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

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| KENDALL GARLAND, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | CIVIL ACTION NO. 04-153J |
| v. | ) | |
| | ) | JUDGE GIBSON |
| LT. MALINICH, | ) | |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM ORDER**

This matter comes before the Court on the Plaintiff's "Notice of Appeal" (Document No. 13) filed on June 21, 2005. The Plaintiff had also filed an "Application for Reconsideration" (Document No. 11) which was considered by Magistrate Judge Pesto who had been assigned this case for pretrial matters. The Plaintiff's "Application for Reconsideration" requested a reconsideration of Magistrate Judge Pesto's May 19, 2005 ruling denying the Plaintiff's request, filed that same day, to amend his Complaint in the above-captioned matter; this matter was originally closed after this Court had adopted the report and recommendations of Magistrate Judge Pesto on November 10, 2004. Magistrate Judge Pesto issued an Order dated June 22, 2005 denying the Plaintiff's "Application for Reconsideration" finding no relief available for the Plaintiff under Federal Rules of Civil Procedure 15, 59 and 60 after reasoning that the Plaintiff is subject to the limitations of 28 U.S.C. § 1915(g) as he had two previous civil actions dismissed for failure to state a claim in addition to the dismissal of the current civil action.

In consideration of the fact that the Magistrate Judge Pesto has ruled upon the "Application for Reconsideration", the Court finds that the Plaintiff's "Notice of Appeal" is now proper for consideration.

The Court considers the orders by Magistrate Judge Pesto originally denying the amendment of the complaint and the reconsideration of that order to be "pretrial matters" as they relate to the initiation of a civil action. Had amendment been permitted, the case would have proceeded through the pleading and discovery phases under the direction of Magistrate Judge Pesto. The denial of the amendment of the complaint in effect only terminated any possibility that the civil action would be permitted to proceed through the pleading stage. Therefore, the Court views the order of Magistrate Judge Pesto denying the Application for Reconsideration as a pretrial matter although it was entered after this civil action was dismissed.

With that understanding, it is noted that the Court reviews decisions of a magistrate judge on pretrial matters pursuant to the standard of whether the "order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1). The Plaintiff has forwarded to this Court correspondence dated July 1, 2005, which is not docketed, but which was received on July 6, 2005. In this correspondence, the Plaintiff requests amendment of his Complaint based upon an argument that Federal Rule of Civil Procedure 15 "expressly allows amendments to be made at any time, even after judgment." Further, the Plaintiff argues that a conflict for resolution exists, "there is no improper delay", "there was no previous amendment in this matter", that the statute of limitations has not expired and that the "one year statute of limitations for reopening judgment after dismissal has not expired either, "that none of the 11 affirmative defenses offered in the answer to the complaint will be unduly prejudiced by allowing amendment", and finally the Plaintiff requests that the application to amend be considered both an application to amend and an application to reopen judgment under Federal Rule of Civil Procedure 60(b).

The Court finds that the magistrate judge's order dated June 22, 2005 was not clearly erroneous

or contrary to law. While it is true that Rule 15 (b) permits amendment after judgment, this rule applies only to those cases which have proceeded to trial and where the issues tried were not set forth in the pleadings. In addition, the Plaintiff has failed to meet the deadlines for amendment set forth in subsection (a) of the rule; and the Plaintiff has not set forth facts establishing relief under subsections (c) or (d) of the rule. The Court also notes the delay of the Plaintiff in filing the original motion to amend, *i.e.* over six months. In considering this "application" as a motion under Federal Rule of Civil Procedure 60(b), the Court notes that it is within the one year filing period required for reasons (1), (2), and (3) of the rule, but the Plaintiff does not set forth a basis in these three reasons to establish relief under this rule. Specifically, to the extent the Plaintiff's letter raises an issue of inadvertence under reason (1) by stating that he "only recently came to realize that this complaint could be amended to cure defects" this does not establish a case for inadvertence. *See Bershad v. McDonough*, 469 F.2d 1333, 1337 (7th Cir. 1972)(finding that "ignorance" or "carelessness on the part of a litigant or his attorney will [not] provide grounds for Rule 60(b) relief"). Furthermore, the Court finds no support in the Plaintiff's appeal demonstrating that a basis exists under reasons (4), (5), or (6) to establish relief under Rule 60(b).

Finally, if Plaintiff's request is considered a motion to alter or amend judgment under Rule 59(e), Magistrate Judge Pesto was correct in finding that the Plaintiff's original motion and "Application for Reconsideration" were untimely.

Therefore, the Court finds that Magistrate Judge Pesto's order dated June 22, 2005 is not clearly erroneous or contrary to law and that order is affirmed.

**AND NOW**, this 1st day of August, 2005, this matter coming before the Court on the Plaintiff's "Notice of Appeal" (Document No. 13) filed June 21, 2005, IT IS HEREBY ORDERED THAT the Magistrate Judge's Order of June 22, 2005 is AFFIRMED.

**BY THE COURT:**

**KIM R. GIBSON,**
**UNITED STATES DISTRICT JUDGE**

cc: Kendall Garland, *Pro se*
Robert S. Englesberg, Esq.