

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

EUGENE L. CHERRY,

Plaintiff,

v.

GARY BOUGHTON and
JON LITSCHER,

Defendants.

ORDER

07-cv-732-bbc

Judgment was entered in this case on February 1, 2008, following the court's determination that plaintiff Eugene Cherry was ineligible to proceed in forma pauperis in the case because he had struck out under 28 U.S.C. § 1915(g) and he refused to pay the entire filing fee upfront.

Now plaintiff has filed a document titled "motion for reconsideration," in which he states that the court's three-strike determination is incorrect and that he would like to proceed with the case. Insofar as plaintiff argues that the court should not have assessed a strike against him in Cherry v. Frank, 03-cv-129-bbc (W.D. Wis. Apr. 28, 2003), because that case was not dismissed in its entirety as frivolous, he is correct. In Turley v. Gaetz, 2010 WL 4286368 (7th Cir. Nov. 2, 2010), the Court of Appeals for the Seventh Circuit held that "a strike is incurred under § 1915(g) when an inmate's case is dismissed in its entirety based on the grounds listed in § 1915(g)," rather than when only one claim out of

several is dismissed under § 1915(g). Because some of plaintiff's claims survived the screening of his complaint, he should not have received a strike in that case, leaving him with two strikes.

However, to the extent that I understand plaintiff to be attempting to reopen the present case and thus construe his motion as one for relief from a final judgment under Federal Rule of Civil Procedure 60(b), he has filed his motion too late. A motion for relief under Rule 60(b)(1) for "mistake" on the part of the court must be filed within a year of the final judgment. Rule 60(c)(1). The judgment in this case is more than four years old. Even assuming the dubious proposition that the Turley court's clarification of strike procedures constituted the type of extraordinary circumstance justifying relief under Rule 60(b)(6), a motion filed under this provision must be filed "within a reasonable time," Rule 60(c)(1), and I conclude that plaintiff's choice to file the present motion twenty-one months after the Turley decision is not reasonable. In any case, plaintiff's lack of diligence is even more pronounced given his failure to file a direct appeal of the court's three-strike determination when he had the chance. Gonzalez v. Crosby, 545 U.S. 524, 537 (2005) ("change in the law . . . is all the less extraordinary" given petitioner's failure to file direct appeal of unfavorable ruling).

Nonetheless, plaintiff is free to refile his original complaint as a new action and apply for in forma pauperis status now that it is clear he has not struck out. (However, I make no representation as to whether plaintiff's claims would still be viable under the relevant statute of limitations; he will have to research the limitations issue himself.) If he would like to

pursue the case in a new lawsuit, he can either file a new complaint or ask the court to transfer his complaint in the present action into a new case. He should also submit a trust fund account statement for the last six months.

ORDER

IT IS ORDERED that

1. Plaintiff Eugene Cherry's motion for reconsideration of his three-strike status, dkt. #9, is GRANTED; the strike assessed in case no. 03-cv-129-bbc is STRICKEN from the court's records.

2. Plaintiff's motion for relief from judgment under Fed. R. Civ. P. 60(b), dkt. #9, is DENIED.

Entered this 5th day of November, 2012.

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