

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
)	
EHT US1, Inc., <i>et al.</i> ,)	Case No. 21-10036 (CSS)
)	
Debtors.)	
_____)	
Urban Commons Queensway, LLC,)	
)	
Plaintiff, Appellee,)	
)	
v.)	Adv. Pro. No.: 21-50476 (CSS)
)	
EHT Asset Management, LLC, Taylor)	
Woods, Howard Wu,)	
)	Related D.I. 83
Defendants, Appellants.)	
_____)	

MEMORANDUM ORDER

Before the Court is the Amended Motion to Extend Time for Filing Notice of Appeal filed by EHT Asset Management, LLC, Taylor Woods, and Howard Wu,¹ filed on October 7, 2021² (the “Motion to Extend”), the objection³ to the Motion to Extend filed by Plaintiff Urban Commons Queensway, LLC (the “Plaintiff”), the Defendants’ reply,⁴ and

¹ Collectively, EHT Asset Management, LLC, Taylor Woods and Howard Wu will be referred to herein as the “Defendants.”

² Adv. D.I. 83. Documents filed in Bankr. Case No. 21-10036 shall be referred to herein as “D.I. #” and documents filed in Adv. Pro. Case No. 21-50476 shall be referred to herein as “Adv. D.I. #.”

³ Adv. D.I. 85.

⁴ Adv. D.I. 88.

the Defendants' supplemental reply.⁵ In the Motion to Extend, the Defendants seek an extension of time for filing a notice of appeal of the Court's Order Granting Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056, entered on September 14, 2021.⁶

FACTUAL BACKGROUND⁷

1. On June 28, 2021, after the Defendants answered the Complaint, the Plaintiff filed its Summary Judgment Motion, requesting entry of judgment in the Plaintiff's favor in an amount not less than \$2,437,500 on the basis that no genuine issue of material fact existed as to the Plaintiff's entitlement to relief on its claims.⁸

2. On July 2, 2021, the Defendants' former counsel filed its motion for leave to withdraw as counsel to the "Urban Commons Parties," including the Defendants⁹ (the "Withdrawal Motion").

3. Rather than responding to the Summary Judgment Motion on its merits, on July 12, 2021, the deadline for Defendants to submit a response, Defendants filed a motion for extension of time¹⁰ (the "Extension Motion"), seeking an extension to file any

⁵ Adv. D.I. 92. *See* Amended Notice of Completion of Briefing on EHT Asset Management, LLC, Taylor Woods, and Howard Wu Motion to Extend Time for Filing Notice of Appeal. Adv. D.I. 96.

⁶ Adv. D.I. 76. *See* Notice of Appeal (Adv. D.I. 89, filed October 19, 2021).

⁷ Given the Court's familiarity with the background of these chapter 11 cases, the structure of their business, and the role that Messrs. Woods and Wu, and their related entities, played in the business and the events leading to these chapter 11 cases, the Court does not repeat those facts here.

⁸ Adv. D.I. 1.

⁹ D.I. 910.

¹⁰ Adv. D.I. 46.

opposition to the Summary Judgment Motion until Defendants had retained substitute counsel.

4. On July 15, 2021, the Plaintiff filed its Memorandum of Law in Opposition to Defendants' Motion to Extend the Time to Respond to Plaintiff Urban Commons Queensway, LLC's Motion for Summary Judgment and Renewed Cross-Motion for Preliminary Injunctive Relief,¹¹ (the "Renewed PI Motion"). On July 26, 2021, the Court held a hearing on Plaintiff's Renewed PI Motion (the "Second PI Hearing"). At the conclusion of the Second PI Hearing, the Court took the Renewed PI Motion under advisement.

5. On August 12, 2021, the Court held a hearing on the Withdrawal Motion. No replacement counsel or other representative of the Defendants (including Mr. Wu) appeared at the hearing. The Court granted the Withdrawal Motion on the record at the hearing and stated that the Defendants would be given no further adjournments of deadlines in these cases on account of not having counsel.¹²

6. On August 16, 2021, the Court entered orders (the "August 16 Orders") granting the Withdrawal Motion¹³ and Extension Motion and directing Defendants to

¹¹ Adv. D.I. 48.

¹² See D.I. 1045 (Aug. 12, 2021 Hr'g Tr., at 48:3-5 ("[N]o further extensions of time would be granted, even if you don't have counsel. I am not going to mess around."); see also *id.* at 61:24-62:4 (in addressing this proceeding, ruling that "the deadline to file the summary judgment motion response . . . will be extended 28 days from the entry of the order [granting the Withdrawal Motion]. No further extensions will be granted without consent, even on an argument that counsel is just about to get retained. That is not going to fly.")).

¹³ D.I. 1043.

respond to the Summary Judgment Motion within 28 days from entry of the order approving the Withdrawal Motion, or by September 13, 2021.¹⁴

7. On August 27, 2021, the Court entered the Order Granting Plaintiff Urban Commons Queensway, LLC's Renewed Cross-Motion for Preliminary Injunctive Relief,¹⁵ (the "PI Order"), adopting its findings and conclusions as set forth in its Letter Opinion,¹⁶ (also entered August 27, 2021), and enjoining each of Defendants from transferring, encumbering or otherwise disposing of \$2,437,500 or assets of equivalent value and requiring each Defendant to account for such funds or assets to the Plaintiff. In granting this relief, the Court found that "Defendants Woods and Wu have a history of wrongful acts and have proven that they are capable of shuffling assets" and it was likely that, "absent a preliminary injunction, the Defendants' assets will dissipate and Plaintiff will not recover."¹⁷

8. The Defendants failed to respond to the Summary Judgment Motion by the September 13, 2021 deadline.¹⁸ On September 14, 2021, Mr. Wu wrote a Letter to the

¹⁴ Adv. D.I. 67.

¹⁵ Adv. D.I. 71.

¹⁶ Adv. D.I. 69 (*Urban Commons Queensway, LLC v. EHT Asset Mngt., LLC (In re EHT US1, Inc.)*, No. 21-10036, 2021 WL 3828556, at *1 (Bankr. D. Del. Aug. 27, 2021).

¹⁷ Letter Opinion. Adv. Docket No. 69 at 3. *See also id.*, at 4 ("After wrongfully obtaining the funds, Messrs. Woods and Wu transferred them to Defendant EHT Asset Management, an entity they wholly owned, and then caused the funds to disappear. They now have the gumption to refuse to return the funds to Plaintiff (or even hold the funds in a trust pending outcome of the litigation). These facts show Defendants' willingness to flaunt the law, use entities and transfers to avoid paying money wrongfully obtained, and a lack of remorse for so doing.").

¹⁸ The Defendants had more than 90 days to respond to the Summary Judgment Motion but did not file a response. In their reply, the Defendants assert that "there is a high probability that the \$2.4 million judgment can be offset against amounts owed by the Debtors to [Defendants]." Adv. D.I. 88 (EHT Asset Management, LLC, Taylor Woods, and Howard Wu Reply to the Debtors' Response to Motion to Extend

Court requesting an extension of time to secure new counsel for an additional 30 days.¹⁹

Mr. Wu's letter stated: "We have selected and come to terms with the new counsel, however, we have been unable to fully onboard the new counsel within the time given."²⁰

The Plaintiff opposed the request for further extension.²¹

9. On September 14, 2021, the Court entered the Summary Judgment Order,²² thus establishing the September 28, 2021 notice of appeal deadline. Based on Mr. Wu's aforementioned letter, replacement counsel had been obtained at least 14 days prior to the expiration of the appeal deadline.²³

10. On September 17, 2021, the Court entered an order denying the extension of time requested by Mr. Wu to obtain new counsel.²⁴ Messrs. Wu and Woods have now obtained counsel.²⁵

Time for Filing Notice of Appeal) (the "Reply") at p. 6 (emphasis removed). However, the Defendants did **not** reply to the Summary Judgment Motion, *pro se* or otherwise. The Defendants were aware of the already extended deadline to respond to the Summary Judgment Motion and then failed to timely appeal the uncontested entry of the Summary Judgment Order. Asserting an alleged substantive ground to the Summary Judgment Motion in their Reply is wholly inappropriate let alone in a reply to a subsequent motion. See *e.g.*, *Oberwager v. McKechnie Ltd.*, 351 F. App'x 708, 711 n. 5 (3d Cir. 2009) ("It is, of course, inappropriate to raise an argument for the first time in a Reply brief."); *Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 91 n.13 (2d Cir. 2010) (citations omitted) ("Issues raised for the first time in a reply brief are generally deemed waived."); *Ceglia v. Zuckerberg*, 287 F.R.D. 152, 162 (W.D.N.Y. 2012) (citations omitted) (holding that "arguments raised for the first time in replying in further support of a motion are generally deemed waived."); see also *Ruiz v. Comm'r of Dep't of Transp. of City of New York*, 858 F.2d 898, 902 (2d Cir. 1988) (holding that it is within the discretion of the court to reject an argument first raised in a reply brief that is "so belatedly advanced and so vaguely supported.").

¹⁹ D.I. 1163.

²⁰ *Id.*

²¹ D.I. 1164.

²² Adv. D.I. 76.

²³ See D.I. 1163.

²⁴ D.I. 1174.

²⁵ Adv. D.I. 81 (filed on Oct. 7, 2021) (Notice of Appearance filed by EHT Asset Management, LLC, Taylor Woods, and Howard Wu).

11. Through counsel, the Defendants have filed appeals related to three orders issued by the Court;²⁶ however, the Defendants did not timely appeal the Summary Judgment Order.²⁷

12. The Defendants filed the Motion to Extend on October 7, 2021.²⁸

ANALYSIS

13. The Defendants assert that the time for filing an appeal of the Summary Judgment Order should be extended due to excusable neglect. The Defendants assert that the appeal of the Summary Judgment Order can be heard with the three other appeals filed by the Defendants, that the Plaintiff would not be prejudiced, and that finding replacement counsel when Defendants are not located in Delaware and during the COVID-19 pandemic proved difficult and was undertaken in good faith.

14. A party seeking to appeal a bankruptcy court judgment must file a notice of appeal within 14 days after entry of the judgment.²⁹ If neither a notice of appeal nor a motion for extension of time is filed during the initial 14-day period under Bankruptcy Rule 8002(a)(1), the only alternative for filing a timely notice of appeal is to obtain an

²⁶ See D.I. 1276 (Notice of Appeal of Order Denying Extension of Time Request (D.I. 1174)), D.I. 1278 (Notice of Appeal of Order granting Debtors Third Omnibus Objection (Substantive) to Proofs of Claims Filed by Master Lessees Pursuant to Bankruptcy Code 503 and Bankruptcy Rule 3007 (D.I. 1176)); and D.I. 1284 (Notice of Appeal to Order Sustaining Bank of America, N.A. Omnibus Objection (Substantive) to Master Lessee Claims and Joinder to Debtors Third Omnibus Objection (Substantive) to Proofs of Claims Filed by Master Lessees Pursuant to Bankruptcy Section 502 and Bankruptcy Rule 3007 (D.I. 1190)). By way of additional background, the 15 claims asserted by the Master Lessess, owned and controlled by Mr. Woods and Mr. Wu, sought to recover more than \$190 million in the aggregate. See Claim Nos. 799, 800, 801, 802, 804, 805, 806, 807, 808, 811, 813, 816, 817, 818, and 819.

²⁷ See Adv. D.I. 89, filed on October 19, 2021 (“Notice of Appeal”).

²⁸ Adv. D.I. 83.

²⁹ Fed. R. Bankr. P. 8002(a)(1).

extension of the deadline by filing a motion within 21 days after the 14-day time period for appeal based on a showing of “excusable neglect” for missing the original deadline.³⁰

15. Although not defined in the Bankruptcy Code, “excusable neglect” has been interpreted by the Third Circuit (under former Bankruptcy Rule 8002(c)).³¹ The Third Circuit held:

In *Pioneer*, the Supreme Court characterized the “excusable neglect” determination as at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission. [These] include . . . [1] the danger of prejudice to the debtor, [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 whether the movant acted in good faith.³²

The burden of proving excusable neglect falls with the movants; in this case, the Defendants.³³ The Third Circuit has not composed an exhaustive list of factors relevant to consider excusable neglect, but “at a minimum, require[s] weighing and balancing”³⁴ of factors including:

- (1) whether the inadvertence reflects professional incompetence such as ignorance of the rules of procedure;
- (2) whether the asserted inadvertence reflects an easily

³⁰ Fed. R. Bankr. P. 8002(d)(1)(B).

³¹ *Gruber v. Kaplan (In re Kaplan)*, 482 F. App’x 704, 707 (3d Cir. 2012) (“In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), the Supreme Court set forth the standard for evaluating claims of excusable neglect, and that standard applies in the context of a motion under Rule 8002(c).”). Federal Rule of Bankruptcy Procedure 8002(c) was the predecessor to current Rule 8002(d)(1).

³² *In re Kaplan*, 482 F. App’x at 707 (citing *Pioneer Inv. Servs. Co.*, 507 U.S. at 395; further citations and quotation marks omitted).

³³ *Larson v. Bayer*, 558 B.R. 722, 733 (E.D. Pa. 2016) (citations omitted); see also *Jones v. Chemetron Corp.*, 212 F.3d 199, 205 (3d Cir. 2000) (“The burden of proving excusable neglect lies with the late-claimant.” (citations omitted)).

³⁴ *Consol. Freightways Corp. of Delaware v. Larson*, 827 F.2d 916, 919 (3d Cir. 1987).

manufactured excuse incapable of verification by the court; (3) whether the tardiness results from counsel's failure to provide for a readily foreseeable consequence; (4) whether the inadvertence reflects a complete lack of diligence; or (5) whether the court is satisfied that the inadvertence resulted despite counsel's substantial good faith efforts toward compliance.³⁵

Thus, the Court must first determine whether the failure to file a timely appeal was the result of "neglect," and, if so, whether such neglect is "excusable."³⁶

16. Here, the Court must determine if the Defendants' reason for delay - the inability to find new counsel by the September 28, 2021 deadline - was "neglect." Here, Messrs. Woods and Wu were aware of the deadline, contacted the Court for additional time to respond to the underlying motion, and could have filed their own notice of appeal without counsel³⁷ (although, EHT Asset Management could not have filed a notice of appeal *pro se*).

³⁵ *Id.* (citations and parentheticals omitted).

³⁶ *Pioneer Inv. Servs. Co.*, 507 U.S. at 388. The *Pioneer* Court held:

"[T]he Rule grants a reprieve to out-of-time filings that were delayed by "neglect." The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended to esp[ecially] through carelessness." The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry "their ordinary, contemporary, common meaning." Hence, by empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control."

Id. (citations omitted)).

³⁷ See, e.g., *Matter of Pac. Drilling S.A.*, 616 B.R. 634, 645 (Bankr. S.D.N.Y. 2020) ("A decision not to file a claim, even if that decision turns out to be unwise, is not "neglect" of a kind that Rule 9006 excuses."); *In re Tronox Inc.*, 626 B.R. 688, 698 (Bankr. S.D.N.Y. 2021) ("lack of knowledge alone does not suffice to establish

17. For example in *In re Belcher*, plaintiff/debtor did not file her notice of appeal until 13 days after entry of the order she was appealing from (when the appellate time for 10 days from entry of an order) and did not file her motion to extend time to for filing her appeal until 13 days after the expiration of time for filing the notice of appeal.³⁸ The plaintiff/debtor, an inexperienced attorney, acting without counsel, and unfamiliar with federal practice and bankruptcy practice, did not meet the standard for excusable neglect because a misunderstanding of the law does not excuse a *pro se* filer of deadline to file an appeal.³⁹ Similarly, *In re Hickey* held:

Although this Court is sympathetic to Hickey's lack of resources to hire an attorney, such is the norm with most debtors in bankruptcy, and therefore it cannot form the basis of excusable neglect under Rule 60(b). At a minimum, Hickey could have appeared *pro se* and asked for more time to respond to the Hofhenkes' complaint. A defendant cannot simply ignore repeated notices of an action filed against her, allow a default judgment to be entered, and then move to vacate claiming she did not have the money to hire an attorney.⁴⁰

a right to relief from the bar date based on 'excusable neglect.'"); *In re Invs. & Lenders, Ltd.*, 169 B.R. 546, 551 (Bankr. D.N.J. 1994) (holding that "courts have not found excusable neglect when the reason for the delay was merely ignorance or misconstruction of the rules of procedure" (citations omitted)); *In re Graham Bros. Const., Inc.*, 451 B.R. 646, 653 (Bankr. S.D. Ga. 2011) (holding that 'the intentional and tactical decision not to file a claim does not amount to "neglect" under *Pioneer*.').

³⁸ *Belcher v. Columbia University (In re Belcher)*, 293 B.R. 265, 267 (Bankr. N.D. Ga. 2001).

³⁹ *In re Belcher*, 293 B.R. at 268. See also *Devenger v. Forant (In re Forant)*, No. 02-10643, 2003 WL 22247234, at *2 (Bankr. D. Vt. Feb. 25, 2003) ("While the Court recognizes the need to provide special accommodation to parties who proceed in litigation without benefit of counsel, such parties are not relieved of the obligations to comply with Court orders and conduct themselves responsibly in the litigation."); *In re Peninsular Oil Corp.*, 399 B.R. 532, 538 (Bankr. M.D. Fla. 2008) (neglecting to hire counsel is not a justification of not filing a timely claim).

⁴⁰ *Hofhenke v. Hickey (In re Hickey)*, No. 10-80293, 2011 WL 650003, at *2 (Bankr. E.D. Okla. Feb. 11, 2011).

18. Failure to obtain counsel is not “neglect.” Messrs. Woods and Wu were aware that the Court was unwilling to grant additional extensions of time.⁴¹ Furthermore, the Notice of Appeal is a form, without much substantive information needed for filing.⁴² As a result, the Court does not find that the Defendants were neglectful; rather, the Defendants chose of a course of action (finding new counsel) without regard to deadlines set by the Court or the Bankruptcy Code.

19. In addition, the Plaintiff will be prejudiced by such requested extension of time. Over sixteen months have passed since the Defendants received the PPP loan amount and have refused to return such amounts to the Plaintiff. Additionally, it reopens litigation that has been decided by the Court and begins an appellate process for which no arguments were raised in this Court (as the Defendants failed to file *any* response to the Summary Judgment Motion). Furthermore, the Defendants have raised no argument regarding their success on the merits, which is prejudicial to the Plaintiff. At most they have asserted a bald assertion of set-off.⁴³ The time and resources needed to fight against

⁴¹ See D.I. 1045 (Aug. 12, 2021 Hr’g Tr., at 48:3–5 (“[N]o further extensions of time would be granted, even if you don’t have counsel. I am not going to mess around.”); see also *id.* at 62:2–62:4 (“No further extensions will be granted without consent, even on an argument that counsel is just about to get retained.”)).

⁴² See Appellate Forms, Form B 411A (<https://www.uscourts.gov/forms/appellate-forms/notice-appeal-and-statement-election>).

⁴³ See n. 18 *supra*. This Court has already granted a preliminary injunction to freeze the assets of the each of the Defendants finding that Defendants Woods and Wu have a “history of wrongful acts,” are “capable of shuffling assets,” that Messrs. Woods and Wu “misrepresented or lied,” and “knowingly or recklessly made false statements.” *In re EHT US1, Inc.*, No. 21-10036, 2021 WL 3828556 at *2-3. Courts will not allow setoff where doing so would offend the general principals of equity. *U.S. Bank, Nat’l Ass’n v. Rosenberg*, 581 B.R. 424, 428 (E.D. Pa.), *aff’d*, 741 F. App’x 887 (3d Cir. 2018) (“Courts will not allow setoff, however, where doing so would offend the general principles of equity.”). See also *Fed. Deposit Ins. Corp. v. Borne*, 599 F. Supp. 891, 894 (E.D.N.Y. 1984) (citations omitted) (waiver in a contract of setoff will not be enforced to bar a viable set off or counterclaim sounding in fraud); *Sterling Nat. Bank & Tr. Co. of New York v. Giannetti*, 53 A.D.2d 533, 533, 384 N.Y.S.2d 176, 177 (1976) (holding that “defenses based upon allegations of fraud may

amorphous allegations would be incredibly prejudicial (in delay and expense) to the Plaintiff.

20. Failure to find or replace counsel is not a sufficient reason for the Defendants' delay.⁴⁴ When a "pro se litigant fails to comply with an easily understood court-imposed deadline, there is no basis for treating that party more generously than a represented litigant."⁴⁵ As a result, the Defendants' neglect, if any, was not excusable.

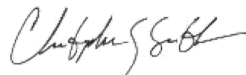
not be waived"); *In re Nuclear Imaging Sys., Inc.*, 260 B.R. 724, 739 (Bankr. E.D. Pa. 2000) (citations omitted) (holding that "where the creditor has committed inequitable, illegal or fraudulent acts, or the application of setoff would violate public policy."); *Womack v. Houk (In re Bangert)*, 226 B.R. 892, 904 (Bankr. D. Mont. 1998) ("Even where there is mutuality of debt, a bankruptcy court may disallow an otherwise proper § 553 setoff if there are compelling reasons for not allowing such a preference.").

⁴⁴ *In re Todd*, No. 15-11083, 2020 WL 2843023, at *3 (Bankr. N.D.N.Y. May 29, 2020) ("[T]he Debtor could have utilized just a few of the many hours she spent looking for counsel on preparing the Notices [of Appeal] and filing them with the Court. Although the Court appreciates that the Debtor is not an attorney, the Debtor filed Notices on her own, albeit untimely. For all of these reasons, receiving notice of the Decisions one day after entry does not amount to excusable neglect."). See also *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366-67 (2d Cir. 2003) (citations omitted) ("We have noted that the equities will rarely if ever favor a party who "fail[s] to follow the clear dictates of a court rule" and held that where "the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test."); *Conway v. Heyl (In re Heyl)*, 609 B.R. 194, 201 (B.A.P. 8th Cir. 2019) ("These substitutions of counsel created delays - whether unintentional or not - in the proceedings, which appeared to the bankruptcy court to be unnecessary and frustrating. The court's decision to deny the appellants' attempt to delay the outcome of this adversary proceeding due to yet another possible change in counsel was not an abuse of its discretion."); *Community Financial Services Bank v. Edwards (In re Edwards)*, No. 17-8028, 2018 WL 2717237, at *5 (B.A.P. 6th Cir. June 5, 2018), *aff'd*, 748 F. App'x 695 (6th Cir. 2019) (finding no "excusable neglect based on Edwards position as a busy pro se litigant who unexpectedly lost his counsel and had difficulty finding new counsel within the time to file the notice of appeal"); *In re Kwong*, No. 3:17-CV-00496 (SRU), 2017 WL 2661627, at *3 (D. Conn. June 20, 2017) ("Kwong cannot escape the requirements of Bankruptcy Rule 8002 simply because he 'is not represented by counsel.'").

⁴⁵ *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996) (citation omitted).

CONCLUSION

21. The Motion to Extend is hereby DENIED.



Christopher S. Sontchi
United States Bankruptcy Judge

Dated: October 28, 2021