

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1451

PATRICK SASSO

vs.

JEFFREY R. MAZER & another.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In this case we consider a Superior Court judge's dismissal of the defendant's appeal, and whether the defendant's inexcusable neglect in failing to comply with certain rules of appellate procedure was so egregious as to deprive him of the protection of the cure provision of Mass. R. A. P. 10 (c), as amended, 417 Mass. 1602 (1994). We conclude that although the judge did not abuse her discretion in determining that the defendant acted with inexcusable neglect, dismissal of the appeal was not warranted, and thus reverse.

Background. This case arises from a fee dispute between the plaintiff, Patrick Sasso, and his former lawyer, the defendant, Jeffrey R. Mazer. On April 28, 2016, the

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<sup>1</sup> Mazer Law Group, LLC.

Massachusetts Bar Association Fee Arbitration Board issued a decision in favor of Sasso, requiring Mazer<sup>2</sup> to repay him \$201,730.95 in legal fees. On June 6, 2016, Mazer filed, in the Essex Superior Court, a complaint and motion to vacate the arbitration award (the Essex case). On June 21, 2016, Sasso filed, in the Suffolk Superior Court, a complaint to confirm the arbitration award (the Suffolk case). Sasso contends that he did so because he received no notice of Mazer's filings in the Essex case, and because the thirty-day time period to file an appeal of the arbitration award had expired. On July 21, 2016, by agreement of the parties, the complaint and motions pending in the Essex case were removed and consolidated with the Suffolk case.

On December 28, 2016, an order of default pursuant to Superior Court Standing Order 1-88 issued against Mazer for failing to respond to the complaint in the Suffolk case.<sup>3</sup> On

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<sup>2</sup> Hereafter, "Mazer" refers collectively to both defendants.

<sup>3</sup> Mazer maintains that a Suffolk Superior Court judge agreed to stay the case until the Suffolk Superior Court received the case file from the Essex Superior Court. He further contends that the Essex County Superior Court dismissed the Essex Superior Court case, in error, for failure to schedule a hearing; that the Suffolk Superior Court did not docket the transfer of the Essex County Superior Court case until December 20, 2016; and that the erroneous dismissal of the Essex Superior Court case, in effect, caused a misunderstanding that led to his delayed response to the Suffolk Superior Court complaint and to the entry of the default. We need not resolve this claim, as it does not impact our analysis of the issues raised in this appeal.

January 18, 2017, Sasso filed a motion for assessment of damages and request for default judgment. On February 17, 2017, Mazer filed an emergency motion for relief from entry of default, accompanied by an answer to the complaint. In February 23, 2017, he filed an emergency motion to vacate dismissal of the Essex case.<sup>4</sup> That same day, a Superior Court judge denied both motions for failure to comply with Rule 9A of the Rules of the Superior Court. The judge affirmed the arbitration award, and judgment entered in favor of Sasso. The default judgment entered on the Suffolk Superior Court docket on February 28, 2017. On March 30, 2017, Mazer filed a notice of appeal regarding the entry of default judgment in the Suffolk case.

On April 12, 2017, Sasso filed a motion to dismiss Mazer's notice of appeal, predicated on Mazer's failure to comply with Mass. R. A. P. 8 (b) (1), as amended, 430 Mass. 1601 (1999), 9 (c) (2), as amended, 437 Mass. 1602 (2002), and 18 (b), as amended, 425 Mass. 1602 (1997).<sup>5</sup> In particular, Sasso argued that Mazer failed to serve or otherwise notify him of the notice of appeal, failed to file and provide notice of the portions of the transcript, if any, that he had ordered, failed to serve any

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<sup>4</sup> See note 3, supra.

<sup>5</sup> Massachusetts Rules of Appellate Procedure 8, 9, and 18, among other provisions, were amended on October 31, 2018. The new version of the rules went into effect on March 1, 2019. Accordingly, this case concerns these rules as they existed prior to the amendments.

designation of the parts of the record he intended to include in the record appendix, and made an "incomplete filing" as a "stalling technique." On April 24, 2017, Mazer informed the court, via letter filed with the Suffolk Superior Court Civil Clerk's Office, that pursuant to Mass. R. A. P. 9 (c) (2), he had not ordered and did not intend to order the transcript or any portion thereof for his appeal. Also, on April 24, 2017, Mazer filed an opposition to Sasso's motion to dismiss the notice of appeal, arguing that (1) he acted with excusable neglect because, on April 7, 2017, he suffered a fractured ankle that rendered him "bedridden," which precluded him from filing a timely notice that he would not be ordering a copy of the transcript, and (2) he cured the delay pursuant to Mass. R. A. P. 10 (c) by informing the court that he would not be ordering a transcript. On June 8, 2017, following a hearing, the judge allowed the motion to dismiss the appeal. On the record, the judge made the following findings of fact and rulings of law:

"Okay, so that tells me that what counsel did was wait for the 30th day in order to file the appeal. Okay. But that comes into my calculus, in any event.

"Then there was a requirement of 30-day notice as to whether or not the transcript would be assembled. That didn't happen for longer than a 30-day period. And I have considered the reasons that counsel has put forth in terms of having broken his ankle, and I have reviewed the document provided.

"But then, in addition, I have taken into account Rule -- first of all, the failure to serve plaintiff's counsel; and then also Rule 8 in its entirety, and in particular, in the event that a transcript will not be made available, there is a requirement of notice that must be served on counsel, who may then file objections or proposed amendments within 10 days. That was not done. And, again, that language is 'shall. . . .'

"And in light of the totality of the circumstances and the facts as I find them here, I find that there was inexcusable neglect on the part of the defendant, Mr. Mazer. I further find that the inexcusable neglect was meant to delay, cause delay and otherwise hinder and hamper the proper procedure in the court. And as such, after full consideration, review of the record, review of the plaintiff's verified Motion to Dismiss, in view of the Court's findings of the defendant's attempt to delay, obfuscate and otherwise hamper the proper progression of this case and his failure on each and every level to follow the rules as promulgated, and I find that in each instance the neglect was inexcusable. The plaintiff's Motion to Dismiss is allowed."

Mazer now appeals from the allowance of the motion to dismiss.

Discussion. Mazer contends that he cured the procedural misstep -- i.e., his failure to order or designate portions of the transcript for appeal or inform the Superior Court and Sasso that he did not intend to do so -- by informing the Superior Court on April 24, in writing, that he would not be ordering a transcript. Consequently, he argues, the judge erred in allowing Sasso's motion to dismiss the notice of appeal from the default judgment.

"An appellant's responsibilities with respect to ordering a transcript of a trial court proceeding to be included in the appellate record vary depending on the manner in which the

relevant trial court hearing was recorded." Neuwirth v. Neuwirth, 85 Mass. App. Ct. 248, 253-254 (2014). In the present case, the parties do not dispute that the relevant hearing "was 'recorded electronically on equipment under the control of the court and which were not recorded by an official court reporter,' [and thus] the appellant's obligations generally are spelled out in Mass. R. A. P. 8 (b) (3), as amended, 430 Mass. 1601 (1999)." Id. at 254.<sup>6</sup>

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<sup>6</sup> Much confusion in this case stems from the parties' conflation of the relevant provisions of Mass. R. A. P. 8 (b) and 9 (c). On appeal, and in the proceedings in the Superior Court, the parties referenced the requirements under Mass. R. A. P. 9 (c) (2). As it existed at that time, rule 9 (c) (2) mandated that an appellant in a civil case who decided that the transcript of the "lower court" proceedings was not necessary for determination of the appeal, "shall, within ten days after filing a notice of appeal," deliver a "signed statement certifying that the appellant has not ordered and does not intend to order the transcript or any portion thereof." However, rule 9 (c) (2) specifically excepted "electronically recorded proceedings governed by rule 8 (b) (3)." Thus, rule 9 (c) (2) did not govern the electronically recorded proceedings relevant to the present case. Similarly, in his motion to dismiss the notice of appeal, Sasso argued, inter alia, that Mazer failed to comply with the provisions of rule 8 (b) (1). However, rule 8 (b) (1) applies to procedures for ordering a transcript from a court reporter, but not "electronically recorded proceedings governed by rule 8 (b) (3)." Thus, rule 8 (b) (1) likewise did not govern the present case. At oral argument, counsel for Sasso clarified that the relevant proceedings in the Superior Court were recorded on electronic equipment under the control of the court, and, accordingly, rule 8 (b) (3) governs the present case. Mazer does not argue to the contrary.

Rule 8 (b) (3), as it existed at the time of the Superior Court proceedings,<sup>7</sup> delineated the procedures for ordering and designating electronic recordings or portions thereof necessary for inclusion in the record on appeal. Under that rule, Mazer's first obligation was, "simultaneously with filing a notice of appeal, [to] order from the clerk of the lower court . . . [a] copy of the electronic recording" of the proceedings in the Superior Court. It is uncontested that Mazer did not do so.

Compounding this failure, Mazer also neglected to notify Sasso and the Superior Court that he did not intend to order or designate portions of any electronic recordings. Rule 8 (b) (3) did not explicitly require an appellant to notify the court or appellee that it did not order, or intend to order, the electronic recording or any portion thereof. However, the absence of a specific notice provision in rule 8 (b) (3) did not absolve an appellant from providing proper notice to the trial court and the appellee. The need for service is implied in that an appellee has a right to review and order other parts of the recording it may want. See Mass. R. A. P. 8 (b) (3) (iii), as appearing in 388 Mass. 1106 (1983). Moreover, rule 9 (c) (1) requires an appellant to "perform any act reasonably necessary to enable the clerk to assemble the record," when the clerk

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<sup>7</sup> See note 5, supra.

issues such a request. Mass. R. A. P. 9 (c) (1), as amended, 378 Mass. 935 (1979). "The underlying obligation articulated in rule 9 (c) (1) is not confined to circumstances in which the clerk directly requests the appellant to take action." Scheuer v. Mahoney, 80 Mass. App. Ct. 704, 709 (2011). "[A]n appellant must take actions 'which are necessary to move the appeal along . . . irrespective of an express mandate or a request by the clerk.'" Id., quoting Robinson v. Planning Bd. of Wayland, 23 Mass. App. Ct. 920, 921 (1986). See Neuwirth, 85 Mass. App. Ct. at 260 n.16 (noting that rule 8 (b) (3) "not only requires an appellant to take certain specified steps designed to ensure that a transcript is produced expeditiously, but also to document that he has in fact taken those steps in a way that is transparent to both the court and opposing parties"); Points East, Inc. v. City Council of Gloucester, 15 Mass. App. Ct. 722, 726 (1983) ("When an appellant files a notice of appeal he must treat that step as something more than taking out an option to appeal"). Here, Mazer did nothing but file his notice of appeal. He thus violated rules 9 (c) (1) and 8 (b) (3).

In view of Mazer's failures, Sasso filed, on April 12, 2017, the aforementioned motion to dismiss the notice of appeal. Mass. R. A. P. 10 (c) authorizes a judge to dismiss an appeal in a civil case for failure to comply with rule 9 (c), "but only upon a finding of inexcusable neglect." Mass. R. A. P. 10 (c).

The judge determined that Mazer acted with inexcusable neglect because he (1) waited until the thirtieth and final day to file his notice of appeal;<sup>8</sup> (2) failed to take steps to order electronic recordings or take required steps that would allow the record to be assembled for appeal; (3) failed to comply on multiple occasions with notice requirements; and (4) failed to comply with Rule 8 "in its entirety." We discern no abuse of discretion in this part of the judge's ruling. See Neuwirth, 85 Mass. App. Ct. at 257 (judge's determination of inexcusable neglect under rule 10 [c] "is subject to review only for an abuse of discretion").<sup>9</sup>

The finding of inexcusable neglect does not end our analysis because rule 10 (c) further states that "[i]f, prior to

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<sup>8</sup> The judge did not err by factoring into her inexcusable neglect calculus Mazer's decision to wait until the thirtieth and final day to file his notice of appeal. Mazer's failures to comply with procedural rules at various stages of the proceedings warranted this finding. See McIsaac v. Cedergren, 54 Mass. App. Ct. 607, 610 (2002) (among other factors supporting finding of inexcusable neglect "trial judge was entitled to consider the disruptive effects to the judicial system of counsel's failure to serve the complaint and filing the rule 60 [b] [1] motion on the last possible day").

<sup>9</sup> The judge noted that she "considered the reasons that counsel has put forth in terms of having broken his ankle," and, at least implicitly, rejected that injury as a basis to excuse Mazer's neglect. In light of the judge's finding that Mazer had failed to comply with rule 8 "in its entirety," along with her finding that he acted with the intent to "delay, obfuscate and otherwise hamper the proper progression of this case and his failure on each and every level to follow the rules," we discern no abuse of discretion in her refusal to credit Mazer's claim.

the lower court's hearing such motion for noncompliance with [r]ule 9 (c), the appellant shall have cured the noncompliance, the appellant's compliance shall be deemed timely." Mass. R. A. P. 10 (c). "Rule 10 (c) thus contemplates that there will be situations where an appellant who has committed 'inexcusable' neglect nevertheless can escape dismissal by taking advantage of the cure provision." Neuwirth, 85 Mass. App. Ct. at 256.

Here, it is undisputed that on April 24, Mazer provided written notification to the Superior Court that he did not intend to order a transcript or any portion thereof. Sasso contends that Mazer did too little too late, failed to provide notice or service, and failed to respond with the immediacy contemplated by rule 10 (c) and cases interpreting that rule. See Neuwirth, 85 Mass. App. Ct. at 262-264. We disagree. Mazer's notice to the Superior Court, provided twenty-four days after the deadline had passed,<sup>10</sup> cured his noncompliance with rule 8 (b) because the cure was effectuated prior to the hearing on the motion to dismiss. See Mass. R. A. P. 10 (c). Moreover, the delay was brief. See Neuwirth, 85 Mass. App. Ct. at 259-260 ("While even this relatively short delay never should have

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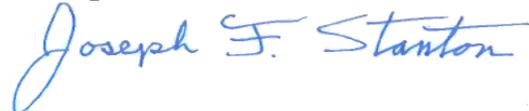
<sup>10</sup> The twenty-four day delay stems from Mazer's failure to order the electronic recording "simultaneously with filing [the] notice of appeal" under rule 8 (b) (3), and failure to notify the Superior Court or Sasso that he did not intend to order the electronic recording.

occurred, it was not so egregious as to deprive him of the protection of the cure provision of Mass. R. A. P. 10 (c)").<sup>11</sup> Neuwirth cautions that in such circumstances, even in the face of inexcusable neglect and less than good faith on the part of the appellant, the drastic sanction of dismissal of the appeal is not warranted.

We vacate the order dismissing Mazer's underlying appeal. Mazer's notice of appeal shall be reinstated and the Superior Court forthwith shall complete assembly of the record.

So ordered.

By the Court (Meade, Milkey & Neyman, JJ.<sup>12</sup>),



Clerk

Entered: February 22, 2021.

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<sup>11</sup> Our decision should neither be read to condone Mazer's actions, nor to suggest that the judge's views were not justified. Her frustration with Mazer was not unwarranted. That notwithstanding, the judge's analysis did not account for the timely cure and short delay, just as in Neuwirth, 85 Mass. App. Ct. at 263-264. Contrast Scheuer, 80 Mass. App. Ct. at 709-711 (appellant's failure to take any action over course of four-year period to advance appeal warranted dismissal of appeal).

<sup>12</sup> The panelists are listed in order of seniority.