

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANIEL R. STANTON,

Plaintiff

v.

CUMBERLAND COUNTY
COMMISSIONERS, *et al.*

Defendants

Civil No. 96-111-P-C

GENE CARTER, District Judge

ORDER

The Court now has before it Defendants' Motion for Relief from Judgment Pursuant to Rule 60(b), filed by the Cumberland County Defendants. Docket No. 68. A thorough review of the pleadings on file reveals the following facts. On April 17, 1998, Plaintiff Stanton filed a letter motion requesting an award of \$75,000. Docket No. 55. Plaintiff's letter motion does not include a certificate of service, noting only "cc: W. Fisher." *Id.* On May 12, 1998, Plaintiff filed a "Motion for Writ of Habious [sic] Corpus for Plaintiff to Appear (his custodian) for jury selection and jury trial and to award to . . . plaintiff . . ." requesting \$300,000. Docket No. 57. That motion includes the statement, "I certify a copy has been sent to: as noted below in cc:." *Id.* The "cc:" notation includes "W. Fisher, Esq." without any address or indication of the date the motion was sent.¹ Mr. Fisher represents Defendants in this matter. On May 19, 1998, at Defense

¹The Court notes that, on pleadings previously filed by Plaintiff Stanton, he has, at
(continued...)

counsel's request, the Clerk of Court's Office sent him a copy of Plaintiff's motions of April 17 and May 12. A transmittal letter and copies of Plaintiff's motions were sent to William R. Fisher, Esq., William R. Fisher P.A., Post Office Box 6760, Portland, ME 04103.²

On June 3, 1998, the Court granted Plaintiff Stanton's Motions for Awards per Local Rule 7(b) because no response had been filed by Defendants, *see* endorsements on Docket Nos. 55 and 57, and entered Judgment in the amount of \$300,000 as requested by Plaintiff, *see* Docket No. 59. On June 26, 1998, Defendants filed a Motion for Leave of the Court to File a Late Objection to Plaintiff's Motions for Award (Docket No. 55) and Plaintiff's Motion for \$300,000 (Docket No. 57), stating that "By letter dated May 19, 1998, Defense Counsel did receive a copy of Stanton's Motion for Award and Motion for Writ from the Court itself. Since they were not served as required by Rule 5, no response was filed." Docket No. 67 at n.1. On June 30, 1998, Defendants filed a Motion for Relief from Judgment Pursuant to Rule 60(b), asserting that Plaintiff Stanton never served them with copies of the motions, as required by Rule 5, that led to the judgments upon the Defendants.

¹(. . . continued)
various times, included Mr. Fisher's address and the date that the copies were sent in a proper certificate of service. *See* Trial Papers; Docket Nos. 40, 41, 42, 43. On other documents, Plaintiff Stanton has not certified service but instead has simply "cc"ed Mr. Fisher and included his address. *See* Docket Nos. 21, 26, 31, 32, 33, 34, 35.

²Mr. Fisher changed law firms at the end of April 1998. Mr. Fisher states that his "last day of work at his former law firm was April 30, 1998. The present firm was formed on May 1, 1998." Motion for Relief from Judgment Pursuant to Rule 60(b) by the Cumberland County Defendants (Docket No. 68) at 4 n.4. Mr. Fisher asserts that he sent an Appearance Form, with his new address, in this case dated May 27, 1998, to the Court and to Mr. Stanton. *Id.* at 4. However, it appears that the Court was aware of Mr. Fisher's new address as early as May 19, 1998, when the Clerk of Court's office sent a letter to Mr. Fisher regarding the motions filed by Plaintiff Stanton.

A. Service of Process

Rule 5(a) requires that written motions be served on all parties. Where a party is represented by counsel, as Defendants are here, Rule 5(b) allows service to be made by mail upon the party's attorney. Rule 5(d), however, requires the filing of a certificate of service. As the Advisory Committee Notes to the 1991 Amendments to the rule indicate, the rule "require[s] that the person making service ... *certify* that service has been effected. . . . The certificate will generally specify the date as well as the manner of service"

The notation "cc:," included on both of Plaintiff's motions and which commonly appears at the end of correspondence, does not comply with either the letter or spirit of Rule 5. Although, the notation is commonly understood to mean that a copy has been transmitted to the person identified, standing alone the notation *certifies* absolutely nothing. Nor does the ambiguous "cc:" reveal either the date or manner of transmission to the intended recipient. Similarly, to "certify" that a copy has been "sent" does not clarify how the motion was transferred, to what address, or on what date. This is plainly not what Rule 5 intends. Rather, the rule contemplates a clear and unambiguous certification that the document was served in a particular way on a certain date. Anything less invites trouble. Plaintiff Stanton's motions, requesting an award of \$75,000 (Docket No. 55) and "Writ of Habious [sic] Corpus for Plaintiff to Appear (his custodian) for jury selection and jury trial and to award to . . . plaintiff" requesting \$300,000 (Docket No. 57), do not properly certify service. There is no statement, in either motion, regarding how the motion was "sent" or to what address. Moreover, to the extent the "cc:" notation can be understood to represent an attempted certification, it does not include a date.

B. Relief from Judgment

Defendants' motion does not identify the subsection of Rule 60(b) pursuant to which they seek relief. Given the facts, the Court will assume therefore that they invoke the "excusable neglect" provision found in Rule 60(b)(1). Under Rule 60(b), a motion for relief from judgment "shall be made within a reasonable time," and for "excusable neglect," "not more than one year after the judgment, order or proceeding was entered or taken." Defendants easily satisfy the one-year limitation. The Court now must look to the nature of the neglect to determine whether it is excusable. *Pioneer Investment Svs.. v. Brunswick Associates Ltd.*, 507 U.S. 380, 395 (1993). To make this determination, the Court considers the relevant circumstances surrounding the party's omission or failure to act in a timely manner. Those circumstances include "the danger of prejudice to the [other party], the length of the delay and its potential impact on the 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." *Id.*

This Court, in exercising that discretion, will focus on the four factors of the *Pioneer* analysis. In this case, it does not appear that there is danger of prejudice to Plaintiff should the Court grant Defendants' motion. The Court is not aware of any delay other than that caused by the filing of Defendants' motions relating to the ineffective service by Plaintiff. The reason for the delay was, as discussed above, the failure to receive copies of Plaintiff's motions from Plaintiff Stanton. Upon notification by the Clerk of Court's office of the existence of the motions, Defendants' counsel should have promptly advised the Court, by filing a motion to compel service, that he was not receiving copies of the motions filed by Plaintiff Stanton. Defendants' counsel's inaction clearly added to the confusion already existing in this case. The Court does not, however, find that counsel for Defendants acted in bad faith. Applying all four

factors, on balance the Court concludes that consideration of the relevant circumstances supports the determination that Defendants' counsel's failure to respond to the motions constitutes excusable neglect, and that the motion seeking relief from judgment should be granted.

Accordingly, it is **ORDERED** that the Judgment be, and it is hereby, **VACATED**. It is further **ORDERED** that Plaintiff's letter motion filed on April 17, 1998, requesting an award of \$75,000 (Docket No. 55); Plaintiff's "Motion for Writ of Habious [sic] Corpus for Plaintiff to Appear (his custodian) for jury selection and jury trial and to award to . . . plaintiff" requesting \$300,000 (Docket No. 57); motion by Plaintiff for Writs to Appear (Docket No. 60); motion by Plaintiff for compensatory and punitive damages and attorney's fees (Docket No. 63); motion by Plaintiff to Amend (Docket No. 64); motion for Interest Owed on Balance (Docket No. 65); and motion for Relief Compensatory, Punitive, Normal, Monetary Damages (Docket No. 66) be, and they are hereby, **STRICKEN** for insufficient service. If Plaintiff refiles those motions, or any other pleadings, he must file all original pleadings and other papers submitted for consideration of the Court in this case with the Clerk of this Court. Copies of papers filed in this Court shall be served upon defense counsel. Service may be made by mail. Proof that service has been made is provided by a certificate of service. The certificate of service setting forth the address of the person served and the day and manner of service shall be filed along with the original papers. An example of a certificate of service by mail follows:

"I, [name], do hereby certify that a true and correct copy of the foregoing [name of pleading or other paper] has been served upon [name of person served] at [address of person served] by placing the same in the U.S. Mail, properly addressed, this [date] day of [month], [year].

[Signature]"

The Court will endorse the motions which remain pending as moot. *See* Defendants' Motion for Leave of the Court to File a Late Objection to Plaintiff's Motions for Award and Plaintiff's Motion for \$300,000 (Docket No. 67); Defendants' Motion to Compel Plaintiff to serve upon Defendants, in accordance with Rule 5 of the Federal Rules of Civil Procedure, all motions currently pending before the Court (Docket No. 71); "Plaintiff's Motion to this Honorable Court to Denie [sic] Defense Motion for Relief of Judgment" (Docket No. 72); and Motion for Leave of Court to Respond to Plaintiff's "Rebuttal" Dated July 9, 1998 (Docket No. 76).

GENE CARTER
District Judge

Dated at Portland, Maine this 21st day of July, 1998.