

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

PIERO A. BUGONI,

Plaintiff,

v.

CASE NO.: 8:13-cv-1224-T-23AEP

RICK SCOTT,

Defendant.

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**ORDER**

A November 7, 2013 order (Doc. 8) requires the plaintiff to “amend the complaint to remove any ‘redundant, immaterial, impertinent, or scandalous matter,’ including profanity.” A November 27, 2013 order (Doc. 10) denies the plaintiff’s motion (Doc. 9) “for reconsideration” and grants in part the plaintiff’s motion (Doc. 9) for an “extension of time to refile complaint.” In response, the plaintiff timely filed the fourth amended complaint (Doc. 11) and stated, “Due to this Court’s order issued, 27 November 2013, Plaintiff hereby releases all defendants except Governor Scott in this manner . . . [and] corrects this Complaint with regard to Defendant Scott only.” (Doc. 11 at 2)

A December 13, 2013 order (Doc. 12) construes the fourth amended complaint “as another motion for an extension of time to amend the complaint and to comply with the November 7 order” and denies the motion. Also, the order strikes “the class allegations in the [fourth amended complaint].” Finally, the order states, “No later

than **January 10, 2014**, [the plaintiff] must file proof of service of process of the [fourth amended complaint] on the defendant.” On January 8, 2014, the plaintiff filed a fifth amended complaint (Doc 13). On January 9, 2014, the plaintiff issued (Doc. 15) a summons. However, the plaintiff failed to file proof of service by the January 10, 2014 deadline.

A January 13, 2014 order (Doc. 16) dismisses this action because the plaintiff “file[d] no proof of service of process.” The order states, “[The plaintiff] waited until January 9, 2013, the day before the January 10 deadline, to cause the clerk to issue a summons (Doc. 15), effectively guaranteeing non-compliance with the December 13 order.” (Doc. 16 at 1 n.1) On January 15, 2014, the plaintiff filed proof of service of both the fourth amended complaint and fifth amended complaint on Rick Scott, the Governor of Florida, and on Pam Bondi, the Attorney General of Florida.

Nearly eleven months later, on December 3, 2014, the plaintiff moved (Doc. 20) under Rule 60(b)(6), Federal Rules of Civil Procedure, for relief from the January 13, 2014 dismissal order. The plaintiff states, “The failure was to return the receipts of service, not [to] serve the Complaint.” (Doc. 20 at 2) Also, the plaintiff states, “While the failure of the process server to return the receipts of service timely to the Court may have been a neglect on [the process server’s] part, it was not any neglect on Plaintiff’s part.” (Doc. 20 at 2) Although doubt exists that the plaintiff moved for relief under Rule 60(b)(6) within a reasonable time and with due diligence, the plaintiff’s motion (Doc. 20) is **GRANTED** based on excusable neglect. The

January 13, 2014 order (Doc. 16) is **VACATED**. The clerk is directed to re-open the case.\* The defendant, Governor Rick Scott, is directed to respond to the fifth amended complaint (Doc. 13) by **JANUARY 31, 2015**.

ORDERED in Tampa, Florida, on December 9, 2014.



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STEVEN D. MERRYDAY  
UNITED STATES DISTRICT JUDGE

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\* After the January 13, 2014 order dismissed this action, the plaintiff sued (Doc. 1, 8:14-cv-1903-T-23EAJ) Governor Rick Scott in a second action on August 7, 2014. In the second action, “[d]espite minor and immaterial differences, [the plaintiff sought] the same relief against the same defendant as in [the first action].” (Doc. 11 at 1, 8:14-cv-1903-T-23EAJ)

A September 19, 2014 order in the second action (Doc. 11, 8:14-cv-1903-T-23EAJ) directed the plaintiff to “show cause (1) why [the second] action should not be dismissed as barred — by *res judicata*, claim preclusion, or otherwise — by the adjudication of [the first action] and (2) why [the second] action should not be dismissed for failure to prosecute because of [the plaintiff]’s failure to adhere to the Magistrate Judge’s August 18, 2014 order (Doc. 5) requiring [the plaintiff] to obtain a summons form and to submit the form to the United States Marshal within the stated time.” An October 14, 2014 order (Doc. 14, 8:14-cv-1903-T-23EAJ) dismissed the second action because the plaintiff “fail[ed] either to explain why *res judicata* does not bar this action or to explain why his failure to comply with the Magistrate Judge’s order does not warrant dismissal for failure to prosecute.” The plaintiff appeals (Doc. 15, 8:14-cv-1903-T-23EAJ) the October 14, 2014 order.

Because this order vacates the January 13, 2014 order and re-opens this action, the plaintiff should move in the circuit court of appeals under Rule 42(b), Federal Rules of Appellate Procedure, and under Rule 42-1(a), Eleventh Circuit Rules, to voluntarily dismiss the pending appeal in the second action. After receipt of an order from the circuit court of appeals dismissing the appeal in the second action, the plaintiff can voluntarily dismiss the second action, which repeats impermissibly the claims in this action, which was filed first. Dismissal of a pending appeal must precede dismissal of an action in the trial court; the second action cannot continue after the revival of this action, which is the first-filed action, in which the same claims pend between the same parties.