

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

ERIC L. TOLONEN,

Plaintiff,

v.

DR. RICHARD HEIDORN,
JEANETTE ZWIERS,
DR. DAVID BURNETT,
DR. KENNETH ADLER
and LIZZIE TEGELS,

Defendants.

ORDER

12-cv-782-bbc

In this case, plaintiff Eric Tolonen, a prisoner at the Jackson Correctional Institution, brought Eighth Amendment claims against defendant prison officials for failing to properly treat his severe dermatitis and cystic acne. In a November 26, 2013 order, I granted defendants' motion for summary judgment. Judgment was entered the same day.

Now before the court are plaintiff's motion for relief from the judgment, notice of appeal, motion for leave to proceed in forma pauperis on appeal and motion for appointment of counsel on appeal. Jurisdiction remains in this court because plaintiff's appeal does not take effect until this court rules on his motion for relief from judgment. Fed. R. App. P. 4(a)(4)(B). Accordingly, I turn first to plaintiff's motion for relief from judgment.

DISCUSSION

A. Motion for Relief from Judgment

Plaintiff styles his motion as one for relief from judgment under Fed. R. Civ. P. 60(b), arguing that the court's September 17, 2013 decision denying various discovery-related motions and extending his deadline for responding to defendants' summary judgment motion to September 30, 2013 did not give him enough time to properly respond to the summary judgment motion. He argues that this short time to respond is a basis for finding "excusable neglect" under Rule 60(b) for his failure to properly support his summary judgment opposition. He includes also an affidavit laying out in more detail some of his medical treatment, the severity of his acne and including his layman's opinion that defendants acted with deliberate indifference in failing to properly treat him, which he believes would have successfully staved off summary judgment had he been given time to file these materials.

This raises the question how to properly characterize plaintiff's motion. Courts often treat Rule 60 motions filed within the 28-day deadline for Rule 59 motions under Rule 59's more generous standard. Yongping Zhou v. Belanger, 528 F. App'x 618, 621 (7th Cir. 2013) ("we have adopted the bright-line rule that district courts should treat motions filed before the deadline established in Rule 59 as arising under that rule, not Rule 60."). This relabeling of a motion for relief from judgment should not occur when the only basis provided by the moving party is excusable neglect. Harrington v. City of Chicago, 433 F.3d 542, 546 (7th Cir. 2006) ([plaintiff's attorney's] motion is simply a plea for the district court to excuse his neglect in prosecuting this case; as such, the motion advances no grounds to support Rule

59(e) relief.”).

I conclude that it is unnecessary to analyze this issue further because plaintiff’s motion would fail under either standard. Whether I consider plaintiff’s new affidavit as new evidence under Rule 59 or his failure to submit the evidence under the excusable neglect rationale of Rule 60, the evidence contained therein would not change the outcome of the case. In the November 26, 2013 order, I reasoned as follows:

I need not consider whether plaintiff’s conditions constitute serious medical needs; the record is clear that even if the conditions are serious medical needs, defendants have not been deliberately indifferent to them.

Defendants have submitted a voluminous medical history showing that they provided plaintiff with more than a dozen different topical or oral medications for acne and dermatitis, including antibiotics and hydrocortisone cream, and have given him special antiseptic soap and an allowance for daily showers. . . .

* * *

. . . plaintiff is not a medical expert and has not provided any medical testimony to support his claims about the alleged ineffectiveness of the prescribed medications (particularly given his repeated decisions to stop taking them) or his proposed standards of care or expert testimony that the defendant doctors’ decisions were “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate the person responsible did not base the decision on such a judgment.” Estate of Cole v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996).

Nothing plaintiff has submitted in his new affidavit changes this reasoning. I already assumed that plaintiff’s medical condition was serious, so new testimony about the seriousness of his acne is irrelevant. He does not provide any evidence that defendants acted with deliberate indifference toward those needs; his layman’s opinion is insufficient to show that defendants departed substantially from accepted professional judgment or practice.

Because nothing in plaintiff's belated affidavit would change my reasoning on summary judgment, his motion for relief from judgment will be denied as futile.

B. Notice of Appeal

Plaintiff has filed a notice of appeal and a request for leave to proceed in forma pauperis on appeal. 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 taken in bad faith or the litigant is a prisoner and has three strikes. § 1915(a)(1),(3) and (g). Sperow v. Melvin, 153 F.3d 780, 781 (7th Cir. 1998). None of these reasons apply to plaintiff and his appeal.

From plaintiff's trust fund account statement, I assess plaintiff an initial partial payment of the \$505 fee for filing his appeal in the amount of \$120.32. If plaintiff does not have the money to make the initial partial appeal payment in his regular account, he will have to arrange with prison authorities to pay some or all of the assessment from his release account. The only amount plaintiff must pay at this time is the \$120.32 initial partial appeal payment. Before prison officials take any portion of that amount from plaintiff's release account, they may first take from plaintiff's regular account whatever amount up to the full amount plaintiff owes. Plaintiff should show a copy of this order to prison officials to make sure they are aware they should send plaintiff's initial partial appeal payment to this court.

C. Motion for Appointment of Counsel

Finally, plaintiff has also filed a motion for appointment of counsel on appeal, but this motion is not properly raised in this court. If he wishes to have counsel recruited to represent him on appeal, he will have to make his request directly to the Court of Appeals for the Seventh Circuit.

ORDER

IT IS ORDERED that

1. Plaintiff Eric Tolonen's motion for relief from judgment, dkt. #83, is DENIED.
2. Plaintiff's request for leave to proceed in forma pauperis on appeal, dkt. #92, is GRANTED. Plaintiff may have until April 23, 2014, in which to submit a check or money order made payable to the clerk of court in the amount of \$120.32. If, by April 23, 2014, plaintiff fails to pay the initial partial payment or explain his failure to do so, then I will advise the court of appeals of his noncompliance in paying the assessment so that it may take whatever steps it deems appropriate with respect to this appeal.

Further, the clerk of court is requested to insure that the court's financial records reflect plaintiff's obligation to pay the \$120.32 initial partial payment and the remainder of the \$505 fee in monthly installments.

3. Plaintiff's motion for the court's assistance in recruiting him counsel for his appeal,

dk. #85, is DENIED.

Entered this 3d day of April, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge