

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

HARRISON FRANKLIN,

Plaintiff,

v.

ORDER

02-C-618-C

GARY R. McCAUGHTRY, GERALD BERGE,
PAULINE BELGADO, SARGENT SIEDOSCHLAG,
PETER HUIBREGTSE, LINDA HODDY-TRIPP,
JIM WEGNER, SARGENT LIND, CAPTAIN JOHN P
GRAHL, SARGENT DAN MEEHAN, CO II MIKE
GLAMAN, NURSE HOLLY MEIER, PAM BARTELS,
TODD BAST and STEVEN SCHOELER,

Defendants.

Judgment was entered in this case on February 3, 2004, dismissing the case against all defendants. Now plaintiff has filed a “Motion for Extension of Time . . . and Motion to Substitute Parties Due to Death . . .” and a motion for appointment of counsel. I construe plaintiff’s submission as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59.

In his motion, plaintiff asks the court to allow him to substitute defendant Belgado’s

estate in place of defendant Belgado, who died after this lawsuit began. He explains that his failure to make the substitution earlier was the result of his being pro se and unfamiliar with the Fed. R. Civ. P. 25. He asks the court to find excusable neglect and allow him an enlargement of the time to make the substitution. Plaintiff's motion will be denied.

In this court's order of February 3, 2004, I understood that plaintiff likely was unaware of his obligation to make a party substitution when a defendant dies during litigation. That is why I advised plaintiff expressly that I would consider the evidence and the facts the parties proposed with respect to defendant Belgado's alleged unconstitutional conduct and rule on each claim on its merits.

Plaintiff may protest that he was unaware of the requirements of Rule 25 and that because he is proceeding without counsel, the court should extend the 90-day deadline. Under Fed. R. Civ. P. 6(b), a court may extend deadlines imposed by the federal rules when the failure to act is a result of excusable neglect. Plaintiff would have an uphill battle persuading the court that his failure was a result of excusable neglect when counsel for defendant Belgado cited Rule 25 in the statement of death sent to plaintiff and filed with the court. Nevertheless, I have considered the merits of plaintiff's claims against defendant Belgado and conclude that they would fail even if plaintiff had filed a proper motion for substitution. No reasonable jury could find that Belgado violated plaintiff's Eighth Amendment rights.

Because I considered fully plaintiff's claims against defendant Belgado and found in defendant Belgado's favor on each claim, there is no reason to vacate the judgment and allow plaintiff to substitute Belgado's estate as a defendant. Furthermore, because I am denying

plaintiff's Rule 59 motion, I will deny plaintiff's request for appointment of counsel as moot.

ORDER

IT IS ORDERED that plaintiff's motion pursuant to Fed. R. Civ. P. 59 to alter or amend the judgment is DENIED.

Further, IT IS ORDERED that plaintiff's request for appointment of counsel is DENIED as moot.

Entered this 9th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge