IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSEPH VAN PATTEN,

Plaintiff, ORDER

v. 06-C-374-C

MATTHEW FRANK,
JOSEPH LADWIG, WARDEN
DEPPISCH and DR. LUY,fr

Defendants.

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A judgment of dismissal was entered in this case on August 3, 2007, after I ruled that defendants were entitled to summary judgment in their favor. Now plaintiff has filed a motion for reconsideration of the decision on summary judgment and a notice of appeal from the August 3 judgment. I construe plaintiff's motion for reconsideration as a motion to alter or amend the judgment pursuant to Fed. R. Civ. Pro. 59.

The purpose of a Rule 59 motion is to bring to the court's attention newly discovered evidence or a manifest error of law or fact. E.g., Bordelon v. Chicago School Reform Bd. of Trustees, 233 F.3d 524, 529 (7th Cir. 2000). It is not intended as an opportunity to reargue the merits of a case. Neal v. Newspaper Holdings, Inc. 349 F.3d 363, 368 (7th Cir. 2003).

Nor is a Rule 59 motion intended as an opportunity for a party to start giving evidence that could have been presented earlier. Dal Pozzo v. Basic Machinery Co., Inc., No. 04-4277 (7th Cir. Sept. 6, 2006) (citing Frietsch v. Refco, Inc., 56 F.3d 825, 828 (7th Cir. 1995)).

Motions under Rule 59 must be filed within ten days of the entry of judgment. Fed. R. Civ. P. 59(b). A litigant's failure to meet the time limits of Rule 59 forecloses him from raising in the district court his assertions that errors of law have been made. United States v. Griffin, 782 F.2d l393 (7th Cir. l986). If the motion is timely, the movant must "clearly establish" his or her grounds for relief. Romo v. Gulf Stream Coach, Inc., 250 F.3d 1119, 1122 n.3 (7th Cir. 2001). A timely motion filed pursuant to Fed. R. Civ. P. 59 tolls the time for taking an appeal.

Plaintiff's motion is timely. Therefore, it may be considered. In the motion, plaintiff argues that I erred in concluding that his evidence was not admissible because it was not authenticated. Plaintiff contends that he filed two separate affidavits, one that purportedly authenticates all of the documents he attached to his response to defendants' proposed findings of fact, and one on page 11 of his brief in opposition to defendants' motion.

The record reveals that plaintiff's response to defendants' proposed findings of fact includes as an attachment an untitled document in which plaintiff states,

> I, Joseph Van Patten, authenticate this Response to Defendants' Proposed Findings of Fact in this Affidavit/Declaration, pursuant to 28 U.S.C. § 1746: I state under penalty of perjury that the contents herein are true and correct

> to the best of my knowledge. As to matters and information based on belief, I believe the same to be true.

Nothing in this statement is sufficient to establish the authenticity of the 64 documents plaintiff attached to his response to defendants' proposed findings of fact. Document authentication requires that a party produce not only a copy of the particular document he wishes to submit into evidence, but a witness who can testify from his or her own knowledge that the document is what it appears to be. For example, in order to properly introduce medical records into evidence, plaintiff should have obtained a copy of the relevant records from the prison staff member responsible for maintaining custody of the records. He then should have asked the custodian to certify or aver in an affidavit that the records were made at or near the of time the events recorded in them, and that they were recorded and kept in the course of regularly conducted business. Fed. R. Evid. 806(6).

True, there are certain documents attached to plaintiff's response to defendants' proposed findings of fact that appear to be documents plaintiff prepared himself or letters various persons addressed to him. In those instances, plaintiff has the requisite personal knowledge of the content of the original document to be able to testify that the copy he provided the court was an unaltered version of the original. However, the only averment plaintiff made in his "affidavit" was that his "response to Defendants' Proposed Findings of Fact" was authentic to the best of his knowledge. Aside from the fact that plaintiff did not

establish the basis for asserting personal knowledge of the authenticity of the documents, an affidavit averring that a packet of documents is authentic "to the best of [his] knowledge" and "information based on belief" is inadequate to make any one of the documents admissible. Statements that documents are authentic "based on information and belief" do not satisfy Fed. R. Civ. P. 56(e)'s mandatory requirement that affidavits be based on personal knowledge. Toro Co. v. Krouse, Kern & Co., 827 F.2d 155, 162 n.3 (7th Cir. 1987).

Similarly, plaintiff's statement at the end of his brief is insufficient to establish the authenticity of any of his documentary submissions. In the statement plaintiff avers under penalty of perjury that "the contents herein are true and correct to the best of [his] knowledge" and that "as to matters and information based on belief, [he] believes the same to be true." A brief is not evidence. Therefore, plaintiff's averment that what he said in the brief is true and correct is meaningless.

Even if plaintiff's documentary submissions could have been considered in deciding defendants' motion for summary judgment, they would have been insufficient to change my finding that defendants Ladwig and Luy acted reasonably in helping plaintiff secure medical care that each believed was appropriate given the facts known to them at the time, or that defendants Deppisch or Frank acted with deliberate indifference to plaintiff's medical needs by failing to intervene in the course of treatment offered to plaintiff by defendant Luy.

The remaining arguments in plaintiff's Rule 59 motion are nothing more than a rehash of his complaints about his inability to obtain discovery from the defendants. Those complaints were addressed numerous times in the course of these proceedings. Nothing is to be gained from further discussion of them.

I turn then to plaintiff's notice of appeal. Because the notice is not accompanied by the $455 fee required to file an appeal, I construe plaintiff's notice to include a request for leave to proceed in forma pauperis on appeal.

Plaintiff's request for leave to proceed in forma pauperis on appeal is governed by the 1996 Prison Litigation Reform Act. This means that this court must determine first whether plaintiff's request must be denied either because he has three strikes against him under 28 U.S.C. § 1915(g) or because the appeal is not taken in good faith. Plaintiff does not have three strikes against him, and I do not intend to certify that his appeal is not taken in good faith.

The only other hurdle to plaintiff's proceeding with his appeal in forma pauperis is the requirement that he make an initial partial payment of the filing fee that has been calculated from a certified copy of his trust fund account statement for the six-month period immediately preceding the filing of his notice of appeal. 28 U.S.C. § 1915(a)(2). Plaintiff has not submitted the necessary trust fund account statement. Until he does so, I cannot

determine whether he is indigent and, if he is, the amount of his initial partial payment.

ORDER

IT IS ORDERED that

1) Plaintiff's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59 is DENIED;

2) Plaintiff may have until September 13, 2007, in which to submit a certified copy of his trust fund account statement for the six-month period beginning approximately February 20, 2007 to approximately August 20, 2007. If, by September 13, 2007, plaintiff fails to submit the required trust account statement or show cause for his failure to do so, then I will deny his request for leave to proceed in forma pauperis on the ground that he has failed to show that he is entitled to indigent status on appeal.

Entered this 24th day of August, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge