Adrian & Pankratz, P.A.
Attorneys at Law
301 N. Main, Suite 400
Newton, KS 67114
Phone: (316) 283-8746
Fax: (316) 283-8787

STATE OF KANSAS
BEFORE THE DIVISION OF WATER RESOURCES
KANSAS DEPARTMENT OF AGRICULTURE

In the Matter of the City of Wichita's	)	
Phase II Aquifer Storage and Recovery Project	)	**Case No. 18 Water 14014**
In Harvey and Sedgwick Counties, Kansas.	)	

Pursuant to K.S.A. 82a-1901 and K.A.R. 5-14-3a.

BRIEF ON MOTION FOR RECONSIDERATION AND FOR LEAVE TO HAVE ADDITIONAL MOTIONS CONSIDERED OUT OF TIME

COMES NOW Equus Beds Groundwater Management District Number 2 (hereinafter "the District"), by and through counsel Thomas A. Adrian of Adrian & Pankratz, P.A., Leland Rolfs of Leland Rolfs Consulting, and David Stucky, with its Brief in support of its position. The District has already briefed the need for the motions to be heard "out of time." Thus, the District stands by the law outlined in its prior motions. However, in addition to the prior analysis raised by the District, it would like to submit the following considerations:

1. The District would like to remind the Hearing Officer that there is "discretion" to hear motions out of time "to prevent a miscarriage of justice which might occur if blind adherence to set time periods were otherwise required." *Boyce v. Boyce*, 206 Kan. 53, 55, 476 P.2d 625 (1970). In this case, hearing the motions would allow for the resolution of essential underlying issues, as articulated in the prior Motion for Reconsideration and Motion for Leave to Have Additional Motions Considered Out of Time.

2. The *Boyce* factors, which have been outlined in the District's prior motion, are well established. For instance, in *Jones v. Nat'l Warranty Serv.*, 303 P.3d 1278 (Kan. Ct. App. 2013), the court found excusable neglect where the delay in filing was due to circumstances such as 1) no "reckless indifference" by the party seeking excusable neglect, 2) only a 2 month delay existed in filing, 3) no prejudice could be shown by the counterparty, 4) and the party seeking excusable neglect had a "meritorious defense." *Id.*
3. It is well established that when the delay in filing a motion or pleading is caused by factors outside the party's reasonable control, then that party should be allowed to file the motion or pleading out of time. *See, e.g., Montez v. Tonkawa Village Apartments*, 215 Kan. 59, 523 P. 2d 351 (1974) (excusable neglect found where defendants had no knowledge of lawsuit because petition was lost after service by another third party, and default judgment taken).
4. Excusable neglect is justifiably found where the delay is not the fault of the party seeking excusable neglect, but rather due to the actions of another third party. *See id.*
5. Excusable neglect is certainly appropriate where the delay is caused by the actions of the counterparty or the counterparty's attorney. *See Mid-Continent Real Estate, Inc. v. Fitchett*, 1999 Kan. App. Unpub. LEXIS 497, at *5-7 (Ct. App. Feb. 12, 1999) (excusable neglect existed where party filed untimely because it was prejudiced by the actions of the counterparty's attorney and the prejudiced party had a meritorious defense). This is also supported by the *St. Clair* case previously cited by the District, which was directly on point to the facts before the Hearing Officer.

6. Indeed, it is so axiomatic that excusable neglect should exist where a party is seeking excusable neglect due to a counterparty causing the delay, that few court of appeals cases in Kansas have analyzed such compelling circumstances.

7. Indeed, in this case, the District has more than met the *Boyce* factors. As articulated previously, the District was prejudiced in the City's failure to properly submit discovery and expert reports in the first place. Had the City done so, the District would have had plenty of time to analyze the information before the motion deadline. Further, the District's Revised Motion for Summary Judgment presents meritorious legal issues that must be addressed prior to a hearing occurring in this case. Likewise, the Revised Motion in Limine also provides essential ground rules that should be addressed prior to the hearing. Additionally, the District's delay in this case was minimal and reasonable given the voluminous additional documents and reports submitted by the City. Finally, the District has acted in good faith in filing these motions and no prejudice would be caused to the other parties because the District is not seeking to delay the hearing.

8. If the District is unable to have these "supplemental" or "revised" motions heard, it will be greatly prejudiced by the City's actions. The actions of the City were completely outside of the District's control and this alone is a compelling reason to grant the Motion for Reconsideration and Motion for Leave to Have Additional Motions Considered Out of Time.

9. By way of further response, the City postures that it was *abundantly* clear from its original Proposal that Aquifer Maintenance Credits (AMCs) were based on "water left in storage as a result of utilizing Little Arkansas River flows rather than water from the EBWF." The District was also *abundantly* aware of this fact from the day the Proposal was submitted,

and indeed, even prior based on initial discussions. However, the District has attempted to flesh out the nuances to the above distinction through its interrogatories, through its requests for admission, and through its original Motion for Summary Judgment. This included, but not limited to, the now uncontroverted facts that no source water from the Little Arkansas River would be actually physically recharged into the Aquifer when an AMC is accumulated and that AMCs are not "based on the entry of water into the Aquifer through gravity flow (City of Wichita's Supplemental Responses to Requests 1 and 2 of Equus Beds Groundwater Management District No 2's Second Requests for Admission.) Yet, through its responses, the City has repeatedly found a way to parse words and deny the implications of this simple reality. The District appreciates the fact that the City is essentially admitting to all these facts now. However, at the naked core of the City's position, the City is now arguing that this matter should go to hearing because it is too late to consider the clarity afforded by these more recent admissions. To the contrary, the District is positing that the Hearing Officer now has exactly what is needed to make a ruling on the Revised Motion for Summary Judgment (or even the Motion to Dismiss) at this juncture. The District stands by its prior position regarding the chronology of what led to the filing of the recent motions and the fact that it acted in good faith.

For the reasons articulated above, and based on the prior analysis submitted by the District, the District is respectfully asking the Hearing Officer to grant the Motion for Reconsideration and Motion for Leave to Have Additional Motions Considered Out of Time, and for such other relief as the Hearing Officer deems just and equitable.

RESPECTFULLY SUBMITTED,

Thomas A. Adrian, SC #06976
tom@aplawpa.com
ADRIAN & PANKRATZ, P.A.
David J. Stucky, SC #23698
stucky.dave@gmail.com
Leland Rolfs SC#9301
Leland Rolfs Consulting
leland.rolfs@sbcglobal.net
Attorneys for Equus Beds Groundwater
Management District Number

CERTIFICATE OF FILING AND SERVICE

We, Thomas A. Adrian, Leland Rolfs, and David J. Stucky, do hereby certify that a true and correct copy of the above was served by (___) mail, postage prepaid and properly addressed by depositing the same in the U.S. mail; (___) fax; (_x__) email; and/or (___) hand delivery on the 30 day of October, 2019, to:

Aaron Oleen
Division of Water Resources
Aaron.Oleen@ks.gov; Lane.Letourneau@ks.gov

Brian K. McLeod
City of Wichita
BMcLeod@wichita.gov; jpajor@wichita.gov; AKing@wichita.gov; DHenry@wichita.gov
SMacey@wichita.gov; JMagana@wichita.gov; SDickgrafe@wichita.gov

Tessa M. Wendling
twendling@mac.com

State of Kansas
Division of Water Resources
Kansas Department of Agriculture
Kenneth.Titus@ks.gov; David.Barfield@ks.gov; Chris.Beightel@ks.gov; Ronda.Hutton@ks.gov
Stephanie.Murray@ks.gov

and the original sent by (___) mail, (___) fax, (_x__) email, and/or (____) electronically filed to/with:

Presiding Officer
Connie Owen connieowen@everestkc.net

Thomas A. Adrian, SC #06976
tom@aplawpa.com
ADRIAN & PANKRATZ, P.A.
David J. Stucky, SC #23698
stucky.dave@gmail.com
Leland Rolfs SC#9301
Leland Rolfs Consulting
leland.rolfs@sbcglobal.net
Attorneys for Equus Beds Groundwater
Management District Number 2

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Document (1)

1. *Mid-Continent Real Estate, Inc. v. Fitchett, 1999 Kan. App. Unpub. LEXIS 497*

Client/Matter: -None-
Search Terms: Mid-Continent Real Estate, Inc. v. Fitchett, 1999 Kan. App. Unpub. LEXIS 497
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
US Cases	-None-

Mid-Continent Real Estate, Inc. v. Fitchett

Court of Appeals of Kansas

February 12, 1999, Opinion Filed

No. 79,273

Reporter
1999 Kan. App. Unpub. LEXIS 497 *

MID-CONTINENT REAL ESTATE, INC., a Missouri corporation, Appellant, v. JEFFREY T. FITCHETT and KRISTA WEIHE, a/k/a KRISTA McCOY, Defendants, and APPLEBEE'S INTERNATIONAL, INC., Appellee.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Reported at *Mid-Continent Real Estate, Inc. v. Fitchett, 977 P.2d 294, 1999 Kan. App. LEXIS 216 (Kan. Ct. App., 1999)*

Prior History: **[*1]** Appeal from Butler District Court; CHARLES M. HART, judge.

Disposition: Reversed and remanded with directions.

Core Terms

trial court, garnishment, discovery, excusable neglect, documents, garnishee

Counsel: C. Gregg Larson, of St. Joseph, Missouri, Thomas L. Steele, of Wichita, and Rodney L. Eisenhauer, of Kansas City, Missouri, for appellant.

Stanley N. Wilkins and Gregory N. Pottorff, of Turner & Boisseau, Chartered, of Overland Park, for appellee.

Judges: Before GREEN, P.J., GERNON, J., and D. KEITH ANDERSON, District Judge, assigned.

Opinion by: GREEN

Opinion

MEMORANDUM OPINION

GREEN, J.: Mid-Continent Real Estate, Inc., (Mid-Continent) appeals the judgment of the trial court denying its garnishment action against Applebee's International, Inc. (Applebee's). Mid-Continent claims the trial court abused its discretion when it excused Applebee's from filing an answer and denied Mid-Continent's garnishment without a motion from Applebee's. We reverse and remand with directions to allow Applebee's to file an answer out of time, to permit discovery, and to decide the case once it is ripe for judgment.

Mid-Continent had a rental contract with Jeffrey Fitchett. On his rental application, Fitchett listed dividend proceeds from Applebee's stock as a source of "OTHER INCOME." When Fitchett defaulted on his rental agreement, Mid-Continent **[*2]** obtained a judgment against him. Mid-Continent's attorney, C. Gregg Larson, had an order of garnishment issued against Applebee's. The return of service showed that the order was personally served on Patsy Ward, the payroll administrator at Applebee's, on October 24, 1996. The garnishment answer contained two columns: one to be filled out for wage garnishment and one for nonwage garnishment. The order provided 40 days in which to file an answer.

After brief inquiry, Ward concluded Fitchett was neither an employee nor stockholder. She filled out and subscribed the *wage* garnishment portion of the answer. In the nonwage column, she put a "Ø" in the section denoting the amount of funds owed to Fitchett. She returned the garnishment answer to Larson.

Once he received the answer, Larson telephoned Ward and told her she had filled out the form incorrectly. Ward told him she was in charge of administering payroll, and she had nothing to do with shareholders. In her affidavit, Ward claims she believes she mailed a copy of the answer to the trial court clerk. Larson returned the original documents to Ward along with a letter advising her to forward the documents to Applebee's legal department.

On **[*3]** December 5, 1996, Larson telephoned the trial court clerk and discovered Applebee's had not filed an answer. He contacted Applebee's legal department and left a message for Robert Steinkamp, the general counsel and resident agent for Applebee's in Kansas. Steinkamp called Larson twice but was unable to reach him.

Mid-Continent filed an application to determine garnishee liability on December 24, 1996, alleging Applebee's had failed to file an answer and moved for judgment for the full amount of its liability against Fitchett. Larson served the application and supporting documents by mail on Applebee's legal department and Steinkamp as registered agent. Applebee's filed an entry of appearance on January 13, 1997. It then filed a motion to file its answer out of time on January 14, 1997, alleging excusable neglect under K.S.A. 60-206(b).

On March 12, 1997, the trial judge stated:

> "Court therefore finds that Applebee's reply to the plaintiff did not comply strictly with the statute, but did conform with the intent by putting plaintiff on notice that Mr. Fitchett held no Applebee's stock; that by submitting to jurisdiction and appearing, Applebee's out-of-time answer is not relevant, inasmuch **[*4]** as under E & M Ready-Mix [& Pre-Cast, Inc. v. Sanders, 20 Kan. App. 2d 533, 889 P.2d 808 (1995)], plaintiff, could have availed themselves [*sic*] of the opportunities of discovery under the Kansas statutes but did not. . . . Subsequently, the Court does find for garnishee, Applebee's, and the court does request that [counsel for Applebee's] prepare the journal entry in the case."

Applebee's never filed an answer with the trial court in this action.

K.S.A. 60-718 controls the time in which a party must file an answer to an order of garnishment. A party who fails to file an answer may move for leave to file out of time under K.S.A. 1998 Supp. 60-206(b). The trial court is not compelled to enter default judgment if the garnishee's failure is due to excusable neglect. Boyce v. Boyce, 206 Kan. 53, 55-56, 476 P.2d 625 (1970). The trial court should consider the circumstances under which the neglect to act occurred, as well as the effect of an enlargement upon the rights of all involved parties. 206 Kan. at 56.

The trial court relied on E & M Ready-Mix & Pre-Cast, Inc. v. Sanders, 20 Kan. App. 2d 533, 889 P.2d 808 (1995), to determine Applebee's failure to answer was irrelevant. E & M does not **[*5]** apply to these facts. In *E & M*, the issue was whether the garnishee's answer was sufficient under the statute when it failed to disclose the existence of a third-party's claim to the disputed funds. 20 Kan. App. 2d at 536. *E & M* reasoned discovery was the proper vehicle for sorting out possible third-party claims once the garnishee has submitted to the jurisdiction of the court. 20 Kan. App. 2d at 540. In contrast, Applebee's failed to file an answer and did not enter an appearance in time to allow meaningful discovery. The issue here does not revolve around the sufficiency of the answer but its complete absence. The trial court erred in relying on *E & M*. As a result, we must determine whether excusable neglect exists.

Mid-Continent correctly noted that the trial court failed to make an explicit finding of excusable neglect and cites Kansas Sand & Concrete, Inc. v. Lewis, 8 Kan. App. 2d 91, 96, 650 P.2d 718 (1982), to argue the failure constitutes reversible error. Because the Kansas Sand court was more concerned with the party's failure to make a documented oral or written motion to the court showing excusable neglect, it is distinguishable from this case. See 8 Kan. App. 2d at 96.

We **[*6]** must now turn our attention to the facts of this case. It is undisputed that Ward erred in failing to forward a proper answer to the trial court. Nevertheless, Ward put Larson on notice that she was not the proper person to receive an order for garnishment of stock dividend proceeds. Although Larson knew Applebee's believed Fitchett was not a stockholder, he mailed the answer to Ward with instructions to forward the documents to Applebee's legal department. Larson was also less than diligent in contacting Applebee's resident agent, arguably the proper person to handle the order. Finally, Larson based his action solely on Fitchett's brief notation in the rental application. Larson did not investigate Fitchett's claim and failed to furnish Applebee's with any additional helpful information, making it more difficult for Applebee's to respond to his claim.

Regarding the consequences of enlargement, if Fitchett is indeed not a stockholder, Applebee's would be prejudiced if it did not gain another chance to respond. Applebee's would be saddled with Fitchett's debt, and Mid-Continent would enjoy a windfall. On the other hand, Mid-Continent is in its original position if the trial court ultimately **[*7]** denies its application on the merits.

The time and manner requirements of K.S.A. 60-718 are liberally construed. E & M, 20 Kan. App. 2d at 539. While Applebee's bears the blame for failing to file a timely answer, Larson contributed to Applebee's problems, and Applebee's failure is excusable.

Nevertheless, Applebee's is not entitled to an outright dismissal at this stage. To date, Applebee's has not filed an answer but simply requested an opportunity to file an answer out of time, limiting its arguments and supporting affidavits to that issue. On the scant record before it, the trial court abused its discretion in granting relief beyond what Applebee's asked, especially without making specific findings of fact. See K.S.A. 60-252.

K.S.A. 1998 Supp. 60-721(a) provides that the trial court shall enter judgment on garnishment actions upon determination of the issues by admissions in the answer or reply, or upon determination of controverted issues by the court. In this case, the controverted issue was whether the trial court should have granted Applebee's leave to file its answer out of time. The statute does not contemplate dismissing the plaintiff's claim on issues not yet argued. Similarly, **[*8]** K.S.A. 1998 Supp. 60-241(b)(1) provides generally that the court may enter an involuntary dismissal upon motion of the defendant or on its own motion for lack of prosecution under 60-241(b)(2). Such a motion is lacking here.

Finally, the trial court erred in finding Mid-Continent had neglected to conduct discovery. Applebee's filed its entry of appearance and submitted to the jurisdiction of the trial court the day before it filed its response to Mid-Continent's application for default judgment. The trial court set the matter for hearing and decision. Mid-Continent may have been able to conduct discovery in the interim, but it was appropriate for Mid-Continent to wait until the trial court decided the pending motion.

Reversed and remanded with directions.

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