IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Peter B., Jimmy "Chip" E., and Michelle M.,

Plaintiffs,

v.

Beverly Buscemi, Kelly Floyd, the South Carolina Department of Health and Human Services, the South Carolina Department of Disabilities and Special Needs, Anthony Keck, and Richard Huntress,

Defendants.

C/A No. 6:10–767-TMC

**ORDER**

This matter is before the court on Plaintiff Jimmy "Chip" E.'s (Plaintiff") motion for attorneys' fees and guardian ad litem fees (ECF No. 333). Rather than address the merits of the motion unnecessarily, Defendants filed a motion to strike or dismiss Plaintiff's motion on the ground that the motion for fees is untimely. (ECF No. 336).[1] Plaintiff filed a response opposing Defendants' motion to strike or dismiss (ECF No. 343), and Defendants filed a reply (ECF No. 345). Accordingly, the motion is now fully briefed and ready for a ruling.

## I. Discussion

Defendants contends that the motion for attorneys' fees is untimely under Federal Rule of Civil Procedure 54(d)(2)(B) because it was not filed within fourteen (14) days after entry of the judgment of the district court. Plaintiff argues that the motion is timely under Rule 54 and, if

[1]Defendants also filed a motion to stay the deadline for their response to the motion for attorney's fees until the motion to strike or dismiss has been ruled on (ECF No. 337) - basically asking the court to rule on the timeliness of the motion before requiring the merits of the motion to be fully briefed. The court granted the motion. (ECF No. 338).

not, the court should find excusable neglect and extend the time for filing pursuant to Rule 6 of the Federal Rules of Civil Procedure.

Rule 54(d)(2)(B) states, "Unless a statute or court order provides otherwise, the motion [for attorney's fees] must be filed no later than 14 days after entry of judgment." Fed.R.Civ.P. 54(d)(2)(B)(i). In this case, judgment was entered on December 10, 2014. (ECF No. 303). Plaintiff filed a timely appeal, and the Fourth Circuit Court of Appeals dismissed the appeal on April 29, 2016. (ECF Nos. 310, 327). The Fourth Circuit denied a motion for rehearing on September 7, 2016. (ECF No. 329). On December 6, 2016, Plaintiff filed a petition for a writ of certiorari in the United States Supreme Court, which was denied on April 17, 2017. (ECF Nos. 331, 332). Plaintiff filed this motion for attorneys' fees on May 1, 2017. (ECF No. 333).

Plaintiff argues that Rule 54(d)'s reference to "judgment" is only to a final judgment and not an interlocutory judgment. The court agrees with this statement. However, then Plaintiff further argues that the judgment entered in December 2014 was not a final judgment. Plaintiff contends that cases often have many judgments and its motion is timely as it was filed on May 1, 2017, within fourteen days of the final order of the United States Supreme Court dismissing the case. (ECF No. 343 at 6).[2] Specifically, Plaintiff argues that "the fourteen day deadline to file a motion for attorneys fees could not have run until, at the earliest, after the final order issued by the Supreme Court of the United States. Plaintiff filed the motion for fees within 14 days of that final order of the Supreme Court, perhaps prematurely, because this Court still has not filed a judgment." (ECF No. 343 at 5).

Plaintiff is simply mistaken. The December 2014 order was undoubtably a final order, and under Rule 54 a motion for attorneys' fees had to be filed within fourteen days of its entry.

[2]The court notes that Plaintiff in response to the motion to strike or dismiss refers to a disciplinary action and includes as exhibits related documents. The court does not see how this disciplinary proceeding or any argument regarding it is relevant to the issue of whether Plaintiff's motion for attorneys' fees is timely.

Rule 54(a) defines the term "judgment" and states that a judgment "includes a decree and any order from which an appeal lies." Fed.R.Civ.P. 54(a). *See also* 10 C. Wright, A. Miller, and M. Kane, Federal Practice and Procedure § 2651 (2d ed.1983) (stating that "judgment" means only final judgments and appealable interlocutory orders). "Based on that definition alone, Rule 54 [arguably] could apply to a judgment from the Court of Appeals. After all, a judgment from the Court of Appeals can be appealed to the United States Supreme Court." *Dippin' Dots, Inc. v. Mosey*, 602 F.Supp.2d 777, 782 (N.D.Tex. 2009). However, here Plaintiff is arguing that it is the judgment from the United States Supreme Court that is controlling, and certainly as there is no appeal from that judgment, the court finds his argument unavailing.

Moreover, the federal rules should be read in context with the Advisory Committee Notes.[3] The Advisory Committee's Notes accompanying Rule 54 bolster the conclusion that it is the district court's final order which triggers the fourteen-day period. The Advisory Committee Notes to Rule 54(b) indicate that one of the reasons for the deadline for filing a motion for attorney's fees "is to assure that the opposing party is informed of the claim before the time for appeal has lapsed." Fed.R.Civ.P. 54 Advisory Committee's Note, 1993 Amendments. Those Notes also contain an explanation of how a district court should handle a request for costs and fees under Rule 54(d)(2)(B):

> If an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court under subdivision (d)(2)(B) may effectively extend the period by permitting claims to be filed after resolution of the appeal. A new period for filing will automatically begin if a new judgment is entered following a reversal or remand by the appellate court or the granting of a motion under Rule 59.

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[3]The Advisory Committee's Notes on the federal rules are "of weight" in interpreting the meaning of the rules. *See Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 316 (1988) (explaining that the Advisory Committee's notes on Rule 3 "although not determinative," were "of weight" in the Court's "construction of the rule").

Fed.R.Civ.P. 54, Advisory Committee Notes, 1993 Amendments. Clearly, the Notes anticipate the filing of a new "judgment" only following reversal or remand on appeal, and expressly indicate that the entry of such a judgment triggers the running (for a second time) of the fourteen-day time period set forth in Rule 54(d)(2)(B). There has been no reversal or remand in this case by the appellate courts.[4] In this case, the United States Supreme Court's denial of a writ of certiorari has not resulted in such a judgment. As a result, that denial is not an appropriate "entry of judgment" upon which to calculate the timeliness of Plaintiff's motion for attorney's fees.

Moreover, the purpose of requiring a motion for attorney's fees to be filed no later than 14 days after entry of judgment is to "permit the court to resolve fee disputes while the services that were performed [are] still . . . freshly in mind." 10 Charles Alan Wright, et al., Federal Practice and Procedure: Civil § 2680 (3d ed.1998). Additionally, "prompt filing may allow the district court to make its fee ruling in time to allow appellate review at the same time as review on the merits." *Id.* [5] Finally, the court notes that the Federal Rules of Civil Procedure "'govern

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[4]Plaintiff also argues that "while the preliminary injunction might have justified an award of interim fees, the most significant success occurred on October 27, 2016, while Plaintiff's petition for certiorari was pending in the Supreme Court, when Defendants drastically increased Chip E.'s hours to nearly double those he would have received had this lawsuit not been filed." (ECF No. 343 at 6). This later action happened without any judicially sanctioned judgment or decree and would not qualify as a catalyst to award attorney's fees. To rule otherwise would directly conflict with the United States Supreme Court's rejection of the catalyst theory: "a defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change to make that plaintiff a prevailing party." *Smyth, et al. v. Rivero*, 282 F.3d 268, 275 (4th Cir. 2002)(citing *Buckhannon Bd. & Care Home, Inc. v. Virginia Dep't of Health & Human Res*., 532 U.S. 598, 605 (2001)).

[5]As the Second Circuit has noted, "Congress's reasons for its 1993 addition to Rule 54(d)(2)(B) (the fourteen-day deadline) were three-fold: (1) to provide notice of the fee motion to the non-movant before the time to appeal expires; (2) to encourage a prompt ruling on fees to facilitate a consolidated appeal on both the merits and the attorneys' fee issue; and (3) to resolve fee disputes efficiently, 'while the services performed are freshly in mind.' " *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 227 (2d Cir. 2004) (quoting Fed.R.Civ.P. 54 Advisory Committee's Notes (1993)).

the procedures in all civil actions and proceedings in the United States District Courts." Fed. R. Civ. P. 1. Thus, Rule 54 can only refer to a judgment entered by the district court and not a judgment or mandate of the Fourth Circuit Court of Appeals or Supreme Court. Accordingly, Plaintiff's motion is untimely.

Plaintiff also argues that if the court determines the motion is untimely, the court should find excusable neglect and extend the time for filing the motion pursuant to Rule 6(b)(1)(B). Rule 6 provides "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time on motion made after the time has expired if the party failed to act because of excusable neglect." Fed.R.Civ.P. 6(b)(1)(B).[6]

Plaintiff makes only a cursory argument regarding excusable neglect and does not state exactly what he contends would constitute excusable neglect in this action. Rather, Plaintiff merely argues that he is entitled to the application of excusable neglect pursuant to Rule 6 and that Defendants would not be prejudiced. The court disagrees.

"Inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect. . . . ." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392 (1993). Excusable neglect "is not easily demonstrated, nor was it intended to be." *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 534 (4th Cir. 1996). The court has recognized that "it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Id. (citing Pioneer Inv. Servs. Co.*, 507 U.S. at 392). "Rather, it may encompass delays caused by inadvertence, mistake or carelessness, at least when the delay was not long,

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[6]The court notes Plaintiff has not filed a motion for an extension under Rule 6 (b)(1)(B), as the rule requires, but rather merely argues for the application of excusable neglect in response to Defendants' motion to dismiss. *See Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 896 (1990) (stating that pursuant to Rule 6, "any post deadline extension must be 'upon motion made' ").

there is no bad faith, there is no prejudice to the opposing party, and movant's excuse has some merit." *LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2d Cir.1995) (*citing Pioneer Inv. Servs. Co.,* 507 U.S. at 395) (in context of bill of costs).

The Court in *Pioneer* explained that the determination of whether lawyer neglect can be deemed as "excusable" is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission," including "the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Inv. Servs. Co.*, 507 U.S. at 395. The reason for the delay is the most important factor. *Colony Apartments v. Abacus Project Mgmt.*, 197 Fed. Appx. 217, 223 (4th Cir. 2006). However, "[m]erely establishing these elements does not entitle a party to relief," as the decision " 'whether to grant an enlargement of time still remains committed to the discretion of the district court.' " *Id.* (*quoting Thompson*, 76 F.3d at 532 n.2). Moreover, a lawyer's simple lack of knowledge of a deadline will not ordinarily constitute excusable neglect, *Safety-Kleen, Inc. (Pinewood) v. Wyche,* 274 F.3d 846, 867 (4th Cir. 2001), nor will a mistaken interpretation of a rule or statute, *see United States ex rel. Shaw Env't, Inc. v. Gulf Ins. Co.*, 225 F.R.D. 526, 528-29 (E.D.Va. 2005) (*citing Pioneer Inv. Servs. Co.*, 507 U.S. at 395), nor will a hectic law practice, *see McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387-88 (11th Cir. 1981).

As noted above, " 'excusable neglect' is not easily demonstrated, nor was it intended to be." *Thompson*, 76 F.3d at 534. And quoting from the Advisory Committee Notes to former Fed.R.Civ.P. 73, from which Fed. R.App. P. 4(a) was derived, the court advised that a district court should find excusable neglect "only in the 'extraordinary cases where an injustice would otherwise result.' " *Id.* Here, the only apparent excusable neglect is a misinterpretation of the time limit set forth in Rule 54. However, the court finds Plaintiff has not demonstrated excusable

neglect based upon counsel's misinterpretation of a rule. *Pioneer Inv. Servs. Co.*, 507 U.S. at 395.

Moreover, the other factors weigh heavily against a finding of excusable neglect in this case. The delay in this case is extraordinarily lengthy. The court entered its final judgment of dismissal on December 10, 2014, and Plaintiff did not file this motion for attorney's fee until May 1, 2017, almost two and a half years later. And, as Defendants argue, they would be greatly prejudiced by permitting a late filing because had they known Plaintiff would file a motion for attorney's fees alleging Plaintiff was the prevailing party based on the granting of a preliminary injunction, Defendants might have appealed the granting of the preliminary injunction. Additionally, as Plaintiff recognizes, the 14-day deadline in Rule 54 "[is] to avoid prejudice to the opposing party if a fee application could be delayed beyond the 30 day period when the other side [has] to decide whether to file a notice of appeal." (ECF No. 343 at 7 n.6). Based on the foregoing, Plaintiff has not shown excusable neglect to extend the deadline for filing a motion for attorney's fees.

## II. Conclusion

Accordingly, based on the foregoing, the court **GRANTS** Defendants' Motion to Dismiss (ECF No. 336) and **DENIES** Plaintiff's Motion for Attorney's Fees (ECF No. 333).

**IT IS SO ORDERED.**

s/Timothy M. Cain
United States District Judge

July 28, 2017
Anderson, South Carolina