

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-03150-LTB

BRADLEY D. BROSWICK,

Plaintiff,

v.

ARISTEDES W. ZAVARAS, et al.,

Defendants.

ORDER DENYING FED. R. CIV. P. 60(b) MOTION

Plaintiff, Bradley D. Brosnick, is a prisoner in the custody of the Colorado Department of Corrections who currently is incarcerated at the correctional complex in Buena Vista, Colorado. Mr. Brosnick, acting *pro se*, filed a pleading titled "Motion for Relief From Judgment" on December 6, 2011. The Court must construe the Motion liberally because Mr. Brosnick is a *pro se* litigant. 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 will be denied.

The Court dismissed this action without prejudice on May 19, 2011, after Mr. Brosnick failed within the time allowed to file a Second Amended Complaint.

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). This case was dismissed on May 19, 2011, because Mr. Broswick failed to comply with the Court's order to file an Amended Complaint within the time allowed.

A motion to reconsider filed more than twenty-eight days after the final judgment in an action should be considered pursuant to Rule 60(b). See *Id.* (stating that a motion to reconsider should be construed as filed pursuant to Rule 59(e) when it is filed within the ten-day limit (limit effective prior to December 1, 2009) set forth under Rule 59(e)). Mr. Broswick's request was filed over twenty-eight days after the Court's Order of Dismissal was entered on May 19, 2011. Therefore, the Motion for Relief properly is filed pursuant to Fed. R. Civ. P. 60(b).

Relief under Rule 60(b) is appropriate only in extraordinary circumstances. See *Massengale v. Oklahoma Bd. of Examiners in Optometry*, 30 F.3d 1325, 1330 (10th Cir. 1994). Upon consideration of the Motion and the entire file, the Court finds that the Mr. Broswick fails to demonstrate some reason why the Court should reconsider and vacate the May 19 Order of Dismissal.

Mr. Broswick states in the Motion that he attempted to file a timely amended complaint, but a "John Doe" correctional staff member in the segregated housing unit where he was housed refused his requests to use the inmate legal mailing system. Mr. Broswick contends that starting on May 11, 2011, he requested access to the legal mailing system, but he was not allowed to mail the Second Amended Complaint to the Court until May 17, 2011. Based on the DOC stamp placed on the back of the envelope, which contained Mr. Broswick's Amended Complaint and was received by the Court on May 20, 2011, Mr. Broswick's Amended Complaint was received by DOC staff for mailing to the Court on May 17, 2011.

Mr. Broswick, however, concedes that he received the May 19, 2011 Order of Dismissal and does not indicate that his receipt of the Order was delayed. He also concedes that he knew the Second Amended Complaint was due on May 13, 2011. Mr. Broswick, therefore, waited almost seven months to inform the Court of his alleged inability to file the Second Amended Complaint within the time allowed. Such a delay does not support a finding for extraordinary circumstances.

The Court also notes that the action was dismissed without prejudice and that Mr. Broswick was instructed in the Order of Dismissal he could proceed with his claims in a new action if he so desired. Mr. Broswick, however, has not filed a new action addressing the same claims. Accordingly, it is

ORDERED that the Motion for Relief from Judgment (Doc. No. 19) filed on December 6, 2011, is denied.

DATED at Denver, Colorado, this 13th day of December, 2011.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court