

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

NANTUCKET, ss.

CASE NO. 09 MISC. 418340

_____)
ONE WEST BANK, FSB,)
	Plaintiff,)
	v.)
)
DANIEL ISSOKSON,)
	Defendant.)
_____)

MEMORANDUM AND ORDER DENYING DEFENDANT’S MOTION TO FILE LATE
APPEAL

Introduction

This is a case under the Servicemember’s Civil Relief Act of 1940 as amended, 50 U.S.C. App. §§501 *et seq.* (“the Act”), brought by plaintiff One West Bank against defendant Daniel Issokson, the owner of the property at 11 Tom Nevers Road in Nantucket. Judgment was entered on December 14, 2011, finding and declaring that Mr. Issokson was not entitled to the benefits of the Act (a fact Mr. Issokson concedes). Mr. Issokson filed a Notice of Appeal on January 17, 2012, four days beyond the January 13 deadline. Mass. R. App. P. 4(a) (“In a civil case, unless otherwise provided by statute, the notice of appeal shall be filed with the clerk of the lower court within thirty days of the date of the entry of the judgment appealed from...”). He now moves for an extension to make his late-filed notice timely. Mass. R. App. P. 4(c). For the reasons set forth below, the motion is **DENIED**.

Discussion

A party seeking an extension of time for filing a notice of appeal must make two showings. *First*, he must show “excusable neglect.” Mass. R. App. P. 4(c). *Second*, he must

show that there is merit to his appeal. See *Commonwealth v. Barclay*, 424 Mass. 377, 379 (1997);¹ *Tisei v. Bldg. Inspector of Marlborough*, 3 Mass. App. Ct. 377, 379 (1975). Mr. Issokson has done neither.

Mr. Issokson's claim of "excusable neglect" rests on a delayed FedEx delivery. The deadline for filing his notice of appeal was Friday, January 13. Assuming (without deciding) that his allegations as true, he prepared his notice on January 12 and gave it to FedEx before 5:00 p.m. that day (the final pick-up time), marking it for next day delivery to the Land Court in Boston. Due to high winds on Nantucket the evening of the 12th, the FedEx package did not leave the island until the 13th, and delivery to the Land Court in Boston was not made until the 17th (the intervening days were the weekend and the Martin Luther King holiday). There are two problems with that excuse, both fatal. First, there is no reason why the notice could not have been prepared and sent earlier. It is, literally, one sentence long.² As discussed more fully below, I conclude that Mr. Issokson left it so late solely for purposes of delay. Second, Mr. Issokson did not need to send the notice to Boston. He could simply have filed it with the Nantucket Registry of Deeds, a short walk from his counsel's office. G.L. c. 185, §22.³

My conclusion that the notice of appeal was left so late, solely for purposes of delay, is based not only on its "last minute" preparation but also its complete lack of merit. As previously noted, this is a Servicemember's proceeding with only two issues: (1) Mr. Issokson's entitlement to the benefits of the Servicemember's Civil Relief Act (he concedes he has none), and (2) One

¹ Applications for late claims of appeal should not be granted "unless it appears that the petitioning party has a case meritorious or substantial in the sense of presenting a question of law deserving judicial investigation and discussion. A meritorious appeal is one that is worthy of presentation to a court, not one which is sure of success." *Commonwealth v. Barclay*, 424 Mass. at 379 (internal citations and quotations omitted).

² A copy of the Notice is attached as Ex. 1.

³ "Writs, complaints, bills and pleadings in proceedings in the land court may be filed with the recorder of the land court, or with the register of deeds for the district where the land or any part thereof lies, who shall immediately index the proceedings in the general index by the names of the parties, and transmit the papers to the recorder." G.L. c. 185, §22.

West Bank's standing to obtain such a declaration. *Beaton v. Land Court*, 367 Mass. 385, 390-391 (1975). One West *unquestionably* has such standing; it is the present holder of Mr. Issokson's mortgage by a clear chain of assignment. See the *Memorandum and Order Vacating Dismissal and Directing Entry of Judgment for Plaintiff* in this case at 2-3 (Dec. 14, 2011); *Gilbert v. Federal National Mortgage Association*, Mass. Appeals Ct. Case No. 11-P-1165, Memorandum and Order Pursuant to Rule 1:28 (Apr. 10, 2012), 2012 WL 1172188 (Mass. App. Ct.) (upholding validity of MERS assignment, etc.).

Perhaps in recognition of this, counsel for Mr. Issokson stated at the oral argument of this motion that he had only one issue to present on appeal: his allegation that the G.L. c. 244, §35A notice he received failed to meet the statutory requirements in one or more respects. But those deficiencies, if any, are *irrelevant* in a Servicemember's proceeding. See *Memorandum and Order Vacating Dismissal and Directing Entry of Judgment for Plaintiff* at 4. Any possible question about this was put to rest by the Appeals Court in *Aurora Loan Services LLC v. Kiah*, Mass. Appeals Ct. Case No. 11-P-701, Memorandum and Order Pursuant to Rule 1:28 (Mar. 1, 2012) which held, unequivocally, that "the Servicemembers action is not the appropriate forum...to challenge the ninety-day default notice." 2012 WL 660992 (Mass. App. Ct).

Conclusion

For the foregoing reasons, the defendant's motion to file late appeal is **DENIED**.

SO ORDERED.

By the court (Hong, J.)

Attest

Dated: 26 April 2012

Deborah J. Patterson, Recorder

A TRUE COPY
ATTEST:

Deborah J. Patterson
RECORDER

filed 1/17/12

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT
LAND COURT

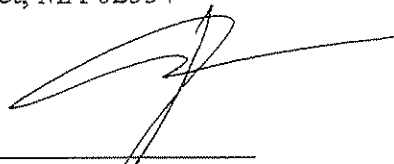
SUFFOLK, SS

One West Bank, FSB)	
Plaintiff,)	
)	09 MISC 418340 (KCL)
v.)	
)	
Daniel Issokson)	
Defendant)	

DEFENDANT'S NOTICE OF APPEAL

NOW COMES the Defendant by and through counsel in the above-referenced matter, and files his appeal of Entry of Judgment in this matter and the Court's Memorandum and Order Vacating Dismissal and Directing Entry of Judgment for Plaintiff dated December 14, 2011 (Long, J.).

DATED: January 12, 2012
Nantucket, MA 02554



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EXHIBIT 1