

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CLINTON BROOKS JR.,)
)
 Plaintiff,)
)
 v.)
)
 LINCOLN POLICE DEPARTMENT,)
 OFFICER SCHMIDT, #1610, In their)
 individual capacities, OFFICER)
 HITE, #1643, In their individual)
 capacities, and OFFICER)
 PICKERING, #1425, In their)
 individual capacities,)
)
 Defendants.)

4:11CV3114

**MEMORANDUM
AND ORDER**

This matter is before the court on Plaintiff's Notice of Appeal (filing no. 8) and Motion for Leave to Appeal In Forma Pauperis (filing no. 9). The court dismissed Plaintiff's claims in this matter on September 29, 2011. (Filing Nos. 6 and 7.) On October 31, 2011, Plaintiff filed his Notice of Appeal. (Filing No. 8.) Therefore, 32 days elapsed between the court's Judgment and the filing of Plaintiff's Notice of Appeal.

Federal Rule of Appellate Procedure 4 ("Rule 4") governs the time in which a notice of appeal must be filed. As set forth in Rule 4, a notice of appeal "must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(A). This time limit is mandatory and jurisdictional, and failure to file a timely notice of appeal deprives an appellate court of jurisdiction. *See, e.g., Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 462-64 (8th Cir. 2000)* (citations omitted). However, Rule 4 permits an extension of time in which to file an appeal if (1) such extension is requested within the "extension period," i.e., within 30 days after expiration of the appeal deadline; and (2) regardless of the "extension period," the appellant shows excusable neglect or good cause for the delayed filing of

the appeal. [Fed. R. App. P. 4\(a\)\(5\)\(A\).](#)

In this matter, Plaintiff did not seek an extension of the time in which to file a notice of appeal. Regardless, an extension under Rule 4 would still be appropriate, provided that the requisite showing of excusable neglect or good cause has been made. The Eighth Circuit has clarified “excusable neglect” as follows:

[T]he determination ... is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission. ... [T]hose circumstances ... include the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

[Lowry](#), 211 F.3d at 462 (citation and quotation omitted).

Here, the reasons set forth by Plaintiff for his failure to timely file are his extensive health problems. (Filing No. [12](#).) The court finds that Plaintiff has shown good cause for his failure to timely file his Notice of Appeal and his appeal is deemed timely filed.

Also pending is Plaintiff’s Motion for Leave to Appeal In Forma Pauperis. (Filing No. [9](#).) Plaintiff is not a prisoner and has previously been granted leave to proceed IFP in this matter. (Filing No. [5](#).)

As set forth in [Federal Rule of Appellate Procedure 24\(a\)\(3\)](#):

(a) Leave to Proceed in Forma Pauperis

(3) Prior Approval. A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court – before or after the notice of appeal is filed –

certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. In that event, the district court must state in writing its reasons for the certification or finding.

The court finds that because Plaintiff proceeded IFP in the district court, he may now “proceed on appeal in forma pauperis without further authorization.”

IT IS THEREFORE ORDERED that:

1. Plaintiff’s Notice of Appeal is deemed timely filed.
2. Plaintiff’s Motion for Leave to Appeal In Forma Pauperis (filing no. [9](#)) is granted.
3. The Clerk of the court is directed to forward a copy of this Memorandum and Order to the Eighth Circuit Court of Appeals.

DATED this 9th day of January, 2012.

BY THE COURT:

Richard G. Kopf
United States District Judge

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