

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD ROGALSKI, # 257594,

Plaintiff,

Case No. 1:07-cv-946

v

HON. JANET T. NEFF

GEORGE PRAMSTALLER,

Defendant.

OPINION

This prisoner civil rights action under 42 U.S.C. § 1983 is before the Court on remand from the United States Court of Appeals for the Sixth Circuit for a determination whether plaintiff should be granted an extension of time to file a late notice of appeal under FED. R. APP. P. 4(a)(5). The matter was referred to the Magistrate Judge, who issued a Report and Recommendation, recommending that the motion for an extension of time be denied for failure to show good cause. The matter is presently before the Court on Plaintiff's objections to the Report and Recommendation.¹ In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

Plaintiff's Objection is based on two allegations of error. Plaintiff first argues that the Magistrate Judge erred in failing to recognize the proof of service notarized November 10, 2008 for

¹ Plaintiff's Objection (Dkt 53), titled "Motion Objecting the Report and Recommendation," is cited herein as simply as "Obj."

an extension of time to file an objection to the Magistrate Judge's October 29, 2008 Report and Recommendation. (Obj. at 3, 8.) Plaintiff's argument is without merit. First, plaintiff's argument is immaterial to the issue on remand of whether plaintiff should be granted an extension of time to file a late notice of appeal under FED. R. APP. P. 4(a)(5). Second, this Court ultimately considered and rejected plaintiff's objections on the merits. As the Magistrate Judge pointed out in the most recent Report and Recommendation, "[o]n December 1, 2008, plaintiff filed a motion for reconsideration, accompanied by a 'response,' affidavit, and brief in opposition to the summary judgment motion. (docket #'s 40-43)." (5/4/09 R & R.) "Judge Neff considered all submissions by plaintiff and, by order entered February 5, 2009, denied the motion for reconsideration, finding that plaintiff's submissions did not undermine the court's conclusion that plaintiff had failed to exhaust [his] administrative remedies." (*Id.* at 2; Or., Dkt 45, at 2-3.) Thus, any objection on this first ground fails.

Plaintiff's second ground of objection is that, contrary to the Magistrate Judge's conclusion, plaintiff has shown "good cause" for his late notice of appeal; that is, that forces beyond his control prevented him from timely filing the notice. (Obj. 8.) The Court disagrees that plaintiff has shown good cause. The Magistrate Judge properly found that plaintiff failed to show that he was diligent in submitting his notice of appeal, given that Judge Neff's order was entered on February 5, 2009 and he was not incarcerated until February 27, 2009 (R & R 4-5). Plaintiff admits that he received the order on February 10, 2009 (Obj. ¶ 18), but did not file the notice of appeal during the next two weeks, prior to his incarceration. (Obj. at 6.) Plaintiff's factual assertions that he twice telephoned the Sixth Circuit Court of Appeals during this interim period, standing alone, do not provide a sufficient basis for this Court to grant an extension of time to file a notice of appeal (Obj. ¶ 18.).

The Magistrate Judge properly determined that plaintiff's incarceration was not an actual impediment to the timely filing of his notice of appeal. Plaintiff offers no circumstances that would, in this Court's view, constitute good cause for failing to timely file a notice of appeal.

For these reasons and because this action was filed *in forma pauperis*, this Court also certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of this Opinion and Order would not be taken in good faith. *See McGore v. Wrigglesworth*, 114 F.3d 601, 610 (6th Cir. 1997).

An Order will be entered consistent with this Opinion.

Dated: June 23, 2009

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

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Defendant.

ORDER

In accordance with the Opinion entered this date:

IT IS HEREBY ORDERED that the Objections (Dkt 53) are DENIED and the Report and Recommendation (Dkt 49) is APPROVED and ADOPTED as the opinion of the Court.

IT IS FURTHER ORDERED that plaintiff is not entitled to an extension of time to file a late notice of appeal under FED. R. APP. P. 4(a)(5).

IT IS FURTHER ORDERED that the Court certifies pursuant to 28 U.S.C. § 1915(a) that an appeal of the Judgment would not be taken in good faith.

Date: June 23, 2009

/s/ Janet T. Neff

JANET T. NEFF

United States District Judge