

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL SHAVERS,

Plaintiff-Appellant,

v.

LAVERN SHARP, Deputy Warden, et al.,

Defendants-Appellees.

FILED
Mar 28, 2018
DEBORAH S. HUNT, Clerk

ORDER

Michael Shavers, a Michigan prisoner proceeding pro se, appeals the district court's judgment dismissing his complaint without prejudice pursuant to Federal Rule of Civil Procedure 4(m). Shavers moves this court for leave to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

Shavers filed a civil rights complaint under 42 U.S.C. § 1983 against several officials at Oaks Correctional Facility. Because he paid the filing fee and was not proceeding in forma pauperis, Shavers was responsible for serving the summons and complaint on each defendant. *See* Fed. R. Civ. P. 4(c)(1). The district court dismissed the complaint without prejudice for failure to effect timely service pursuant to Rule 4(m), and Shavers filed a notice of appeal. Shavers moved the district court for leave to proceed in forma pauperis on appeal and to review his status under the "three-strikes" provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g). A magistrate judge denied Shavers's request to reverse his status under the "three-strikes" rule, pointing out that the cases forming the basis for his "three strikes" had not been reversed on appeal. The district court affirmed the magistrate judge's ruling and denied

Shavers's motion for leave to proceed in forma pauperis on appeal as barred by the "three-strikes" rule.

Shavers now moves this court for leave to proceed in forma pauperis on appeal. *See Fed. R. App. P. 24(a)(5)*. The PLRA's "three-strikes" rule states:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). Shavers has three lawsuits counting as "strikes" under § 1915(g): *Shavers v. Bergh*, No. 2:07-cv-173 (W.D. Mich. May 22, 2008) (dismissing for failure to state a claim), *aff'd*, No. 08-1860 (6th Cir. June 18, 2009); *Shavers v. Liefer*, No. 1:06-cv-196 (W.D. Mich. May 15, 2006) (dismissing for seeking relief from a defendant immune from suit and for failing to state a claim), *aff'd*, No. 06-1832 (6th Cir. Jan. 24, 2007); and *Shavers v. Stapleton*, No. 2:03-cv-134 (W.D. Mich. Aug. 18, 2003) (dismissing for failure to state a claim), *aff'd*, No. 03-2210 (6th Cir. June 9, 2004). *See Shavers v. Bauman*, No. 10-1817 (6th Cir. Feb. 4, 2011) (affirming dismissal of complaint for failure to pay the filing fee after denial of leave to proceed in forma pauperis pursuant to the "three-strikes" rule).

Shavers asserts that the dismissal in *Bergh* should not be counted as a strike because the district court improperly dismissed his excessive force claims in that case in light of a subsequent Supreme Court decision, *Wilkins v. Gaddy*, 559 U.S. 34 (2010). Relying on *Wilkins*, Shavers filed a motion for relief from the district court's judgment in *Bergh* pursuant to Federal Rule of Civil Procedure 60(b)(6). The district court denied Shavers's Rule 60(b)(6) motion, and this court affirmed. *Shavers v. Bergh*, No. 2:07-cv-173 (W.D. Mich. Aug. 4, 2011), *aff'd*, No. 11-2079 (6th Cir. Apr. 4, 2012). Because the district court's judgment in *Bergh* remains intact, the dismissal counts as a strike for purposes of § 1915(g).

Accordingly, the court **DENIES** Shavers's motion for leave to proceed in forma pauperis on appeal pursuant to the "three-strikes" rule. Unless Shavers pays the \$505 filing fee to the

No. 17-1573

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district court within thirty days of the entry of this order, this appeal will be dismissed for want of prosecution.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-1573

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL SHAVERS,

Plaintiff-Appellant,

v.

LAVERN SHARP, Deputy Warden, et al.,

Defendants-Appellees.

FILED
Dec 17, 2018
DEBORAH S. HUNT, Clerk

) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE WESTERN DISTRICT OF
) MICHIGAN

)
)
)

ORDER

Before: SILER, ROGERS, and COOK, Circuit Judges.

Michael Shavers, a pro se Michigan prisoner, appeals the district court's judgment dismissing his complaint without prejudice pursuant to Federal Rule of Civil Procedure 4(m) and its order denying his motion to alter or amend that judgment. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed.

See Fed. R. App. P. 34(a).

Shavers filed a civil rights complaint under 42 U.S.C. § 1983 against several officials at Oaks Correctional Facility. Because he paid the filing fee and was not proceeding in forma pauperis, Shavers was responsible for serving the summons and complaint on each defendant. *See Fed. R. Civ. P. 4(c)(1).* Shavers attempted to serve the summonses himself by mailing them to the prison's litigation coordinator. The defendants moved to dismiss for insufficient service, and Shavers moved for an extension of time to serve the defendants and for reissuance of summonses. Upon the recommendation of a magistrate judge, the district court granted the

defendants' motion to dismiss, which was construed as a motion to quash service of process; quashed the summonses served on the defendants; granted Shavers's motion for an extension of time to serve the defendants; and ordered the clerk to reissue summonses with a 60-day expiration date.

Shavers subsequently moved for an extension of time to serve three of the defendants and for entry of default against the other defendants. The magistrate judge recommended that the district court deny Shavers's motions for entry of default because the defendants had not been served properly, deny his motions for an extension of time to serve the defendants because he had failed to establish good cause for a second extension, and dismiss his complaint without prejudice pursuant to Rule 4(m). Shavers failed to file timely objections to the magistrate judge's report and recommendation, and the district court adopted it and entered judgment in favor of the defendants. Nearly two weeks later, Shavers filed objections to the magistrate judge's report and recommendation and a motion to alter or amend the district court's judgment pursuant to Federal Rules of Civil Procedure 59(e) and 60(b)(1) and (6). Denying Shavers's motion, the district court failed to find good cause or excusable neglect for his untimely filing. The district court further stated that Shavers's objections, even if considered, would be overruled. This appeal followed.

A party who does not file timely objections to a magistrate judge's report and recommendation, after being advised to do so, waives his right to appeal. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995). By failing to file timely objections, Shavers waived appellate review of the district court's order adopting the magistrate judge's report and recommendation and dismissing his complaint without prejudice. Although we "may excuse a default if exceptional circumstances are present that justify disregarding the [waiver] rule in the interests of justice," *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012), such circumstances are not present in this case.

Seeking consideration of his untimely objections, Shavers moved to alter or amend the district court's judgment pursuant to Rule 59(e) and Rule 60(b)(1) and (6). We review the district court's order denying Shavers's motion for abuse of discretion. *See Yeschick v. Mineta*,

675 F.3d 622, 628 (6th Cir. 2012) (denial of Rule 60(b) motion); *Intera Corp. v. Henderson*, 428 F.3d 605, 619 (6th Cir. 2005) (denial of Rule 59(e) motion). “A court may grant a Rule 59(e) motion to alter or amend if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.” *Intera Corp.*, 428 F.3d at 620. Under Rule 60(b)(1), a court may grant relief from judgment for excusable neglect, taking “into account the length and reasons for the delay, the impact on the case and judicial proceedings, and whether the movant requesting relief has acted in good faith.” *Burrell v. Henderson*, 434 F.3d 826, 832 (6th Cir. 2006). Rule 60(b)(6), the other rule cited by Shavers, applies only in “unusual and extreme situations where principles of equity *mandate* relief.” *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990).

In support of his motion to alter or amend, Shavers asserted that he had prepared timely objections to the magistrate judge’s report and recommendation for legal mail pickup on the morning of March 8, 2017, but the prison official never picked up his legal mail that day. As the district court pointed out, Shavers did not make these assertions under oath. Furthermore, even assuming the truth of his assertions, Shavers failed to provide any explanation for waiting over two more weeks to mail his objections, which were postmarked on March 27, 2017. In light of this unexplained delay and Shavers’s repeated failure to comply with the court’s procedural requirements, the district court did not abuse its discretion in denying his motion to alter or amend.

For these reasons, we **AFFIRM** the district court’s judgment dismissing Shavers’s complaint without prejudice and its order denying his motion to alter or amend that judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL SHAVERS,

Plaintiff,

v.

UNKNOWN SHARP, et al.,

Defendants.

CASE NO. 1:15-CV-222

HON. ROBERT J. JONKER

ORDER

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action on February 23, 2017 (ECF No. 39). The Report and Recommendation was duly served on the parties. No objections have been filed under 28 U.S.C. 636(b)(1)(C). Plaintiff sent the Court a letter dated February 23, 2017, which was before Plaintiff would have received a copy of the Magistrate Judge's Report and Recommendation. Court records indicate the Report and Recommendation was mailed to Plaintiff on February 24, 2017. The Court filed the letter for the sake of a complete record. Plaintiff has not filed objections to the Report and Recommendation.

ACCORDINGLY, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge (ECF No. 39) is approved and adopted as the opinion of the Court.

IT IS FURTHER ORDERED that Plaintiff's motions for entry of default (ECF Nos. 26, 28 and 32) are **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's motions for an extension of time to serve defendants (ECF Nos. 31 and 34) are **DENIED**.

IT IS FURTHER ORDERED that all of Plaintiff's claims are **DISMISSED** without prejudice pursuant to Fed. R. Civ. P. 4(m).

The Court discerns no good-faith basis for appeal of this matter. *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997); 28 U.S.C. § 1915(a)(3).

Date: March 16, 2017

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

Certified as a true copy
By RJ
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date 3/17/17

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL SHAVERS,

Plaintiff,

File no: 1:15-CV-222

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HON. ROBERT J. JONKER

UNKNOWN SHARP, et al.,

Defendants.

JUDGMENT

JUDGMENT is entered in favor of Defendants.

Date: March 15, 2017

/s/ Robert J. Jonker

ROBERT J. JONKER

CHIEF UNITED STATES DISTRICT JUDGE

Certified as a True Copy
By U.S. Deputy Clerk
U. S. District Court
Western Dist. of Michigan
Date 3/17/17

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL SHAVERS,

Plaintiff,

CASE NO. 1:15-CV-222

v.

HON. ROBERT J. JONKER

UNKNOWN SHARP, *et al.*,

Defendants.

ORDER

On February 23, 2017, Magistrate Judge Kent issued a Report and Recommendation (ECF No. 39). Plaintiff did not object within the fourteen-day objection period. The Court approved the Report and Recommendation on March 16, 2017. (ECF No. 41.) Plaintiff's claims were dismissed without prejudice, and Judgment entered the same day. (ECF Nos. 41-42.) Almost two weeks later, Plaintiff filed belated objections. (ECF No. 43.) Plaintiff requests that the Court excuse the untimely filing, consider the objections, and amend its Order adopting the Report and Recommendation. (ECF No. 44.)

The Court is not satisfied that there is good cause or excusable neglect for Plaintiff's untimely filing. Plaintiff states that he attempted to mail his objections before the deadline and that problems in the mail delivery system caused the delay, but his statement is not under oath. Moreover, it is clear that the prison system has generally been effective in handling Plaintiff's legal mail. Even if the Court did consider Plaintiff's objections on the merits, the objections would fail.

The Court is satisfied that the Magistrate Judge was correct in his analysis and would overrule the objections.

ACCORDINGLY, Plaintiff's Motion to Amend the Court's Order (ECF No.44) is **DENIED**. The case is **DISMISSED WITHOUT PREJUDICE**.

Date: April 13, 2017

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

No. 17-1573

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Feb 26, 2019

DEBORAH S. HUNT, Clerk

MICHAEL SHAVERS,

Plaintiff-Appellant,

V.

LAVERN SHARP, DEPUTY WARDEN, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: SILER, ROGERS, and COOK, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

John S. Shantz

Deborah S. Hunt, Clerk