

CASE NUMBER: USAP2 23-7705

PETITIONERS

APPENDIX:

Appendix- (A1)[2 pages], (A2) [4 pages], (A3)[1 page] and (A4) [5 pages]

Appendix- (B)[14 pages]

Appendix- (C)[5 pages]

Appendix-(D1)[7 pages] and (D2)[2 pages]

Appendix- (E) [1 page]

Appendix- (H) [2 pages]

Appendix- (I) [8 pages]

Appendix- (J) [16 pages]

TOTAL PAGES = 112

CAUSE NUMBER: USAP223-7705

APPELLANT APPENDIX: [A₁-A₄]

Appendix (A1) [2pages] These was filed in United States District Court **Case 3:22-cv-01013-OAW (Doc# 25)** JUDGMENT Dated: 08/17/23

Appendix(A2) [4pages] These was filed in The United District Court **Case 3:22-cv-01013-OAW (Doc# 28)** ORDER DENYING **MOTION TO AMEND THE JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 59(e)** Dated: 09/15/23

Appendix- (A3)[2page] These was also filed in The United States District Court **Case 3:22-cv-01013-OAW (Doc# 35)** ORDER DENYING as moot ECF No [30] Dated: 11/15/23

Appendix- (A4)[5pages] These was also filed in The United States District Court **Case 3:22-cv-1010-OAW (Doc# 26)** ORDER DENYING “MOTION TO AMEND THE JUDGMENT” UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b) Dated 09/30/23.

[APPENDIX A] ~

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: EMIABATA

**PHILIP EMIABATA AND SYLVIA
EMIABATA,
Appellants**

v.

**US TRUSTEE,
Notice**

v.

**New Rez, LLC, doing business as
Shellpoint Mortgage Servicing, doing
Business as MTGLQ Investors, LP.;
Santander Consumer USA Inc.;
ROBERTA NAPOLITANO,
Appellees**

v.

**SYLVIA NGOZI EMIABATA,
Debtor**

**NO. 3:22-cv-01013-OAW
Bankruptcy Case No: 21-30197**

JUDGMENT

This action having come before the Court on an appeal of an order of the United States Bankruptcy Court before the Honorable Omar A. Williams, United States District Judge; and the Court having considered the full record of the case including applicable principles of law and having issued an order dismissing the case for Plaintiffs' failure to timely file their appellate brief on or before August 1, 2023, it is hereby

ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered dismissing the case, and the case is closed.

Dated at Hartford, Connecticut, 17th day of August, 2023.

DINAH MILTON KINNEY, Clerk

By /s/ Frances Velez

Frances Velez

Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: EMIABATA,
Appellant.

No. 3:22-cv-1013 (OAW)

**ORDER DENYING MOTION TO AMEND THE JUDGMENT
UNDER FEDERAL RULE OF CIVIL PROCEDURE 59(e)**

Self-represented plaintiff, Sylvia Emiabata, brought this action as an appeal from Bankruptcy Court. ECF No. 1; *In re: Emiabata*, 642 B.R. 481 (Bankr. D. Conn. 2022). On August 11, 2023, the court dismissed the case for Plaintiff's failure to timely file her appellate brief after being granted multiple extensions of time within which to do so. ECF No. 24. Accordingly, the case was closed on that date.

On August 29, 2023, Plaintiff filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure Rule 59(e). ECF No. 26. "A motion for reconsideration is an extraordinary request that is granted only in rare circumstances, such as where the court failed to consider evidence or binding authority." *Van Buskirk v. United Grp. of Cos., Inc.*, 935 F.3d 49, 54 (2d Cir. 2019). "The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).

The court "for good cause" may extend the time for a party to act "if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). The district court has the discretion to determine whether such excusable neglect is present in each case. See *Gladstone Ford v. N.Y. City Transit Auth.*, 43 Fed.Appx. 445, 449 (2d Cir.

2002) (upholding the district court's denial of leave to file a reply because the movant did not have a sufficient excuse for his failure to request an extension); *Davidson v. Keenan*, 740 F.2d 129, 132 (2d Cir. 1984) (upholding the district court's rejection of a late filing). In assessing excusable neglect, courts consider: "(1) the danger of prejudice to the [other party], (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." *Falls v. Novartis Pharms. Corp.*, No. 3:13-CV-270 JBA, 2014 WL 3810246, at *2 (Aug. 1, 2014) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)).

This case comes before the district court as an appeal of a bankruptcy court decision dismissing Plaintiff's Chapter 13 case. ECF No. 1 at 8. The bankruptcy court noted that Plaintiff filed her Chapter 13 case in bad faith, as an effort to stall foreclosure based on a defaulted mortgage from 2002. *In re: Emiabata*, 642 B.R. at 481. That court's decision includes a table tracking over a dozen bankruptcy cases filed by Plaintiff or her spouse, all of which were dismissed. *Id.* at 483. In considering the length of delay, the court not only considers the delay in the present case, but also the strategic practice of delay apparently used by Plaintiff.

Plaintiff was granted two extensions of time in which to file her appellate brief, and was warned that failure to file by the extended deadline would result in dismissal of the case. ECF Nos. 15 and 23. She alleges that she has not received all of the court's orders and thus that she could not comply with them. See ECF No. 26, at 4. Plaintiff also states that she mailed the appellant's brief, but that it was never filed. *Id.* at 3. Although Plaintiff blames the delay on the United States Postal Service and the Clerk's

Office, she has provided no evidence for these claims, and the court takes notice of the fact that prior delays have been at Plaintiff's request. See *id.* at 4-5; ECF Nos. 14 and 21.

Furthermore, there is reason to doubt that Plaintiff resides in Connecticut and that venue is proper in this court. See *In re: Emiabata*, 642 B.R. at 482. The residential address provided by Plaintiff is the address of a UPS store, and Plaintiff has failed to file supplemental evidence that she resided in Connecticut at the times relevant to venue. *Id.* These details, when taken with the repeated delays and history of bankruptcy filings, suggest that Plaintiff has not acted in good faith.

Having weighed these factors, the court finds that there is no excusable neglect to justify Plaintiff's failure to act. Plaintiff has filed a timely motion to amend the judgment under Rule 59(e). See Fed. R. Civ. P. 59(e) (motion must be filed within 28 days after judgment). However, Plaintiff is not entitled to relief under Rule 59 because she has not demonstrated that the court overlooked any legal or factual issue that would have altered its decision. See, e.g., *Tanner v. MTA Long Island R.R.*, No. 22-CV-9831, 2023 WL 2889456, at *1-3 (S.D.N.Y. Apr. 10, 2023) (denying a Rule 59(e) motion where the plaintiff did not demonstrate that the court overlooked any "controlling decisions or factual matters"); see also *Pickering-George v. Gazivoda Mgmt. LLC*, No. 22-CV-10397, 2023 WL 1466634, at *1-2 (S.D.N.Y. Feb. 1, 2023) (denying a Rule 59(e) motion where the plaintiff did not show "that the Court overlooked any controlling decisions or factual matters with respect to dismissal of [the] action"). Accordingly, the motion is denied.

CONCLUSION

For the foregoing reasons, Plaintiff's motion to amend the judgment (ECF No. 26) is **DENIED**.

IT IS SO ORDERED at Hartford, Connecticut, this 15th day of September, 2023.

/s/
OMAR A. WILLIAMS
UNITED STATES DISTRICT JUDGE

APPENDIX A₂ page 1

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

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U.S. District Court

District of Connecticut

Notice of Electronic Filing

The following transaction was entered on 11/14/2023 at 5:20 PM EST and filed on 11/14/2023

Case Name: In Re: Emiabata

Case Number: 3:22-cv-01013-OAW

Filer:

WARNING: CASE CLOSED on 08/11/2023

Document Number: 34 (No document attached)

Docket Text:

ORDER denying as moot ECF No. [30], Motion for Leave to Proceed In Forma Pauperis, as to Philip Emiabata. Philip Emiabata is not a named party to this case, and so he may not file a motion.

ORDER denying ECF No. [29], Motion for Leave to Proceed In Forma Pauperis, as to Sylvia Emiabata. The court dismissed this case for Plaintiff's failure to file her appellate brief after having been given several extensions within which to do so. See ECF No. 24. Plaintiff filed a motion to amend the judgment, which was denied because it failed to show excusable neglect. See ECF Nos. [26] and [28]. Plaintiff filed an appeal with the United States Court of Appeals for the Second Circuit and now asks for leave to appeal *in forma pauperis*. However, "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C.A. \diamond 1915. Good faith is shown where a party "seeks appellate review of any issue not frivolous." *Coppedge v. United States*, 369 U.S. 438, 445 (1962). Here, Plaintiff and her husband have a history of filing Chapter 13 cases in bad faith in order to stall a foreclosure action based on a defaulted mortgage from 2002, and they have used the appeals process to draw out this process. See ECF No. [26] at 3-4, *In re: Emiabata*, 642 B.R. 481, 481-486 (Bankr. D. Conn. 2022). Thus, the issue for which Plaintiff seeks appellate review is not taken in good faith. Accordingly, the motion to proceed *in forma pauperis* is denied. Signed by Judge Omar A. Williams on 11/14/23. (Coghlan, Katharine)

Appendix A₃]₂

3:22-cv-01013-OAW Notice has been electronically mailed to:

Patrick Crook pcrook@ch13rn.com

Mitchell J. Levine mlevine@nairlevin.com

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3:22-cv-01013-OAW Notice has been delivered by other means to:

Sylvia Emiabata
857 Post Rd. #139
Fairfield, CT 06824

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUTAPPENDIX A₄] pages 5IN RE: EMIABATA,
Appellant.

No. 3:22-cv-1010 (OAW)

**ORDER DENYING "MOTION TO AMEND THE JUDGMENT"
UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)****I. PROCEDURAL HISTORY**

Self-represented plaintiffs, Sylvia and Phillip Emiabata, brought this action as an appeal from bankruptcy court. ECF No. 1; Case No. 21-ap-03010. The case on appeal is an adversary proceeding in which the Emiabatas are plaintiffs suing numerous defendants who allegedly were involved in the property at issue. ECF No. 1. The bankruptcy court dismissed the underlying Chapter 13 case, Case No. 21-bk-30197, on July 22, 2022, and it dismissed the adversary proceeding (for lack of jurisdiction) on August 1, 2022. See, Case No. 21-ap-03010, ECF Nos. 155 & 160. Plaintiffs thereafter filed a notice of appeal, see Case No. 21-ap-03010, ECF No. 163, causing the case to appear before the undersigned (as Case No. 22-cv-1010).

On June 21, 2023 (and after granting several extensions of time), the court dismissed the case for Plaintiffs' failure to timely file their appellate brief. ECF No. 22. Accordingly, the case was closed on that date. Then, on August 10, 2023, Plaintiffs filed a "motion to alter or amend the judgment," claiming as authority to do so Rule 60(b) of the Federal Rules of Civil Procedure, see ECF No. 23, though they still did not attach or otherwise file their appellate brief, which originally was due on November 23, 2022 (some ten months ago), see ECF No. 14.

Plaintiffs seek relief under three provisions of Rule 60(b): Clause (1), which permits relief from a judgement for “mistake, inadvertence, surprise, or excusable neglect;” Clause (2), which permits relief due to newly discovered evidence; and Clause (6), which permits relief for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b). They argue that they are entitled to such relief because: (1) they did not receive this court’s order granting them an extension of time in which to file their brief; (2) such mistake was the fault of the court or the United States Postal Service; and (3) Plaintiff, Philip Emiabata, was sick, receiving treatment out of town, and taking medication that caused dizziness. ECF No. 23-1 at 1-2.

II. DISCUSSION

“The decision whether to grant a party’s Rule 60(b) motion is committed to the ‘sound discretion’ of the district court”. *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012).

A. Excusable Neglect

Plaintiffs contend that their failure to timely file a brief constitutes “excusable neglect” under Rule 60(b)(1). In assessing excusable neglect, courts consider: “(1) the danger of prejudice to the [other party], (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.” *Falls v. Novartis Pharms. Corp.*, No. 3:13-CV-270 JBA, 2014 WL 3810246, at *2 (Aug. 1, 2014) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993)). For the following reasons, the court finds that Plaintiffs have been the cause for the repeated delays in this case, and that they have not acted in good faith.

This case comes before the district court as an appeal of an adversarial proceeding in bankruptcy court that was dismissed due to the dismissal of Plaintiffs' underlying Chapter 13 case. ECF No. 1-1 at 1. In her ruling dismissing the Chapter 13 case, Judge Nevins noted that “[m]ost of the claims asserted in the pending adversary proceeding are non-sensical and frivolous, or, are barred by prior litigation between the parties.” *In re: Emiabata*, 642 B.R. 481, 486 (Bankr. D. Conn. 2022). The bankruptcy court noted that Plaintiffs filed their Chapter 13 case in bad faith, as an effort to stall foreclosure based on a defaulted mortgage from 2002. *Id.* at 481. That court’s decision includes a table tracking over a dozen bankruptcy cases filed by Plaintiffs, each of which was dismissed. *Id.* at 483. In considering the length of delay, the court not only considers the delay in the present case, but also the strategic practice of delay apparently used by Plaintiff.

Plaintiffs were granted three extensions of time in which to file their appellate brief and were warned that failure to file by the extended deadline would result in dismissal of the case. ECF Nos. 17, 19 and 21. Plaintiffs allege that they did not receive all of the court’s orders and thus that they could not comply with them. See ECF No. 23-1 at 2. Plaintiffs also claim they mailed the appellant’s brief, but that it was never filed, *id.* at 4, though the present motion (mailed from Austin, Texas, see ECF No. 23-1) was delivered to the court and was posted on the docket at ECF No. 23. And although Plaintiffs blame the United States Postal Service and also the Clerk’s Office for their failure to file an appellate brief, they have provided no evidence for these claims, and the court takes notice of the fact that previous delays have been at Plaintiffs’ request. See *id.* at 4-5; ECF Nos. 15 and 20.

Furthermore, there is reason to doubt that Plaintiff resides in Connecticut and that venue is proper in this court. See *In re: Emiabata*, 642 B.R. at 482. The residential address provided by Plaintiff is the address of a UPS store, and Plaintiffs have failed to file supplemental evidence that they resided in Connecticut at the times relevant to venue. *Id.* These details, when taken with the repeated delays and history of bankruptcy filings, suggest that Plaintiffs have not acted in good faith.

Plaintiffs' failure to check the status of the case or to file their appellate brief after being granted three extensions of time in which to do so cannot be considered excusable neglect under the circumstances of this case. See *Lawtone-Bowles v. Brown*, No. 21-1242-CV, 2022 WL 839280 at 1 (2d Cir. Mar. 22, 2022) (no excusable neglect where Plaintiff failed to check whether her response had been filed). Due to length of delay, reasons for delay, and Plaintiffs' bad faith tactics, the court finds that the neglect simply was not excusable within the meaning of Rule 60(b)(1).

B. Newly Discovered Evidence

Plaintiffs also seek relief under Rule 60(b)(2), which allows for reconsideration where there is "newly discovered evidence that, with reasonable diligence, could not have been discovered [within 28 days of the judgment.]" Fed. R. Civ. P. 60(b)(2). Plaintiffs' motion for relief does not allege any new evidence, so this argument is unavailing.

C. Extraordinary Circumstances

"Relief under Rule 60(b)(6) is appropriate only in cases presenting extraordinary circumstances." *Rodriguez v. Mitchell*, 252 F.3d 191, 201 (2d Cir. 2001) (quoting *First Fidelity Bank, N.A. v. Gov't of Antigua & Barbuda*, 877 F.2d 189, 196 (2d Cir. 1989)). The discretion of the court whether to grant a motion under Rule 60(b)(6) "is especially broad."

Matter of Emergency Beacon Corp., 666 F.2d 754, 760 (2d Cir. 1981). None of the reasons for relief listed by Plaintiffs rise to the level of "extraordinary circumstance." Plaintiffs have not shown why medical, travel, or other needs have prevented them from filing an appellate brief by a deadline set at their own request (or at any time since then), see ECF No. 21, particularly in light of the fact that they were able to file multiple requests for extension of time, and the instant motion, itself.

III. CONCLUSION

Having carefully weighed these factors, the court finds no valid grounds to grant Plaintiffs' Rule 60(b) motion. Plaintiffs have filed a timely motion for relief from a judgment or order under Rule 60(b). See Fed. R. Civ. P. 60(c) (motion must be made within a reasonable time). However, they are not entitled to such relief because they have not demonstrated that there was excusable neglect, new evidence, nor any extraordinary circumstances that would merit relief from judgment. Accordingly, the motion is denied.

ORDER

For the foregoing reasons, Plaintiffs' motion for relief from judgment (ECF No. 23) is DENIED.

IT IS SO ORDERED at Hartford, Connecticut, this 30th day of September, 2023.

/s/
OMAR A. WILLIAMS
UNITED STATES DISTRICT JUDGE

[APPENDIX H] pages 2

D. Conn.
22-cv-1010
Williams, 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 19th day of April, two thousand twenty-four.

Present:

Barrington D. Parker,
Michael H. Park,
*Circuit Judges.**

In Re: Sylvia Emiabata,

Debtor.

Philip Emiabata,

Plaintiff-Appellant,

Sylvia Emiabata,

Debtor-Plaintiff-Appellant,

v.

23-7705

NewRez, LLC, D/B/A Shellpoint Servicing,

Appellee,

Specialized Loan Servicing, LLC, et al.

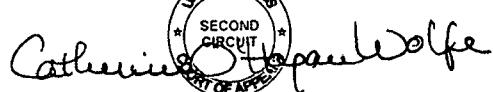
Defendants-Appellees.

Appellants, pro se, move for leave to proceed in forma pauperis. Appellee, JP Morgan Chase Bank, N.A., moves for summary affirmance and imposition of a leave-to-file sanction. Upon due

* Judge Calabresi has recused himself from consideration of this motion. Pursuant to Second Circuit Internal Operating Procedure E(b), the matter is being decided by the two remaining members of the panel.

consideration, it is hereby ORDERED that Appellants' 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). Appellee's motion for summary affirmance is DENIED as moot, and its motion for sanctions is DENIED. Appellants are warned, however, that the continued filing of clearly meritless appeals, motions, or other papers could result in sanctions including a leave-to-file sanction requiring Appellants to obtain permission from this Court before filing further submissions. *See Sassower v. Sansverie*, 885 F.2d 9, 11 (2d Cir. 1989).

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


Catherine O'Hagan Wolfe

