UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

A.A., a minor, by and through his Guardian ad Litem, LORENA ARREOLA,

Plaintiff,

v.

UNITED STATES OF AMERICA, and DOES 1 through 20, inclusive,

Defendants.

Case No.: 3:15-cv-01244-H-WVG

ORDER:

1) **GRANTING DEFENDANT'S MOTION TO RECONSIDER, and**
2) **GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

[Doc. Nos. 19, 32]

On June 3, 2015, Plaintiff A.A., through his mother and guardian, Lorena Arreola, filed this action, asserting a single cause of action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671, et seq., 1346(b), et seq., 1367, 1402(b), et seq. (Doc. No. 1.) Plaintiff alleges that Ms. Arreola received negligent prenatal care at Vista Community Clinic, a community health center supported by the Department of Health and Human Services ("HHS"). (Id. at 2-6, ¶¶ 4, 12-29.)

On December 9, 2016, Defendant United States of America filed a motion for summary judgment, arguing that Plaintiff's claim was barred by the statute of limitations

and the rule requiring plaintiffs to first present their claims to defendant agencies. (Doc. No. 19.) On February 9, 2017, the Court denied Defendant's motion for summary judgment. (Doc. No. 28.) In its summary judgment order, the Court held that there was a triable issue of material fact as to whether the claim was properly presented to the agency. (Id. at 8-9.) And construing the facts in the light most favorable to the non-moving party, the Court determined that the claim may have been presented only a day late. (Id. at 10.) The Court equitably tolled the statute of limitations, finding sufficient diligence and extraordinary circumstances to justify one day of equitable tolling. (Id. at 11.)

On March 7, 2017, Defendant filed a motion for reconsideration, arguing that the Court's order on equitable tolling was inconsistent with the Ninth Circuit's recent decision in Okafor v. United States, 846 F.3d 337 (9th Cir. 2017). (Doc. No. 32.) Plaintiff filed an opposition on March 27, 2017. (Doc. No. 36.) Defendant filed a reply on April 3, 2017. (Doc. No. 37.) The Court, pursuant to its discretion under Local Rule 7.1(d)(1), determines that the motion is fit for resolution without oral argument, submits the motion on the papers, and vacates the hearings set for April 10, 2017. For the reasons that follow, the Court grants Defendant's motion for reconsideration. Accordingly, the Court grants Defendant's previous motion for summary judgment.

Background

Plaintiff A.A. brings this action to recover damages for injuries he allegedly suffered as a result of being born prematurely on June 6, 2007. Plaintiff filed this action on June 3, 2015, eight years after his birth, through his mother and guardian Lorena Arreola. (Doc. No. 1.) During her pregnancy with A.A., Ms. Arreola sought prenatal care at Vista Community Clinic ("VCC"), a community health center supported by HHS. (Doc. No. 19-2 at 10.) Plaintiff alleges that VCC provided negligent care to Ms. Arreola, causing A.A. to be born four months before his due date. (Doc. Nos. 1 at 5-6, ¶¶ 23-29; 19-2 at 41, 59.)

By way of background, Ms. Arreola had two miscarriages prior to her pregnancy with A.A., one at approximately 12 weeks, and the second at approximately 17.5 weeks. (Doc. No. 19-2 at 7-8.) Following her second miscarriage, Ms. Arreola was told that she

had a weak cervix and should consider getting a cerclage for future pregnancies. (Id. at 9.) A cerclage is a technique whereby a suture is placed in the cervix to prevent the mother from going into labor and delivering too early. (Id. at 43-44.) According to her doctor at VCC, the window to perform an elective cerclage is when a patient is between 14 and 18 weeks of gestation. (Id. at 45.) Ms. Arreola was already at 20 weeks and two days of gestation when she presented at VCC and received an ultrasound. (Id.) On May 22, 2017, Ms. Arreola's doctor and another specialist ruled out an emergency cerclage based on an ultrasound showing Ms. Arreola's cervix to be thick and closed. (Id. at 43; 48-49.) A.A. was born prematurely on June 6, 2007. (Id. at 59.)

On June 4, 2009, Plaintiff's law firm mailed a claim to HHS for $20 million in damages under the FTCA. (Doc. Nos. 20-2, ¶ 1; 19-2 at 59-64.) The claim was sent by certified mail to the "Parklawn Building," in Rockville Maryland. (Doc. No. 19-2 at 59, 62.) The claim lists 500 Fishers Lane as the HHS address (id. at 59), but the certified mail receipt only lists "Parklaw [sic] Bldg." with no street address (id. at 62). Plaintiff submitted a declaration stating that the claim was sent to 5600 Fishers Lane, the intended address, as opposed to 500 Fishers Lane, the address listed on the claim. (Doc. Nos. 20 at 3; 20-1 ¶ 3.)

Regardless of the address, the HHS claims office had left the Parklawn Building four years before (Doc. No. 19-3, ¶ 4), but divisions of HHS still operated in the building in 2009. (Doc. No. 31 at 7.) The claim was sent from San Diego, California to Rockville, Maryland after 3:00 p.m. on Thursday, June 4, 2009. (Doc. Nos. 19-2 at 61-62; 20-2 ¶ 1.) The two-year time period would have ended on June 7, 2009, which was a Sunday. FED. R. CIV. P. 6(a)(1) (2009); see also, Hart v. United States, 817 F.2d 78, 80 (9th Cir. 1987) (Rule 6(a) dictates how to compute time under the FTCA's statute of limitations). The period would then have run until the end of the next non-holiday on Monday June 8, 2009. FED. R. CIV. P. 6(a)(3) (2009).

In attempting to timely file the claim, Plaintiff's counsel relied on the United States Postal Service website, which purportedly stated that first class mail is delivered in "3 business days or less." (Doc. No. 20 at 5.) The return receipt indicates that the claim was

delivered to the "Parklaw [sic] Bldg." on Tuesday, June 9, 2009. (Doc. No. 19-2 at 62.) The delivery was one day late.[1] FED. R. CIV. P. 6(a) (2009).

In sending the claim to an out-of-date address, Plaintiff's counsel relied on a letter he had received from HHS five years prior for a different lawsuit against VCC. (Doc. No. 20-1, ¶ 3.) The letter informed counsel that because VCC is a federally supported health facility, the FTCA is the exclusive remedy for injuries caused by employees of the health center. (Doc. No. 20 at 8.) The letter also informed counsel that the FTCA provides a two year statute of limitations. (Id.)

Defendant contends that HHS never received Plaintiff's claim. (Doc. No. 19-3 ¶ 6.) The parties agree that HHS never sent Plaintiff an acknowledgment of the claim. (Id. at ¶ 7; Doc. No. 1 at 2, ¶ 7.) After attempting to submit the claim in 2009, Plaintiff waited six years before filing this action. (Id., ¶¶ 6-8; Doc. No. 26, ¶ 2.)

Discussion

I. Legal Standards

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, a district court may reconsider and amend a previous order. Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000). "Under Rule 59(e), a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999) (citing School Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir.1993)).

II. Analysis

The Supreme Court has held "that the FTCA's time bars are nonjurisdictional and subject to equitable tolling." United States v. Kwai Fun Wong, 135 S. Ct. at 1638. "Generally, a litigant seeking equitable tolling bears the burden of establishing two

[1] If the mail went out after 3:00 p.m. on Thursday, and was delivered in three business days, it would have arrived on Monday June 8, 2009. If the mail went out on Friday, it would be untimely even if delivered in three business days. It is unknown whether the discrepancy in the address contributed to the delay.

elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." Credit Suisse Sec. (USA) LLC v. Simmonds, 132 S. Ct. 1414, 1419 (2012) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

With regard to the diligence element, a litigant pursues his rights diligently if he puts forth "the effort that a reasonable person might be expected to deliver under his or her particular circumstances." Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1052 (9th Cir. 2013), aff'd and remanded sub nom. United States v. Kwai Fun Wong, 135 S. Ct. 1625 (2015) (quoting Doe v. Busby, 661 F.3d 1001, 1015 (9th Cir. 2011). "Central to the analysis is whether the plaintiff was 'without any fault' in pursuing his claim." Kwai Fun Wong v. Beebe, 732 F.3d at 1052 (quoting Fed. Election Comm'n v. Williams, 104 F.3d 237, 240 (9th Cir. 1996)).

With regard to the extraordinary circumstances element of equitable tolling, a litigant must show that "extraordinary circumstances ma[de] it impossible to file [the document] on time." Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009) (citations omitted). Extraordinary circumstances do not include "a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline." Holland v. Florida, 560 U.S. 631, 651 (2010) (internal quotation marks and citations omitted). Instead, litigants must generally show that they were "unable to file timely [documents] as a result of external circumstances beyond their direct control." Kwai Fun Wong v. Beebe, 732 F.3d at 1052 (quoting Harris v. Carter, 515 F.3d 1051, 1055 (9th Cir. 2008)).

The Court originally denied summary judgment on the statute of limitations issue. (Doc. No. 28.) Construing the facts in the light most favorable to the non-moving party, the Court determined that Plaintiff's claim may have been presented only a day late. (Id. at 10.) The Court found sufficient diligence and extraordinary circumstances to justify one day of equitable tolling. (Id. at 11.)

In its motion for reconsideration, Defendant argues that the Court's order was inconsistent with the Ninth Circuit's recent decision in Okafor v. United States, 846 F.3d

337 (9th Cir. 2017). (Doc. No. 32.) In Okafor, the plaintiff's attorney mailed a claim for overnight delivery the day before the claim was due. The claim arrived one day late, and the district court refused to equitably toll the statute of limitations. The Ninth Circuit affirmed the district court, explaining that a "delivery delay does not constitute the kind of extraordinary circumstance that [the Ninth Circuit has] found to justify equitable tolling." Id. at 340. The court also explained "that an attorney's filing by mail shortly before a deadline expires constitutes routine negligence." Id. (citing Luna v. Kernan, 784 F.3d 640, 646 (9th Cir. 2015)). The court "do[es] not recognize [such] run-of-the-mill mistakes as grounds for equitable tolling." Id. (citing Luna, 784 F.3d at 647).

Okafor was not yet published when Defendant filed its motion to dismiss. Defendant cited the case in its reply brief, but Plaintiff never had a chance to address Okafor in the briefing on the motion for summary judgment. Furthermore, Defendant had argued that the statute of limitations had been missed by six years and that the Court did not have jurisdiction to hear the case because the claim had never been properly presented. Because the parties were focused on those issues, they did not reach Okafor and its similarities to this case. Now, however, the parties have fully briefed the Court on Okafor, operating under the Court's assumption that the statute of limitations may have only been missed by one day.

Under the Ninth Circuit's "law of the circuit" rule, courts are bound by a prior Ninth circuit decision unless that decision is "clearly irreconcilable with intervening Supreme Court precedent." Biggs v. Sec'y of Cal. Dep't of Corr. & Rehab., 717 F.3d 678, 689 (9th Cir. 2013). The Court has seen no intervening precedent contradicting the very recent Okafor decision. And the relevant facts at issue here are very similar to those of Okafor. In each case, the plaintiff relied on a mail delivery service to deliver a claim within a certain period of time, and each claim was delivered one day late. Under the clear language of Okafor, this cannot be considered an extraordinary circumstance for purposes of equitable tolling. Okafor, 846 F.3d at 340 (a one-day "delivery delay does not constitute the kind of extraordinary circumstance that [the Ninth Circuit has] found to justify equitable tolling.").

Plaintiff has offered no other potential extraordinary circumstance that would have prevented him from timely presenting his claim. Since an extraordinary circumstance is required for equitable tolling, the Court cannot toll the statute of limitations in this case. Accordingly, the Court grants Defendant's motion for reconsideration and grants Defendant's motion for summary judgment.

Conclusion

The Court grants Defendant's motion for reconsideration. (Doc. No. 32.) The Court grants Defendant's motion for summary judgment as to Plaintiff's sole cause of action. (Doc. No. 19.) The clerk is directed to close the case.

IT IS SO ORDERED.

DATED: April 4, 2017

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT