VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

JEFFREY-MICHAEL BRANDT, Plaintiff v. LISA MENARD, et al., Defendants	Docket No. 30-1-17 Cncv

RULING ON REMAND FROM THE VERMONT SUPREME COURT ON PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

On July 17, 2020, the Vermont Supreme Court remanded this matter back to this court for the purpose of reconsidering Plaintiff Jeffrey-Michael Brandt's V.R.C.P. 60(b) Motion for Relief from Judgment. This court held a status conference and evidentiary hearing on the motion November 3, 2020, at which Plaintiff appeared and testified on his own behalf. The court also gave the parties an opportunity to submit any additional materials by November 30th. Defendants' post-hearing submission was received on November 23, 2020, and Plaintiff's submission was received on December 1, 2020. Based upon the evidence of record in this matter and the parties' submissions, the court makes the following findings, conclusions and orders.

The Plaintiff commenced this civil action on January 6, 2017. He was at the time an inmate in a correctional facility in Baldwin, Michigan. His complaint sought, among other things, compensatory and punitive damages for the Defendants' alleged censorship of his correspondence with an inmate in another correctional facility in Kentucky, in violation of his civil and constitutional rights. Simultaneously with the filing of his complaint, the Plaintiff also filed with the court a "Notice of Appearance For Self-Represented Litigant" form, in which he listed the mailing address and telephone number where he could be reached at the correctional facility in Michigan. The form that he signed and filed stated: "In representing myself, I understand that I MUST ... [n]otify the court in writing of any changes in my address, phone number, or email address."

Although incarcerated, the Plaintiff was able to arrange for service of process (i.e., service of summonses and his complaint) upon the several individuals whom he had named as defendants. On March 8, 2017, Michael J. Leddy Esq. entered his appearance in the case on behalf of the defendants. That same day Attorney Leddy also filed a motion to dismiss the Plaintiff's complaint on the grounds that Plaintiff's claims were barred by the doctrine of *res judicata*, or claim preclusion. The Plaintiff filed memoranda in opposition to the motion on March 13, 2017, and April 10, 2017.

June 15, 2017, Attorney Leddy sent a letter to the court, addressed to Court Operations Manager Jill Mongeon, advising that "the Plaintiff, along with the other Vermont inmates who have been housed in Michigan, has been transferred to SCI Camp Hill, a correctional facility in Pennsylvania." Attorney Leddy's letter added that "[c]orrespondence to these inmates may be addressed as follows: SCI Camp Hill, P.O. Box 200, Camp Hill, PA 17001-0200." Attorney Leddy copied the Plaintiff on his letter to the court.

Plaintiff had in fact been transferred from Michigan to the correctional facility in Camp Hill, Pennsylvania in early June, 2017. However, he did not notify the court of his change of address, as called for by the "Notice of Appearance for Self-Represented Litigant" form (Official Form 28) that he had signed and filed at the outset of this suit.

On September 11, 2017, the court issued its "Ruling on Defendants' Motion to Dismiss," granting the motion to dismiss and dismissing the Plaintiff's complaint on *res judicata* grounds. That same day, the clerk mailed copies of the Ruling to the parties, as required by V.R.C.P. 77(d).[1] The clerk mailed Plaintiff's copy of the Ruling to the Plaintiff at the address listed on his "Notice of Appearance for Self-Represented Litigant" form (i.e. to Baldwin, Michigan). On October 2, 2017, the clerk received the envelope, which she had addressed to the Defendant, back from the U.S. Postal Service with the following note stamped on it: "**RETURN TO SENDER**NO LONGER AT THIS ADDRESS." The clerk apparently took no further action to notify the Plaintiff of the court's Ruling.

In February of 2018, during a telephone conference with a court clerk in another county in Vermont, the Plaintiff learned that his complaint in this case had been dismissed in September. The Plaintiff immediately sent a letter to the clerk of this court requesting a copy of the dismissal ruling, and, in his letter he advised the clerk: "My address is Jeffrey-Michael Brandt M21585, P.O. Box 200 Camp Hill PA, 1700—0200." Upon receipt of the letter, the clerk mailed a copy of the Ruling to the Plaintiff at his new address in Pennsylvania. It was only then that the Plaintiff received actual notice of the Ruling.

On March 19, 2018, the Plaintiff filed his Rule 60(b) Motion for Relief from Judgment, arguing that he had not been notified of the court's September 11, 2017, Ruling "in time for [him] to enter a notice of appeal." Treating the motion as a request under V.R.A.P. 4(d) for additional time to appeal, this court denied the motion on the grounds that "this court may only grant such a motion if it is 'filed no later than 30 days after the expiration' of the 30-day time limit for appealing a ruling." The Plaintiff appealed that decision to the Vermont Supreme Court, which reversed and remanded the motion back to this court for further proceedings.

On appeal, the Vermont Supreme Court noted "[w]e have not previously addressed whether Rule 60(b) permits a trial court to vacate and re-enter judgment to enable a delayed appeal where the moving party failed to receive notice of the judgment at issue." Jeffrey-Michael Brandt v. Menard, 2020 VT 61, ¶ 6. The Court began its analysis by referring to an earlier decision holding that "[a] V.R.C.P. 60(b) motion is invoked to prevent hardship or

[1] V.R.C.P. 77(d) provides: "Immediately upon the entry of an order or judgment the clerk shall give notice of the entry to every party who is not in default for failure to appear.... Lack of notice of the entry by the clerk does not affect the time to appeal or relieve ... a party for failure to appeal within the time allowed, except as permitted in Rule 4 of the Rules of Appellate Procedure."

injustice and therefore should be liberally construed." Id. ¶ 9 (citation and quotation omitted). The Court then added the following:

> Such relief is severely limited, but Rule 60(b) may properly provide relief, in the form of vacating and re-entering the judgment for the purpose of enabling a timely appeal, in rare, exceptional circumstances. In determining whether such extraordinary circumstances exist, relevant considerations may include whether the clerk provided notice as required by Vermont Rule of Civil Procedure 77; whether the party had actual notice; whether the relief sought would create prejudice to the other party; whether the moving party acted diligently in attempting to learn the date of the decision; whether the moving party acted diligently after receiving actual notice; and other "extraordinary, unique, or compelling circumstances...."

Id. The Court added, "Mere lack of notice or excusable neglect are insufficient.... Rule 60(b) relief 'relating to timeliness of an appeal is available only under the most unusual, rare, compelling and propitious circumstances.'" Id. ¶ 10. The Court remanded the motion back to this court "so the court may consider whether plaintiff did fail to receive notice; if so, whether that failure, together with other circumstances, could provide a basis for relief under Rule 60(b); and whether, within its discretion, relief from judgment under Rule 60(b) is appropriate." Id. ¶ 12.

In his motion, the Plaintiff argues that he is entitled to relief from judgment under Rule 60(b) because: up until the time of the dismissal he "had been generally very diligent in prosecuting this case"; defense counsel had informed this court's COM of the Plaintiff's new address in Camp Hill, Pennsylvania; the clerk's envelope, mailing a copy of the dismissal order to the Plaintiff in Michigan, was returned to the clerk as undeliverable; "as a consequence, Plaintiff did not receive actual notice of the Court's decision until well after the time period for filing notice of appeal had expired"; and "once Plaintiff received said notice he acted promptly to obtain relief from that judgment" (Plaintiff's "Motion in Support of Motion for Relief from Judgment" filed December 1, 2020, p. 2).

The defendants oppose Plaintiff's motion. They point out that "Plaintiff did not for himself submit a change of address notice" to the court, despite having acknowledged in his "Notice of Appearance for Self-Represented Litigant" form that "[i]n representing myself, I understand that I MUST ... [n]otify the court in writing of any changes in my address...." ("Defendants' Post-Hearing Memorandum," pp. 1-2). Defendants further point out that "Plaintiff is well-versed in Vermont state court litigation," having "been a party to at least thirty-eight (38) civil cases" since 2010 while incarcerated at various correctional facilities (Id, p. 2). Defendants refer to two cases in Washington County, Vermont, in which the Plaintiff "updated the court with his new address as is required, [but] in the instant case Plaintiff for whatever reasons did not bother to keep the clerk in the Chittenden Unit apprised of his new address" (Id., p. 3). "Instead, as he testified at the November 3, 2020 hearing, he never even inquired about this case until sometime in February 2018 while speaking with the clerk in the Washington Unit" (Id.). Defendants contend that the Rule 60(b) motion should be denied because "Plaintiff has no one to blame but himself for not promptly receiving the Court's September 11, 2017 Decision" (Id., p. 3).

The court agrees with the Defendants. Plaintiff has not met his burden of demonstrating the existence of such "rare, exceptional circumstances" as would warrant the "severely limited" relief that he is seeking. The clerk of court fully complied with V.R.C.P. 77(d)(1), when she mailed copies of this court's September 11, 2017, Ruling to both parties. The clerk mailed Plaintiff's copy of the Ruling to the address that the Plaintiff had provided to the court in his "Notice of Appearance for Self-Represented Litigant" form. The only reason Plaintiff did not receive the clerk's mailing is because he had been moved to another correctional facility. Therefore, the U.S. Postal Service returned the mailing to the clerk as undeliverable.

While the clerk may bear some responsibility for not finding the Plaintiff's new mailing address in Attorney Leddy's letter of June 15, 2017, correspondence from opposing counsel is not where a clerk typically looks for a party's address. The primary responsibility for the clerk's failure to re-send the Ruling to Plaintiff's new address lay with the Plaintiff, not the clerk. It was the Plaintiff's responsibility to inform the clerk, in writing, of any changes in his mailing address.[2] The Plaintiff was fully aware of that requirement; the notice of appearance form that he had signed and filed earlier explicitly stated: "In representing myself, I understand that I MUST ... [n]otify the court in writing of any changes in my address...." The Plaintiff did not do that.[3]

The Plaintiff also failed to act diligently in attempting to learn about this court's September 11th Ruling. The Plaintiff clearly knew that the Defendants had filed a motion to dismiss his complaint; indeed, he filed two oppositions to the motion, one on March 13th and another on April 10th. Yet, he waited 5½ months (from September 11, 2017, to February 27, 2018) before contacting the clerk to find out whether the motion had been acted on. The Plaintiff's neglect might be excusable under the circumstances, given his pro se status, but, as the Supreme Court makes clear in its remand decision, "[m]ere lack of notice or excusable neglect are insufficient" to support relief under Rule 60(b). "[R]are, exceptional circumstances" are required.

None of the out-of-state cases cited by the Vermont Supreme Court in its remand decision appears to support the Plaintiff's Rule 60(b) motion for relief from judgment in this case. In Chung v. Choulet, 459 P.3d 498, ¶ 15 (Ariz. Ct. App. 2020), for example, the clerk of court had failed to send notice to the parties of the court's entry of partial summary judgment, yet the Arizona court of appeals reversed the trial court's grant of appellant's Rule 60(b) motion to vacate and re-enter the judgment because appellant had failed to present evidence of any "extraordinary, compelling, or unique circumstances." Similarly, in Vencor Hospitals, Inc. v. Standard Life and Acc. Ins. Co., 279 F.3d 1306, 1312 (11th Cir. 2002) the clerk failed to send either party notice of the court's denial of a motion for reconsideration, yet the circuit court of appeals affirmed the denial of relief under Rule 60(b) because: "Crucial to the application of the unique circumstances doctrine is the occurrence of a judicial action

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[2] V.R.C.P. 79.1(d) provides, "When a party not an attorney of the court prosecutes or defends in the party's own proper person, the party shall comply with subdivision (b) of this rule." Subdivision (b) states that "an attorney who wishes to participate in any action must ... file notice in writing with the clerk...." and the notice "shall state the attorney's office address."

[3] On June 13, 2018, the clerk sent the Plaintiff a note asking him to "[p]lease use this Notice of Appearance to update your mailing address for future hearing updates." Plaintiff still has yet to do so.

upon which a party relies in failing to file a timely notice of appeal. As a result the mere failure of the district court's clerk office to serve Appellant with notice of the ... order, standing alone, does not constitute a judicial assurance or action sufficient to warrant relief under the unique circumstances doctrine."[4] Likewise, in Ahern v. Anderson-Bishop Partnership, 946 P.2d 417, 422-23 (Wyoming 1997), although the pro se plaintiff did not receive a copy of an order granting summary judgment to an opposing party, his status as a pro se party was held not to constitute sufficient compelling circumstances to warrant relief under Rule 60(b).

Lastly, if this court had the discretion to grant the Plaintiff's Rule 60(b) motion, notwithstanding the foregoing, this court in the exercise of its discretion would decline to do so. In light of the Plaintiff's failure to update the clerk of court as to his new mailing address, as well as his failure for 5½ months to take any steps to determine the status of the Defendants' motion to dismiss, and in consideration of the importance of upholding the finality of judgments, this court is of the opinion that the extraordinary relief sought here is not appropriate.

Order

For the foregoing reasons, Plaintiff's Rule 60(b) motion to relief from judgment is DENIED.

SO ORDERED this 7th day of December, 2020.

Robert A. Mello
Superior Judge

[4] Old Republic Ins. Co. v. O'Neal, 788 S.E.2d 40, 50 (W.Va. 2016) provides an example of the kind of judicial action upon which a party can rely in failing to file a timely notice of appeal. There, the clerk of court not only failed to send the judgment to the plaintiff, but, when plaintiff's attorney called to inquire about the status of the case, the clerk told the attorney that no final order had been issued.