

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

AMERICAN GENERAL LIFE INSURANCE
COMPANY,

Plaintiff and Counter-defendant,

v.

ESTATE OF SALLY PERGOLSKI,

Defendant,

CHASE BORUCH,

Defendant, Counter-claimant and Cross-claimant,

and

JAMIE PERGOLSKI,

Defendant and Cross-defendant.

OPINION AND ORDER

12-cv-324-wmc

Pending before the court are three principal and ultimately meritless post-judgment motions by defendant, counter-claimant and cross-claimant Chase Boruch, who is claiming an interest in the proceeds of an insurance policy on his mother's life, despite previously being convicted in state court of killing her.¹ In the first motion (really two), Boruch seeks a stay of the judgment pending appeal and to alter the judgment. (Dkt. #80.) On the same day, Boruch filed a second motion, seeking leave to proceed *in forma*

¹ There are two other motions both concerning the record on appeal before the court. (Dkt. ## 94, 98.) Boruch filed a Circuit Rule 10 request. Plaintiff American General and defendants Jamie Pergolski and the Estate of Sally Pergolski then filed a joint motion to amend or correct Boruch's Circuit Rule 10 request, noting several documents which were missing from Boruch's proposed record on appeal. The court will grant both requests.

pauperis on appeal. (Dkt. #83.) In the third motion, Boruch again seeks a stay of the judgment, but offers a second and distinct reason for granting it. (Dkt. #101.)

Because Boruch fails to articulate any basis for altering the judgment recognized under either Federal Rule of Civil Procedure 59(e) or Rule 60, the court will deny this request. The court will also deny Boruch's motion for leave to proceed *in forma pauperis* on appeal, finding the proposed issue on appeal (that American General erroneously admitted liability) to be brought in bad faith. As for Boruch's motion to stay the judgment -- either pending appeal or because of a possible interest in his bankruptcy estate -- the court will deny it for the reasons explained below.

BACKGROUND

Plaintiff American General Life Insurance Company filed this interpleader action against Chase Boruch, his sister Jamie Pergolski, and the Estate of Sally Pergolski, his deceased mother's estate. For reasons explained in earlier opinions, American General sought an order allowing it to deposit a \$500,000 life insurance policy into the registry of this court and an order enjoining defendants from instituting any proceedings against American General relating to the policy. On November 26, 2012, the court granted American General the relief it sought, entered judgment in its favor, and dismissed Boruch's cross-claims and counterclaims against the other parties. (Dkt. #70.) The court further instructed the clerk of the court to close this action. Judgment was entered on November 30, 2012. (Dkt. #71.) Boruch's numerous motions followed.

OPINION

I. Motion to Alter or Amend Judgment

On December 6, 2012, Boruch filed the first motion before the court moving to alter the judgment to allow Boruch to proceed on a claim that American General is not liable to anyone under the terms of the policy. (Boruch's 1st Mot. (dkt. #80) 2.) Specifically, Boruch contends that his mother committed suicide, that his sister was aware of his intent to assist his mother in committing suicide, and that, therefore, American General does not have a duty to pay the proceeds of the policy at all.

Proceeding *pro se*, Boruch fails to identify any rule permitting the court to consider his motion, nor can the court do so. Because Boruch filed this motion just six days after the entry of judgment, it falls within the time limits of a Rule 59(e) motion, which has a lower bar for relief than a Rule 60 motion. *Helm v. Resolution Trust Corp.*, 43 F.3d 1163, 1166-67 (7th Cir. 1995) (explaining that a motion to alter a judgment if served within the time limit described in Fed. R. Civ. P. 59(e) should be considered under Rule 59(e), but if served outside that time limit, the court should consider it under Rule 60). Still, "a Rule 59(e) motion must clearly establish either a manifest error of law or fact or must present newly discovered evidence." *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995); *see also Sigsworth v. City of Aurora, Ill.*, 487 F.3d 506, 511-12 (7th Cir. 2007). Rule 59(e) "does not allow a party to introduce new evidence or advance arguments that could or should have been presented to the district court prior to the judgment." *Popovits v. Circuit City Stores, Inc.*, 185 F.3d 726, 729 (7th Cir. 1999) (quotation marks and citation omitted).

The court already considered and rejected the merits of Boruch's proposed counterclaim against American General based on a theory that American General has no obligation to pay any proceeds. (Dkt. #70.) As the court explained in that opinion, American General "owes no contractual or fiduciary duties to Boruch that could form the basis for his claim that American General breached a duty by concluding that it had an obligation to pay the Proceeds under the policy issued to Sally Pergolski. Any duty breached by *payment* under a policy -- as opposed to a failure to pay -- presumably would be owed to American General's shareholders, not to Boruch as a named beneficiary under an insurance policy." (11/26/12 Opinion & Order (dkt. #70) 10.) While Boruch now asserts that Jamie Pergolski was aware of their mother's intent to commit suicide and Boruch's plans to assist her in these efforts, this alleged fact (1) would have been known to Boruch before the entry of judgment and (2) could have been timely raised. More importantly, the fact that Boruch now alleges that Jamie Pergolski knew of her mother's planned suicide does not alter the court's holding that American General owed no duty to Boruch with respect to *payment* of the proceeds that could form the basis for a counterclaim against American General. At bottom, Boruch's argument seems like nothing more than a blatant, even childishly petty, attempt to divert the insurance proceeds from his sister ("if I can't have it, neither can you"). Regardless of Boruch's questionable motives for asserting these allegations against his sister, there is nothing about his motion that satisfies the requirement of Rule 59(e).

Boruch's motion under Rule 60 fails no better. Rule 60(b) authorizes a court to grant relief from judgment or a final order when a party brings a motion based on one of

six specific grounds. Fed. R. Civ. P. 60(b); *see also United States v. Deutsch*, 981 F.2d 299, 301 (7th Cir. 1992) (explaining that Rule 60(b) motions “must be shaped to the specific grounds for modification or reversal found in 60(b) -- they cannot be general pleas for relief”). Specifically,

the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Boruch does not specify which of the six grounds he believes is applicable to his motion. The court has already rejected new evidence as a basis for altering the judgment. As discussed, Boruch’s allegation that Jamie Pergolski committed fraud against American General also supplies no basis for altering the judgment -- any fraud on her part would have been for American General to address, not for Boruch. Nor do any of the other exceptions under 60(b) apply. Accordingly, the court will deny Boruch’s motion to alter or amend the judgment.

II. Motion for Leave to Proceed *In Forma Pauperis*

On December 6, 2012, Boruch filed a notice of appeal and a motion for leave to proceed *in forma pauperis*. The district court’s role with respect to an appeal is limited. A district court has authority to deny a request for leave to proceed *in forma pauperis* under

28 U.S.C. § 1915 for one or more of the following reasons: the litigant wishing to take an appeal has not established indigence; the appeal is in bad faith; or if the litigant is a prisoner and has three strikes. 28 U.S.C. § 1915(a)(1),(3) and (g); *see also Sperow v. Melvin*, 153 F.3d 780, 781 (7th Cir 1998). In this case, Green's request for leave to proceed *in forma pauperis* on appeal will be denied, because the court will certify that his appeal is not taken in good faith.²

In *Lucien v. Roegner*, 682 F.2d 625, 626 (7th Cir. 1982), the court of appeals instructed district courts to find bad faith in cases in which a plaintiff is appealing the same claims the court found to be without legal merit. *See also Lee v. Clinton*, 209 F.3d 1025, 1027 (7th Cir. 2000). This is such a case. In his motion to proceed, Boruch indicates that he seeks to appeal the issue of whether American General had a duty in the first instance to pay the insurance proceeds at issue because of Boruch's claim that his mother committed suicide. (Boruch's Abstract of Issues on Appeal (dkt. #82).) For the reasons previously provided in the court's opinion and order disposing of this case (dkt. #70), summarized in part above in rejecting Boruch's motion to alter or amend the judgment, the court concludes that there is no legally meritorious basis for Boruch's appeal. As such, the court must certify that the appeal is not taken in good faith. In light of this certification, Boruch cannot proceed with his appeal without prepaying the \$455 filing fee absent permission from the court of appeals.

² From the prisoner trust fund account statement, it appears Boruch would be eligible for some reduction in his initial filing fee, but the court need not make this determination given its decision to deny him leave to proceed *in forma pauperis*.

Under Fed. R. App. P. 24, Boruch will have 30 days from the date of this order in which to ask the Court of Appeals for the Seventh Circuit to review this court's denial of leave to proceed *in forma pauperis* on appeal. Boruch must include with his motion, an affidavit as described in the first paragraph of Fed. R. App. P. 24(a), with a statement of issues he intends to argue on appeal. Also, he must send along a copy of this order. Boruch should be aware that he must file these documents in addition to the notice of appeal he has filed previously. **If he does not file a timely motion requesting review of this order, the Court of Appeals may choose not to address the denial of leave to proceed *in forma pauperis* on appeal.** Instead, it may require him to pay the full \$455 filing fee before it considers his appeal further. **Moreover, if Boruch does not request review or pay the fees within the deadline set, it is possible that the court of appeals may dismiss the appeal.**

III. Motions to Stay Because of Bankruptcy Proceeding

Having found the underlying basis for Boruch's original motion for stay pending appeal to be frivolous, that motion will obviously also be denied.³ On January 22, 2013, however, Boruch filed a second motion to stay the judgment. (Dkt. #101.) In this motion, Boruch argues that "litigation concerning the res which is the subject of litigation

³ Perhaps Boruch could seek a stay by supersedeas bond pursuant to Federal Rule of Civil Procedure 62(d), but he has repeatedly represented to this court and the bankruptcy court that he is unable to post a bond and has obviously provided no basis for the court to relieve him of this obligation. Other than that option, Boruch fails to offer any reason for granting such a stay pending appeal to the Seventh Circuit, which also assumes Boruch pays the full \$455 filing fee or the Seventh Circuit grants his petition to proceed *in forma pauperis*.

in/of 12-cv-324 may be defective, as Bankruptcy Estate was not a party to/in/of 12-cv-234, and the res which is the subject of 12-cv-324 is property which may belong to Bankruptcy Estate.” (*Id.* at 3.)

From Pacer, the court discerns that Boruch filed a Chapter 7 bankruptcy petition on September 29, 2011. *In re Chase Michael Boruch*, No. 1-11-16005-cjf (Bankr. W.D. Wis. Sept. 29, 2011). On May 23, 2012, the court issued an order discharging the debtor. On October 22, 2012, Boruch filed a motion to reopen the case, and on December 26, 2012, Boruch filed an adversary proceeding against Jamie Pergolski, in her individual capacity and as the special administrator of the Estate of Sally Pergolski, and against the estate. In that complaint, Boruch asserts that he may have a right to the American General Policy -- in contrast to his position before this court that American General has *no* obligation under the Policy -- and asks the court to enjoin Pergolski from transferring or receiving funds. (*In re Boruch*, No. 1-11-16005-cjf (dkt. #51).)

Title 11 U.S.C. § 362 provides several bases for an automatic stay upon filing of a bankruptcy petition. Arguably, section 362(a)(1) may have applied to this case, which provides in pertinent part that the filing of a bankruptcy petition acts as an automatic stay of “[t]he commencement or continuation, including the issuance or employment of process, or a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under

this title.”⁴ 11 U.S.C. § 362(a)(1). Section 362(c)(2), however, provides that the stay continues only “until the earliest of (A) the time the case is closed; (B) the time the case is dismissed; or (C) if the case is a case under chapter 7 of this title concerning an individual . . . , the time a discharge is granted or denied.” 11 U.S.C. § 362(c)(2). Since Boruch’s discharge was granted on May 23, 2012, the stay would have been lifted over six months before this court’s entry of judgment.

Boruch appears to argue that a stay should have been in place pursuant to § 362(a)(3), which automatically stays “[a]ny act to obtain possession of the property of the estate or of property from the estate[.]” 11 U.S.C. § 362(a)(3). The interpleader action here sought neither. Rather, the plaintiff in this case merely wanted guidance on where *it* should deposit the insurance proceeds so that the proper owner could be determined. In granting relief, the court merely ordered the proceeds be deposited so that the state court could determine who ultimately had a legitimate claim to it. If anything, § 362 would arguably apply to those proceedings, though this court is skeptical that an automatic stay would apply to that court either. Regardless, the bankruptcy court, which is currently considering Boruch’s adversary action against Jamie Pergolski and the Estate of Sally Pergolski, is in the best position to correctly apply § 362, especially in light of its authority to annul the stay pursuant to 11 U.S.C. § 362(d).

⁴ It is not clear that American General Life Insurance Company could have brought the interpleader action prior to September 2011, when Boruch filed his Chapter 7 bankruptcy. This fact, however, is not material in light of the fact that the stay would have been lifted several months before the court entered judgment.

ORDER

IT IS ORDERED that:

- 1) defendant Chase Boruch's motion to stay judgment pending appeal and motion to alter or amend judgment (dkt. #80) is DENIED;
- 2) defendant Boruch's motion for leave to proceed *in forma pauperis* (dkt. #83) is DENIED;
- 3) defendant Boruch's Circuit Rule 10 request (dkt. #94) is GRANTED;
- 4) plaintiff American General Life Insurance Company and defendants Jamie Pergolski and the Estate of Sally Pergolski's joint motion to correct record on appeal (dkt. #98) is GRANTED; and
- 5) defendant Chase Boruch's motion to stay judgment and order of district court (dkt. #101) is DENIED.

Entered this 8th day of April, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge