IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4759
Summary Calendar

RICHARD G. KELLEY,

Petitioner-Appellant,

versus

DEPARTMENT OF THE ARMY,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(91 MC 20)

(April 16, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

On June 26, 1991, Richard G. Kelley proceeded pro se to seek judicial review of the Merit Systems Protection Board's final decision affirming his removal as a toxic waste handler at the Red River Army Depot in Texarkana, Texas. On January 13, 1992, the U.S. Army filed a motion to dismiss for failure to effect service of process within 120 days of the filing of his complaint pursuant to Fed. R. Civ. P. 4(j). That motion was granted on January 14, 1992.

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

On January 24, 1992, Kelley filed a motion to correct clerical errors in the dismissal order. The motion to correct clerical errors was timely served to qualify as a Fed. R. Civ. P. 59(e) motion. In that motion, in which Kelley intended to correct the record "should I have to proceed to appeal," Kelley mentioned that he had no opportunity to explain "good cause" for failing to effect service timely. Because Kelley stated that he wanted the judgment corrected to show that he had no such opportunity, the motion, liberally construed, appears to be one under Rule 59(e). See Harcon Barge Co. v. D & G Boat Rentals, 784 F.2d 665, 668-69 (5th Cir.) (en banc), cert. denied, 479 U.S. 930 (1986).

Then on February 5, 1992, Kelley filed a Fed. R. Civ. P. Rule 60(b)(6) motion, requesting that the district court vacate its order of dismissal because the order was entered before he had time to respond in accordance with a local court rule.

On February 11, 1992, the district court denied Kelley's Rule 60(b) motion. On February 24, 1992, Kelley filed a "motion for ruling," urging the court to rule on his previous clerical-error motion, and stating that it was his belief that the time for filing his appeal would be tolled until the clerical-error motion was ruled upon. On March 13, 1992, Kelley filed a "motion for extension of time to file appeal," requesting a thirty-day extension.

On March 17, 1992, the district court overruled Kelley's motion to correct clerical errors and denied his motion to extend

the time for appeal. On the same day, Kelley filed another Rule 60(b)(6) motion, a motion for recusal, and a "motion in opposition to respondent's motion to dismiss." In support of his motion for recusal, Kelley contended that recusal was proper because, inter alia, the district judge failed to inform him that service of process was required, and that his law clerk told him that service of summons was not necessary.

On April 1, 1992, Kelley filed a "motion to strike" the defendant's motion to dismiss, alleging that the defendant's motion was not signed by the U.S. Attorney, in violation of Fed. R. Civ. P. 11. The pleading was signed by an Assistant U.S. Attorney, and counsel for the U.S. Army.

On May 27, 1992, the district court denied Kelley's motion for recusal, his second Rule 60(b) motion, and his motion in opposition to defendant's motion to dismiss. Kelley's motion to strike the defendant's motion to dismiss was also denied. Kelley filed a notice of appeal from the denial of these three motions.

In this pro se appeal, Kelley argues that the district judge committed reversible error when he denied his motion for recusal, motion in opposition to the appellee's motion to dismiss, and his Rule 60(b) motion. For reasons set forth below, Kelley's argument lacks merit.

Dismissal may be proper where a second Rule 60(b) motion raises the same grounds as those raised in a previous motion and where it is filed several months after the denial of the first

motion. See Eleby v. American Medical Systems, Inc., 795 F.2d 411, 412-13 (5th Cir. 1987); Burnside v. Eastern Airlines, Inc., 519 F.2d 1127, 1128 (5th Cir. 1975). It is not clear whether this case presents a problem of successive Rule 60(b) motions. The number of motions filed and the order in which they were considered by the district court presents some confusion.

When Kelley filed his first Rule 60(b) motion, the district court had not yet ruled on his Rule 59(e) motion to correct clerical errors. Kelley urged the district court in his first Rule 60(b) motion to set aside the judgment of dismissal because he did not have the opportunity to respond to the appellee's motion to dismiss, an issue raised in his Rule 59(e) motion. Kelley failed to appeal the denial of his first Rule 60(b) motion and the subsequent denial of his Rule 59(e) motion. Kelley only appeals the district court's order on May 27, 1992, denying his second Rule 60(b) motion, his motion for recusal, and motion in opposition to appellee's motion to dismiss. Thus, the question before us is whether the district court abused its discretion in denying these motions.

Fed. R. Civ. P. 60(b) permits relief from a final judgment for "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); ... or ... (6) any other reason justifying relief from the operation of the judgment." See Fed. R. Civ. P. 60(b).

"[A]ppellate review of the denial of such a motion `must be narrower in scope than review of the underlying order of dismissal ...'" Phillips v. Insurance Co. of N. America, 633 F.2d 1165, 1167 (5th Cir. 1981) (citation omitted). "[T]he denial of a Rule 60(b) motion does not bring up the underlying judgment for review." Matter of Ta Chi Navigation (Panama) Corp. S.A., 728 F.2d 699, 703 (5th Cir. 1984). This court also "`may not treat the appeal from the ruling on the rule 60(b) motion as an appeal from the [underlying order] itself.'" Aucoin v. K-Mart Apparel Fashion Corp., 943 F.2d 6, 8 (5th Cir. 1991) (citation omitted). A Rule 60(b) motion thus does not "vitiate the requirement of a timely appeal." Id. Nor can Rule 60(b) be employed as "`an avenue for challenging mistakes of law that should ordinarily be raised by timely appeal.'" Id. (citation omitted).

On review, this court is limited to a determination whether the district court's denial of relief under Rule 60(b) was an abuse of discretion. Aucoin, 943 F.2d at 8; see Industrias Cardoen, Ltda. v. U.S., 983 F.2d 49, 52 (5th Cir. 1993). "It is not enough that the granting of relief might have been permissible, or even warranted -- denial must have been so unwarranted as to constitute an abuse of discretion." Matter of Jones, 970 F.2d 36, 37 (5th Cir. 1992) (citation omitted). Although this court has characterized Rule 60(b)(6) as "`a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses,'" Harrell v. DCS Equipment

Leasing Corporation, 951 F.2d 1453, 1458 (5th Cir. 1992) (citation omitted), "[r]elief under this section ... should be granted `only if extraordinary circumstances are present.'" Picco v. Global Marine Drilling Co., 900 F.2d 846, 851 (5th Cir. 1990) (citation omitted). No such circumstances are presented in this case.

Although review is thus narrowly confined to the order denying Kelley's second Rule 60(b) motion, review of that motion is facilitated by considering Kelley's arguments raised in his previous motions. See Williams, 828 F.2d at 328-29. In Kelley's first Rule 60(b)(6) motion, Kelley contended that the district court prematurely ordered dismissal of his claim in contravention of local rules. He contended further that he was thus "deprived of the opportunity to show `good cause' for failure to effect proper service under Rule 4(j)." We should note that the Rule requires that service of the summons and complaint be made on the defendant "within 120 days after the filing of the complaint ..." See Fed. R. Civ. P. 4(j). Where the plaintiff fails to meet the 120-day limit, "the action shall be dismissed as to that defendant without prejudice," either sua sponte or by motion, unless the plaintiff demonstrates "good cause." Id.; see McDonald v. U.S., 898 F.2d 466, 467-69 (5th Cir. 1990). Ignorance of procedural rules or the law is usually not a basis for "good cause." Id. at 467.

In his "motion for ruling" filed nearly three weeks after his first 60(b)(6) motion, Kelley contended, albeit incorrectly, that his motion to correct clerical errors would toll the time for

appeal. See, e.g., Harcon Barge, 784 F.2d at 668-69 (motions to correct clerical errors do not toll time for appeal). At that time, Kelley still failed to indicate why he did not effect proper service.

Over a month later, Kelley stated for the first time in his second Rule 60(b)(6) motion that he failed to effect proper service because he was misled by the district judge's clerk——a contention directed, not to relief under Rule 60, but to the merits of the court's ruling, which dismissed Kelley's complaint for failure to effect service. Furthermore, Kelley's motion for recusal——based on the district judge's alleged bias arising out of his processing and handling the case——is linked to the merits of the grounds for dismissal of Kelley's complaint.

Indeed, the issues raised by Kelley in his second Rule 60(b) motion, his motion for recusal, and motion in opposition to appellee's motion to dismiss were based on facts available to him at the time the district court first dismissed his claim under Rule 4(j). Kelly should have raised the issues at that time, but instead chose to pursue clerical and other errors. However, because Kelley chose to use Rule 60(b) to raise issues before the district court that should have been pursued by timely appeal of the merits ruling, he has failed to show on appeal that the district court abused its broad discretion by denying relief under Rule 60(b)(6).

A F F I R M E D.