

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
|--------------------------|---|-------------------|
| BRIAN T. COLLUM, |) | 8:12CV17 |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | MEMORANDUM |
| |) | AND ORDER |
| PAYPAL, and KELLIE CAIN, |) | |
| |) | |
| Defendants. |) | |

This matter is before the court on Plaintiff’s Motion for Leave to Appeal in forma pauperis. (Filing No. [35](#).) On May 16, 2012, the court dismissed Plaintiff’s claims and entered Judgment against him. (Filing Nos. [18](#) and [19](#).) On November 20, 2012, the court, in an effort to curb Plaintiff’s litigation abuses, entered a Memorandum and Order restricting Plaintiff from filing complaints in this court and proceeding IFP without first seeking the court’s leave to do so. (Filing No. [33](#).) On December 3, 2012, Plaintiff filed a Notice of Appeal. (Filing No. [34](#).)

[Federal Rule of Appellate Procedure 4\(a\)\(1\)](#) requires that the notice of appeal in a civil case be filed within thirty days after the judgment or order appealed from is entered. “A timely notice of appeal is both mandatory and jurisdictional.” [Burgs v. Johnson Cnty., Iowa, 79 F.3d 701, 702 \(8th Cir. 1996\)](#). Moreover, an untimely notice of appeal cannot serve as a motion for extension of time to file an appeal. [Id.](#) However, the district court may extend the time to file a notice of appeal if a party moves for an extension of time and shows excusable neglect or good cause. [Fed. R. App. P. 4\(a\)\(5\)\(A\)\(ii\)](#).

Plaintiff's Notice of Appeal was filed more than six months after the court's May 16, 2012, Memorandum and Order and Judgment.¹ (*See* Docket Sheet.) Thus, it is untimely with respect to the court's May 16, 2012, Memorandum and Order and Judgment. Liberally construed, however, Plaintiff may have intended to appeal the court's November 20, 2012, Memorandum and Order. (Filing Nos. [33](#) and [35](#).) To the extent Plaintiff intended to appeal the court's November 20, 2012, Memorandum and Order, his Notice of Appeal was timely filed.

Plaintiff is a non-prisoner and has previously been granted leave to proceed in forma pauperis 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:

(A) the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or

¹The court notes that Plaintiff filed a Motion to Reopen on the same day the court entered its May 16, 2012, Judgment in this matter. (Filing No. [20](#).) Liberally construed, Plaintiff may have intended to file this Motion under [Fed. R. Civ. P. 59\(e\)](#), which would have tolled the time to appeal while the Motion was pending. *See* [Fed. R. App. P. 4\(a\)\(1\), \(a\)\(4\)\(A\)\(iv\)](#) (30-day time limit; timely Rule 59(e) motion tolls time to file appeal until entry of order disposing of motion). However, the court disposed of Plaintiff's Motion to Reopen on June 22, 2012 (filing no. [22](#)) and Plaintiff's successive motions for reconsideration do not repeatedly toll the time to appeal. [Charles v. Daley, 799 F.2d 343, 347–48 \(7th Cir.1986\)](#).

finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

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

IT IS THEREFORE ORDERED that:

1. In accordance with this Memorandum and Order, Plaintiff is permitted to appeal the court’s November 20, 2012, Memorandum and Order and Plaintiff’s Motion for Leave to Appeal in forma pauperis (filing no. [35](#)) is granted.

2. The Clerk of the court shall provide the Court of Appeals with a copy of this Memorandum and Order.

DATED this 5th day of December, 2012.

BY THE COURT:

Richard G. Kopf

Senior United States District Judge

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