

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

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DUSTIN WEBER,

Plaintiff,

ORDER

v.

13-cv-291-wmc

GREAT LAKES EDUCATIONAL LOAN  
SERVICES, INC.,

Defendant.

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Plaintiff Dustin Weber alleged in this civil action that defendant Great Lakes Educational Loan Services, Inc. (“Great Lakes”) violated the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*, and the Wisconsin Consumer Act (“WCA”), Wis. Stat. § 421 *et seq.*, when it sought to collect on his student loans. On summary judgment, this court held that Great Lakes was not subject to the FDCPA. Given the rejection of Weber’s federal claims, the court also declined to exercise supplemental jurisdiction over plaintiff’s remaining state law claim under the WCA, pursuant to 28 U.S.C. § 1367(c), and dismissed that claim without prejudice for lack of subject matter jurisdiction. (*See* Apr. 29, 2014 Opinion & Order (dkt. #44).)

Weber has since filed a motion to amend that judgment pursuant to Fed. R. Civ. P. 60(a) and 60(b)(1). (Dkt. #54.) Specifically, he asks the court to order remand of the remaining WCA claim back to Dane County Circuit Court from which the case was originally removed, rather than dismissing it without prejudice.<sup>1</sup> Great Lakes opposes the motion, arguing that this court lacks the power to alter its judgment under either provision of Rule 60.

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<sup>1</sup> Plaintiff explains this relief is sought not for the usual reason that its claim would now be barred by the applicable statute of limitations, but rather because (1) it would be required to pay another filing fee in state court; (2) it would likely be denied attorney’s fees incurred in pursuing its claim in the original lawsuit; and (3) it may be assigned to a different state court judge by virtue of random assignment or defendant disqualifying the first judge assigned as a matter of right. While not

Rule 60(a) “allows a court to correct records to show what *was* done, rather than change them to reflect what *should have been done*.” *Blue Cross & Blue Shield Ass’n v. Am. Exp. Co.*, 467 F.3d 634, 637 (7th Cir. 2006) (emphasis in original). Thus, on its face, it does not appear this provision authorizes the relief Weber seeks. *Cf. Williams ex rel. Williams v. City of Beverly Hills*, No. 4:04-CV-631 CAS, 2006 WL 1360875, at \*3 (E.D. Mo. May 17, 2006) (“In this case, the Court would have remanded plaintiff’s state law claims had it recalled at the time of judgment that the case was removed from state court rather than initially filed in federal court. Nonetheless, at the time judgment was entered, the Court intended to dismiss the state law claims without prejudice. . . . For this reason, the Court concludes that plaintiff’s motion does not seek relief from a clerical mistake under Rule 60(a).”).

On the other hand, Rule 60(b)(1) permits a court to relieve a party or its legal representative from a final judgment, order or proceeding for mistake or inadvertence, including that of the court itself, provided the motion for relief is made “within a reasonable amount of time” as required by Fed. R. Civ. P. 60(c)(1). *Mendez v. Republic Bank*, 725 F.3d 651, 658 (7th Cir. 2013). In *Mendez*, the Seventh Circuit also cautioned, however, that “a Rule 60(b) motion filed after the time to appeal has run that seeks to remedy errors that are correctable on appeal will typically not be [deemed] filed within a reasonable time.” *Id.* at 660.

Here, Weber chose not to file his motion to alter or amend until June 4, 2014, unfortunately some four days beyond the deadline to appeal from the final judgment entered in this case on April 29, 2014. Fed. R. App. P. 4(a)(1)(A). Because the time to file a notice of

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dismissing any of these reasons for seeking relief out of hand, none strike the court as extraordinary, as might the loss of the claim altogether.

appeal had passed, this court appears to lack the power to alter its judgment under *Mendez*, even if remand rather than dismissal seems the more just course of action in retrospect.<sup>2</sup>

Other courts to consider the question have likewise declined to use Rule 60(b)(1) to alter a court's discretionary decision as to whether to dismiss or remand claims. *See Moses v. Banco Mortg. Co.*, 778 F.2d 267, 274 (5th Cir. 1985) (district court erred when it used Rule 60(b)(1) to alter a judgment dismissing state law claims without prejudice to remand the claims, because its original decision was not erroneous); *Williams*, 2006 WL 1360875, at \*4-6 (same) (citing *Moses*). While *Moses* is not binding on this court, it supports defendant's argument that the relief Weber seeks is beyond this court's power to grant.

Even so, this court will not direct the state court how to proceed with plaintiff's WCA claim, whether by allowing the plaintiff to proceed with the existing state court action, which apparently remains open, or by requiring plaintiff to file a new action.

#### ORDER

IT IS ORDERED that plaintiff's motion to alter or amend the judgment (dkt. #51) is DENIED.

Entered this 22nd day of August, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge

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<sup>2</sup> Had the court's order to dismiss without prejudice *not* been appealable, then plaintiff's delay of 34 days from judgment might well have been deemed reasonable, but plaintiff has to date offered no legal grounds why this would be so.