

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2012

4 (Submitted: March 8, 2013 Decided: May 10, 2013)

5 Docket No. 12-3871-cv

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7 - - - - -
8 RLI Insurance Co.,
9 Plaintiff-Counter-Defendant-Appellee,

10 v.

11 JDJ Marine, Inc.,
12 Movant-Defendant-Counter-Claimant-Appellant,

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14 Commerce Bank, N.A.,
15 Intervenor.

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19 B e f o r e: NEWMAN, WINTER, and CABRANES, Circuit Judges.

20 Motion to reinstate an appeal after a dismissal based on a
21 failure to file a brief in compliance with a scheduling order.

22 The motion is denied.

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25 John F. Karpousis, Freehill, Hogan & Mahar,
26 LLP, New York, New York, for Movant-
27 Defendant-Counter-Claimant-Appellant.
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1 PER CURIAM:

2 Appellant JDJ Marine, Inc., moves to reinstate an appeal
3 dismissed after its failure to comply with this court's second
4 scheduling order for filing a brief. The motion is denied.

5 BACKGROUND

6 On September 28, 2012, appellant filed its notice of appeal.
7 It filed a scheduling letter on November 13, 2012 pursuant to
8 Local Rule 31.2(a)(1)¹ selecting a date of January 15, 2013 on
9 which its opening brief and appendix would be due. The court so-
10 ordered the deadline.

11 On January 10, 2013, five days before the brief was due,
12 appellant filed a motion for an extension of time. In the papers
13 accompanying the motion, appellant stated that counsel had been
14 unable to complete the brief because his offices were
15 significantly affected by the October 28, 2012 storm Hurricane
16 Sandy. Aff. in Supp. of Mot. for Extension to File Br. at 1-2
17 (Jan. 10, 2013).

18 On January 17, 2013, we granted the motion for an extension
19 giving counsel an additional month and one-half, as requested, to
20 file a brief. This extension was considerably longer than those
21 normally granted but was believed by the court to be justified by
22 the storm. However, the order stated,

¹Local Rule 31.2(a) establishes the court's brief scheduling procedure. Under this rule, parties set their own deadlines within a period of 91 days of the applicable "ready date" -- typically, for appellants, the date on which the last transcript is received, and, for appellees, the date on which an appellant's brief is filed.

1 [T]he appeal is dismissed effective March 1,
2 2013 unless a brief is filed by that date. A
3 motion for reconsideration or other relief
4 will not stay the effectiveness of this order.
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7 RLI Ins. Co. v. JDJ Marine, Inc., No. 12-3871 (2d Cir. Jan. 17,
8
9 2013).

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11 On February 26, 2013, three days before the extended due
12 date, appellant moved for another extension, this time for thirty
13 days. Counsel's supporting affidavit stated that preparation for
14 other cases, out-of-state business travel, and responsibilities
15 as a mediator precluded him from submitting the brief by the due
16 date. Aff. in Supp. of Mot. for Extension to File Br. at 1-2
17 (Feb. 26, 2013).

18 Because this court's order of January 17, 2013, directed
19 that the appeal "is dismissed effective March 1 unless a brief is
20 filed by that date" and that "a motion for reconsideration or
21 other relief will not stay the effectiveness of this order," the
22 second motion for an extension, decided on March 8, 2013, was
23 denied as moot in light of the dismissal of the appeal.

24 On March 8, 2013, appellant filed the present motion to
25 reinstate the appeal. In the accompanying affidavit, counsel
26 stated that he was "prejudiced" because, rather than "decide [his
27 motion] on a timely basis," this court left the motion "open and
28 undecided . . . seven . . . full days after the filing deadline."
29 Aff. in Supp. of Mot. to Reinstate at 2 ¶¶ 5-6. Counsel outlined
30 again in the affidavit the press of other business as the reason
31 for the failure to file a brief.

1 DISCUSSION

2 A brief discussion is necessary to understand our decision
3 to deny the motion. About ten years ago, the court faced a
4 caseload crisis. The number of cases briefed and ready to be
5 calendared for argument was at an historic low, so low that
6 calendars sometimes could not be filled. This was not the result
7 of a diminished caseload; in fact, pending cases numbered in the
8 thousands above historic levels because of a huge influx of
9 immigration matters. See, e.g., Comm. on Federal Courts, The
10 Ass'n of the Bar of the City of N.Y., The Surge of Immigration
11 Appeals and Its Impact on the Second Circuit Court of Appeals
12 (2004), available at
13 <http://www.nycbar.org/pdf/report/AppealSurgeReport.pdf>.

14 The problem of so few cases ready for argument was
15 determined to be the result of a culture in which the bar had
16 come to believe that the 40- (for appellant) and 30- (for
17 appellee) day time periods set out in Federal Rule of Appellate
18 Procedure 31(a)(1) were meaningless and that motions for
19 extensions of time, usually for 30 days, to file briefs would be
20 routinely granted time after time. This belief existed in spite
21 of the fact that the orders granting the extensions would just as
22 routinely state, in boldface type no less, that only
23 "EXTRAORDINARY CIRCUMSTANCES" would justify another extension.
24 The cause of the failure of the "EXTRAORDINARY CIRCUMSTANCES"
25 warnings was that the Clerk's Office, which ruled on the motions,
26 was reluctant to resort to coercive measures -- and was so

1 perceived by the bar. It was, therefore, decided that motions
2 for extensions would be sent to a judge for decision and that,
3 with warnings appropriate to the particular case, coercive
4 measures, including dismissal, would be used when the warnings
5 failed to produce a brief.

6 Altering a culture in which much of the bar had come to
7 believe that briefing schedules were issued only to be
8 automatically extended until convenient for counsel to file a
9 brief was difficult. After the new system of judge-decided
10 motions was in place for several years, the number of cases ready
11 for calendaring had increased, but problems remained. In
12 particular, the Clerk's Office often had to process, and the
13 extensions judge had to decide, 50-75 extension motions per week.

14 Experiments were undertaken with some attorneys who had
15 numerous appeals pending before the court and were filing equally
16 numerous motions for extensions of time. In particular, some
17 attorneys were asked to propose a schedule for filing the briefs
18 in all pending cases the attorney had before the court on the
19 understanding that the schedule would be met without further
20 extension motions. The success of this experiment led to the
21 present method of allowing all parties to appeals and petitions
22 for review to select a filing date within a 91-day period after
23 the ready date, see supra Note 1, or in the case of appellees,
24 after the appellant's brief is filed. Our 91-day period is
25 considerably longer than that allowed by Federal Rule of
26 Appellate Procedure 31(a)(1).

1 However, allowing counsel to choose a date within such an
2 extended period of time has a consequence: counsel is expected
3 to comply with the date chosen and extensions of time are granted
4 grudgingly and only for brief periods of time. See 2d Cir. R.
5 27.1(f).

6 Moreover, for appellants in civil actions, the extension is
7 often granted with a provision for automatic dismissal of the
8 appeal if the appellant's brief was not filed by the extended
9 date. See 2d Cir. R. 31.2(d) ("The Court may dismiss an appeal
10 . . . for failure to timely file a brief or to meet a deadline
11"). When entered, the automatic dismissal provision is
12 accompanied by a warning to counsel that further motions will not
13 stay the effectiveness of the order. This particular warning
14 simply restates a rule of this court that a motion for an
15 extension of time to file a brief does not stay the effectiveness
16 of the scheduling order already in force. See 2d Cir. R.
17 27.1(f)(1).

18 When appellees seek extensions, dismissal of the appeal is
19 inappropriate for the obvious reason that a dismissal would
20 benefit the appellee, and an order is often entered that provides
21 for treating the case as ready for calendaring on the extension
22 date whether or not appellee's brief is filed.

23 In the present matter, appellant has demonstrated a
24 persistent indifference to the court's scheduling orders and
25 local rules. First, the motion for a second extension was
26 inadequate because the press of other business is not an

1 "extraordinary circumstance" justifying an extension under our
2 rules, especially given the liberal policy of allowing lawyers to
3 establish their own dates for filing briefs within 91 days of the
4 ready date. See 2d Cir. R. 27.1(f)(1) ("Absent an extraordinary
5 circumstance, such as serious personal illness or death in
6 counsel's immediate family, the court will not grant a motion to
7 extend the time to file a brief.").

8 Moreover, appellant violated a local rule by waiting until
9 the last minute to file both extension motions. 2d Cir. R.
10 27.1(f)(3) ("A party seeking to extend the time to file a brief
11 must move as soon as practicable after the extraordinary
12 circumstance arises."). Appellant's first motion for an
13 extension was filed just five days before the filing date
14 selected by counsel. Still, it relied on events that had
15 occurred months before the brief's due date and even before
16 counsel selected that date. Nevertheless, a six-week extension
17 was granted. The second motion for an extension was filed three
18 days before the date on which the brief was due but relied upon
19 grounds -- trials and mediation -- known for some time, perhaps
20 even before the first extension motion was filed.

21 Appellant was, therefore, afforded ample time, and
22 considerable choice in selecting dates, in which to file its
23 brief and appendix and given an explicit warning of the
24 consequences of failing to meet the extended deadline. The order
25 granting the first motion extended the time for filing well
26 beyond the 91-day period and plainly stated that the appeal "is

1 dismissed effective March 1" unless a brief was filed by that
2 date. It stated, further, that a filing of a subsequent motion
3 would not stay the effectiveness of the dismissal order. This
4 notice simply reflected our rules that a "deadline for a brief
5 remains in effect unless the court orders otherwise," 2d Cir. R.
6 27.1(f)(1), and "[t]he court may dismiss an appeal . . . for
7 failure to timely file a brief or to meet a deadline." 2d Cir.
8 R. 31.2(d).² The purpose of these rules is to maintain an orderly
9 docket and to prevent counsel from triggering "automatic"
10 extensions simply by filing motions for extensions and waiting
11 for the rulings. While appellant claims to have been prejudiced
12 by the court's "delay" in deciding the second extension motion,
13 the prejudice is entirely the result of its lack of familiarity
14 with the January 17 order and the court's rules.

15 We deny the motion for reinstatement. It may well be that
16 the indifference to our scheduling orders and rules described
17 above alone would justify denial. However, we also consider the
18 fact that the motion for reinstatement does not append to it
19 appellant's proposed brief or an appropriately detailed statement
20 demonstrating that the appeal is meritorious. Indeed, it does
21 not even mention the merits of the appeal, an important factor in
22 determining whether reinstatement of an appeal is appropriate.

²The caveat regarding dismissal for failure to comply not only is included in our local rules, but it is also stated -- in boldface type -- on our website. See United States Court of Appeals for the Second Circuit, Clerk's Office, http://www.ca2.uscourts.gov/clerk/forms_and_instructions/How_to_appeal/Civil_ase/Briefing_schedule.htm (last visited Mar. 25, 2013).

1 See, e.g., Lattanzio v. Comm'n on Massage Therapy Accreditation,
2 481 F.3d 137, 139 (2d Cir. 2007) (per curiam) (denying the motion
3 for reinstatement because the underlying claims were meritless).
4 From the District Court's thorough opinion, it appears that the
5 appeal is entirely without merit.

6 We note that the appellee has consented to the
7 reinstatement. While this is certainly a factor to be considered
8 in favor of granting the motion, we deem it outweighed by the
9 court's institutional concerns over handling its docket and
10 requiring adherence to its rules.

11 CONCLUSION

12 For the reasons set forth above, the motion to reinstate the
13 appeal is denied.