

1 result in dismissal of the action. Along with said notice, plaintiff was sent a copy of the
2 court-approved prisoner's IFP application, instructions for completing it, and a return
3 envelope.

4 When more than thirty days had passed since the deficiency notice was sent to
5 plaintiff and he had not filed a completed IFP application or paid the filing fee, the Court, by
6 order filed November 13, 2009, dismissed the action without prejudice. (Docket No. 5.)¹
7 Judgment was entered that same date.

8 On November 23, 2009, the envelope containing copies of the Court's orders
9 dismissing the action and entering judgment, sent by the Clerk to plaintiff at his last known
10 address, was returned as undeliverable. (Docket No. 8.)

11 On February 24, 2010, plaintiff filed a motion for reconsideration, in which he stated
12 he had only recently learned, after requesting a status update on his case, that the action had
13 been dismissed and that the envelope containing the order of dismissal mistakenly had been
14 returned by prison officials as undeliverable. Consequently, plaintiff moved the Court for the
15 opportunity to "respond" to the order of dismissal. (Docket No. 9.)

16 Thereafter, plaintiff filed a notice of appeal; on May 13, 2010, the Clerk transmitted
17 the file to the Ninth Circuit. (Docket No. 13.) On June 7, 2010, plaintiff filed a request to
18 proceed in forma pauperis on appeal.

19 On June 21, 2010, the Ninth Circuit remanded the appeal to this Court for the limited
20 purpose of allowing the Court to rule on plaintiff's above-noted motion for reconsideration,
21 which motion the Ninth Circuit has construed as a motion to reopen the time to file an appeal
22 under Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

23 Rule 4(a)(6) provides a limited exception to the usual thirty days to appeal in cases in
24 which the prospective appellant did not learn of entry of judgment in time to file a notice of
25 appeal. Specifically, Rule 4(a)(6) provides:

26
27 ¹On October 8, 2009, plaintiff filed a renewed application to proceed in forma
28 pauperis. As with the original application filed by plaintiff, however, the renewed
application was incomplete, as neither a Certificate of Funds in Prisoner's Trust Account nor
a copy of plaintiff's trust account statement was included therewith. (See Docket No. 4.)

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2 The district court may reopen the time to file an appeal for a period of
3 14 days after the date when its order to reopen is entered, but only if all the
4 following conditions are satisfied:

5 (A) the court finds that the moving party did not receive notice under
6 Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order
7 sought to be appealed within 21 days after entry;

8 (B) the motion is filed within 180 days after the judgment or order is
9 entered or within 7 days after the moving party receives notice under Federal
10 Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

11 (C) the court finds that no party would be prejudiced.

12 Fed. R. App. P. 4(a)(6)(A)-(C).

13 The Court finds plaintiff meets all three conditions to qualify for relief under Rule
14 4(a)(6). In particular: (1) plaintiff did not receive notice under Rule 77(d) of the Court's
15 order of dismissal within 21 days after judgment was entered, because plaintiff's mail
16 mistakenly was returned to the court as undeliverable; (2) plaintiff's motion was filed within
17 180 days of the entry of judgment; and (3) no party would be prejudiced by reopening of the
18 time to file an appeal.

19 Accordingly, plaintiff's motion to reopen the time to file an appeal is hereby
20 GRANTED. **Plaintiff, within fourteen (14) days of the date this order is filed, may file a**
21 **timely notice of appeal in this court. See Fed. R. App. P. 4(a)(6).** Plaintiff's notice of
22 appeal will be deemed timely if it is deposited in the prison's internal mail system on or
23 before the last day for filing. See Fed. R. App. P. 4(c)(1).

24 Plaintiff also seeks leave to proceed in forma pauperis on appeal. (Docket No. 16.)
25 Good cause appearing, plaintiff's request is hereby GRANTED.

26 The Clerk shall serve a copy of this order on the Ninth Circuit.

27 This order terminates Docket Nos. 9 and 16.

28 IT IS SO ORDERED.

DATED: June 28, 2010


MAXINE M. CHESNEY
United States District Judge