

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BRUCE D. BLOMEYER : CIVIL ACTION
 :
 v. : 02-8378
 :
 DOUGLAS F. LEVINSON, M.D., MEDICAL :
 COLLEGE OF PENNSYLVANIA, MEDICAL :
 COLLEGE OF PENNSYLVANIA HOSPITAL, :
 EASTERN PENNSYLVANIA PSYCHIATRIC :
 INSTITUTE :

MEMORANDUM AND ORDER

JOYNER, J.

February 21, 2006

Via the motion now pending before this Court, Plaintiff, Bruce D. Blomeyer, seeks relief from the judgment entered against him pursuant to Federal Rule of Civil Procedure 60(b). For the reasons outlined below, this motion is DENIED.

I. Factual and Procedural Background

Plaintiff, Bruce D. Blomeyer ("Plaintiff"), initiated the instant medical malpractice suit against Defendants, Douglas F. Levinson, M.D., Medical College of Pennsylvania, Medical College of Pennsylvania Hospital, and Eastern Pennsylvania Psychiatric Institute ("Defendants") on November 8, 2002.¹ On December 18, 2002, Plaintiff signed the summonses issued by the Clerk of

¹It appears from the docket that Eastern Pennsylvania Psychiatric Institute was never properly served with the complaint and summons in this case. See Unexecuted Summons as to Eastern Pa. Psych. Inst. Returned Feb. 10, 2003 (Doc. No. 6). Because this party was never properly served, and the 120 days provided for the service of summons has long since expired, Plaintiff's claim could properly be dismissed as to this party even absent the dismissal from which Plaintiff now seeks relief. See Fed. R. Civ. P. 4(m).

Court. (See Unexecuted Summons as to Eastern Pa. Psych. Inst. Returned Feb. 10, 2003; Executed Summonses as to Douglas F. Levinson, M.D., Med. Coll. of Pa., and Med. Coll. of Pa. Hosp. Returned Feb. 10, 2003.) The summonses were received by the United States Marshals' Service ("USMS") for the Eastern District of Pennsylvania on January 8, 2003. See id. On January 27, 2003, Plaintiff submitted a Notice of Change of Address to the Clerk of Court. (Pl.'s Notice of Change of Address of Jan. 27, 2003.) The executed summonses were served on February 4, 2003. Id.

On February 25, 2003, Defendant Douglas F. Levinson, M.D. ("Levinson") filed a Motion to Strike Pursuant to Federal Rule of Civil Procedure 12(b)(6) and 12(f). (Levinson's Mot. to Strike.) On February 28, 2003, Defendants Medical College of Pennsylvania and Medical College of Pennsylvania Hospital ("MCOP") filed a similar Motion to Strike. (MCOP's Mot. to Strike.) Responses to these motions were due on March 11, 2003 and March 14, 2003, respectively. See Loc. R. Civ. P. 7.1(c); see also n.4, infra. On March 24, 2003, Plaintiff filed a Motion for Extension of Time to Respond to Defendants' Motions to Strike, seeking an additional sixty days from March 18, 2003 -- until May 18, 2003 -- to respond to both the Levinson's and MCOP's motions to strike. (Pl.'s Mot. for Extension of Time to Respond to Defs.' Motions to Strike.) Plaintiff claimed that his receipt of Defendants' motions was delayed because they were sent to his

former address. Id. Plaintiff stated that he received the motions, which had to be forwarded from his former address, on March 9 and 12, 2003, respectively. Id. This Court granted Plaintiff's motion on March 26, 2003, but provided for fifteen days from the date of the order -- until April 10, 2003 -- for Plaintiff to respond to the motions to strike. (Order of Mar. 26, 2003.)

Having received no response from Plaintiff by the extended response deadline, this Court granted Defendants motions to strike on April 16, 2003. (Orders of Apr. 16, 2003.) On May 4, 2003, Plaintiff sent a letter to the Clerk of Court indicating that he had received no notices from this Court since the filing of his Notice of Change of Address in January. (Pl.'s Ltr. to Clerk of Ct. of May 4, 2003.) Plaintiff stated that on May 2, 2003, having become "concerned about the long delay in response" to his motion for extension of time filed March 24, 2003, he "logged on to PACER for the first time." Id. Plaintiff claimed that this was the first time that he learned that he had been given an extension and that the motions to strike subsequently granted. Id.

As a result, this Court, in acknowledgment of this claimed lack of notice, entered an order on May 9, 2003 vacating the orders granting the motions to strike, specifically directing the Clerk of Court to send all correspondence to the address indicated by Plaintiff's Notice of Change of Address, and giving

Plaintiff sixty days -- until July 7, 2003 -- to respond to the motions to strike. (Order of May 9, 2003.) Plaintiff filed an appeal in the Third Circuit on May 15, 2003. (Pl.'s Notice of App. of May 15, 2003.) Plaintiff's appeal was dismissed by the Third Circuit as premature. (Order of U.S.C.A. of June 12, 2003.) Plaintiff then filed his response to the motions to strike on July 7, 2003, and this Court granted Defendants' motions to strike on July 22, 2003. (Pl.'s Resp. to Defs. Motions to Strike; Order of July 22, 2003.)

Defendants subsequently filed their Answer to Plaintiff's Complaint, and served Plaintiff with notice to plead in response to the Answer and Affirmative Defenses. (Def.' Answer.) The Notice to Plead, served on August 11, 2003, informed Plaintiff that he had twenty days to respond. Id. Plaintiff submitted letters to this Court on August 28, 2003 and September 1, 2003 requesting an extension of an additional sixty days to respond. (See Order of Sept. 9, 2003.) By an Order signed on September 9, 2003, this Court denied Plaintiff's request for a sixty day extension, but granted him an additional thirty days to respond. Id. Plaintiff's response was filed on October 14, 2003. (Pl.'s Resp. to Defs.' Answer.)

On June 8, 2004, Defendants filed motions to compel discovery responses, a mental evaluation, and Plaintiff's deposition. (Def.' Mot. to Compel Disc.; Defs.' Mot. to Compel Pl.'s Dep.; Defs.' Mot. to Compel Pl.'s Mental Eval.) Responses

to these motions were due on June 25, 2004. See Loc. R. Civ. P. 7.1(c); see also n.4, infra. Defendants filed an Amended Motion to Compel Mental Evaluation of Plaintiff on June 16, 2004. A response to that motion was due on July 6, 2004. See id. Plaintiff filed his responses to Defendants' discovery motions on July 14, 2004. (Pl.'s Resp. to Defs.' Mot. to Compel.)

On August 2, 2004, this Court held a telephone conference pursuant to Federal Rule of Procedure 16. Based on that conference, the Court entered an Order setting out the actions to be taken by Plaintiff as follows:

1. Plaintiff shall file a Motion to Amend the Complaint within two (2) weeks.
2. Plaintiff shall serve Defendants with responses to their Discovery Requests within two (2) weeks.
3. Plaintiff shall appear in Pennsylvania for a deposition within thirty (30) days.
4. Plaintiff shall make himself available for a psychiatric examination in Pennsylvania within thirty (30) days.

(Order of Aug. 8, 2003.) On August 18, 2004, Defendants filed a motion to dismiss for failure to comply with the Order of August 3, 2004 and for failure to prosecute. (Def.' Mot. to Dismiss.) Defendants stated that Plaintiff did not file an amended complaint or respond to written discovery requests as ordered. Id. at ¶¶ 15, 16. Defendants also pointed to a pattern of delay

and avoidance in complying with measures necessary to prosecute his case. Id. A response to this motion was due on September 7, 2004. See n.4, infra. Having received no response from Plaintiff and no request for extension of the time to reply, this Court granted Defendants motion as uncontested pursuant to Local Rule of Civil Procedure 7.1(c), dismissing Plaintiffs claims against all defendants with prejudice. (Order of Sept. 15, 2004.)

Plaintiff filed an appeal with the Third Circuit on March 15, 2005. (Pl.'s Notice of App. of Mar. 15, 2005.) The Third Circuit circulated a Briefing Notice on March 30, 2005. (Docket Entry of Mar. 30, 2005 "BRIEFING NOTICE ISSUED" in Blomeyer v. Levinson, No. 05-1849 (3d Cir.).) Defendants filed a motion to quash the appeal on May 3, 2005, which required a response by May 16, 2005. (Docket Entry of May 3, 2005 "MOTION" in Blomeyer, No. 05-1849.) Plaintiff's appeal was dismissed for failure to prosecute on May 18, 2005. (Docket Entry of May 18, 2005 "CLERK ORDER" in Blomeyer, No. 05-1849.) Plaintiff filed the motion for relief from judgment now before this court on September 15, 2005. When filing the instant motion, Plaintiff also filed another Notice of Change of Address.

II. Discussion

Plaintiff seeks relief from the dismissal of his suit

pursuant to Rule 60(b).² Plaintiff proffers four reasons that relief from judgment is appropriate. First, Plaintiff claims that he never received service copies of Defendants' motion to dismiss. Second, Plaintiff asserts that, even had he received Defendants' motion, he could not have responded to the motion because he was traveling to Philadelphia during the response time. Third, Plaintiff claims that he received no notice from the Clerk of Courts of the Order dismissing his case, and thus was unable to timely move for reconsideration or file a timely appeal. Last, Plaintiff claims that Defendants, by continuing to engage in discovery up through October 29, 2003, caused him to believe that nothing of significance had occurred in his case, and prevented him from "suspecting that anything was wrong with either [his] case or mail delivery from the Clerk."

Federal Rule of Civil Procedure 60(b) provides for relief from a judgment or order as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (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); (3) fraud

²Plaintiff erroneously titles his submission a motion "for Relief from the Summary Judgment entered in this case on September 16, 2004." As set forth above, the dismissal of this case was not based on a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, but rather was granted on an uncontested motion to dismiss for failure to comply with the orders of this court and failure to prosecute.

(whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b). Plaintiff does not specify which subdivision is applicable to his situation, but, based on the facts and circumstances offered by Plaintiff as excuses for his failure to respond to Defendants' motion to dismiss, 60(b)(1) seems to be the only potentially relevant provision.³ We therefore consider whether any of the scenarios described by Plaintiff as leading to his failure to respond to Defendants' motion constitute "mistake, inadvertence, surprise, or excusable neglect" such that relief from this Court's dismissal of

³Plaintiff does not set forth any claim that new evidence was discovered, that any party engaged in fraud or misrepresentation, that the judgment is void, or that the judgment has been affected by a prior or subsequent judgment. The catchall provision of Rule 60(b)(6) is utilized by courts only in "exceptional circumstances," and usually only where the motion for relief has been filed more than one year after the entry of judgment. Pioneer, infra, at 393 (noting that the provisions of Rules 60(b)(1) and 60(b)(6) are mutually exclusive, and that the latter is only applicable to grant relief to parties who are wholly faultless in the delay and show "extraordinary circumstances") Plaintiff's claimed lack of notice is neither "exceptional" nor submitted more than one year after the entry of judgment. Rather, this motion was filed exactly on the one-year anniversary of the entry of judgment. Thus, application of the extraordinary remedy available pursuant to Rule 60(b)(6) is inappropriate.

Plaintiff's claims may be appropriate.

Failure to respond to a pleading is generally evaluated for Rule 60(b)(1) as a question of "excusable neglect." See Pioneer Inv. Svcs., Inc. v. Brunswick Assocs. Ltd. P'ship., 507 U.S. 380, 393 (1993); see also James v. Virgin Isl. Water and Power Auth., 119 Fed. Appx. 397, 400 (3d Cir. 2005) (noting that the failure of counsel to file a timely opposition to a motion to dismiss qualifies as neglect) (citing Lorenzo v. Griffith, 12 F.3d 23, 27 (3d Cir. 1993)). In determining when an error is "excusable" pursuant to Rule 60(b)(1), the Court must consider the factors set out by the Supreme Court in Pioneer. See id.; see also In re Cendant Corp. PRIDES Litg., 235 F.3d 176, 182 (3d Cir. 2000) ("Cendant I") (remanding for analysis pursuant to the Pioneer factors); Scott v. U.S. Env'tl. Prot. Agency, 185 F.R.D. 202, 206 (E.D. Pa. 1999) (applying the Pioneer factors to determination of whether mistake or neglect under Rule 60(b)(1) is excusable).

The Court's decision in Pioneer establishes the determination of whether error is "excusable" as "at bottom an equitable one." Pioneer, 507 U.S. at 395. Thus, the Court must consider the circumstances surrounding the act or omission leading to the judgement from which relief is sought. Id. In the context of Rule 60(b)(1), these circumstances include (1) the danger of prejudice to the non-movant, (2) the length of delay and its potential impact on further proceedings, (3) the reason for the delay, including whether it was reasonably within the

control of the movant, and (4) whether the movant acted in good faith. See id.

A. Reason for Delay

We begin by considering the reason for delay because it is the most complex and fully developed of the four factors. Plaintiff's proffers several reasons for his delay in responding to Defendants' motion, each of which is considered below. As discussed below, we find that none of the reasons presented by Plaintiff persuade us that this factor should weigh in Plaintiff's favor.

i. Claimed Non-Receipt of Motion to Dismiss

Plaintiff claims that he never received a copy of Defendants' motion to dismiss. He states that he does not know whether this was "by error on the part of myself, the mail, or the Defendants' counsel." (Pl.'s Br. at 2.) He assures the court that he has looked for the motion, but cannot find it. Id. Plaintiff does not claim that his address changed at any time between his last Notice of Change of Address and the filing of the motion to dismiss, or that he experienced difficulties receiving mail other than correspondence related to this case. Id. He simply asserts that he did not receive any copy of the motion, either before leaving for Philadelphia, or at any time after returning to California. See id.

Defendants respond that a service copy of the motion to dismiss was sent to Plaintiff via Certified Mail on August 18,

2004, and that it was received at Plaintiff's address no later than August 21, 2004. (Defs.' Br. at II.) In support of this claim, Defendants offer a copy of the Certified Mail receipt, the completed Return Receipt Postcard, and the "Track and Confirm" results from the United States Postal Service ("USPS") online tracking service for certified mail. (Defs.' Br. Ex. C, D.) These documents indicate that Defendants sent a piece of Certified Mail to Plaintiff's listed address on August 18, 2004, that it was received and signed for at that address by one Tom Ramirez, and that it was delivered to Plaintiff's address on August 21, 2004. Id.

When the receipt of something sent via mail is at issue, a rebuttable presumption of receipt arises upon a showing that the item was mailed. See In re Cendant Corp. PRIDES Litg., 311 F.3d 298, 304 (3d Cir. 2002) ("Cendant II") (internal citations omitted). Additionally, once a certificate of service is filed averring that a pleading has been served by being placed in the U.S. mail, "a presumption of regularity arises that the addressee received the pleading." Fiore v. Giant Food Stores, Inc., Civ. A. No. 98-517, 1998 U.S. Dist. LEXIS 5418, *4 (E.D. Pa. 1998). Both presumptions may be overcome by evidence that tends to call into question the validity of service. Denials of receipt may rebut the presumption, but generally will not overcome the presumption in the absence of some supporting evidence. See, e.g., Cendant II, 311 F.3d at 304 (noting that "at least one

court has held that testimony denying receipt suffices to rebut the presumption") but see id. at 305 (providing examples of cases in which the presumption was rebutted, each of which contained specific allegations of mailroom misconduct or other identifiable irregularity in the receiving or sending procedures) (citing In re Cendant Corp. PRIDES Litg., 235 F.3d 176, 183 (3d Cir. 2000); In re Cendant Corp. PRIDES Litg., 98 F. Supp. 2d 602, 608 (D.N.J. 2000)).

Plaintiff previously sought an extension of time to respond, claiming that he received the copies of Defendants' motions to strike only six days before the responses were due. This delay occurred because the motions were mailed to Plaintiff's old address, as evidenced by the certificates of service. (See Cert. of Svc. for Levinson's Mot. to Strike; Cert. of Svc. for MCOP's Mot. to Strike.) Now before us is Plaintiff's claim that he did not receive a service copy of Defendants' motion to dismiss. The Certified Mail Receipt, Return Receipt Postcard, and tracking results, as well as Defendants' Certificate of Service establish that the service copy of the motion was properly addressed and mailed, thus giving rise to the presumption of receipt. (Defs.' Br. at Ex. C.)

Plaintiff offers no support for his protestation that he never received the copy in the mail. That the motion was received at his address, at the latest, three days before he left California for Pennsylvania further belies his denials. Having

presented no evidence in support of his claim that he never received a copy of Defendants' motion, Plaintiff is unable to rebut the presumption that the properly mailed copy was indeed received. The evidence establishing the properly addressed mailing of the service copy goes even further, in establishing that the documents were actually received at that address in accordance with the presumption of regularity.

Plaintiff's claim that he did not receive the motion, therefore, is without merit and does not itself support any mistake, inadvertence, surprise, or excusable neglect for which relief from judgment may be granted. Rather, it suggests that, at worst, Plaintiff received the motion, ignored it, and now presents false claims to this Court in an attempt to reverse the damage done. At best, the evidence suggests that Plaintiff received and subsequently misplaced the motion. Even if Plaintiff did receive and misplace the motion, that scenario would not negate the fact that he received actual notice of the pending motion and was obliged to either timely respond or seek an extension of time from the Court as he had done in the past. Plaintiff's claimed non-receipt of the service copy of the motion to dismiss, therefore, is not credible and provides no compelling reason for the long delay in responding.

ii. Travel During Period for Response

Plaintiff claims that, even if he had received service of the motion to dismiss, he could not have timely responded because

he was traveling to Philadelphia to participate in depositions and a mental evaluation during the time allowed for a response. (Pl.'s Br. at 2.) Plaintiff left for Pennsylvania on August 24, 2004, and returned to California on September 6, 2004. Id. Plaintiff claims that September 6 was "almost a week after a response was due." Id. Plaintiff, however, had until September 7, 2004 to respond.⁴ Furthermore, the documents arrived at Plaintiff's address on August 21, 2004, three days before he left for Pennsylvania. (Defs.' Br. at Ex. C.)

Plaintiff provides no suggestion that anything - other than his claimed non-receipt of the motion - prevented him from seeking an extension of the time to respond. Plaintiff's multiple prior requests for extensions of time to respond illustrate that he was well aware of the availability of such extensions upon request to the Court. (See Pl.'s Mot. for Extension of Time to Respond to Defs.' Motions to Strike; Order of May 8, 2003; Order of Sept. 9, 2003.) Such a request for

⁴The time to respond began to run on August 18, 2004, when the copies were mailed. See Fed. R. Civ. P. 5(b)(2)(B) (providing that service by mail is complete upon mailing). Local Rule of Civil Procedure 7.1(c) provides fourteen days from the date of service to respond to a motion. Federal Rule of Civil Procedure 6(e) provides that three days shall be added to the period for response when the time for such is measured from service and service is accomplished pursuant to Federal Rule of Civil Procedure 5(b)(2)(B). With these three days added, the response period would end on September 4, 2004. Rule 6(a), however, provides that the last day of a period shall not be counted when that day is a Saturday, Sunday, or legal holiday. Because September 4, 2004 was a Saturday, September 5, 2004 was a Sunday, and September 6, 2004 was Labor Day, the response was due on Tuesday, September 7, 2004.

extension could even have been made after the expiration of the response period itself. See Fed. R. Civ. P. 6(b).

In addition to knowing that an extension could be requested, the expiration of time limits for response never previously prevented Plaintiff from submitting documents to this Court. For example, Defendants filed and served a series of discovery motions on June 8, 2004. (Defs.' Mot. to Compel Disc.; Defs.' Mot. to Compel Pl.'s Dep.; Defs.' Mot. to Compel Pl.'s Mental Eval.) The responses to those motions were due on June 25, 2004. See n.4, supra. One of those motions was amended by a filing submitted and served on June 16, 2004, with a response period ending July 6, 2004. (Defs.' Am. Mot. to Compel Pl.'s Mental Exam.) Plaintiff filed no response to any of these motions until July 14, 2004, over a week after time for a response to the most recent motion had expired. (Pl.'s Resp. to Defs. Mot. to Compel.) Neither Defendants nor this Court objected to the late filing.

Plaintiff's suggestion that Defendants purposefully orchestrated this series of events is inconsistent with the realities of the situation. Defendants filed their motion to dismiss immediately upon ascertaining that Plaintiff had not, in their opinion, complied with this Court's Order, and properly served the motion on Plaintiff. Even if Plaintiff did not, as he claims, receive the copy of the Order from this Court, he was still aware of and subject to the rulings made by this Court

during the telephone conference. Defendants had no obligation to inform him of either their belief in his noncompliance with the Order or of their pending motion. That notice was provided by service by mail of a copy of Defendants' motion to Plaintiff's last known address. Nor did Defendants have any obligation to delay the filing of their motion based on their knowledge that Plaintiff was scheduled to participate in discovery in Philadelphia. Defendant mailed, and even confirmed delivery of, the motion to dismiss before Plaintiff's scheduled departure from California.

Plaintiff's previous actions in requesting (and being liberally granted) extensions, as well as in filing beyond the time allotted for response, belie his claim that a timely response would have been impossible. Plaintiff further fails to support his suggestion that Defendants intentionally created a situation in which it was impossible for him to respond. Thus, the concurrence of Plaintiff's trip to Philadelphia with the period for filing a response to Defendants' motion to dismiss does not provide a compelling reason for the delay in responding to that motion.

iii. Non-Receipt of Notice from the Clerk of Court

Plaintiff claims that he did not receive any correspondence from the Clerk of Court since the Notice of Discovery Hearing.⁵

⁵Plaintiff states that, at the time his motion was submitted, he had not "received anything from the Clerk since the Notice of Discovery Hearing mailed on June 16, 2004. . . ." We

As with his claims regarding non-receipt of Defendants' motion, Plaintiff must overcome the strong presumption of regular receipt of mail that arises upon mailing. See supra Cendant II; Fiore. Although we do not have before us a mailing receipt as we did in considering Defendants' service of pleadings on Plaintiff, mailing can be established by circumstantial evidence "such as evidence of standard operating office procedures or business practices regularly used." See Cendant II, 157 F. Supp. 2d at 391 (internal citations omitted).

In most instances, information regarding the regular mailing practices would be presented by the party asserting that a letter was received. Here, however, the question is not whether an item was mailed by a party, but rather, whether an item was mailed by the Clerk of Court. It is the regular practice of the Clerk of Court to mail a paper copy of each court order and judgment to any party or attorney that has not consented to electronic service. See Clerk's Office Procedural Handbook, U.S. Dist. Ct. for the E. Dist. of Pa., Appendix A at 14. Mail returned as undeliverable is placed in the file.

Each order of this Court in the file for this case bears a handwritten mark indicating the date of entry and mailing, and the list of names to whom paper copies of that order were mailed. Plaintiff's name is listed on each order, including the Order

assume that Plaintiff refers to the notice mailed on July 16, 2004.

dismissing Plaintiff's claims with prejudice.⁶ This marking indicates that, in keeping with the regular practice of the Clerk's office, a copy of the Order was mailed to Plaintiff. Furthermore, the docket entry for the Order dismissing Plaintiff's claims is marked "ENTERED AND COPIES MAILED." Docket Entry of Sept. 15, 2004 in Blomeyer v. Levinson, Civ. A. No. 02-8378 (E.D. Pa.). We find this sufficient to establish that the Order was mailed, giving rise to the factual presumption that it was also received in due course.

Next, we consider whether Plaintiff has presented sufficient evidence to rebut the presumption. As discussed above, the mere denial of receipt, with no explanation or evidence in support thereof, is generally not sufficient. See supra, Cendant II. In support of his claim of non-receipt, Plaintiff points to earlier problems with receipt of court correspondence. (Pl.'s Br. at 3.) Earlier in this case, after failing to respond to Defendants' motions to strike, Plaintiff claimed that he had received no correspondence since filing his notice of change of address. (See Pl.'s Ltr. to Clerk of Ct. of May 4, 2003.) At that time, Plaintiff sent a letter to the Clerk noting that he had discovered the problem only upon logging on to PACER. Id. This Court, in recognition of Plaintiff's claim of non-receipt,

⁶The file copy of the Order signed September 15, 2004 (entered September 16, 2004) dismissing Plaintiff's claims (Doc. No. 46) bears the handwritten text "9/16/04 Blomeyer Dillon" indicating the date of mailing and recipients.

vacated the Orders granting Defendants motions to strike, and gave Plaintiff additional time to respond. (Order of May 9, 2003.)

Plaintiff's current claims of problems in receiving mail from the Clerk of Court do not have the benefit of being subsequent to a change of address.⁷ Plaintiff provides no evidence of either any impediment to his receipt of mail or to any regular procedures for the processing of incoming mail that support his claim of non-receipt. Furthermore, considering the totality of the circumstances, this Court has significant doubts as to Plaintiff's credibility.

Plaintiff's claim of non-receipt, particularly when considered against the backdrop of his other similar claims, suggest an unusual and unlikely scenario. Although the postal system is not perfect, it is difficult to believe that during two periods throughout this case, Plaintiff failed to receive multiple notices from the Clerk. It is even more incredible that both such periods coincided with instances in which Plaintiff failed to timely respond to motions made by Defendants that were subsequently resolved in Defendants' favor. The proposition that the reason for this failure to respond was a lack of court notice becomes even less plausible when we consider that Plaintiff's

⁷Plaintiff did not submit a second change of address until he filed the instant motion. See Doc. No. 50. Plaintiff makes no claim that he moved at any time that would have affected his receipt of Defendants' motion or notices from this Court.

pattern of failing to respond to court orders and party submissions extends to his appellate activity as well.

Plaintiff appealed to the Third Circuit for relief from the same Order from which he now seeks relief in this Court. The briefing schedule for that appeal published on March 30, 2005 required Plaintiff to submit a brief in support of his appeal by May 9, 2005. (Docket Entry of Mar. 30, 2005 "BRIEFING NOTICE ISSUED" in Blomeyer v. Levinson, No. 05-1849 (3d Cir.)) In addition to the regular appellate briefing requirements, Defendants filed a motion to quash the appeal on May 3, 2005, which required a response by May 16, 2005. (Docket Entry of May 3, 2005 "MOTION" in Blomeyer, No. 05-1849.) Plaintiff made no submissions to the Third Circuit in response to either of these items. As a result, his appeal was dismissed for failure to prosecute on May 18, 2005. (Docket Entry of May 18, 2005 "CLERK ORDER" in Blomeyer, No. 05-1849.)

Plaintiff's credibility as to his non-receipt of mailings from the Clerk is further undermined by his claim, made despite substantial evidence to the contrary, that he did not receive Defendants' motion. Furthermore, Plaintiff had access to PACER, and knew that logging on to that system would provide him with updated information with regards to his case. (See Pl.'s Ltr. to Clerk of Ct. of May 4, 2003.)

Thus, considering all the circumstances surrounding Plaintiff's claim that he did not receive notice from the court

that a judgment had been entered against him, we find that Plaintiff's claim is not credible and does not support a finding of excusable neglect.

iv. Reliance on Opposing Counsel and Stenographer

Plaintiff asserts that his delay in responding to Defendants' motion is due, at least in part, to Defendants' failure to alert him to the pending motion and to statements made by a stenographer regarding the timing for the preparation of deposition transcripts. (See Pl.'s Br. at 3-4.)

With regards to Defendants and defense counsel, Plaintiff claims that they were silent as to the pending motion and continued the discovery process even after the motion (allegedly unbeknownst to Plaintiff) was granted. (Pl.'s Br. at 3.)

Plaintiff asserts that throughout all of his interactions with Defendants or defense counsel during his visit to Philadelphia, there was no mention of the pending motion. Id. Plaintiff further complains that Defendants continued seeking discovery responses beyond the filing of the motion and up through October 29, 2005. Id. Defendants admit that they sought Plaintiff's signature on proprietary release forms for institutions that refused to accept the general release previously signed by Plaintiff earlier in the discovery process. (Defs.' Br. at II.) Defendants state that they sought the completed forms despite the favorable decision on their motion because they anticipated that Plaintiff might appeal. Id. This seems a reasonable

expectation, and, if fulfilled, would have meant that the medical records might yet prove necessary for Defendants' case.

Plaintiff apparently does not claim that these actions were responsible for the initial delay. Rather, Plaintiff seems to claim that because he inferred from Defendants' behavior that nothing of importance was occurring in his case, he did not check the docket via PACER or otherwise seek information concerning the status of his case such that he might have been alerted earlier to the motion and resulting dismissal. (See Pl.'s Br. at 3.) Plaintiff argues that his inferences and resulting inattention to his case were further justified by the statement of the stenographer in attendance at Plaintiff's deposition of Levinson that the transcripts would take some forty-five days to produce. Id.

Plaintiff's reliance on Defendants' behavior and the timing of the production of deposition transcripts was seriously misplaced. Defendants have no obligation to provide any notice of the filing of their motion beyond service of a copy of that motion pursuant to the rules of procedure. Nor did Plaintiff have any reason to believe that Defendants, their counsel, or a stenographer spoke for this Court with regards to whether any "serious action[]" in his case might occur at any given time. (See Pl.'s Br. at 3). Furthermore, it is clear from Federal Rule of Civil Procedure 26(d) that the discovery activity of one party "does not operate to delay any other party's discovery." Fed. R.

Civ. P. 26(d). Plaintiff, regardless of his pro se status, is bound by the same procedural rules as any party, and there is nothing to indicate that, as he proposes, the preparation of deposition transcripts can effect what amounts to a stay of proceedings.

Ultimately, Plaintiff is responsible for his own case, and cannot rely on others to go beyond the requirements of the Federal Rules of Civil Procedure in providing him special additional notice of activity in his case. We find that he could not reasonably have relied on the silence of Defendants, an overlap in discovery, or the statements of a stenographer in deciding how to proceed with his case. Thus, Plaintiff's claims based on this reliance do nothing to push the balance in his favor with regards to whether his delay was due to excusable neglect.

v. Misunderstanding of "With Prejudice"

Although not presented as a separate reason supporting his delay, Plaintiff asserts that his misunderstanding of the impact of the dismissal with prejudice contributed to the continued delay in response. (Pl.'s Br. at 4). Plaintiff claims that, upon finally checking PACER on November 9, 2004, he immediately tried to "salvage" his case. Id. He claims that, by the second week of November, he drafted both a letter to the Clerk regarding the alleged problems with receiving notices and an objection to

Defendants' motion.⁸ Id. He did not, at that point, request an extension of time or otherwise contact this Court directly in an attempt to preserve his rights. Plaintiff does not explain the lack of any attempts to contact the Clerk or this Court by telephone. Instead, Plaintiff informs us that he never sent the drafted items to the Court because he interpreted the term "with prejudice" in the dismissal order to mean that he had no further recourse in the District Court. Id.

Plaintiff's understanding of "with prejudice" does not, however, negate the fact that, if he had consulted the Federal Rules of Civil Procedure, he would have found that relief might be available under the same provision that is the basis of the instant motion. Furthermore, Plaintiff was aware from previous proceedings that this Court has the power to vacate its own orders. In any event, Plaintiff's apparent misunderstanding of the effect of the dismissal with prejudice does not explain either his failure to prosecute his appeal or his failure to bring this motion until the very last possible day permitted under Rule 60(b)(1). Thus, we find Plaintiff's confusion regarding the meaning of "with prejudice" to be unpersuasive as used by Plaintiff to support his motion for relief from judgment.

B. Danger of Prejudice to the Non-Movant

Defendants' response does not specifically address the issue

⁸Plaintiff has not submitted these drafted documents to this Court at any point in the proceedings.

of prejudice that might result from granting of Plaintiff's motion. It is evident, however, that the relief from the dismissal of this case would require significant further discovery on Defendants' part. The underlying claims include ongoing injuries allegedly resulting from some conduct of Defendants. These claims of current and future injury prompted Defendants to seek a court-ordered psychiatric examination to evaluate the current state of Plaintiff's mental health. Plaintiff submitted to such an examination in August, 2004. Due to the forward-looking nature of Plaintiff's claims, however, Defendants would likely need to re-examine Plaintiff or be prejudiced by relying on the now-outdated snapshot of Plaintiff's mental health. Either choice could result in prejudice to Defendants.

C. Length of Delay

The judgment from which Plaintiff seeks relief was entered on September 16, 2004. Plaintiff filed the instant motion on September 15, 2005, exactly one year after the entry of judgment. According to Plaintiff's claims, he became aware of the entry of judgment on November 9, 2004. This motion was filed over ten months after that date. Plaintiff's first attempt to respond to the motion, in the form of his appeal to the Third Circuit, was made six months after the entry of judgment and over four months after Plaintiff claims he first learned of the judgment. Plaintiff's appeal, as discussed above, was dismissed for failure

to prosecute because Plaintiff entirely failed to make (or seek additional time for) the submissions required either by the briefing schedule issued by the Third Circuit or in response to Defendants' motion to quash the appeal. The instant motion was filed nearly four months after Plaintiff's appeal was dismissed. Although Plaintiff timely filed this motion, the length of the delay, particularly in light of his failure to diligently pursue what he thought was the appropriate avenue for relief, weighs against excusing Plaintiff from the effects of this Court's judgment.

D. Movant's Good Faith

Throughout the course of this litigation, which was initiated nearly three years before the instant motion was filed, Plaintiff has repeatedly ignored both the rules of procedure and his obligation to prosecute his claims. Occasional filing out of time and resistance to discovery, particularly in light of Plaintiff's pro se status, might not suggest bad faith. The pattern of ignoring the obligation to respond to pleadings and court orders is deeply troubling, and reflects an escalation of earlier problematic behavior. This Court, as discussed above, is concerned that Plaintiff's claims as to the reasons for this delay are not wholly credible. Although it is not certain whether Plaintiff acted entirely in bad faith, these considerations of credibility and apparent attempt to "salvage" claims that were only ever pursued in fits and starts seems to

preclude the conclusion that Plaintiff acted in good faith.

III. Conclusion

The above discussion of the Pioneer factors illustrates that none of the four factors weighs in favor of Plaintiff. Although the question of prejudice is not altogether clearly resolved by the record before us, each of the other factors, most importantly the reason for delay and the absence of good faith, weighs against granting Plaintiff relief from the judgment entered against him. Plaintiff's claims that he has not received numerous mailed items in this case have transcended what is believable, even considering that the U.S. Postal Service is not infallible. Plaintiff's continued reliance on such claims, particularly when coupled with his overall failure to diligently pursue his claims and abide by procedural rules -- both of which influenced the analysis of more than one of the Pioneer factors -- bring us to the conclusion that Plaintiff's neglect, error, and delay were not "excusable." Thus, relief from judgment pursuant to Rule 60(b) is not appropriate.

For all of the reasons set forth above, Plaintiff's motion for relief from judgment is denied pursuant to the attached order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRUCE D. BLOMEYER	:	CIVIL ACTION
	:	
v.	:	02-8378
	:	
DOUGLAS F. LEVINSON, M.D., MEDICAL	:	
COLLEGE OF PENNSYLVANIA, MEDICAL	:	
COLLEGE OF PENNSYLVANIA HOSPITAL,	:	
EASTERN PENNSYLVANIA PSYCHIATRIC	:	
INSTITUTE	:	

ORDER

AND NOW, this 21st day of February, 2006, upon consideration of Plaintiff's Motion for Relief (Doc. No. 51), and all responses thereto (Doc. No. 52), it is hereby ORDERED that the motion is DENIED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.