S.D.N.Y.–N.Y.C.
19-cv-2902
McMahon, C.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of October, two thousand nineteen.

Present:

Rosemary S. Pooler,
Michael H. Park,
Circuit Judges,
Jennifer Choe-Groves,
Judge. *

Robert W. Johnson,

Plaintiff-Appellant,

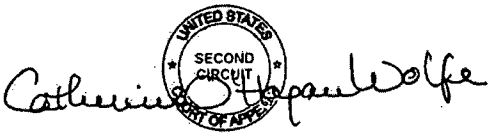
v. 19-1688

Progressive Corporation Insurance Company,

Defendant-Appellee.

Appellant, pro se, moves for leave to proceed in forma pauperis and for immediate judgment in his favor which this Court construes as a motion for summary reversal. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



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* Judge Jennifer Choe-Groves, of the United States Court of International Trade, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of December, two thousand nineteen.

Robert W. Johnson,

Plaintiff - Appellant,

v.

Progressive Corporation Insurance Company,

Defendant - Appellee.

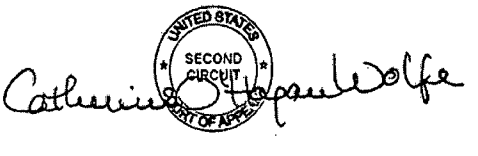
ORDER

Docket No: 19-1688

Appellant, Robert W. Johnson, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT W. JOHNSON,

Plaintiff,

-against-

PROGRESSIVE CORPORATION INSURANCE COMPANY,

Defendant.

19-CV-2902 (CM)

CIVIL JUDGMENT

Pursuant to the order issued May 22, 2019, dismissing the complaint,

IT IS ORDERED, ADJUDGED, AND DECREED that the complaint is dismissed without prejudice to *Johnson v. Progressive*, No. 19-CV-826 (N.D. Ohio).

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from the Court's judgment would not be taken in good faith.

IT IS FURTHER ORDERED that the Clerk of Court mail a copy of this judgment to Plaintiff and note service on the docket.

SO ORDERED.

Dated: May 22, 2019
New York, New York

COLLEEN McMAHON
Chief United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT W. JOHNSON,

Plaintiff,

-against-

PROGRESSIVE CORPORATION INSURANCE COMPANY,

Defendant.

19-CV-2902 (CM)

ORDER OF DISMISSAL

COLLEEN McMAHON, Chief United States District Judge:

Plaintiff, proceeding *pro se* and *in forma pauperis* (IFP), brings this action under the Court's diversity jurisdiction, 28 U.S.C. § 1332, against Progressive Corporation Insurance Company. Plaintiff resides in the Bronx, and he alleges that Progressive is headquartered in Ohio. His claims arise out of a car accident that occurred on January 28, 2017, in Buffalo, New York. Although a summons has not issued, Plaintiff moved for entry of a default judgment, and Defendant opposed that motion. The Court denied that motion on May 16, 2019. For the following reasons, the Court dismisses the complaint without prejudice.

Plaintiff filed a virtually identical complaint and motion for a default judgment in the United States District Court for the Northern District of Ohio. *See Johnson v. Progressive*, No. 19-CV-826 (N.D. Ohio). In that case, Progressive moved for an extension of time to answer the complaint, and opposed Plaintiff's motion for a default judgment. The district judge in that case granted Progressive's motion, and its answer is due on June 7, 2019. (No. 19-CV-626 (N.D. Ohio), (ECF Nos. 4-7.) That court also directed Plaintiff to submit an amended IFP application. (*Id.* No. 10.)

As this complaint raises the same exact claims as the matter pending in the Northern District of Ohio, no useful purpose would be served by the filing and litigation of this duplicate

lawsuit. Therefore, this complaint is dismissed without prejudice to Plaintiff's case pending in the Northern District of Ohio under docket number 19-CV-826.

LITIGATION HISTORY AND WARNING

While this dismissal is without prejudice, the Court notes that Plaintiff has filed other duplicative complaints against insurance companies arising out of the same 2017 car accident. For example, he filed substantially similar complaints against Nationwide Insurance Company and Victoria Fire & Casualty in three different courts. *See Johnson v. Nationwide Ins., et al.*, No. 19-CV-1130 (S.D. Ohio filed Mar. 26, 2019); *Johnson v. Victoria Fire & Casualty, et al.*, No. 19-CV-1130 (S.D. Ala. filed Mar. 29, 2019); *Johnson v. Victoria Fire & Casualty, et al.*, No. 19-CV-2782 (S.D.N.Y. filed Mar. 28, 2019).

Plaintiff is warned that should he persist in filing duplicative complaints, he runs the risk of being ordered to show cause why he should not be barred from filing future actions IFP without prior permission. *See* 28 U.S.C. § 1651.

CONCLUSION

The Clerk of Court is directed to reassign this matter to my docket, mail a copy of this order to Plaintiff, and note service on the docket.

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: May 22, 2019
New York, New York

COLLEEN McMAHON
Chief United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT W. JOHNSON,

Plaintiff,

-against-

PROGRESSIVE CORPORATION INSURANCE COMPANY,

Defendant.

19-CV-2902 (CM)

ORDER

COLLEEN McMAHON, Chief United States District Judge:

Plaintiff, who is proceeding *pro se* and *in forma pauperis*, filed this complaint under the Court's diversity jurisdiction against Progressive Corporation Insurance Company. Plaintiff resides in the Bronx, and he alleges that Progressive is headquartered in Ohio. His claims arise out of a car accident that occurred on January 28, 2017, in Buffalo, New York. Although a summons was not issued, Plaintiff moved for entry of a default judgment. Defendant, who was never properly served, opposed the motion. (ECF Nos. 5-7.) On May 16, 2019, the Court denied Plaintiff's motion by memorandum endorsement. On May 22, 2019, the Court dismissed this action without prejudice because there is a virtually identical complaint pending in the United States District Court for the Northern District of Ohio. *See Johnson v. Progressive*, No. 19-CV-826 (N.D. Ohio).[1]

Plaintiff has filed a motion "to reserve right to appeal and object default judgment endorsement." (ECF No. 11.) The Court liberally construes this submission as a motion under Fed. R. Civ. P. 59(e) to alter or amend judgment and a motion under Local Civil Rule 6.3 for

[1] The Court also noted that Plaintiff has three other complaints against other insurance companies, pending in this District and in other courts, arising out of the same car accident.

reconsideration, and, in the alternative, as a motion under Fed. R. Civ. P. 60(b) for relief from a judgment or order. *See Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006); *see also Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010) (The solicitude afforded to *pro se* litigants takes a variety of forms, including liberal construction of papers, "relaxation of the limitations on the amendment of pleadings," leniency in the enforcement of other procedural rules, and "deliberate, continuing efforts to ensure that a *pro se* litigant understands what is required of him") (citations omitted).

After reviewing the arguments in Plaintiff's submission, the Court denies the motion.

DISCUSSION

A. Motion for Reconsideration

The standards governing Fed. R. Civ. P. 59(e) and Local Civil Rule 6.3 are the same. *R.F.M.A.S., Inc. v. Mimi So*, 640 F. Supp. 2d 506, 509 (S.D.N.Y. 2009). The movant must demonstrate that the Court overlooked "controlling law or factual matters" that had been previously put before it. *Id.* at 509 (discussion in the context of both Local Civil Rule 6.3 and Fed. R. Civ. P. 59(e)); *see Padilla v. Maersk Line, Ltd.*, 636 F. Supp. 2d 256, 258-59 (S.D.N.Y. 2009). "Such motions must be narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court." *Range Road Music, Inc. v. Music Sales Corp.*, 90 F. Supp. 2d 390, 391-92 (S.D.N.Y. 2000); *see also SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 206 (S.D.N.Y. 2009) ("A motion for reconsideration is not an invitation to parties to 'treat the court's initial decision as the opening of a dialogue in which that party may then use such a motion to advance new theories or adduce new evidence in response to the court's ruling.'") (internal quotation and citations omitted).

The Court properly denied Plaintiff's motion for entry of a default judgment.[2] Plaintiff failed to provide proof of service of a summons and complaint. In fact, the Court never issued a summons. Defendant therefore was not in default. It was also proper for this Court to dismiss this action without prejudice. Plaintiff is not entitled to simultaneously litigate the same claims against the same Defendant in multiple districts.

Accordingly, Plaintiff has failed to demonstrate in his motion for reconsideration that the Court overlooked any controlling decisions or factual matters with respect to the dismissed action. Plaintiff's motion under Fed. R. Civ. P. 59(e) and Local Civil Rule 6.3 is therefore denied.

Under Fed. R. Civ. P. 60(b), a party may seek relief from a district court's order or judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct of an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason justifying relief.

Fed. R. Civ. P. 60(b).

The Court has considered Plaintiff's arguments, and even under a liberal interpretation of his motion, Plaintiff has failed to allege facts demonstrating that any of the grounds listed in the first five clauses of Fed. R. Civ. P. 60(b) apply. Therefore, the motion under any of these clauses is denied.

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[2] Plaintiff objects that he was not given an opportunity to respond to Defendant's opposition. But the Court acted *sua sponte* — meaning on its own — in denying the motion. Although named as a Defendant, Progressive was not served with process, and thus was not a party to this action.

To the extent that Plaintiff seeks relief under Fed. R. Civ. P. 60(b)(6), the motion is also denied. "[A] Rule 60(b)(6) motion must be based upon some reason other than those stated in clauses (1)-(5)." *United Airlines, Inc. v. Brien*, 588 F.3d 158, 175 (2d Cir. 2009) (quoting *Smith v. Sec'y of HHS*, 776 F.2d 1330, 1333 (6th Cir. 1985)). A party moving under Rule 60(b)(6) cannot circumvent the one-year limitation applicable to claims under clauses (1)-(3) by invoking the residual clause (6) of Rule 60(b). *Id.* A Rule 60(b)(6) motion must show both that the motion was filed within a "reasonable time" and that "'extraordinary circumstances' [exist] to warrant relief." *Old Republic Ins. Co. v. Pac. Fin. Servs. of America, Inc.*, 301 F.3d 54, 59 (2d Cir. 2002) (per curiam) (citation omitted).

Plaintiff has failed to allege any facts demonstrating that extraordinary circumstances exist to warrant relief under Fed. R. Civ. P. 60(b)(6). *See Ackermann v. United States*, 340 U.S. 193, 199-202 (1950).

B. Motion for Extension of Time to Appeal

A notice of appeal must "designate the judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B); *The New Phone Co. v. City of New York,* 498 F.3d 127, 131 (2d Cir. 2007) (holding that appellate jurisdiction "depends on whether the intent to appeal from [a] decision is clear on the face of, or can be inferred from, the notice[ ] of appeal"). In addition, under Fed. R. App. P. 4(a)(1)(A), a notice of appeal in a civil case must be filed within thirty days after entry of judgment. "[T]he taking of an appeal within the prescribed time is mandatory and jurisdictional." *In re WorldCom, Inc.*, 708 F.3d 327, 329 (2d Cir. 2013) (citation and internal quotation marks omitted).

Although the motion for an extension of time to appeal was filed within thirty days from the entry of judgment and demonstrates Plaintiff's intent to appeal the dismissal of his case, it is not a notice of appeal. *Pro se* submissions, however, must be construed liberally and read "to

raise the strongest arguments they suggest." *Ortiz v. McBride,* 323 F.3d 191, 194 (2d Cir. 2003). Within thirty days from the date of this order, Plaintiff must complete and return the attached notice of appeal form. Should Plaintiff comply with this order, the Court will construe the motion for an extension of time to appeal as a timely filed notice of appeal, and the notice of appeal as a supplemental filing.

CONCLUSION

The Clerk of Court is directed to mail a copy of this order to Plaintiff and note service on the docket. Plaintiff's motion for reconsideration (ECF doc. #11) is denied. The Court denies as moot Plaintiff's motion for an extension of time to appeal. If Plaintiff files the notice of appeal within thirty days from the date of this order, the Clerk of Court is directed to process the appeal.

Plaintiff's case in this Court under Docket No. 19-CV-2902 is closed. No further documents will be accepted for filing documents except for those that are directed to the Second Circuit Court of Appeals.

The Clerk of Court is directed to docket this as a "written opinion" within the meaning of Section 205(a)(5) of the E-Government Act of 2002.

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: May 30, 2019
New York, New York

COLLEEN McMAHON
Chief United States District Judge

Additional material from this filing is available in the Clerk's Office.