

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CORNELIUS ANDERSON,
Plaintiff,
v.
ERIC ARNOLD et al.,
Defendants.

No. 2:14-cv-2660 MCE AC P

ORDER

I. Introduction

This action was dismissed without prejudice by order and judgment filed January 31, 2017. See ECF Nos. 29, 30. Plaintiff filed a notice of appeal on February 27, 2017, which is currently pending before the Ninth Circuit Court of Appeals. See ECF Nos. 37, 38. During the interval between entry of this court’s judgment and plaintiff filing his notice of appeal, plaintiff filed three motions in this court: (1) motion to vacate the judgment of dismissal, ECF No. 31, filed February 7, 2017; (2) motion for appointment of counsel, ECF No. 32, also filed February 7, 2017; and (3) motion for extension of time to file an appeal, ECF No. 35, filed February 17, 2017. For the reasons that follow, each of these motions is denied.

///
///
///

1 II. Motion for Relief From Final Judgment

2 Plaintiff moves, pursuant to Federal Rule of Civil Procedure 60(b)(6), for relief from this
3 court’s judgment of dismissal. See ECF No. 31. Plaintiff’s motion, docketed February 7, 2017,
4 was filed less than a week after entry of judgment and therefore within a “reasonable time” as
5 required by Rule 60(c)(1). Moreover, because plaintiff’s motion was filed within twenty-eight
6 days after entry of judgment, the time for filing an appeal does not commence until this court
7 rules on the motion. See Fed. Rule App. Proc. 4(a)(4)(A)(vi) (“If a party files in the district court
8 any of the following motions under the Federal Rules of Civil Procedure – and does so within the
9 time allowed by those rules – the time to file an appeal runs for all parties from the entry of the
10 order disposing of the last such remaining motion: . . . (vi) for relief under Rule 60 if the motion
11 is filed no later than 28 days after the judgment is entered.”). More specifically, here, where
12 plaintiff filed a notice of appeal after filing his Rule 60 motion, the notice does not become
13 effective until this court rules on his Rule 60 motion. See Fed. Rule App. Proc. 4(a)(4)(B)(i) (“If
14 a party files a notice of appeal after the court announces or enters a judgment – but before it
15 disposes of any motion listed in Rule 4(a)(4)(A) – the notice becomes effective to appeal a
16 judgment or order, in whole or in part, when the order disposing of the last such remaining
17 motion is entered.”).

18 Thus, although generally “[t]he filing of a notice of appeal is an event of jurisdictional
19 significance – it confers jurisdiction on the court of appeals and divests the district court of its
20 control over those aspects of the case involved in the appeal,” Griggs v. Provident Consumer
21 Discount Co., 459 U.S. 56, 58 (1982) (per curiam), this court retains jurisdiction to consider the
22 merits of plaintiff’s Rule 60 motion under Federal Rule of Appellate Procedure 4(a)(4)(B)(i).
23 “Under Appellate Procedure Rule 4(a), a Rule 60(b) motion is ‘pending’ and suspends the effect
24 of a notice of appeal when the motion is filed ‘no later than 28 days after the judgment is
25 entered.’ Fed. R. App. Proc. 4(a)(4)(A)(vi).” Lasenbby v. State Farm Fire & Cas. Co., 2015 WL
26 3505320, at *1 n.5, 2015 U.S. Dist. LEXIS 72693, at *2 n.5 (D. Nev. June 2, 2015) (citing United
27 Nat’l Ins. v. R & D Latex Corp., 242 F.3d 1102, 1109 (9th Cir. 2001) (notice of appeal did not
28 divest district court of jurisdiction because motion for reconsideration was pending)); accord,

1 Hearns v. San Bernardino Police Dep't, 530 F.3d 1124, 1129 n.2 (9th Cir. 2008) (“Construing
2 Plaintiff’s motion as seeking relief under either Federal Rule of Civil Procedure 59 or 60(b), that
3 motion tolled the time period for filing the notice of appeal.”) (citing, inter alia, Miller v. Marriott
4 Int’l, Inc., 300 F.3d 1061, 1063-64 (9th Cir. 2002) (same principal applied to motions for
5 reconsideration)).

6 Before turning to the merits of the instant motion, the court notes that plaintiff previously
7 filed a Rule 60(b)(6) motion challenging the initial dismissal of this case without prejudice due to
8 plaintiff’s failure to file an amended complaint. By order filed September 23, 2016, the court
9 granted plaintiff’s first Rule 60(b)(6) motion, vacated judgment, reopened this case and accorded
10 plaintiff additional time to file an amended complaint. See ECF No. 23. However, due to the
11 subsequently demonstrated futility of according plaintiff additional time, the court again
12 dismissed the action on January 31, 2017. See ECF No. 29; see also ECF No. 27 (findings and
13 recommendations). It is this dismissal that plaintiff now challenges.

14 Federal Rule of Civil Procedure 60(b)(6) provides that “the court may relieve a party . . .
15 from a final judgment, order, or proceeding for . . . any . . . [unenumerated] reason that justifies
16 relief.” “Judgments are not often set aside under Rule 60(b)(6). Rather, the Rule is used
17 sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where
18 extraordinary circumstances prevented a party from taking timely action to prevent or correct an
19 erroneous judgment. Accordingly, a party who moves for such relief must demonstrate both
20 injury and circumstances beyond his control that prevented him from proceeding with the action
21 in a proper fashion.” Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1103 (9th Cir. 2006)
22 (citations, internal quotation marks and punctuation omitted). The “extraordinary circumstances”
23 standard for assessing a Rule 60(b)(6) motion is intended to avoid a mere “second bite at the
24 apple.” In re Pacific Far East Lines, Inc., 889 F.2d 242, 250 (9th Cir. 1989).

25 Like plaintiff’s prior filings, the instant motion lacks coherence and appears to be a
26 patchwork of excerpts from other motions and/or cases. For example, although it previously
27 appeared that plaintiff was attempting to challenge the quality of his medical care, he now avers
28 in random fashion that he “submitted the above-entitled complaint against the incorrect

1 defendants;” he was deprived of his personal property “by prison officials in retaliation for the
2 exercise of his First Amendment rights;” “due process violations are cognizable under 42 U.S.C.
3 § 1983;” and the “lead defendant [name blacked out] has no personal involvement in the matter in
4 dispute, and likewise enjoys absolute immunity[.]” ECF No. 31 at 1. The typewritten portion of
5 the motion, like plaintiff’s previous filings, is interlineated with handwritten statements.

6 The incomprehensibility of this motion underscores the reasons this court previously
7 dismissed this case. As the magistrate judge reasoned most recently, dismissal is appropriate
8 “[d]ue to the proven futility of according plaintiff additional guidance and opportunity to file a
9 cognizable pleading.” ECF No. 27 at 5. Plaintiff has presented no new or different facts or
10 circumstances explaining his failure to properly pursue this action in the normal course or
11 otherwise. Moreover, in the absence of any potentially cognizable claims, plaintiff’s repeated
12 requests for appointment of counsel do not demonstrate that plaintiff proceeding pro se presents
13 an extraordinary circumstance.

14 Accordingly, plaintiff’s motion for relief from final judgment pursuant to Rule 60(b)(6),
15 Federal Rules of Civil Procedure, ECF No. 31, is denied. This action shall remain dismissed
16 without prejudice.

17 III. Plaintiff’s Additional Motions

18 Plaintiff’s motion for appointment of counsel, ECF No. 32, is denied for the several
19 reasons previously set forth by the magistrate judge, see ECF No. 27, and because appointment of
20 counsel in support of plaintiff’s instant Rule 60(b)(6) motion would be futile.

21 Plaintiff’s motion to extend time to file his appeal, ECF No. 35, is denied as unnecessary.
22 Plaintiff’s notice of appeal, see ECF No. 37, will become effective upon the filing of the instant
23 order. See Fed. Rule App. Proc. 4(a)(4)(B)(i).

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that each of plaintiff's motions filed after entry of this court's January 31, 2017 judgment, see ECF Nos. 31, 32 and 35, are DENIED.

IT IS SO ORDERED.

Dated: March 13, 2017


MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE