UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PENNSYLVANIA PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM, *individually and on behalf of others similarly situated,*

Plaintiff,

-against-

BANK OF AMERICA CORPORATION, *et al.*,

Defendants.

11cv733

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, Senior United States District Judge:

Gaia Holdings Ltd. ("Gaia") moves to intervene in this class action and to extend its time to file a notice of appeal of this Court's October 12, 2018 Order (ECF No. 385 (the "October 12 Order")) pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure. For the reasons that follow, Gaia's motion to intervene is denied as moot and its motion to extend the time to file a notice of appeal is denied.

BACKGROUND

This Court's preliminary approval order fixed November 14, 2016 as the deadline for filing proofs of claim in this action. (ECF No. 338.) The claims administrator received 399,627 proofs of claim on or before the filing deadline. Gaia, an investment holdings company located in Gibraltar with no office or registered agents in the United States, submitted its $1.4 million claim on June 27, 2017—more than seven months after the deadline set by this Court. (Declaration of Edward J. Radetich, Jr. in Response to Gaia's Motion to Extend Time to File

Notice of Appeal, ECF No. 401-1 ("Radetich Decl.") ¶ 3.) Its claim was one of approximately 3,000 late-filed, but otherwise valid claims.

On October 12, 2018, this Court ratified the claims administrator's determinations on all valid, timely claims and denied all late-filed claims. That denial stemmed in part from the fact that the funds available for distribution to the class were insufficient to pay all the recognized losses for timely claims. (Declaration of Edward J. Radetich, Jr. in Support of Lead Counsel's Motion for Partial Distribution of the Net Settlement Fund, ECF No. 383, ¶¶ 39–40.)

The claims administrator published the October 12 Order on its settlement website on October 17, 2018 and sent a copy of the Order by mail to late claimants, including Gaia, on October 18, 2018. (Radetich Decl. ¶ 7.) The time to appeal expired on November 13, 2018. Gaia claims that it did not learn of the October 12 Order until November 14, 2018, when it checked the settlement website and emailed the claims administrator seeking clarification on the status of its claim. (Declaration of Philip Haretos in Support of Gaia's Motion to Extend Time to File Notice of Appeal, ECF No. 396-1 ("Haretos Decl."), Ex. 1 at 4–5.) According to Gaia, the October 12 Order arrived by mail at Gaia's Gibraltar address on November 21, 2018. (Haretos Decl. ¶ 6.)

DISCUSSION

As a preliminary matter, Gaia's motion to intervene is denied as moot. Gaia is a class member bound by this Court's orders and has identified a concrete interest "clearly affected by the judgment of [this Court]." Rothstein v. Am. Int'l Grp., Inc., 837 F.3d 195, 204 (2d Cir. 2016). Accordingly, Gaia is already a party for the purpose of appealing the October 12 Order. Devlin v. Scardelletti, 536 U.S. 1, 7 (2002).

"Under Rule 4(a) [of the Federal Rules of Appellate Procedure], 'a notice of

appeal in a civil case must be filed within 30 days after entry of judgment.'" Williams v. KFC Nat'l Mgmt. Co., 391 F.3d 411, 415 (2d Cir. 2004) (quoting Fed. R. App. P. 4(a)(1)(A)). The district court may extend the 30-day time to appeal "if (i) a party moves for the extension no later than 30 days after the time prescribed by Rule 4(a) expires and (ii) the moving party establishes excusable neglect or good cause." Williams, 391 F.3d at 415 (citing Fed. R. App. P. 4(a)(5)).

Gaia's December 13, 2018 motion fell within the 30-day window "after the time prescribed by . . . Rule 4(a) expire[d]." Fed. R. App. P. 4(a)(5). Thus, Gaia must establish excusable neglect or good cause for its failure to file a timely notice of appeal.

> The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault—excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Al-Qadaffi v. Servs. for the Underserved, 2015 WL 3401045, at *1 (S.D.N.Y. Apr. 27, 2015) (citing Fed. R. App. P. 4 advisory committee's note to 1993 amendment).

Gaia asserts that the "good cause" standard applies here because mail delivery to Gibraltar was beyond its control and the October 12 Order did not arrive until November 21, 2018. However, as Gaia concedes, the postal service was not the company's only recourse. Rather, Gaia emailed the claims administrator on October 11, 2018 to inquire about the status of its claim and requested confirmation that any court order would be posted on the settlement website. (Haretos Decl., Ex. 1 at 6.) The claims administrator responded that although "[Gaia could] certainly check back [with the claims administrator] in a month," the court order would be posted on the website. (Haretos Decl., Ex. 1 at 6.) And Gaia availed itself of this resource, albeit a day late, by checking the website on November 14, 2018. Accordingly, the "excusable

neglect" standard is more appropriate.

The excusable neglect standard requires a court to consider "(1) the danger of prejudice to the [non-movant], (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." Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 366 (2d Cir. 2003) (alteration in original) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'Ship, 507 U.S. 380, 395 (1993)). Excusable neglect is often "difficult to demonstrate." Lehr Constr. Corp. v. Flaxer, 2017 WL 464428, at *3 (S.D.N.Y. Feb. 2, 2017); see also Al-Qadaffi, 2015 WL 3401045, at *1 (citation and quotation marks omitted) ("[T]he equities will rarely if ever favor a party who fails to follow the clear dictates of a court rule."). Underlying this demanding evaluation is the concern that "'the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced.'" Al-Qadaffi, 2015 WL 3401045, at *1 (quoting Williams, 391 F.3d at 416).

Generally, the first two factors—danger of prejudice to non-movants and the length of the delay—favor a movant. Silivanch, 333 F.3d at 366. However, Gaia's motion presents the rare circumstance where those factors do not tip in Gaia's favor. First, Gaia informed the claims administrator that it intended to challenge the October 12 Order and requested that the claims administrator delay making any settlement distributions pending resolution of this motion. (Radetich Decl. ¶ 8.) The claims administrator apparently acceded to this request on the advice of Lead Counsel and has held any distributions in abeyance. (Radetich Decl. ¶ 8.) This was done without the Court's knowledge or approval. Thus, two months after this Court ordered the initial distribution of over $234 million (Order, ECF No. 390), and despite eighty inquiries in the interim from claimants about the disbursement schedule, no payments

have been made. (Radetich Decl. ¶¶ 8, 10.) The prejudice to class members is obvious.

And while the impact of a delay in most situations may "be minimal in actual if not relative terms," Silivanch, 333 F.3d at 355, this motion arrives on the heels of nearly eight years of litigation. Judges in this district have been loath to delay disbursement of remainder settlement funds, let alone an initial distribution, where the delay "disrupts the finalization of the settlement process." In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig., 2014 WL 4443458, at *7 (S.D.N.Y. Sept. 9, 2014). Timely claimants have waited long enough, and any further delay would contravene this circuit's "strong judicial policy in favor of settlements, particularly in the class action context." See Bear Stearns, 2014 WL 4443458, at *7 (quoting In re PaineWebber Ltd. P'ships Litig., 147 F.3d 132, 138 (2d Cir. 1998)).

But the third factor—the reason for delay—is the critical inquiry in the analysis of Gaia's application. Silivanch, 333 F.3d at 366. Gaia fails to carry its burden on this prong. Gaia filed its claim seven months after the deadline and the claims administrator offered no guarantees that it would be approved. (Haretos Decl., Ex. 1 at 7.) Moreover, Gaia not only acknowledged its understanding of the claims administrator's website policy, but it also conceded when inquiring about its claim that "postal mail from the U.S. is problematic and often lost or significantly delayed." (Radetich Decl., Ex. C.) Indeed, Gaia did not rely on the post, rather, it repeatedly contacted the claims administrator via email.

While class members are not obliged to follow claims processing assiduously, the excusable neglect inquiry requires this Court to "tak[e] account of all relevant circumstances surrounding the [particular] party's omission." Silivanch, 333 F.3d at 366. Gaia had no compunctions communicating directly with the claims administrator about its late-filed claim. And a claims administrator's hedged invitation to "check back in a month" does not excuse a

sophisticated investment company's lack of diligence. Faced with a way to ascertain the status of its claim quickly via the settlement website, Gaia tuned out for a month.

Gaia attempts to sidestep its inattentiveness by protesting that it did not consent to electronic service of notice of the October 12 Order pursuant to Federal Rule of Civil Procedure 77(d). This argument is irrelevant and meritless. "Lack of notice of the entry [of an order or judgment] does not affect the time for appeal or relieve . . . a party for failing to appeal within the time allowed, except as allowed by [Fed. R. App. P.] 4(a)." Fed. R. Civ. P. 77(d)(2) (emphasis added). In turn, Federal Rule of Appellate Procedure 4(a)(1) states explicitly that "[i]n a civil case . . . the notice of appeal . . . must be filed with the district clerk within 30 days after entry of the judgment or order appealed from [except under certain subsections]" (emphasis added). Rule 4(a)(5) carves out no exception dependent upon service of notice—indeed, notice is not mentioned at all. And Gaia cites no authorities supporting its contention that Rule 4(a)(5) depends upon receiving notice of an appealable order.

Finally, with respect to the good faith prong, Gaia failed to disclose important details in its moving papers. Specifically, it persisted in arguing that it could have reasonably relied on the postal system in Gibraltar, while acknowledging the opposite in emails to the claims administrator. (Radetich Decl., Ex. C.) And Gaia also asserted that no one would be prejudiced by its application, although it had already requested—unbeknownst to this Court—that the claims administrator hold up disbursement of settlement funds until this motion had been resolved. (Radetich Decl. ¶ 8.)

After eight years of litigation, enough is enough. This Court finds that Gaia has

not demonstrated excusable neglect justifying an extension under Rule 4(a)(5).[1] This Court exercised its informed discretion to reject all untimely claims. Allowing Gaia's claim, even if it only minimally reduces the pro rata distributions, would be unjust to all class members and would reward a party who held the settlement fund hostage.

CONCLUSION

For the foregoing reasons, Gaia's motion to intervene is denied as moot and its motion to extend its time to file a notice of appeal is denied. The claims administrator is directed to distribute settlement funds for the approved timely claims forthwith, consistent with this Court's November 9, 2018 Order. The Clerk of Court is directed to terminate the motion pending at ECF No. 393.

Dated: January 24, 2019
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

[1] In its reply brief, Gaia seizes upon an acknowledgement in Lead Plaintiff's opposition brief that "the Class might be better served by [amending the October 12 Order to permit Gaia's claim] rather than continu[ing] to litigate the dispute in the Court of Appeals." (Lead Plaintiff's Response to Gaia's Motion to Extend Time to File Notice of Appeal, ECF No. 401 ("Lead Pl.'s Response), at 11.) That argument misconstrues Lead Plaintiff's brief, which recommended allowing Gaia's claim only "if [this Court] believes that some relief is called for," and not if this Court would otherwise deny Gaia's 4(a)(5) motion. (Lead Pl.'s Response at 10, 11) (emphasis added). As stated, Gaia does not deserve leeway. Gaia's newfound concern for the prompt satisfaction of other class members' claims is galling, considering that Gaia itself paralyzed the distribution process.