

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
SOUTHERN DISTRICT OF CALIFORNIA**

PERRY TALLEY,
CDCR #D-91162,

Plaintiff,

vs.

GEORGE NEOTTI; S. PAULEY;
RATHERFUR; J. WALKER,

Defendants.

Civil No. 10-0426 BTM (JMA)

**ORDER VACATING JUDGMENT
PURSUANT TO FED.R.CIV.P. 60(b)
AND GRANTING PLAINTIFF'S
MOTION FOR EXTENSION OF
TIME TO FILE SECOND
AMENDED COMPLAINT**

[ECF No. 11]

Perry Talley ("Plaintiff"), formerly incarcerated at Richard J. Donovan Correctional Facility ("RJD") in San Diego, California, is proceeding pro se and has initiated this civil action pursuant to 42 U.S.C. § 1983. At the time he filed his Complaint, Plaintiff did not prepay the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [ECF No. 2], as well as a Motion for Appointment of Counsel [ECF No. 3].

On May 3, 2010, the Court granted Plaintiff's IFP Motion, but denied his Motion for Appointment of Counsel and dismissed his Complaint pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *See* May 3, 2010 Order [ECF No. 4]. Plaintiff was granted 45 days leave, however, to amend his pleading. *Id.* at 6; *see also Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000)

1 (en banc) (“[A] district court should grant leave to amend even if no request to amend the
2 pleading was made, unless it determines that the pleading could not possibly be cured.”)
3 (citations omitted).) On that same day, the Court received Plaintiff’s change of address pursuant
4 to S.D.CivLR 83.11(b) indicating he had been transferred from RJD to Kern Valley State Prison
5 (“KVSP”) as of April 26, 2010 [ECF No. 5].

6 Plaintiff filed a First Amended Complaint, but on August 3, 2010, the Court again found
7 that his First Amended Complaint failed to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2) and
8 1915A [ECF No. 7]. Plaintiff was granted an additional 60 days leave in which to file a Second
9 Amended Complaint, but cautioned that his failure to do so would result in dismissal of the
10 entire action. *See* Aug. 3, 2010 Order at 4. Plaintiff failed to respond; therefore, on October 25,
11 2010, the Court dismissed the action without prejudice for failure to state a claim, and directed
12 the Clerk to enter judgment accordingly [ECF Nos. 8, 9].

13 On May 11, 2011, Plaintiff submitted a document entitled “Ex parte Request to File Late
14 Second Amended Complaint,” which the Court accepted for filing in light of Plaintiff’s pro se
15 status. *See Eldridge v. Block*, 832 F.2d 1132, 1136 (9th Cir. 1987) (““Strict time limits ... ought
16 not to be insisted upon’ where restraints resulting from a pro se ... plaintiff’s incarceration
17 prevent timely compliance with court deadlines.”) (citing *Tarantino v. Eggers*, 380 F.2d 465,
18 468 (9th Cir. 1967)). In his request, Plaintiff moves the Court to set aside the judgment based
19 on “excusable negligence.” *See* Pl.’s Mot. at 1. Specifically, Plaintiff claims he has been on
20 lockdown at KVSP and was unable to access the prison library. Plaintiff avers he has cured the
21 deficiencies of pleading previously identified by the Court, and if granted an opportunity to do
22 so, will be able to file a Second Amended Complaint within 30 days of the Court’s Order. *Id.*
23 at 2.

24 **I. STANDARD OF REVIEW**

25 Pursuant to Federal Rule of Civil Procedure 60(b), and as applicable here, “[o]n motion
26 and just terms, the court may relieve a party ... from a final judgment, order, or proceeding for
27 ... (1) mistake, inadvertance, surprise, or excusable neglect; or (6) any other reason that
28 justifies relief.” FED.R.CIV.P. 60(b)(1), (6). “Rule 60 is ‘remedial in nature and . . . must be

1 liberally applied.” *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001)
2 (quoting *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984)). “A motion under Rule 60(b) must
3 be made within a reasonable time –and for reasons (1), (2), and (3) no more than one year after
4 the judgment or order or the date of the proceeding.” FED.R.CIV.P. 60(c)(1).

5 “Excusable neglect ‘encompass[es] situations in which the failure to comply with a filing
6 deadline is attributable to negligence,’ and includes ‘omissions caused by carelessness.’”
7 *Lemoge v. United States*, 587 F.3d 1188, 1192 (9th Cir. 2009) (quoting *Pioneer Inv. Servs. Co.*
8 *v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388, 394 (1993)). To determine whether a
9 party’s failure to meet a deadline constitutes “excusable neglect,” the court applies a four-factor
10 equitable test. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010). The
11 court must consider: “(1) the danger of prejudice to the opposing party; (2) the length of the
12 delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether
13 the movant acted in good faith.” *Id.* (citing *Pioneer*, 507 U.S. at 395; *Briones v. Riviera Hotel*
14 *& Casino*, 116 F.3d 379, 381 (9th Cir. 1997) (adopting four-part test for consideration of Rule
15 60(b) motions).

16 Here, Plaintiff claims the conditions of his confinement at KVSP prevented him from
17 complying with the Court’s deadlines regarding amendment. Because his case was in the initial
18 screening stages, no party has been served, and the Court cannot conceive of any prejudice to
19 Defendants. Moreover, Plaintiff has sworn, under penalty of perjury, that the reason for his
20 delay were penological circumstances beyond his control, and nothing in either the history of
21 this case or Plaintiff’s current request suggests bad faith. See Pl.’s Mot. at 2; *Ahanchian*, 624
22 F.3d at 1261.

23 Accordingly, the Court finds all four *Pioneer/Briones* factors weigh in favor of setting
24 aside the judgment entered on October 25, 2010 and simultaneously granting Plaintiff an
25 extension of time in which to file his Second Amended Complaint. See *Balistreri v. Pacifica*
26 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990) (court has a “duty to ensure that pro se litigants
27 do not lose their right to a hearing on the merits of their claim due to ... technical procedural
28 requirements.”); *Bennett v. King*, 205 F.3d 1188, 1189 (9th Cir. 2000) (reversing district court’s

1 dismissal of prisoner's amended pro se complaint as untimely where mere 30-day delay was
2 result of prison-wide lockdown).¹

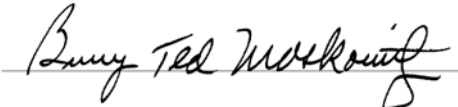
3 **II. CONCLUSION AND ORDER**

4 Accordingly, the Court hereby **VACATES** the Judgment entered in this case on October
5 25, 2010 and **GRANTS** Plaintiff's ex parte Motion to Extend Time to file a Second Amended
6 Complaint [ECF No. 11]. Plaintiff's Second Amended Complaint must be received by the Court
7 no later than **Monday, June 27, 2011**. Moreover, Plaintiff is again cautioned that his Second
8 Amended Complaint must address *all* the deficiencies of pleading previously identified in the
9 Court's May 3, 2010 and August 3, 2010 Orders, and must be complete in itself without
10 reference to his previous pleadings. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc. v.*
11 *Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989). If Plaintiff fails to amend
12 within that time, the Court will re-enter its judgment for Defendants.

13 The Clerk of the Court is further directed to re-open this civil action and forward Plaintiff
14 a copy of its approved form § 1983 Civil Rights Complaint for his use and reference.

15 IT IS SO ORDERED.

16
17 DATED: May 19, 2011

18 
19 Honorable Barry Ted Moskowitz
20 United States District Judge

21
22
23
24
25
26
27 ¹ When an act must be done within a specified time, a court may extend the time for the party
28 to act "on motion made *after* the time has expired if the party failed to act because of excusable neglect." FED.R.CIV.P. 6(b)(1)(B) (emphasis added). The test for whether neglect is excusable under Rule 6(b)(1)(B) is the same as under Rule 60(b)(1). *See Pioneer*, 507 U.S. at 392-93; *Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 825 n.4 (9th Cir. 1996).