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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STEVEN A. RUBIN,)	Civil No. 10-cv-407-L(RBB)
)	
Plaintiff,)	ORDER ON ORDER TO SHOW
)	CAUSE
v.)	
)	
KAISER FOUNDATION HEALTH)	
PLAN, INC.,)	
)	
Defendant.)	

On May 12, 2010 the court issued an order ordering the parties to respond and address Plaintiff's untimely amended complaint. Both sides filed a response. For the reasons which follow, the amended complaint filed May 10, 2010 is rejected. Plaintiff's request for enlargement of time to file an amended complaint is granted.

On March 15, 2010 Defendant filed a motion to dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff did not file an opposition. Instead, he filed a notice of non-opposition stating that he intended to file an amended complaint. Plaintiff's amended complaint was filed on May 10, 2010. The last date for filing an amended complaint as a matter of course was April 5, 2010. See Fed. R. Civ. P. 15(a)(1)(B).

Because the amended complaint was untimely, the court ordered Plaintiff to show cause why the amended complaint should not be stricken, and Defendant to inform the court whether it opposed the filing of the untimely amended complaint. Plaintiff filed a response requesting an

1 enlargement of time to allow the amended complaint to stay on file, and Defendant filed a
2 response stating its opposition to the amended complaint because it was untimely and because it
3 did not address the defects in the original complaint, which were raised in the pending motion to
4 dismiss.

5 Federal Rule of Civil Procedure 6(b) provides district courts with discretion to grant
6 extensions of time. This is so even when the request is made after the expiration of the time
7 period to be extended, provided the request is made by motion and the delay was caused by
8 excusable neglect. Fed. R. Civ. P. 6(b)(1)(B).

9 *Pioneer Investment Services Company v. Brunswick Associates* established a balancing
10 test to determine whether an untimely filing is due to excusable neglect. 507 U.S. 380, 395
11 (1993); *Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004) (*en banc*). The determination
12 whether neglect is excusable is an equitable one that depends on at least four factors:

13 (1) the danger of prejudice to the non-moving party, (2) the length of delay and its
14 potential impact on judicial proceedings, (3) the reason for the delay, including
15 whether it was within the reasonable control of the movant, and (4) whether the
moving party's conduct was in good faith.

16 *Pincay*, 389 F.3d at 855 (citing *Pioneer*, 507 U.S. at 395).

17 Plaintiff's counsel explained that the delay in filing the amended complaint was largely
18 caused by a knee injury and the need to take pain medication, which kept her out of the office for
19 more than two months. Upon her return she erroneously following California procedural rules
20 rather than federal rules pertaining to amendment.

21 Defendant argues that it was prejudiced because the parties discussed the filing of an
22 amended complaint before the due date for Defendant's response to avoid the expense of motion
23 briefing, and that Plaintiff's dilatoriness caused it to incur attorneys' fees for preparing a motion
24 to dismiss. This argument is rejected, because under Rule 15(a)(1), Plaintiff had until 21 days
25 after a Rule 12(b) motion to file an amended complaint as a matter of course. The fact that
26 Plaintiff did not amend the complaint before Defendant's due date for a 12(b) motion is therefore
27 irrelevant to the issue of prejudice resulting from delay.

28 //

1 Defendant does not maintain that it has been prejudiced by Plaintiff's delay after the time
2 to amend as a matter of course has expired. In addition, Defendant does not contend that
3 Plaintiff acted in bad faith during this time. Based on the foregoing, Plaintiff has established
4 good cause and excusable neglect sufficient to grant his request for enlargement of time.

5 However, because it appears that the amended complaint does not address the issues
6 raised in Defendant's motion to dismiss and in the interests of judicial efficiency, the amended
7 complaint Plaintiff filed May 10, 2010 is **REJECTED**. No later than seven (7) days after this
8 order is filed, counsel for both parties shall meet and confer in person regarding the remaining
9 defects in the amended complaint. Plaintiff is granted twenty-one (21) days from the date this
10 order is filed to either file an opposition to Defendant's motion to dismiss or an amended
11 complaint which addresses the issues raised in the motion to dismiss.

12 **IT IS SO ORDERED.**

13
14 DATED: May 24, 2010

15 
16 M. James Lorenz
United States District Court Judge

17 COPY TO:

18 HON. RUBEN B. BROOKS
UNITED STATES MAGISTRATE JUDGE

19 ALL PARTIES/COUNSEL
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