NOT RECOMMENDED FOR PUBLICATION

No. 20-3381

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA EARNEST; JANET KELLY,	)	
	)	
Plaintiffs-Appellants,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE SOUTHERN DISTRICT OF
JOANN ELLISON, et al.,	)	OHIO
	)	
Defendants-Appellees.	)	

ORDER

Before: GUY, CLAY, and DONALD, Circuit Judges.

Patricia Earnest and Janet Kelly (collectively, "Plaintiffs"), *pro se* residents of Arkansas and Georgia, respectively, appeal the district court's order denying their construed motion for relief from judgment under Rule 60(b)(1) and (b)(6) of the Federal Rules of Civil Procedure. This case has been referred to a panel of this Court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

The Plaintiffs are children of the late John H. Ellison, Sr. They filed a lawsuit in August 2019, alleging that certain "officers of the court"—namely, Joann Ellison, Judge Lawrence A. Belskis, Jack G. Gibbs, Jr., and Alphonse P. Cincione—engaged in tortious conduct while their father's will was being probated in the Franklin County (Ohio) Court of Common Pleas, Probate Division. Approximately four months later—on December 13, 2019—the magistrate judge ordered the Plaintiffs to show cause within fourteen days why their complaint should not be dismissed for failure to prosecute based on their continuing failure to timely effect service of process on any of the Defendants. *See* Fed. R. Civ. P. 4(m) and 41(b). The magistrate judge also ordered Earnest to show cause why her claims should not be dismissed for failure to prosecute

based on her failure to provide the court with a current mailing address. The magistrate judge explicitly cautioned the Plaintiffs "that their failure to show cause may result in dismissal of this action."

The Plaintiffs failed to respond to the show-cause order. Accordingly, the magistrate judge recommended that the district court dismiss the Plaintiffs' Complaint without prejudice pursuant to Rules 4(m) and 41(b). On February 3, 2020, over the Plaintiffs' objections, the district court adopted the magistrate judge's report and recommendation and dismissed the Plaintiffs' complaint without prejudice. The Plaintiffs subsequently filed a "Motion for Writ of Mandamus to Set Aside Court Order Dated February 3, 2020 and Judgment," in which they argued that the district court mistakenly found that two of the Defendants—Joann Ellison and Alphonse Cincione—were not served. The district court construed the Plaintiffs' post-judgment motion as a motion for relief from judgment under Rule 60(b)(1) and (b)(6) and denied it on March 9, 2020.

The Plaintiffs thereafter filed a notice of appeal from the district court's February 3, 2020, judgment and March 9, 2020, order. We determined that the Plaintiffs' notice of appeal was "late as it applies to the February 3, 2020, judgment, but timely filed as it applies to the March 9, 2020, order." *Earnest v. Ellison*, No. 20-3381, slip op. at 1 (6th Cir. May 15, 2020) (order) (citing 28 U.S.C. § 2107(a) and Fed. R. App. P. 4(a)(1)(A)). This was because the Plaintiffs' construed Rule 60(b) motion did not toll their time to appeal because it was not filed within twenty-eight days of the district court's February 3, 2020, judgment. *Id.* (citing Fed. R. App. P. 4(a)(4) and *Torras Herreria y Construcciones, S.A. v. M/V Timur Star*, 803 F.2d 215, 216 (6th Cir. 1986)). We therefore dismissed the Plaintiffs' appeal as it pertained to the February 3, 2020, judgment and instructed the Plaintiffs that "[o]nly issues regarding the March 9, 2020, order denying the construed Rule 60(b) motion may be argued on appeal." *Id.*, slip op. at 2.

Prior to our order of May 15th, the Plaintiffs filed an unsolicited appellate brief in which they argued that the district court improperly dismissed their Complaint. As previously noted, those arguments are not properly before this Court. *See id.*, slip op. at 1-2. The Plaintiffs raise no argument in their brief relating to the district court's order dismissing their Rule 60(b) motion.

Ordinarily, a party's failure to raise an argument in an appellate brief forfeits the argument on appeal. *See Geboy v. Brigano*, 489 F.3d 752, 767 (6th Cir. 2007). But since the Plaintiffs filed their brief before our jurisdiction order, we elect to review the district court's Rule 60(b) order.

The district court construed the Plaintiffs' post-judgment motion as being filed pursuant to Rule 60(b)(1) and (b)(6), and the Plaintiffs do not dispute that interpretation on appeal. We review a district court's order denying a Rule 60(b) motion for abuse of discretion. *See Yeschick v. Mineta*, 675 F.3d 622, 628 (6th Cir. 2012). Under Rule 60(b)(1), a court may grant relief from judgment for "mistake, inadvertence, surprise, or excusable neglect." On the other hand, a court may grant relief from judgment under Rule 60(b)(6) for "any other reason that justifies relief." Rule 60(b)(6) 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).

On appeal, the Plaintiffs reiterate their argument that the district court mistakenly found that none of the Defendants were properly served. But as the district court correctly noted, the docket reflects only that summonses were issued to the Defendants. There is no indication in the record that service was ever effectuated, and the Plaintiffs did not provide the district court with evidence to the contrary. The Plaintiffs therefore failed to demonstrate that they were entitled to relief from the district court's judgment based on either mistake or an "unusual and extreme situation[] where principles of equity *mandate* relief." *Olle*, 910 F.2d at 365. The district court did not abuse its discretion when it dismissed the Plaintiffs' construed Rule 60(b) motion.

Accordingly, we **AFFIRM** the district court's order.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 20-3381

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 15, 2020
DEBORAH S. HUNT, Clerk

PATRICIA EARNEST; JANET KELLY,

Plaintiffs-Appellants,

v.

JOANN ELLISON, et al.,

Defendants-Appellees.

ORDER

Before: GIBBONS, COOK, and READLER, Circuit Judges.

This court must examine the basis of its jurisdiction, on its own motion if necessary. *Alston v. Advanced Brands & Importing Co.*, 494 F.3d 562, 564 (6th Cir. 2007). Generally, in a civil case where the United States, a United States agency, or a United States officer or employee is not a party, a notice of appeal must be filed within thirty days after the judgment or order appealed from is entered. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

In this civil rights action, the district court entered its final judgment on February 3, 2020. On March 5, 2020, plaintiffs Patricia Earnest and Janet Kelly filed a "Motion for Writ of Mandamus to Set Aside Court Order Dated February 3, 2020 and Judgment." That filing, construed as a Federal Rule of Civil Procedure 60(b) motion for relief from judgment, was denied by order entered on March 9, 2020. Because the motion was not filed within twenty-eight days of the February 3, 2020, judgment, it did not toll the time to appeal. *See* Fed. R. App. P. 4(a)(4); *Torras Herreria y Construcciones, S.A. v. M/V Timur Star*, 803 F.2d 215, 216 (6th Cir. 1986). The notice of appeal filed in the district court on March 30, 2020, is late as it applies to the February 3, 2020, judgment, but timely filed as it applies to the March 9, 2020, order. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

Compliance with the statutory requirement in § 2107(a) that the notice of appeal be filed within thirty days after the entry of a judgment is a mandatory jurisdictional prerequisite that this court may neither waive nor extend. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 (2017); *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

It is therefore ordered that this appeal is **DISMISSED** as it applies to the February 3, 2020, judgment. Only issues regarding the March 9, 2020, order denying the construed Rule 60(b) motion may be argued on appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICIA EARNEST, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	**Case No. 2:19-cv-3611**
	:	
JOANN ELLISON, *et al.*,	:	
	:	**JUDGE SARAH D. MORRISON**
	:	**Magistrate Judge Chelsey M. Vascura**
Defendants.	:	

ORDER

This matter is before the Court for consideration of a Report and Recommendation ("R&R") issued by the Magistrate Judge on January 3, 2020. (ECF No. 10). Therein, the Magistrate Judge recounted her December 13, 2019 Order requiring Plaintiffs to show cause why the case should not be dismissed for failure to effect service under Fed. R. Civ. P. 4(m) and for failure to prosecute. (ECF No. 8.) The Order cautioned Plaintiffs that failure to respond could result in their case being dismissed. *Id.* Plaintiffs did not respond, so the R&R was issued. The R&R suggested that the case should be dismissed for failing to prosecute for lack of service and to provide the Court with an updated mailing address. (ECF No. 10.)

Plaintiffs Patricia Earnest and Janet Kelly filed their "Motion for Relief from Judgment or Order Motion to Set Aside Court Order Dated October 28, 2019" on January 13, 2020. (ECF No. 11.) That filing, which the Court shall treat as an objection to the R&R, seemingly argues that service was effected on Defendants Joann Ellison and Alphonse Cincione such that the Court should not adopt the R&R but should instead reverse the Magistate Judge's October 28,

2019 Order denying Plaintiffs' motions for default for lack of service.[1] But the docket reflects only that summons were issued as to those individuals, not that service was perfected upon them. This ground of objection is therefore **OVERRULED** and the relief sought is **DENIED**.

Accordingly, the Court **OVERRULES** Plaintiff's Objections to the R&R and **DENIES** Plaintiff's Motion to Set Aside Court Order Dated October 28, 2019. (ECF No. 11.) Thus, the Court hereby **ADOPTS** the R&R (ECF No. 10) and **DISMISSES** Plaintiffs' Complaint **WITHOUT PREJUDICE.**

Plaintiffs are **ORDERED** to list 19cv-3611 as a related case should they choose to re-file.

IT IS SO ORDERED.

/s/ Sarah D. Morrison
SARAH D. MORRISON
UNITED STATES DISTRICT JUDGE

[1] Judge Belskis is listed as a defendant in the Complaint's case caption and is mentioned in the body of the Complaint. Plaintiffs do not address whether he was served, and the docket does not indicate that a summons was issued as to him. Jack Gibbs is also a named defendant. Plaintiffs do not address whether he was served, either.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICIA EARNEST, *et al.*,

Plaintiffs,

v.

Civil Action 2:19-cv-3611
Judge Sarah D. Morrison
Magistrate Judge Chelsey M. Vascura

JOANN ELLISON, *et al.*,

Defendants.

REPORT AND RECOMMENDATION

On December 13, 2019, the Court ordered Plaintiffs to show cause within fourteen days why this action should not be dismissed for failure to prosecute based on their failure to timely effect service over any of the Defendants. (Show Cause Order, ECF No. 8.) Plaintiff Patricia Earnest was also ordered to show cause why her claims should not be dismissed for failure to prosecute based on her failure to provide the Court with an updated mailing address. (*Id.* at 2.) Plaintiffs were further cautioned that failure to comply with the Show Cause Order may result in dismissal of their case. (*Id.*) To date, Plaintiffs have not responded to the show cause order.

Under the circumstances, the undersigned finds dismissal of Plaintiffs' action appropriate pursuant to Rules 4(m) and 41(b). The Court's inherent authority to dismiss a plaintiff's action with prejudice because of her failure to prosecute is expressly recognized in Rule 41(b), which provides in pertinent part: "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an

adjudication on the merits." Fed. R. Civ. P. 41(b); *Link v. Walbash R.R. Co.*, 370 U.S. 626, 629–31 (1962). "This measure is available to the district court as a tool to effect 'management of its docket and avoidance of unnecessary burdens on the tax-supported courts [and] opposing parties.'" *Knoll v. AT & T*, 176 F.3d 359, 363 (6th Cir. 1999) (internal citations omitted).

The Sixth Circuit directs the district courts to consider the following four factors in deciding whether to dismiss an action for failure to prosecute under Rule 41(b):

> (1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.

Schafer v. City of Defiance Police Dep't, 529 F.3d 731, 737 (6th Cir. 2008) (citing *Knoll*, 176 F.3d at 363). "'Although typically none of the factors is outcome dispositive, . . . a case is properly dismissed by the district court where there is a clear record of delay or contumacious conduct.'" *Schafer*, 529 F.3d at 737 (quoting *Knoll*, 176 F.3d at 363).

Here, Plaintiffs (1) failed to effect service of process of any of the Defendants during the time permitted by Federal Rule of Civil Procedure 4(m); (2) failed to provide the Court with an updated mailing address; and (3) failed to comply with the Court's show cause order. Moreover, the Court explicitly cautioned Plaintiffs in the Show Cause Order that failure to comply could result in dismissal of this action. *See Stough v. Mayville Cmty. Schs.*, 138 F.3d 612, 615 (6th Cir. 1998) (noting that "[p]rior notice, or the lack thereof, is . . . a key consideration" in whether dismissal under rule 41(b) is appropriate). Plaintiffs' failure to timely comply with the clear orders of the Court, which established reasonable deadlines for compliance, constitutes bad faith or contumacious conduct. *See Steward v. Cty. of Jackson, Tenn.*, 8 F. App'x 294, 296 (6th Cir. 2001) (concluding that a plaintiff's failure to comply with a court's order "constitute[d] bad faith or contumacious conduct and justifie[d] dismissal"). Because Plaintiffs have missed these

deadlines and disregarded the Court's order, the undersigned concludes that no alternative sanction would protect the integrity of the pretrial process. The undersigned nevertheless finds that dismissal with prejudice is too harsh a sanction under these circumstances.

It is therefore **RECOMMENDED** that this action be **DISMISSED WITHOUT PREJUDICE** pursuant to Rule 4(m) for failure to timely effect service of process and pursuant to Rule 41(b) for failure to prosecute. It is further **RECOMMENDED** that Plaintiffs be ordered to list 2:19-cv-3611 as a related case if they re-file this action.

PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A Judge of this Court shall make a *de novo* determination of those portions of the Report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a Judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the District Judge review the Report and Recommendation *de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Chelsey M. Vascura
CHELSEY M. VASCURA
UNITED STATES MAGISTRATE JUDGE

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