

**NOT RECOMMENDED FOR PUBLICATION**

No. 22-2052

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Jul 17, 2023  
DEBORAH S. HUNT, Clerk

LATAUSHA SIMMONS, )  
 )  
Plaintiff-Appellant, )  
 )  
v. )  
 )  
CITY OF DETROIT, MI; DETROIT, MI POLICE )  
DEPARTMENT; JAMES CRAIG, Police Chief; )  
JOHN DOES, Unknown City of Detroit Police )  
Officers, )  
 )  
Defendants-Appellees. )

ON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF  
MICHIGAN

**ORDER**

Before: NORRIS, McKEAGUE, and MATHIS, Circuit Judges.

In this 42 U.S.C. § 1983 action, LaTausha Simmons, proceeding pro se, appeals a district court order denying her post-judgment motion to vacate or set aside the district court’s order of dismissal, reinstate the case, and extend the time for her deposition or, alternatively, to extend the time to respond to the defendants’ motion to dismiss. 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). Because the district court did not abuse its discretion in denying Simmons’s belated post-judgment motion, we affirm.

In 2018, Simmons sued the City of Detroit; the Detroit Police Department (DPD); James Craig, the DPD’s police chief; and several unknown DPD officers. Simmons alleged that the DPD officers used excessive force and sexually assaulted her while falsely arresting her at a hospital and detaining her at a holding facility.

**United States Court of Appeals for the Sixth Circuit**

**U.S. Mail Notice of Docket Activity**

The following transaction was filed on 07/17/2023.

**Case Name:** Latausha Simmons v. City of Detroit, MI, et al

**Case Number:** 22-2052

**Docket Text:**

ORDER filed : AFFIRMED. Mandate to issue, decision not for publication, pursuant to FRAP 34(a)(2)(C). Alan E. Norris, Circuit Judge; David W. McKeague, Circuit Judge and Andre B. Mathis, Circuit Judge.

**The following document(s) are associated with this transaction:**

Document Description: Order

**Notice will be sent to:**

Ms. Latausha Simmons  
20500 Dean Street  
Detroit, MI 48234

**A copy of this notice will be issued to:**

Ms. Kinikia D. Essix  
Ms. Sheri L. Whyte

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The district court entered a scheduling order that directed the parties to complete all discovery by June 5, 2020. The defendants attempted to schedule Simmons's deposition but were unable to reach her at the two phone numbers that she provided. After a hearing, the district court ordered Simmons to show cause why it should not dismiss the case or impose sanctions for her failure to comply with the local rule requiring parties to provide an operable telephone number and email address. A few weeks later, the district court vacated the show-cause order and ordered that communication with Simmons be made via regular mail and that her deposition take place the following month.

Simmons failed to appear for her noticed January 21, 2020, deposition because she was in jail at the time. After she was released from jail, the defendants attempted to mail her a notice of deposition to take place on February 21, 2020, but the delivery attempt failed and she did not appear. The City of Detroit<sup>1</sup> then moved to dismiss Simmons's complaint under Federal Rule of Civil Procedure 37(b) based on her failure to appear for her deposition.

In April 2020, while that motion was pending, the district court stayed the proceedings because of the COVID-19 pandemic. The stay was lifted on January 6, 2021, at which time the district court warned Simmons that her failure to appear at the upcoming status conference could result in sanctions, including the dismissal of her complaint. The district court reiterated that warning when it denied the City of Detroit's motion to dismiss, ordering Simmons to appear telephonically for the status conference and to comply with her discovery obligations, including appearing for her deposition. Simmons appeared telephonically at the status conference, after which the district court ordered Simmons's deposition to be held within 21 days (by February 15, 2021) and once again warned Simmons that, if she failed to appear, she would be subject to sanctions, including dismissal of her complaint.

According to the City of Detroit, the parties agreed that Simmons's deposition would be taken on February 12, 2021, with defense counsel and the court reporter appearing via Zoom and

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<sup>1</sup> At this point, the DPD and Craig had been dismissed as defendants.

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Simmons appearing via telephone. Simmons, however, did not appear, purportedly informing defense counsel that she was uncomfortable with the use of Zoom for her deposition.

The City of Detroit then moved again to dismiss Simmons's complaint pursuant to Rule 37(b), citing Simmons's unwillingness to comply with her obligation to appear at her deposition. Construing the motion as being filed on behalf of all remaining defendants (the City of Detroit and the unnamed DPD officers), the district court granted it on March 31, 2021, reasoning that each of the four factors that courts consider when determining whether to dismiss a plaintiff's complaint for failing to comply with discovery obligations or a court order weighed in favor of dismissal. *See Mager v. Wis. Cent. Ltd.*, 924 F.3d 831, 837 (6th Cir. 2019).

Over six months later, Simmons filed her post-judgment motion, citing Federal Rules of Civil Procedure 6(b) and 60(b)(1) and (b)(3), among others. On the whole, she argued that defense counsel engaged in "abusive discovery practices" by, for example, requiring her to take her deposition via Zoom instead of via the telephone or in person, failing to secure a location for her deposition, and failing to move for an extension of time to take her deposition as the parties had agreed; that she "made herself available" for deposition via the telephone or in person and that her calls to defense counsel to schedule the deposition were largely ignored; and that she "has always acted in good faith with no ill intent or undue delay regarding the taking of her deposition or appearance for such and has never been uncooperative or uncommunicative." The district court denied the motion as untimely and meritless, reasoning that the dismissal of Simmons's complaint was due to her own "failure to cooperate in the action that she initiated," including her failure to comply with the court's order to attend her deposition, and was not attributable to any mistake or excusable neglect or any fraud, misrepresentations, or misconduct on the part of the defendants or their counsel. It also denied Simmons's alternative request for an extension of time to respond to the defendants' motion to dismiss.

#### Rule 60(b)

A party may seek relief from a final judgment or order under Rule 60(b)(1) for "mistake, inadvertence, surprise, or excusable neglect" and under Rule 60(b)(3) for "fraud (whether

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previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.” Fed. R. Civ. P. 60(b)(1), (3). We review the denial of a Rule 60(b) motion for an abuse of discretion. *West v. Carpenter*, 790 F.3d 693, 697 (6th Cir. 2015). “Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment.” *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009) (quoting *Burrell v. Henderson*, 434 F.3d 826, 831 (6th Cir. 2006)).

No abuse of discretion occurred here. The district court reasonably rejected the motion on the merits. When determining whether a party is entitled to relief under Rule 60(b)(1) based on excusable neglect, courts consider three factors: “(1) culpability—that is, whether the neglect was excusable; (2) any prejudice to the opposing party; and (3) whether the party holds a meritorious underlying claim or defense.” *Yeschick v. Mineta*, 675 F.3d 622, 628-29 (6th Cir. 2012) (quoting *Flynn v. People’s Choice Home Loans, Inc.*, 440 F. App’x. 452, 457-58 (6th Cir. 2011)). Importantly, “[a] party seeking relief must first demonstrate a lack of culpability before the court examines the remaining two factors.” *Id.* (quoting *Flynn*, 440 F. App’x at 458). For purposes of Rule 60(b)(1), “[a] party’s conduct is culpable if it ‘display[s] either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceeding.’” *Williams v. Meyer*, 346 F.3d 607, 613 (6th Cir. 2003) (quoting *Amernational Indus. v. Action-Tungsum, Inc.*, 925 F.2d 970, 978 (6th Cir. 1991)).

The district court appropriately determined that Simmons’s failure to demonstrate a lack of culpability doomed her request for relief under Rule 60(b)(1) based on excusable neglect. She devotes the bulk of her motion and appellate briefs to placing blame on the defendants for their failure to depose her. For example, she repeatedly argues that, after the attempted deposition that was noticed for January 21, 2020—which she could not attend because she was in jail—the defendants never provided her with any date, location, or notification of any deposition. These arguments are contradicted by the record, which shows that the defendants filed a notice that their counsel would take Simmons’s deposition on February 12, 2021, “telephonically via secure Zoom conference technology.” And although Simmons objected to use of Zoom for her deposition, the

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defendants explained that they conferred with Simmons and explained that their “counsel and the court reporter would appear on a Zoom call and [Simmons] would be able to call in from a telephone.” Simmons did not heed these accommodations and notified the defendants that she refused to participate via telephone. Insofar as Simmons defied a court order to attend her deposition and then, after the fact, attempted to blame the defendants for the scheduling issues, the district court’s conclusion that she failed to show excusable neglect to justify relief under Rule 60(b)(1) was not an abuse of discretion.

Simmons also invokes the “mistake” component of Rule 60(b)(1) by arguing that the district court dismissed her complaint “due to improper factual findings.”<sup>2</sup> Rule 60(b)(1) permits relief only “when the judge has made a *substantive* mistake of law or fact in the final judgment or order.” *Cacevic v. City of Hazel Park*, 226 F.3d 483, 490 (6th Cir. 2000) (emphasis added) (quoting *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999)). Simmons did not identify any substantive mistakes; instead, she again belatedly attempts to blame the defendants for her failure to attend her court-ordered deposition. Given that Simmons repeatedly flouted the defendants’ offers for accommodations (e.g., that her deposition be taken via telephone), it was reasonable for the district court to conclude that Simmons identified no mistake that might otherwise justify relief from the dismissal of her complaint for failing to comply with her discovery obligations and its orders to appear at her deposition.

In short, because Simmons did not demonstrate a lack of culpability and did not identify a substantive mistake of fact, the district court’s denial of relief under Rule 60(b)(1) was not an abuse of discretion.

Nor did the district court abuse its discretion in denying Simmons relief under Rule 60(b)(3), which required her “to show by clear and convincing evidence that defendants deliberately engaged in some act of fraud, misrepresentation or other misconduct that adversely affected the fairness of the proceedings.” *Thurmond v. Wayne Cnty. Sheriff Dep’t*, 564 F. App’x

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<sup>2</sup> Simmons’s argument that she did not receive the defendants’ motion to dismiss and that the nonreceipt was an inadvertent mistake “due to mail delays” is unconvincing for the reasons set forth below in the discussion of her alternative request for relief.

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823, 827 (6th Cir. 2014) (citing *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008)). Although she repeatedly alleges that the defendants engaged in misconduct regarding the scheduling of her deposition (e.g., that they intentionally scheduled her deposition knowing that she was in jail), these allegations are unsupported by any evidence (other than screenshots of Simmons's call log, which reveal nothing in terms of misconduct). And the defendants denied the allegations, reiterating that Simmons was given "multiple opportunities to appear via telephone, Zoom, or in-person for her deposition," but she "refused to participate." Insofar as Simmons offered no clear and convincing evidence to the contrary, the district court did not abuse its discretion in denying Simmons relief under Rule 60(b)(3).

#### Rule 6(b)

Simmons also sought relief pursuant to Rule 6(b), which provides that, "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time" to act either "with or without motion . . . if a request is made[] before the original time or its extension expires" or "on motion made after the time has expired if the party failed to act because of excusable neglect." According to Simmons, the parties had agreed to an extension of time for her deposition prior to the expiration of the court-imposed deadline of February 15, 2021, and thus Rule 6(b) excuses her failure to attend her deposition before that deadline. But neither Simmons nor the defendants moved for an extension of time to take Simmons's deposition before the deadline expired. *See* Fed. R. Civ. P. 6(b)(1). And although Simmons moved under Rule 6(b)(2) to extend the time for the defendants to take her deposition—nearly eight months after the deadline expired and more than six months after the case was dismissed—the district court, as set forth above, did not abuse its discretion in concluding that Simmons did not show that her failure to attend her deposition was due to excusable neglect. It follows that the district court likewise did not abuse its discretion in denying her request for relief under Rule 6(b) for failing to attend her deposition by the court-imposed deadline. *See Nafziger v. McDermott Int'l, Inc.*, 467 F.3d 514, 522 (6th Cir. 2006).

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Alternative Motion for Extension of Time to Respond

The district court also did not abuse its discretion in denying Simmons's alternative motion, in which she argued that she never received the defendants' motion to dismiss and thus should have been granted an extension of time to file a response. As the district court explained, the motion to dismiss certified that it was mailed to Simmons at the address that she previously provided, as directed by the district court. This is an acceptable method of service, which was "complete upon mailing." Fed. R. Civ. P. 5(b)(2)(C); see *United States v. Wright*, 238 F.3d 418, 2000 WL 1846340, at \*2 (4th Cir. 2000) (per curiam) (collecting authorities standing for the proposition that a valid certificate of service is sufficient to establish service absent proof to the contrary); see also *Silva-Carvalho Lopes v. Gonzales*, 468 F.3d 81, 85 (2d Cir. 2006) (per curiam) (providing that a properly addressed filing with a certificate of service indicating that it was sent by regular mail yields a presumption that the filing was received); *In re Yoder Co.*, 758 F.2d 1114, 1118 (6th Cir. 1985) ("The common law has long recognized a presumption that an item properly mailed was received by the addressee."). The district court therefore did not abuse its discretion by denying Simmons's request for an extension of time to respond to the defendants' motion to dismiss, which she made over six months after the court granted the motion and dismissed the case.

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

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk



No. 22-2052

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Sep 1, 2023  
DEBORAH S. HUNT, Clerk

LATAUSHA SIMMONS, )  
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Plaintiff-Appellant, )  
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v. )  
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CITY OF DETROIT, MI; DETROIT, MI )  
POLICE DEPARTMENT; JAMES CRAIG, POLICE )  
CHIEF; JOHN DOES, UNKNOWN CITY OF )  
DETROIT POLICE OFFICERS, )  
 )  
Defendants-Appellees. )

ORDER

**BEFORE:** NORRIS, McKEAGUE, and MATHIS, 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



Deborah S. Hunt, Clerk

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\*Judge Davis recused herself from participation in this ruling.

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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Filed: September 01, 2023

Ms. Latausha Simmons  
20500 Dean Street  
Detroit, MI 48234

Re: Case No. 22-2052, Latausha Simmons v. City of Detroit, MI, et al  
Originating Case No.: 2:18-cv-13813

Dear Ms. Simmons,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris  
En Banc Coordinator  
Direct Dial No. 513-564-7077

cc: Ms. Sheri L. Whyte

Enclosure