FILED
United States Court of Appeals
Tenth Circuit

October 1, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STEPHEN PLATO McRAE,

Plaintiff - Appellant,

v.

FEDERAL BUREAU OF PRISONS; IRON COUNTY CORRECTIONAL FACILITY; PURGATORY CORRECTIONAL FACILITY; SGT. CHENEY; SGT. SHAFER; SGT. FIELDING,

Defendants - Appellees.

No. 21-4033
(D.C. No. 2:17-CV-00066-RJS)
(D. Utah)

ORDER AND JUDGMENT*

Before **HOLMES**, **KELLY**, and **McHUGH**, Circuit Judges.

Plaintiff-appellant Stephen Plato McRae, acting pro se, filed a federal prisoner civil rights complaint in January 2017 under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court screened the

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

complaint and ordered Mr. McRae to resolve numerous deficiencies. Mr. McRae amended the complaint twice in response to the district court's orders, but he did not respond in a timely manner to the district court's third and final order to correct deficiencies. Thus, in January 2020, the district court dismissed the action for failure to prosecute. More than three months after the district court dismissed the action, Mr. McRae moved to alter or amend the judgment under Federal Rule of Civil Procedure 60(b). He argued that, despite his effort to notify the court of his new address, he had not received the court's order to amend his complaint until after the action had been dismissed. The district court denied the Rule 60(b) motion, and Mr. McRae appeals that decision. For the following reasons, we vacate the order denying Mr. McRae's Rule 60(b) motion and remand to the district court.

I. BACKGROUND

In January 2017, Mr. McRae, acting pro se, filed a prisoner civil rights complaint against the Federal Bureau of Prisons and others, complaining about the conditions at the prisons and his lack of medical care. The district court screened the complaint pursuant to 28 U.S.C. § 1915A[1] and identified numerous deficiencies.[2] In

[1] Because Mr. McRae's complaint has never passed the district court's screening, none of the defendants has been summoned, and none has appeared in this appeal.

[2] The district court listed the following deficiencies in the original complaint:

> (a) improperly names Federal Bureau of Prisons as a defendant under Section 1983, which is meant to support actions against state and local defendants.

mid-June 2017, the district court provided Mr. McRae guidance on how to cure the deficiencies and ordered him to do so within thirty days. More than thirty days later, in August 2017, Mr. McRae submitted a first amended complaint that contained many of the same deficiencies. Again, in September 2018, the district court ordered Mr. McRae to amend his first amended complaint to cure the deficiencies within thirty days. More than a year passed before Mr. McRae responded to the order.

> (b) improperly names Iron County and Purgatory Correctional Facilities as defendants, though they are not independent legal entities that may sue or be sued.
>
> (c) fails to provide an affirmative link between specific defendants and specific civil rights violations.
>
> (d) inappropriately alleges civil rights violations on a respondeat-superior theory.
>
> (e) does not state a proper legal-access claim (see below).
>
> (f) is perhaps supplemented with claims from documents (including a motion for preliminary injunctive relief) filed since the Complaint and "Amended Complaint," which claims should be included in an amended complaint, if filed, and will not be treated further by the Court unless properly included.
>
> (g) refers to John-Doe types, without giving detailed information that would allow them to be identified.
>
> (h) appears to try to bring claims against other defendants who are referred to only in the Complaint's text and not named in the Complaint's heading.
>
> (i) requests injunctive relief, the granting of which would require confirmation that Plaintiff is still in whatever facility from which he requests the injunctive relief.
>
> (j) inappropriately alleges civil-rights violations on the basis of denied grievances.

ROA Vol. 1 at 37–38.

During that time, the district court issued two orders to show cause why the action should not be dismissed. Mr. McRae eventually submitted a deficient second amended complaint on October 1, 2019.

A few weeks later, Mr. McRae notified the district court that his address was changing, as he had done on prior occasions when the Department of Corrections reassigned him to different facilities.[3] On October 31, 2019, the district court received and stamped Mr. McRae's notice of being transferred to a facility in Florence, Colorado. Unlike the previous change-of-address notices Mr. McRae submitted, this notice was not recorded on the court docket.

On November 13, 2019, the district court gave Mr. McRae a final chance to amend his complaint and ordered him to do so within thirty days. This order, however, was mistakenly mailed to Mr. McRae's prior address at the Weber County Correctional Facility in Ogden, Utah. The order was returned to the district court because Mr. McRae was no longer in custody at that facility. Mr. McRae, who never received the order, did not meet the court's deadline.

In January 2020, the district court dismissed the action with prejudice for failure to prosecute under Federal Rule of Civil Procedure 41(b).[4] Again, the district

[3] During this litigation, Mr. McRae submitted at least five other notices that his address had changed, and those notices were all recorded on the docket.

[4] Although the district court did not explicitly state Mr. McRae had failed to provide the district court with a notice of his change of address, it heavily implied this was the cause of the failure to prosecute through the citations and quotations it used to support the order. As noted, Mr. McRae did not fail to provide notice to the

court mailed the decision and order dismissing the action to the Ogden, Utah address, and it was returned to the district court because Mr. McRae was no longer housed in that facility.

Two months later, in March 2020, the Federal Public Defender mailed copies of the docket and the two undelivered court orders to Mr. McRae at his new facility in Florence, Colorado. Then, in April 2020, Mr. McRae filed a *pro se* motion to alter or amend the judgment. In the motion, Mr. McRae stated he did not receive the court's November 2019 order to cure defects in the second amended complaint until late March 2020—approximately two months *after* the district court dismissed the action for failure to prosecute—despite his diligent notification to the court of his address change.

Construing Mr. McRae's filing as a motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(1), the district court denied it. The district court reasoned that Mr. McRae "never specifie[d] what specifically kept him from amending his Second Amended Complaint between November 13, 2019, when amendment was ordered, and January 16, 2020, when the case was finally dismissed." ROA Vol. 1 at 114 (internal citations omitted).[5]

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district court. Rather, the properly filed notice of change of address was never entered on the case docket.

[5] There is no information in the record about whether the district court mailed the decision and order denying the Rule 60(b) motion to Mr. McRae's correct address, but the fact that he appealed shortly thereafter suggests he received the order.

Mr. McRae filed a notice of appeal nine days after the district court denied the post-judgment motion.

II. DISCUSSION

A. Scope of Appeal

As applicable here, Federal Rule of Appellate Procedure 4 provides, "[t]he notice of appeal may be filed by any party within 60 days after entry of the judgment or order." Fed. R. App. P. 4(a)(1)(B); *see also* Fed. R. Civ. P. 77(d)(2) ("Lack of notice of the entry does not affect the time for appeal or relieve . . . a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a)."). But if a motion for relief under Rule 60 is filed no later than twenty-eight days after the judgment is entered, then the time to appeal the judgment runs "from the entry of the order disposing [that] motion." Fed. R. App. P. 4(a)(4)(A)(iii). If a Rule 60(b) motion is filed more than twenty-eight days after the judgment is entered, then the time to appeal the order on that motion is "within 60 days after entry of the . . . order." *Id.* at 4(a)(1)(B).

Mr. McRae filed his Rule 60(b) motion more than 28 days after the district court entered the judgment, so the time to appeal the judgment ran from January 16, 2020, the date of the judgment. Mr. McRae filed his notice of appeal over a year later. It was therefore not timely to appeal the judgment. But the notice was filed a little over a week after the district court denied the motion to amend the judgment, making it timely to appeal the district court's denial of the post-judgment Rule 60(b) motion. Accordingly, we limit our review to the denial of the Rule 60(b) motion.

B. Rule 60(b) Motion

We review an order on "a Rule 60(b) motion only for an abuse of discretion." *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996). "An abuse of discretion occurs when the district court's decision is arbitrary, capricious, or whimsical, or results in a manifestly unreasonable judgment." *United States v. Weidner*, 437 F.3d 1023, 1042 (10th Cir. 2006) (quotation marks omitted). "Under the abuse of discretion standard, we will not disturb a trial court's decision absent a definite and firm conviction that the [district] court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *United States v. Dunn*, 557 F.3d 1165, 1170 (10th Cir. 2009) (internal quotation marks omitted). "The denial of a [Rule 60(b)] motion will be reversed only if we find a complete absence of a reasonable basis and are certain that the decision is wrong." *Johnson v. Spencer*, 950 F.3d 680, 701 (10th Cir. 2020) (quotation marks omitted). We also liberally construe pro se motions and appeal briefs such as Mr. McRae's. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

As relevant here, "the court may relieve a party . . . from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). To determine whether neglect is excusable, courts take "'account of all relevant circumstances surrounding the party's omission,'" including "'the danger of prejudice to the [opposing party], the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good

faith.'" *Jennings v. Rivers*, 394 F.3d 850, 856 (10th Cir. 2005) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). "Fault in the delay remains a very important factor—perhaps the most important single factor—in determining whether neglect is excusable." *Id.* at 856–57 (quotation marks omitted). Relief under Rule 60(b) "is extraordinary and may only be granted in exceptional circumstances." *Beugler v. Burlington N. & Santa Fe Ry. Co.*, 490 F.3d 1224, 1229 (10th Cir. 2009) (quotation marks omitted).

On appeal, Mr. McRae raises the same argument and supports it with the same evidence he used in his motion. Specifically, he says he submitted a notice of change of address to the district court in a timely fashion in October 2019, and he supports this contention by attaching a copy of the court-stamped notice. He contends the district court did not properly document the address change, which deprived him of receiving the November 2019 order until late-March 2020. The record supports his argument because (1) the October 2019 notice of change of address, which the court acknowledged as received, is not listed on the district court's docket, and (2) the subsequent November 2019 order to amend the second amended complaint and the January 2020 order dismissing the action were both mailed to his prior location and returned to the district court because Mr. McRae was no longer in custody there. In his motion and on appeal, Mr. McRae has clearly specified what kept him from amending his second amended complaint between November 2019 and January 2020—he did not receive the court's order to do so until March 2020 despite his efforts to keep his address updated with the court.

The district court denied the Rule 60(b) motion, stating Mr. McRae had not provided any justification for failing to respond to the November 2019 order within the time limit prescribed. As described above, however, Mr. McRae explained he had not received the court's order until after it had dismissed the action, which is corroborated by the failure to update his address on the court docket and the return to the court of the materials sent to his prior facility. Thus, the ground stated by the district court for its decision to deny the Rule 60(b) motion is not supported by the record.

To be sure, the district court may have been frustrated by Mr. McRae's consistently late responses to its prior orders. However, the district court elected to grant Mr. McRae another opportunity to cure the defects in his complaint. And Mr. McRae plausibly alleges he did not respond to that order in a timely fashion because, through no fault of his own, he did not receive it. Accordingly, Mr. McRae suggests his failure to respond was inadvertent and excusable.

The district court failed to consider Mr. McRae's argument, and its reason for denying the motion was not supported by the record. This was an abuse of discretion. *See Clyma v. Sunoco, Inc.*, 594 F.3d 777, 783 (10th Cir. 2010) ("[A] clear example of an abuse of discretion exists where the trial court fails to consider . . . the facts upon which the exercise of discretionary judgment is based." (internal quotation marks omitted)); *Hartzell v. Honda Motor Co. Ltd.*, No. 90-4016, 1991 WL 50540, at *2 (10th Cir. Apr. 8, 1991) (unpublished) (determining a district court did not abuse its discretion by denying a Rule 60(b) motion when the district court weighed the

evidence supporting the motion against the finality of the judgment). As a result, we vacate the district court's order and remand to afford the district court an opportunity to consider Mr. McRae's argument and the accompanying evidence that through no fault of his own the order instructing him to correct remaining deficiencies in the complaint was not received until after the district court dismissed the action. In doing so, we express no opinion as to whether the 60(b) motion should be granted, and we place no restrictions on the district court's ability to consider all other pertinent considerations, including fault, timing, and Mr. McRae's good faith.

C. In Forma Pauperis

Mr. McRae submitted a motion to proceed on appeal *in forma pauperis* under the Prisoner Litigation Reform Act ("PLRA"). After a thorough review of Mr. McRae's affidavit, we grant the motion. This does not absolve Mr. McRae of the requirement to pay the fees associated with this appeal, which must be paid in full through partial payments pursuant to 28 U.S.C. § 1915.

III. CONCLUSION

For the foregoing reasons, we **VACATE** the district court's order on the Rule 60(b) motion and **REMAND** to allow the district court to consider Mr. McRae's stated arguments. We also **GRANT** Mr. McRae's motion to proceed *in forma pauperis* without prepayment of costs or fees under the PLRA.

Entered for the Court

Carolyn B. McHugh
Circuit Judge