

Slip Copy, 2009 WL 1885621 (N.D.Cal.)
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 and not assigned editorial enhancements.**

United States District Court, N.D. California,
 San Jose Division.

Kenneth B. QUANSAH, JR., Plaintiff.

v.

7-ELEVEN STORE # 25561 (Jay Mousavi, Sadu
 Singh), et al., Defendants.

No. C 08-1012 JF (HRL).

June 30, 2009.

Kenneth B. Quansah, Jr., San Jose, CA, pro se.

[Gary Bruce Wesley](#), Attorney at Law, Mountain
 View, CA, [Richard S. Falcone](#), Payne & Fears LLP,
 San Francisco, CA, [Eric A. Welter](#), Welter Law
 Firm, P.C., Herndon, VA, for Defendants.

ORDER ^{FN1} DENYING MOTION FOR RELIEF
 FROM JUDGMENT

^{FN1}. This disposition is not designated for
 publication in the official reports.

[JEREMY FOGEL](#), District Judge.

*1 Plaintiff Kenneth B. Quansah, Jr. ("Plaintiff"), a
 frequent litigant in this Court ^{FN2}, seeks relief from the
 order and judgment dismissing the instant action for
 lack of prosecution. For the reasons discussed below,
 the motion will be denied.

^{FN2}. A search of the Court's electronic filing
 system shows that Plaintiff has filed 12 ac-
 tions in the Northern District of California
 since 1993.

I. DISCUSSION

Plaintiff filed the instant action on February 20, 2008,
 alleging multiple employment-related claims and

requesting leave to proceed *in forma pauperis*. The
 court issued a scheduling order setting a case man-
 agement conference for June 20, 2008. On April 2,
 2008, the Court denied Plaintiff's application to pro-
 ceed *in forma pauperis*, finding that the supporting
 papers were incomplete but granting Plaintiff leave to
 file an amended application. On April 15, 2008,
 Plaintiff filed a second application to proceed *in forma*
pauperis. The Court granted the application on May
 27, 2008. ^{FN3}

^{FN3}. Plaintiff believes that his decision to
 re-file his application to proceed *in forma*
pauperis caused the U.S. Marshals Service to
 not serve the complaint. However, as noted
 below, Defendants responded to the com-
 plaint and thus appeared in the instant action.

Although Plaintiff now contends that his submission
 of a second application for leave to proceed *in forma*
pauperis necessitated the re-scheduling of the initial
 case management conference, it is undisputed that
 Plaintiff failed to appear at the conference scheduled
 for June 20, 2008. Accordingly, June 25, 2008, the
 Court ordered Plaintiff to show cause why the action
 should not be dismissed for lack of prosecution, in-
 structing Plaintiff to file any response by July 15, 2008
 and setting a hearing for July 25, 2008. The record
 reflects that a copy of the order to show cause was sent
 to Plaintiff's post office box, where Plaintiff received
 and later continued to receive communications from
 the Court. Plaintiff nonetheless claims that he never
 received the order to show cause.

On July 14, 2008, Defendant 7-Eleven Store filed an
 answer, and Defendant 7-Eleven Corporation filed a
 motion to dismiss. On July 25, 2008, Plaintiff failed to
 appear at the hearing on the order to show cause, and
 the Court dismissed the instant action without preju-
 dice for lack of prosecution. Plaintiff claims that on or
 about the same date, he sought but was denied a new
 scheduling order from the Clerk's office. Plaintiff
 thereafter filed several procedurally improper motions
 attempting to revive his case, and in response to each
 motion, the Court directed Plaintiff to [Fed.R.Civ.P.](#)
[60\(b\)](#). Plaintiff filed the instant motion on February

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24, 2009.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure allow relief from judgment on the grounds of “(1) mistake, inadvertence, surprise, or excusable neglect ... or (6) any other reason that justifies relief.” [Fed.R.Civ.P. 60\(b\)](#). A motion for relief for excusable neglect must be made “not more than one year after the judgment, order, or proceeding was entered or taken.” *Id.*

The disposition of a [Rule 60\(b\)](#) motion is a matter “which lies largely within the discretion of the district court.” [Provident Sec. Life Ins. Co. v. Gorsuch](#), 323 F.2d 839, 842 (9th Cir.1963). “[Rule 60\(b\)](#) is remedial in nature and therefore must be liberally applied ... Whenever it is reasonably possible, cases should be decided upon their merits.” [Pena v. Seguros La Comercial, S.A.](#), 770 F.2d 811, 815 (9th Cir.1985) (internal citations omitted). Failure by the movant to cite the applicable standards does not relieve the district court of its duty to apply the correct legal standard. [Bateman v. U.S. Postal Serv.](#), 231 F.3d 1220, 1224 (9th Cir.2000).

*2 The term “excusable neglect” in [Rule 60\(b\)\(1\)](#) generally should be read consistent with its meaning in the bankruptcy context, meaning that applicable bankruptcy precedent is relevant. See [Briones v. Riviera Hotel & Casino](#), 116 F.3d 379, 382 (9th Cir.1997). In evaluating whether the particular neglect was excusable, the Court must consider “the danger of prejudice to the [other 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. v. Brunswick Assocs. Ltd. P'ship](#), 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993).

Pursuant to [Rule 60\(b\)\(6\)](#), a party is entitled to relief if he demonstrates “extraordinary circumstances which prevented or rendered him unable to prosecute [his case].” [Pioneer](#), 507 U.S. at 393. The “excusable neglect” and “any other reason” provisions are mutually exclusive: “The ‘excusable neglect’ clause is interpreted as encompassing errors made due to the ‘mere neglect’ of the petitioner whereas (b)(6) is in-

tended to encompass errors or actions beyond the petitioner's control.” [Community Dental Services v. Tani](#), 282 F.3d 1164, 1170 (9th Cir.2002)

III. DISCUSSION

Plaintiff's motion for relief is timely because it was filed within one year of the entry of judgment. The Court therefore turns to the issue of whether Plaintiff is entitled to relief pursuant to subsection (b)(1) or (b)(6) of [Rule 60\(b\)](#).

A. [Rule 60\(b\)\(6\)](#)

Plaintiff's alleged non-receipt of the order to show cause must be analyzed under subsection (b)(6), because if indeed he did not receive the order, such non-receipt was a factor beyond his control rather than a product of negligence on his part. However, there is a rebuttable presumption that if a document was mailed, the addressee received it. If there is sufficient evidence to raise the presumption, the burden shifts to the receiving party to show that the document never arrived. [Huizar v. Carey](#), 273 F.3d 1220, 1223 (9th Cir.2001).

Official court records show that the order to show cause was mailed to Plaintiff's address of record, which is enough to raise the applicable presumption. It is not sufficient for the plaintiff merely to state that the document never was received. *Id.* Plaintiff presents no other evidence, circumstantial or otherwise, that he did not receive the order. Particularly in light of the fact that Plaintiff apparently received all other correspondence from the Court at the same post office box both before and after his alleged non-receipt of the order to show cause, it must be presumed that Plaintiff received the order.

B. [Rule 60\(b\)\(1\)](#)

Since Plaintiff must be presumed to have received the order, his claim for relief turns on his success in demonstrating “excusable neglect” under 60(b)(1). While Plaintiff does not specify any excuse-he relies entirely on his purported non-receipt of the order-he implies that there was confusion regarding the need for a new case management schedule. However,

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Plaintiff offers no explanation for his belief that the granting of his second application to proceed *in forma pauperis* invalidated the existing schedule. Moreover, the order setting the hearing on the order to show cause was issued a month after Plaintiff's second application to proceed *in forma pauperis* was granted. Even if Plaintiff believed that the existing schedule had been superseded, any subsequent scheduling, such as the setting of the hearing, already would have taken this into account. It was entirely within Plaintiff's reasonable control whether to appear at the hearing. It also was within Plaintiff's reasonable control to comply with the Court's subsequent directive to seek relief under [Fed.R.Civ.P. 60\(b\)](#) rather than by filing other, improper requests for relief. Defendants would suffer substantial prejudice if required to appear in a case that was dismissed nearly a year ago. Accordingly, the Court concludes that Plaintiff's neglect was not excusable.

IV. ORDER

*3 Good cause therefor appearing, the motion for relief from judgment is DENIED.

IT IS SO ORDERED.

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