, in an affidavit in support of the Motion to Extend, declared that despite a "diligent search, counsel could not locate a copy of the correspondence from [the district court] forwarding the Judgment and Memorandum ruling nor the ruling itself." Brimstone's counsel further stated that:

> "[a]lthough affiant cannot affirmatively deny receipt of the Judgment and Memorandum Ruling, counsel affirmatively states that to the best of his knowledge, information and belief, said Judgment and Memorandum Ruling were either not received or if received were lost, misfiled or misplaced and that counsel never saw same prior to receiving the facsimile copy from opposing counsel and was completely unaware that the Judgment had been rendered."

On March 2, 1993, the district court granted Brimstone's Motion to Extend until March 4, 1993. Later, on March 2, 1993, Brimstone filed its notice of appeal asserting that the district court erred in granting Occidental's motion for summary judgment.[5]

Discussion

I. Order Granting the Motion to Extend

This Court reviews extensions of time under Federal Rule of Appellate Procedure 4(a)(5) for abuse of discretion. *Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061 (5th Cir. 1979).

A. Federal Rule of Appellate Procedure 4(a)(5) and Good Cause Standard

Federal Rule of Appellate Procedure 4(a)(1) requires that a notice of appeal be filed within thirty days after the date of

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[5] On March 15, 1993, Occidental filed its notice of appeal from the district court's March 2, 1993, order.

entry of the judgment appealed. The district court's opinion and judgment were entered on January 4, 1993; therefore, Brimstone should have filed a notice of appeal on or before February 3, 1993.

When a party fails to file a notice of appeal within thirty days following the district court's entry of judgment, Federal Rule of Appellate Procedure 4(a)(5) permits that party to request an extension of time. Rule 4(a)(5) provides in part that: "The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed . . . ." Rule 4(a)(5)'s allowance for extensions in cases of "good cause" applies only to a request made before the expiration of Rule 4(a)(1)'s thirty day appeal period. *Latham v. Wells Fargo Bank*, 987 F.2d 1199, 1202 n.6 (5th Cir. 1993). "[W]hen a party files a motion for extension of time after the initial period for appeal has expired, that party must make a showing of excusable neglect." *Britt v. Whitmire*, 956 F.2d 509, 511 (5th Cir. 1992).[6]

Brimstone filed its Motion to Extend on February 24, 1993, well after the February 3, 1993, thirty day deadline for filing a timely notice of appeal. Therefore, the district court's grant of

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[6] The party filing a motion for an extension must file it no later than thirty days after the initial period allowed for filing a notice of appeal has expired. FED. R. APP. P. 4(a)(5); *see also Allied Steel v. Abilene*, 909 F.2d 139, 142 (5th Cir. 1990). Brimstone filed its Motion to Extend on February 24, 1993. Under Rule 4(a)(5), Brimstone timely filed its Motion to Extend since it had until March 5, 1993, to file the request (*i.e.* the initial deadline of February 3, 1993, plus thirty days).

the Motion to Extend pursuant to Rule 4(a)(5)[7] had to be based on excusable neglect.

B. Excusable Neglect Standard

This Court gives "great deference to the district court's determination of excusable neglect when the application for extension is made before the expiration of the initial time period during which a notice of appeal must be filed." *Britt*, 956 F.2d at 511. This Court has noted, however, that "[a]lthough we are still deferential towards the district court once that period has expired, our deference need not [] be as great." *Allied*, 909 F.2d at 142; *see also Britt*, 956 F.2d at 511 (observing that "[w]hen the application is made after [the initial appeal] period has expired, [] less deference is required").

The excusable neglect standard is intended to be strictly construed. *Chipser*, 600 F.2d at 1063. We have reversed a district

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[7] Brimstone also contends that Federal Rule of Appellate Procedure 4(a)(6) provides an additional form of relief. Rule 4(a)(6) states:

> "The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal."

Brimstone's contention is incorrect since (1) Brimstone did not file a Rule 4(a)(6) motion and (2) under the plain language of Rule 4(a)(6), Brimstone would have had to file such motion on or before February 23, 1993 (seven days after February 16, 1993, when it received notice of the judgment). *See Latham*, 987 F.2d at 1202.

court's grant of an extension of time under the excusable neglect standard when the party's failure to timely file a notice of appeal was due to a legal error or miscalculation on the part of counsel. *See, e.g.*, *Allied Steel*, 990 F.2d at 143 ("fact that a party represented by an attorney misconstrues a rule does not raise such party's error to the level of excusable neglect"); *Britt*, 956 F.2d at 510-511 (disallowing an extension for a party that "miscalculated" the date the notice of appeal was due); *see also Harlan v. Graybar Elec. Co.*, 442 F.2d 425, 426 (9th Cir. 1971) (counsel's mistaken belief that rule allowed sixty instead of thirty days in which to file an appeal does not show excusable neglect).

Brimstone's failure to file its notice of appeal was not based on a legal error or miscalculation by counsel. Instead, Brimstone's affidavit alleged that it failed to file its appeal because of a failure to receive notice of the district court's final judgment. This Court has noted that "[f]ailure to learn of the entry of judgment is [a] major . . . reason for finding excusable neglect." *Chipser*, 600 F.2d at 1063. Although the district court likely was not bound to grant the Motion to Extend, we are unable to conclude that it abused its discretion under the excusable neglect standard in doing so.

II. Summary Judgment Order

A. Standard of Review

Our Court reviews summary judgment *de novo* applying the same standard as the district court. *Hansen v. Continental Ins. Co.,* 940 F.2d 971, 975 (5th Cir. 1991). Summary judgment is appropriate

if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). We review the facts in the light most favorable to the party against whom summary judgment was rendered. *See Sanders v. English*, 950 F.2d 1152, 1154 (5th Cir. 1992). As the instant case was removed to federal court on the basis of diversity, this Court must apply Louisiana contract law. *See Mozeke v. International Paper Co.*, 856 F.2d 722 (5th Cir. 1988).

B. Proposal v. Purchase Order

The real merits issue is whether a valid contract was formed based on Brimstone's Proposal or whether it was formed based on Occidental's Purchase Order. Pursuant to LA. CIV. CODE ANN. art. 1927, "[a] contract is formed by the consent of the parties established through offer and acceptance. . . . [O]ffer and acceptance may be made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent." Brimstone contends that its Proposal to Occidental was an offer which served as a valid contract after Occidental's agent Sledge verbally accepted its terms on May 2, 1989, and that Brimstone thereafter began performance before Occidental's Purchase Order was received.

Occidental, however, noting that "[a]n acceptance not in accordance with the terms of the offer is deemed to be a counteroffer,"[8] argues that the Proposal was an offer which was

[8] LA. CIV. CODE ANN. art. 1943.

rejected by Occidental's Purchase Order. Occidental alleges that the Purchase Order was a counteroffer which Brimstone accepted, thereby establishing the Purchase Order as a valid enforceable contract. Brimstone counters by saying there was already a contract between it and Occidental on the terms of the Proposal before Occidental's Purchase Order was received.

The district court's opinion failed to address the factual dispute regarding when a contract was formed between the parties. Material questions of fact concerning (1) the content of Sledge's May 2 telephone conversation with Laundry, (2) the date on which Brimstone commenced the fabrication work, and (3) the actual date on which the written Purchase Order was received by Brimstone are still unanswered. These factual questions were neither resolved nor addressed in the district court's opinion granting summary judgment. On the present record it appears there is a genuine dispute as to these facts such as to preclude summary judgment for Occidental on the basis urged by it and adopted by the district court.[9]

Conclusion

For the reasons stated, the judgment in favor of Occidental is vacated and the cause is remanded for further proceedings.

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[9] Brimstone's arguments that the district court lacked authority to reconsider its previous order denying both parties' motions for summary judgment and improperly applied FED. R. CIV. P. 54(b) are wholly without merit. The district court was entirely free to reconsider its previous denial of the motions (at least where, as here, proper advance notice was given the parties).

VACATED and REMANDED