

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

RODNEY C. MOORE,

Plaintiff,

v.

TIM ZIGLER, JEREMY WRIGHT
and TOM SPEECH,

Defendants.

ORDER

09-cv-23-bbc

Judgment was entered in this case on December 10, 2009, dismissing the case for plaintiff Rodney Moore's failure to exhaust his administrative remedies. Although plaintiff filed two motions for reconsideration, dkt. ##72 and 75, he did not file a notice of appeal after the court denied both of those motions. Dkt. ##73 and 79.

On January 3, 2013, plaintiff filed a document that he calls "Petition for Enlargement of Time Based on New Evidence Not Discoverable Until 2012 to File a Notice of Appeal, FRCP R.26(b)." Presumably, plaintiff is referring to Rule 26(b) of the Federal Rules of Appellate Procedure rather than Federal Rule of Civil Procedure 26(b), which is about discovery. Under Fed. R. App. P. 26(b), a court may not extend the time for filing a notice of appeal, except as authorized by Fed. R. App. P. 4. Under Rule 4, a district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

Fed. R. App. P. 4(a)(5).

Under this rule, plaintiff's deadline for seeking an extension to file a notice of appeal has long since passed. His deadline for appealing was 30 days from the entry of judgment, Fed. R. App. P. 4(a)(1)(A), so his deadline for seeking an extension of time would have expired more than two years ago. I have no authority to extend the deadline further. United States ex rel. Leonard v. O'Leary, 788 F.2d 1238, 1239 (7th Cir. 1986).

Further, plaintiff's argument that he missed his deadline for appealing because his lawyers "abandoned" him is disingenuous. Although it is true that plaintiff's lawyers moved to withdraw from the case after judgment was entered, dkt. #71, plaintiff never opposed that motion, but instead filed a pro se motion the following day under Fed. R. Civ. P. 59 in which he challenged the court's summary judgment decision. In denying plaintiff's motion, I told plaintiff that he had 30 days to file a notice of appeal under Fed. R. App. 4(a)(4). Dkt. #73 at 4. In light of the many other documents that plaintiff has filed throughout the case, he cannot argue plausibly that he was not capable of filing his own notice of appeal.

The deadline for filing a motion for relief from judgment under Fed. R. Civ. P. 60(b) is not as strict as the deadline for appealing. However, even if I construe plaintiff's motion as one brought under Rule 60, I could not grant him any relief. Of the six grounds for relief listed in the rule, three of them must be brought within a year. Fed. R. Civ. P. 60(c)(1). Of

the remaining three grounds, the only one that could be applicable to this case is Rule 60(b)(6). That provision applies to “any other reason that justifies relief,” which the Supreme Court has interpreted as requiring a showing of “extraordinary circumstances.” Gonzalez v. Crosby, 545 U.S. 524, 534 (2005). Plaintiff has not made that showing in this case.

In his motion, plaintiff makes a number of new arguments for why he believes he complied with the exhaustion requirement. However, despite the title of his motion, he does not cite any supporting evidence, much less evidence that was not available to him two years ago. He also seems to argue that he was not required to exhaust his administrative remedies. I disagree with these arguments, but it is unnecessary to discuss them because he could have raised any of them in his motion for reconsideration.

Finally, plaintiff includes new allegations about constitutional violations that occurred in 2012. Those allegations are outside the scope of this lawsuit. If plaintiff believes that prison officials are violating his constitutional rights now, he must file a new lawsuit.

ORDER

IT IS ORDERED that plaintiff Rodney Moore’s “Petition for Enlargement of Time Based on New Evidence Not Discoverable Until 2012 to File a Notice of Appeal, FED. R. CIV. P.

R.26(b),” dkt. #83, is DENIED.

Entered this 25th day of February, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge