

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KEESYA D. ROSS,	:	Case No. 3:13-cv-38
	:	
Plaintiff,	:	Judge Timothy S. Black
	:	Chief Magistrate Judge Sharon L. Ovington
vs.	:	
	:	
TELEPERFORMANCE USA,	:	
INC., <i>et al.</i> ,	:	
	:	
Defendants.	:	

**DECISION AND ENTRY ADOPTING THE REPORT AND
RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE (Doc.
98)**

This case is before the Court pursuant to the Order of General Reference in the United States District Court for the Southern District of Ohio Western Division to United States Magistrate Judge Sharon L. Ovington. Pursuant to such reference, the Magistrate Judge reviewed the pleadings filed with this Court, and, on September 8, 2014, submitted a Report and Recommendations. (Doc. 98). Plaintiff filed Objections. (Doc. 99).

The Magistrate Judge concluded that Plaintiff's Motion to Amend or Alter Judgment (Doc. 96) was untimely under Federal Rule of Civil Procedure 59(e) because it was filed more than 28 days after the entry of judgment and therefore was not properly before the Court. The Magistrate Judge correctly noted that the three-day extension of time provided by Rule 6(d) applies only when a party must act within a specified time after service, while a Rule 59(e) motion must be filed within 28 days after entry of judgment.

Plaintiff argues in her Objections that she mistakenly believed the three-day extension of time in Rule 6(d) applied and that the Court should excuse this misinterpretation based on her *pro se* status. Applying the three-day extension is appropriate based on her “excusable neglect,” Plaintiff submits, and therefore her motion was timely filed because she mailed it on August 14, 2014. However, Rule 6(b)(2) prohibits the Court from extending the time to file a Rule 59 motion.¹ *Wallace v. FedEx Corp.*, —F.3d—, Nos. 11-5500, 11-5577, 2014 WL 4116484, at *8 (6th Cir. Aug. 22, 2014). Untimeliness of a Rule 59(e) motion is a forfeitable affirmative defense. *Nat’l Ecological Found. v. Alexander*, 496 F.3d 466, 475-76 (6th Cir. 2007). Defendants expressly raised the untimeliness of Plaintiff’s motion and Plaintiff failed to file a reply brief to address this argument.

The Court acknowledges the difficulty presented by the interrelation of these procedural rules, especially to *pro se* litigants, and notes that experienced attorneys have made this very mistake. *FHC Equities, LLC v. MBL Life Assur. Corp.*, 188 F.3d 678, 681-84 (6th Cir. 1999). However understandable Plaintiff’s mistake may be, she has not

¹ The Magistrate Judge properly used August 15, 2014 as the date of reference because the timeliness of a Rule 59(e) motion is measured from the date it is “filed” under Rule 5(d). Plaintiff’s reliance on the provision in Rule 5(b)(2)(C) that “*service is complete upon mailing*” is not applicable here. “Filings reaching the clerk’s office after a deadline are untimely, even if mailed before the deadline.” *Torras Herreria y Construcciones, S.A. v. M/V Timur Star*, 803 F.2d 215, 216 (6th Cir. 1986).

presented authority that excusable neglect is a proper basis for the Court to set aside the untimeliness of a Rule 59(e) motion.²

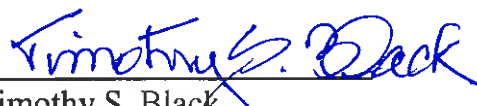
As required by 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), the Court has reviewed the comprehensive findings of the Magistrate Judge and considered *de novo* all of the filings in this matter. Upon consideration of the foregoing, the Court does determine that such Report and Recommendations should be and is hereby adopted in its entirety. Accordingly:

1. The Report and Recommendations of the Magistrate Judge (Doc. 98) is **ADOPTED** in its entirety;
2. Plaintiff's Objections (Doc. 99) are **OVERRULED**;
3. Plaintiff's Motion to Amend or Alter Judgment (Doc. 96) is **DENIED**;
4. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of this Order would not be taken in good faith and therefore Plaintiff is **DENIED** leave to appeal *in forma pauperis*. She remains free, however, to apply to proceed *in forma pauperis* in the Court of Appeals;³ and
5. This civil action remains **TERMINATED** on the Court's docket.

IT IS SO ORDERED.

Date:

10/7/14


Timothy S. Black
United States District Judge

² The Magistrate Judge, citing *Miller v. Smith*, 381 F. App'x 508, 510-11 (6th Cir. 2010), declined to address the merits of Plaintiff's motion under Rule 59(e) and did not construe it as a timely filed Rule 60(b) motion for relief from judgment. Plaintiff did not argue in her Objections that the Magistrate Judge should have addressed the merits of her motion under the Rule 60(b) standard.

³ Plaintiff requests that the Court provide guidance regarding her right to appeal. The Court directs Plaintiff to Federal Rule of Appellate Procedure 4, attached as Exhibit A.