

ALERT

Federal Circuit Patent Bulletin: *Two-Way Media LLC v. AT&T, Inc.*

March 19, 2015

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On March 19, 2015, in *Two-Way Media LLC v. AT&T, Inc.*, the U.S. Court of Appeals for the Federal Circuit (Dyk, O'Malley,* Wallach) affirmed the district court's refusal to extend or reopen the appeal period after AT&T's failure to file a timely notice of appeal from the district court's judgment entering the jury verdict that AT&T infringed U.S. Patents No. 5,778,187 and No. 5,983,005, which related to scalable architecture for the delivery of real-time information over a communications network. The Federal Circuit stated:

[Under Fed. R. App. P. 4(a),] to qualify for an extension of the appeal period, the moving party must show "excusable neglect or good cause." A court may reopen the appeal period, on the other hand, if, inter alia, "the court finds that the moving part did not receive notice" of the entry of the judgment or order at issue. Both decisions are committed to the trial court's discretion. . . .

AT&T argues that its delay should be excused because it received incomplete NEFs and the district court did not reissue new NEFs when it corrected the docket entries. In other words, AT&T argues that, because the initial NEF did not fully describe what the order entailed, the court should have found that the "excusable neglect or good cause" required under Rule 4(a)(5)(A)(ii) had been established. We disagree.

As the district court correctly noted, even a complete lack of notice would not qualify as excusable neglect under Rule 4(a)(5), without some additional showing. . . . AT&T first responds by arguing that this is not just a lack of notice case; it is a case involving an affirmatively misleading notice. And, it argues that, because the district court's NEFs violated Federal Rule of Civil Procedure 79, the notice it received violated the legal requirements governing the same. Turning to AT&T's second argument first, AT&T is wrong when it contends

that the court or its clerk violated Rule 79. Rule 79 applies to the civil docket, not to electronic email notices. Rule 79 provides that each docket entry is to briefly state "the substance and date of entry of each order and judgment." Although the court did not send updated NEFs, the district court promptly corrected the docket entries to state that the orders denied the underlying JMOL motions. The civil docket, therefore, had a complete description of those orders had AT&T bothered to check the docket, as it should have done. AT&T's resort to Rule 79 is, thus, unhelpful to its appeal under Rule 4(a)(5).

AT&T's claim that its failure to read the court's order was excusable because it was misled into doing so by the court itself does not fare much better on these facts. We recognize that excusable neglect "is not limited strictly to omissions caused by circumstances beyond the control of the movant." It is true, moreover, that a court's own conduct—including misleading entries or statements to counsel—is relevant to whether neglect not predicated only on a failure to receive notice of an entry of judgment can, or should, be deemed excusable. The fact that the incomplete NEFs are relevant to the court's inquiry does not mean they are determinative of it, however.

The district court not only may, but should, consider "all relevant circumstances" in determining whether a party's failure to file a timely appeal was excusable. At bottom, Rule 4(a)(5) assumes some neglect on behalf of the non-filer and directs the district court to exercise its equitable discretion to determine whether that neglect should be excused. The trial court examined the circumstances surrounding the admitted neglect by AT&T's counsel and concluded it should not be forgiven. The trial court found that it was not excusable for AT&T's attorneys to rely on the email notifications and neglect to read the orders in light of the circumstances surrounding the November 22, 2013 NEFs. As the trial court noted, AT&T received an order denying its unsealed JMOL motion and an order assigning costs—both of which triggered properly labeled NEFs—at the same time it received the allegedly misleading NEFs. Pointedly, costs are only to be awarded to a prevailing party. An order assessing costs was a clear indication that all matters relevant to the question of whether TWM was a prevailing party had been resolved. The district court noted, moreover, that the orders and NEFs had been sent to 18 different counsel and legal assistants representing AT&T and that at least some of those recipients downloaded the full text of the orders. Given these circumstances, the district court concluded that it was inexcusable for AT&T's multiple counsel to fail to read all of the underlying orders they received, or—at minimum—to monitor the docket for any corrections or additional rulings, which might explain why costs had been awarded to TWM. . . . We conclude that the district court did not abuse its discretion when it found that AT&T did not satisfy its burden to show excusable neglect for its failure to read the underlying orders and check the docket for more than a month after the court issued the final orders.

After concluding that AT&T's neglect was not excusable, the court turned to AT&T's request for relief under Rule 4(a)(6). As noted, Rule 4(a)(6) requires, as a predicate, findings by the trial court that: (1) the movant did not receive notice of the entry of judgment; (2) the movant filed the motion in a timely fashion; and (3) no party would be prejudiced by a reopening of the time to appeal. Even when all of these predicates are satisfied, moreover, the court retains the discretion to either grant or deny the motion.

Here, the district court found that AT&T did receive notice of the entry of judgment when it received and downloaded those judgments from the electronic docket and that TWM would be prejudiced by the reopening of the appeal period, rendering Rule 4(a)(6) inapplicable. After making these factual findings, moreover, the court rejected AT&T's claim that, even if it admittedly received the actual text of the judgments and of the other orders entered at the same time, the court should reopen the appeal because AT&T never received email notifications that the docket was corrected shortly after the initial entries to more accurately reflect the substance of the orders entered. On this point, the trial court expressly declined "to give 'an interpretation of Rule 4(a)(6) that allows parties to ignore entirely the electronic information at their fingertips,' as it would 'severely undermine the benefits for both courts and litigants fostered by the CM/ECF system, including the ease and speed of access to all the filings in a case.'" We see no clear error in the trial court's factual finding that AT&T failed to establish that it did not receive the notice contemplated in Rule 4(a)(6)(A) and no abuse of discretion in the trial court's refusal to grant AT&T's motion solely because AT&T did not receive an NEF of the corrected docket entry.