

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KENNETH W. CLARK,)	4:13CV3075
)	
Plaintiff,)	
)	
v.)	MEMORANDUM
)	AND ORDER
JEFFRE CHEVVRONT, et al.,)	
)	
Defendants.)	

This matter is before the court on its own motion. On June 11, 2013, the court dismissed Plaintiff’s Complaint without prejudice. (Filing Nos. [7](#) and [8](#).) On June 17, 2013, Plaintiff filed a Motion to Appoint Counsel. (Filing No. [9](#).) Although this motion only discussed the appointment of counsel, it contained the following language in the caption: “motion for to set a side [sic] avoid [sic] judgment.” (*Id.*) The court denied Plaintiff’s Motion to Appoint Counsel on June 25, 2013. (Filing No. [11](#).) On July 30, 2013, Plaintiff filed a Notice of Appeal. (Filing No. [13](#).)

On August 5, 2013, the court liberally construed Plaintiff’s Motion to Appoint Counsel, which contained the language “motion for to set a side [sic] avoid [sic] judgment,” as a motion for relief under Rule 59 or 60. (*See* Filing No. [17](#).) Giving Plaintiff the benefit of this liberal construction, the court concluded that the motion tolled the beginning of the appeal period, as set forth in [Federal Rule of Appellate Procedure 4\(a\)\(1\)](#), until July 25, 2013, the day the court denied Plaintiff’s Motion to Appoint Counsel. (*Id.*) Because Plaintiff filed his Notice of Appeal on July 30, 2013, or more than 30 days after the court’s June 25, 2013, Memorandum and Order, his notice of appeal was untimely. (*Id.*) Nevertheless, the court gave Plaintiff until September 1, 2013, to submit an affidavit to show excusable neglect or good cause for his failure to file a timely notice of appeal. (*See* Docket Sheet.)

On August 30, 2013, Linda Clark-Moore filed a Response on Plaintiff's behalf.¹ (Filing No. [19](#).) In the Response, Linda Clark-Moore states that Plaintiff has mental disabilities that hinder his ability to understand issues. (*Id.*) In addition, the record before the court shows that Plaintiff changed his address shortly after the court entered its July 25, 2013, Memorandum and Order. (*See* Filing Nos. [8](#) and [12](#).) In light of Plaintiff's alleged mental disabilities, and his address change during the appeal period, the court finds that Plaintiff has shown excusable neglect for filing an untimely notice of appeal.

Plaintiff was not previously given leave to proceed IFP in the district court. (*See* Docket Sheet.) In order proceed on appeal, Plaintiff must either pay the \$455.00 appellate filing fee, or submit a motion to proceed in forma pauperis ("IFP"). Accordingly,

IT IS THEREFORE ORDERED that:

1. Plaintiff shall have until October 7, 2013, to either submit the \$455.00 appellate filing fee or a motion to proceed IFP, with the required affidavit. If Plaintiff takes no action, his appeal will not be processed.
2. The Clerk of the court shall not process the appeal in this matter until further order of the court.

¹Plaintiff signed the Response and his signature is notarized. (Filing No. [19](#).)

DATED this 6th day of September, 2013.

BY THE COURT:

s/ John M. Gerrard

United States District Judge

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