

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-00833-ZLW

ANTHONY E. McAFEE SR.,

Applicant,

v.

WARDEN PLOUGH, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JUL 16 2009

GREGORY C. LANGHAM
CLERK

ORDER DENYING MOTION TO RECONSIDER

This matter is before the Court on the *pro se* pleading Applicant Anthony E. McAfee Sr. filed on July 2, 2009. Although the pleading is titled, "Applicants [sic] Reply to Respondents [sic] Pre-Answers [sic] Response," the Court construes the pleading as a Motion to Reconsider the Court's June 24, 2009, Order of Dismissal. The Court must construe the Motion liberally because Mr. McAfee is proceeding *pro se*. **See *Haines v. Kerner***, 404 U.S. 519, 520-21 (1972); ***Hall v. Bellmon***, 935 F.2d 1106, 1110 (10th Cir. 1991). For the reasons stated below, the Motion to Reconsider will be denied.

The Court denied the 28 U.S.C. § 2254 Application and dismissed the action as barred by the one-year limitation period in 28 U.S.C. § 2244(d). The reasons for the dismissal are explained in detail in the June 24, 2009, Order of Dismissal.

A litigant subject to an adverse judgment, and who seeks reconsideration by the district court of that adverse judgment, may "file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment

pursuant to Fed. R. Civ. P. 60(b).” ***Van Skiver v. United States***, 952 F.2d 1241, 1243 (10th Cir. 1991). A postjudgment motion filed within ten days of a final judgment should be construed as a Rule 59(e) motion. ***Id.***; **see also *Dalton v. First Interstate Bank***, 863 F.2d 702, 703 (10th Cir. 1988). A motion to reconsider filed more than ten days after the final judgment in an action should be considered pursuant to Rule 60(b). ***Van Skiver***, 952 F.2d at 1243.

Final decisions are those that end the litigation on the merits and leave nothing for the district court to do except execute the judgment. ***Van Cauwenberghe v. Biard***, 486 U.S. 517, 521-22 (1988); ***In re Durability, Inc.***, 893 F.2d 264, 265 (10th Cir. 1990). “It is well settled that an order dismissing the action . . . is a final judgment.” ***Sherr v. Sierra Trading Corp.***, 492 F.2d 971, 978 (10th Cir. 1974). The June 24, 2009, Order denied the Application and dismissed the action. The instant Motion to Reconsider was filed on July 2, 2009. Applicant filed the Motion within ten days of the final judgment in the instant action. **See** Fed. R. Civ. P. 6(a). The Motion, therefore, properly is filed as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e).


A motion to alter or amend that reiterates issues originally raised in the application and that seeks to challenge the legal correctness of the court’s judgment by arguing that the district court misapplied the law or misunderstood the litigant’s position correctly is asserted pursuant to Fed. R. Civ. P. 59(e). **See *Van Skiver***, 952 F.2d at 1244. Upon consideration of the Motion and the entire file, the Court finds and concludes that Mr. McAfee fails to demonstrate some reason why the Court should alter or amend the June 24, 2009, Order of Dismissal in this action. Even if the Court were

to consider the time tolled from March 26, 2005, until July 2005, as Mr. McAfee requests in the Motion, the Application still is time-barred under 28 U.S.C. § 2244(d). Therefore, the Motion will be denied. Accordingly, it is

ORDERED that the pleading, (Doc. # 9), filed July 2, 2009, is construed as filed pursuant to Fed. R. Civ. P. 59(e) and is denied.

DATED at Denver, Colorado, this 15 day of July, 2009.

BY THE COURT:


ZITA L. WEINSHIENK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

Civil Action No. 09-cv-00833-ZLW

Anthony E. McAfee
Prisoner No. 44338
CTCF
PO Box 1010
Cañon City, CO 81215- 1010

Jonathan P. Fero
Assistant Attorney General
DELIVERED ELECTRONICALLY

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on 7/16/09

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk