

United States District Court
For the Northern District of California

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E-FILED on 04/28/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JAMAR EVANS,
Plaintiff,
v.
UNKNOWN NAMES OF DEPARTMENT
CORRECTION OFFICERS,
Defendants.

No. C-03-05429 RMW
ORDER DENYING RELIEF FROM
JUDGMENT WITHOUT PREJUDICE
[Re Docket No. 151]

Plaintiff Jamar Evans ("Evans") representing himself moves for relief from this court's order granting defendant County of Santa Clara's (Department of Corrections) (herein "County") motion for summary judgment and judgment thereon. Both were entered on September 11, 2008. For the reasons stated below, the court denies the motion but without prejudice as more fully set forth herein.

I. BACKGROUND

Evans filed the instant lawsuit on December 3, 2003, alleging that six Department of Corrections Officers assaulted him when he was housed at the Santa Clara County Main Jail. Although Evans appeared to be attempting to bring a civil rights action against the officers involved

ORDER DENYING RELIEF FROM JUDGMENT WITHOUT PREJUDICE
No. C-03-05420 RMW
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1 in his booking on April 2, 2003, he was unable to serve the officers because he did not know their
2 identities. On January 24, 2004 the County provided Evans with a copy of a surveillance tape of the
3 alleged incident. On August 5, 2004 the County (Department of Corrections) was added as a
4 defendant. Following some disputes regarding service and the court's eventual order that the
5 marshal serve the County, the County answered Evans' Amended Complaint on July 3, 2006. On
6 January 3, 2007 the court ordered the County to provide plaintiff with the names of the officers
7 involved. On February 1, 2007 the County provided Evans with those names. To date, Evans has
8 not served any of the officers involved for reasons that are not clear although perhaps because he
9 believes that service on the County is sufficient. The case has proceeded slowly in part due to
10 motions and attempted appeals taken by Evans. In any event on February 5, 2008 the County moved
11 for summary judgment with regard to all claims. After Evans did not oppose the motion or show up
12 for the hearing on March 14, 2008, the court granted the County's motion for summary judgment.
13 The court inadvertently did not file its written order on the motion until September 11, 2008.
14 Between the filing of the summary judgment motion by the County on February 5, 2008 and the
15 entry of judgment, Evans filed the following papers:

16 February 20, 2008: Notice of Amended Complaint and Amended Complaint:
17 The papers appear to seek amendment of the complaint to raise only state claims. No
 hearing date was requested in the notice.

18 March 31, 2008: Amendment to Claim for Personal Injuries: The papers
19 appear to be a claim against the County under the California Torts Claim Act.

20 April 2, 2008: Letter to County's attorney: Appears to be a request that
 the County stipulate to sending the case to state court.

21 April 24, 2008: Notice to Adverse Parties of Filing of Notice of Removal
22 and Declaration of Jamar Evans: Appears to be an attempt to remove the case to
 state court.

23 Evans now moves, by way of his motion filed on September 25, 2008, for
24 relief from the summary judgment based on fraud, misrepresentation, or misconduct by an opposing
25 party. Fed. R. Civ. Pro. 60(b)(3). Evans so moves based on the allegation that he never received
26 service of the County's motion for summary judgment. The County's proof of service shows mailing
27 to Evans on February 5, 2008.
28

1 **II. ANALYSIS**

2 **1. Relief for Fraud or Misrepresentation**

3 Under Rule 60(b)(3), the moving party must establish by clear and convincing evidence that
4 a judgment was obtained by fraud, misrepresentation, or misconduct, and that the conduct
5 complained of prevented the moving party from fully and fairly presenting the case. *Lafarge*
6 *Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.* 791 F.2d 1334, 1338 (9th Cir. 1986).

7 In support of his motion, Evans argues that he never received the County's motion for
8 summary judgment, that he has not been in contact with the County since 2007, and that the court
9 has ignored his motions. Thus, he "contends fraud by either the County or the court" and further that
10 "his ability to fully and fairly present his case has been substantially compromised." Mot. For Relief
11 From Judgment Under Rule 60 at 2-3. In its opposition, the County contends that Evans was served
12 with the motion for summary judgment and includes the motion's proof-of-service form, signed and
13 declared to under penalty of perjury by Alexandra K. Weight. Opp. of County of Santa Clara to
14 Mot. for Relief from Judgment or Order under Rule 60, Ex. H.

15 Evans' contention that he never received service of the motion for summary judgment does
16 not make a sufficient case for fraud. Evans' motion asserts, based solely on an alleged failure of
17 service, that "it is clear to Evans that someone . . . has attempted to fraud him into losing his right to
18 recover damages by granting a summary judgment that was never serviced unto him." Mot. For
19 Relief From Judgment Under Rule 60 at 4. Even if there was a failure to serve, this is not clear and
20 convincing evidence of fraud. Evans has therefore not met his burden under Rule 60(b)(3) to justify
21 relief.

22 **2. Relief for Excusable Neglect**

23 Evans does not seek relief based on Rule 60(b)(1). Nonetheless, the court will consider
24 whether Evans' allegedly not having received service might constitute excusable neglect under that
25 rule.

26 The court must consider four factors to determine whether conduct falls within Rule
27 60(b)(1): "(1) the danger of prejudice to the non-moving party, (2) the length of delay and its
28 potential impact on judicial proceedings, (3) the reason for the delay, including whether it was

1 within the reasonable control of the movant, and (4) whether the moving party's conduct was in good
2 faith." *Mendez v. Knowles*, 535 F.3d 973, 980 (9th Cir. 2008) (citing *Pioneer Investment Services*
3 *Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993)).

4 Some circuits have interpreted these factors to extend excusable neglect to a particular set of
5 factual situations. *See Prizevolts v. Indiana Bell Telephone Co.*, 76 F.3d 132 (7th Cir. 1996)
6 (concluding that excusable neglect "refers to the missing of a deadline as a result of such things as
7 misrepresentations by judicial officers, lost mail, and plausible misinterpretations of ambiguous
8 rules.") The Ninth Circuit, though, requires the district court, with its more intimate knowledge of
9 the case, to weigh the *Pioneer* factors to determine whether particular conduct constitutes excusable
10 neglect. *Mendez v. Knowles*, 535 F.3d 973, 982 (9th Cir. 2008). In *Mendez*, a mailed notice of
11 appeal had arrived late, but the court found the delay excusable, finding that counsel may still seek
12 relief, even when they decide to "rely on the vagaries of the mail." In *Briones v. Riveria Hotel &*
13 *Casino*, 116 F.3d 379, 382 (9th Cir. 1997) the court held that a pro se plaintiff's failure to timely
14 respond to a motion to dismiss did not necessarily foreclose finding that his neglect was excusable
15 and that judgment against him thus should be set aside.

16 Assuming that Evans never received any notice of the motion for summary judgment in the
17 mail, the *Pioneer* factors, and the ruling in *Mendez*, weigh in his favor. In this case it is opposing
18 counsel, not Evans, who purportedly has relied on the "vagaries of the mail." Additionally, the
19 prejudice to the County is not significantly greater than it would have been if Evans had received the
20 motion. It is possible, therefore, on a sufficient factual showing, for Evans to make out a claim for
21 relief under Rule 60(b)(1) for excusable neglect.

22 However, Evans' motion fails to make such a sufficient factual showing. He has not, for
23 example, submitted sworn testimony stating that he did not receive any notice of the motion for
24 summary judgment. Furthermore, he does not explain how, when service by mail has reached him
25 before, he failed to receive this particular notice. The County, on the other hand, has submitted a
26 signed proof of service form, which strongly suggests that the notice of motion was properly
27 delivered to, and received by, Evans. In the absence of any evidence that Evans did not receive the
28 notice, and some explanation for the unusual circumstances, this court cannot grant the motion for

1 relief under Rule 60(b). Therefore, it is denied without prejudice to Evans' filing and serving a
2 renewed motion making a sufficient showing of mistake, inadvertence or excusable neglect
3 including a sworn affidavit or declaration explaining that he did not receive notice of the motion,
4 how frequently he checked hhis mail in February 2008, what attempts he made to contact the County
5 or court in 2008 and any other facts he has justifying relief. The renewed motion must be filed and
6 served by May 29, 2009.

7 **III. ORDER**

8 For the reasons stated above, the court denies Evans' motion for relief from judgment
9 without prejudice to a renewed motion meeting the requirements Rule 60(b)(1) of this order.

10
11 DATED: 04/28/09



RONALD M. WHYTE
United States District Judge

1 **Notice of this document has been sent to:**

2 **Plaintiff:**

3 Jamar James Evans
4 P. O. Box 25
5 Atwater, CA 95301
6 209-358-8909

7 **Counsel for Defendants:**

8 Neysa A. Fligor neysa.fligor@cco.sccgov.org

9 Counsel are responsible for distributing copies of this document to co-counsel that have not
10 registered for e-filing under the court's CM/ECF program.

11 **Dated:** 04/28/09

12 JAS
13 **Chambers of Judge Whyte**

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