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3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA

5 TODD ASHKER,

6 Plaintiff,

7 v.

8 MICHAEL C. SAYRE, et al.,

9 Defendants.

No. 05-03759 CW

ORDER GRANTING
PLAINTIFF'S
MOTIONS FOR
EXTENSION OF TIME
TO FILE MOTION TO
REVIEW TAXATION
OF COSTS AND
DENYING MOTION
FOR ORDER FOR
PRISON LAW
LIBRARY TO
PHOTOCOPY MOTION
(Docket ## 483,
487)

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14 On June 9, 2010, Plaintiff Todd Ashker moved for an extension
15 of time, to June 25, 2010, to file a motion for review of the
16 Clerk's taxation of costs dated March 10, 2010 on the ground that
17 the filing of his motion for a new trial tolled the statute of
18 limitations. On July 1, 2010, Plaintiff moved for an additional
19 extension of time to file a motion for review of the Clerk's
20 taxation of costs, because the Pelican Bay State Prison (PBSP) law
21 library had refused to photocopy his motion with supporting
22 documentation, and for an order for the PBSP law library to
23 photocopy them. Defendant Doctor Michael Sayre opposes the June 9,
24 2010 motion for an extension of time on the grounds that
25 Plaintiff's motion for a new trial did not toll the time to file a
26 motion for review of taxation of costs and, because the motion is
27 untimely, Plaintiff has waived the right to make it.
28

1 On February 4, 2010, judgment was entered against Defendant
2 Sayre; on February 15, 2010, Plaintiff submitted his bill of costs
3 in the amount of \$14,570.78 to the Clerk of the Court; on March 1,
4 2010, Plaintiff filed a motion for a new trial;¹ on March 4, 2010,
5 Defendant Sayre submitted his objections to Plaintiff's bill of
6 costs; on March 10, 2010, the Clerk entered its notice of taxation
7 of costs in the amount of \$684.14; on May 17, 2010, the Court
8 denied the motion for new trial; on May 28, 2010, Plaintiff filed
9 the first motion for an extension of time to move for review of the
10 Clerk's taxation of costs.

11 Federal Rule of Civil Procedure Rule 54(d)(1) provides that
12 any motion for review of the Clerk's taxation of costs must be
13 filed within seven days of the entry of the Clerk's notice of
14 taxation of costs. When an act may or must be done within a
15 specified time, Federal Rule of Civil Procedure 6(b) allows the
16 court to extend the time, for good cause.

17 Although a party may waive his right to move for review of
18 costs by not filing the motion within the proper time limits, a
19 court has discretion to review an untimely motion, notwithstanding
20 the waiver. Walker v. California, 200 F.3d 624, 626 (9th Cir.
21 1999); United States, ex rel. Meyer v. Horizon Health Corp., 2007
22 WL 518607, *3 (N.D. Cal.) (citing cases for proposition that
23 timeliness requirements of Rule 54(d) are not jurisdictional and
24 holding that court had discretion to consider merits of untimely

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26 ¹Under the "prison mailbox rule," the date of filing is deemed
27 to be the date on which the prisoner delivers the document to the
28 prison authorities for mailing, not the date of receipt by the
court. Houston v. Lack, 487 U.S. 266, 276 (1988).

1 motion for review of clerk's taxation of costs); In re Paoli R.R.
2 Yard PCB Litig., 221 F.3d 449, 459-60 (3rd Cir. 2000) (although
3 untimely objection to the clerk's taxation of costs is waived,
4 court has discretion to review it); Lorenz v. Valley Forge Ins.
5 Co., 23 F.3d 1259, 1261 (7th Cir. 1994) (noting Rule 6(b) of
6 Federal Rules of Civil Procedure permits courts to extend deadlines
7 under all but a few rules, therefore court had discretion to hear
8 untimely objection to clerk's order taxing costs); see also, Bouman
9 v. Block, 940 F.2d 1211, 1237 (9th Cir. 1991) (remanding for
10 district court to determine if good cause was shown for court to
11 exercise discretion to enlarge time for filing bill of costs).

12 Defendant argues that Gary v. Spires, 634 F.2d 772, 773 (4th
13 Cir. 1980), cited by the Ninth Circuit in Walker, supports his
14 position that Plaintiff has waived his right to seek review of
15 costs and that granting his motion for an extension of time would
16 be futile. In Gary, the plaintiffs did not appeal the judgment
17 against them, and the defendants moved for attorneys' fees nearly
18 two months after judgment had become final. Id. The district
19 court awarded attorneys' fees, and the Fourth Circuit reversed on
20 two grounds, one of which was untimeliness. Id. However, the
21 court also reversed on the equitable ground that the plaintiffs
22 were prejudiced by the defendants' late-filed motion because they
23 could not consider the defendants' award of attorneys' fees in
24 their decision not to appeal the judgment. Id.

25 Because Plaintiff is proceeding pro se and without the
26 resources of a law office, the Court finds good cause to allow him
27 to seek review of the Clerk's cost award. Therefore, the Court

1 grants Plaintiff's two motions for an extension of time to file his
2 motion for review of the Clerk's taxation of costs.²

3 In regard to his motion to order the PBSP law library to xerox
4 his motion for review of costs, Plaintiff has failed to provide
5 authority that the Court has jurisdiction over employees of the
6 PBSP law library such that it can issue such an order. Therefore,
7 this motion must be denied.

8 CONCLUSION

9 Accordingly, the Court grants Plaintiff's two motions for an
10 extension of time and denies his motion to order the PBSP law
11 library to photocopy his motion. Within twenty-one days from the
12 date of this Order, Plaintiff shall submit to the Court his motion
13 for review of the Clerk's taxation of costs and a declaration with
14 a list and summary of his taxable costs. There is no need to
15 attach copies of prior orders. Within twenty-eight days
16 thereafter, Plaintiff shall submit another declaration with his
17 supporting documentation. If, at that time, Plaintiff has not
18 received his documents with xeroxed copies from the PBSP xeroxing
19 department, he may request a further extension of time. Defendant
20 shall respond fourteen days after Plaintiff has filed his motion,
21 even if the supporting documentation has not been submitted, and
22

23 ²Although Plaintiff has not filed a motion for expenses under
24 42 U.S.C. § 1988, Defendant argues that Kay v. Ehrler, 499 U.S. 432
25 (1991), which held that attorneys' fees are not available to pro se
26 plaintiffs under § 1988, bars Plaintiff from filing such a motion.
27 The Court notes that the Ninth Circuit, in Burt v. Hennessey, 929
28 F.2d 457, 459 (9th Cir. 1991), held that, although a prevailing pro
se plaintiff may not be awarded attorneys' fees under § 1988, he is
entitled to recover actual expenses reasonably incurred to the
extent that an attorney could have received those expenses.

1 Plaintiff may file a reply fourteen days thereafter. Defendant may
2 file a supplemental opposition within fourteen days after the
3 documentation has been submitted.

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5 IT IS SO ORDERED.

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7 Dated: July 29, 2010

Claudia Wilken

CLAUDIA WILKEN
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 ASHKER,

5 Plaintiff,

6 v.

7 ALAMEIDA ET AL et al,

8 Defendant.

Case Number: CV05-03759 CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,
10 Northern District of California.

11 That on July 29, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies)
12 in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in
13 the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's
14 office.

15 Todd A. Ashker C58191
16 Pelican Bay State Prison
17 Box 7500
18 D1-119
19 Crescent City, CA 95532

20 Dated: July 29, 2010

21 Richard W. Wiekling, Clerk
22 By: Ronnie Hersler, Adm Law Clerk
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