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Massachusetts District Court
Case No. 1:11-cv-12000-RBC
Greenspan v. Random House, Inc. et al

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MR. AARON GREENSPAN, an individual, Plaintiff, v. RANDOM HOUSE, INC.; MEZCO, INC.; BENJAMIN MEZRICH; COLUMBIA PICTURES INDUSTRIES, INC. a/k/a SONY PICTURES a/k/a COLUMBIA TRISTAR MOTION PICTURE GROUP, Defendants.	Civil Action No. 1:11-CV-12000-RBC

RANDOM HOUSE, INC.'S, MEZCO, INC.'S,
AND BENJAMIN MEZRICH'S OPPOSITION TO PLAINTIFF'S
SECOND MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)

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Boston, Massachusetts

INTRODUCTION

On May 9, 2012, the Court issued orders granting Defendants' motions to dismiss Plaintiff Aaron Greenspan's complaint and denying his motion to file an amended complaint (Dkt. Nos. 49 and 50; collectively, the "Orders"), and entered a Judgment dismissing the action (Dkt. No. 51, the "Judgment"). After the First Circuit affirmed the dismissal and the Supreme Court denied certiorari, Plaintiff returned to this Court on November 6, 2013 to challenge the Orders and Judgment via a motion for relief pursuant to Rule 60(b) (Dkt. No. 60), which the Court denied (Dkt. No. 67). Now, nearly two years after entry of the Judgment, Plaintiff has filed *yet another* Rule 60(b) motion (the "Motion"), in what amounts to no more than another attempt at a "do over" of his failed appeal.

As the First Circuit has held, "Finality is an institutional value[ ] that transcend[s] the litigants' parochial interests . . . [because] [o]nce litigation has run its course and all available avenues of appeal have been exhausted, the parties must be able to depend upon the certainty and stability of the resultant judgment." *Comfort v. Lynn School Committee*, 560 F.3d 22, 26 (1st Cir. 2009). Here Plaintiff flaunts this longstanding institutional value, again attempting to relitigate issues that have been repeatedly, and finally, decided against him. *See Fafel v. Dipaola*, 399 F.3d 403, 411 (1st Cir. 2005) ("Rule 60(b)(6), like Rule 60(b) generally, is not a substitute for an appeal"). Defendants Random House, Inc., Benjamin Mezrich, and Mezco, Inc. ("Defendants") hereby oppose the Motion, which again falls far short of demonstrating "the existence of exceptional circumstances justifying extraordinary relief."[1] *Teamsters, Chauffers, Warehousemen and Helpers Union, Local No. 59 v. Superline Transportation Co., Inc.*, 953 F.2d 17, 20 (1st Cir. 1992). Plaintiff cannot be allowed to harass Defendants with frivolous motions

[1] Defendants also join in the opposition of Defendant Columbia Pictures Industries, Inc., and incorporates by reference the arguments raised therein.

every time a Supreme Court case is decided that he (erroneously) believes supports his already failed arguments. The time is long past for this matter to finally end. The Motion should be denied, and Plaintiff should be sanctioned for his patently frivolous motion.

ARGUMENT

Plaintiff argues that he is entitled to relief from the Judgment pursuant to Rule 60(b)(5) because the Supreme Court's decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. ___, ___ S.Ct. ___, No. 12-873, 2014 WL 1168967 (Mar. 25, 2014), "reverse[s]" the "earlier judgment(s)" on which the Judgment relied. Motion at 2. *Lexmark* does not undermine the Judgment.[2] In *Lexmark*, the Court clarified that in order to establish standing under the Lanham Act, a plaintiff must demonstrate an injury to a commercial interest in reputation or sales flowing directly from misrepresentations in the defendant's advertising. At *10. However, in this case the Court dismissed Plaintiff's Lanham Act claim because, among other things, it found that describing *The Accidental Billionaires* as "nonfiction" does not constitute a misrepresentation cognizable under the Lanham Act.[3] (*See* Dkt. No. 50 at 27-28.) Similarly, the Court found that the proposed First Amended Complaint also failed to state a Lanham Act claim because it did not allege any cognizable misrepresentation. (*See* Dkt. No. 49 at 3 n.3.) Even assuming that Plaintiff had standing under *Lexmark*, this alleged

[2] The Motion is also untimely, as it was filed nearly two years after entry of the Judgment (Dkt. No. 51). Motions under 60(b)(5) must be "made within a reasonable time." Fed. R. Civ. Pro. 60(c)(1). Plaintiff argues that the Motion satisfies this standard because it was filed shortly after the Supreme Court decided *Lexmark*. Such a standard is irrational and unworkable. It would make a 60(b)(5) motion filed 20 years after a judgment, but shortly after a new relevant Supreme Court decision, timely, completely defeating Rule 60(c)(1)'s reasonable time requirement.

[3] This Court already rejected Plaintiff's challenge to this reasoning in denying his first Rule 60(b) motion.

"misrepresentation" is still not cognizable, and his Lanham Act claim would still fail.[4] In any event, the Court specifically found that "no facts [were] alleged that the defendants' misrepresentations harmed the plaintiff's business by causing loss of sales or goodwill . . . ." (Dkt. No. 50 at 28-29.) Thus, Plaintiff's reliance on *Lexmark* is misplaced, and his protestations to the contrary unavailing.

Moreover, as already shown in Defendants' opposition to Plaintiff's first Rule 60(b) motion (Dkt. No. 63), this is not a basis for relief under 60(b)(5). The First Circuit has clearly held that "[t]he mere emergence of controlling precedent *in some other case* that shows the incorrectness of the prior judgment is not sufficient" to justify relief under Rule 60(b)(5). *Comfort*, 560 F.3d at 27 (emphasis in original); *see also id*. at 26 (the long recognized interest in finality in our judicial system "would consist of nothing more than empty rhetoric were courts compelled to re-litigate past cases. It follows, therefore, that a case cannot be re-opened simply because some new development makes it appear, in retrospect, that a judgment on the merits long since settled was brought about by judicial error"). In *Comfort*, after judgment and appeal, the Supreme Court reached a different result in a case with nearly identical facts. *Id*. at 25. In doing so, the concurrence expressly referred to the First Circuit's opinion in *Comfort* affirming the judgment as "inimical to the Constitution." *Id*. Regardless, the First Circuit held that the subsequent Supreme Court case was of no use to the plaintiffs, because "a change in applicable law does not provide [a] sufficient basis for relief." *Id*. at 27 (internal quotation omitted).

[4] Plaintiff briefly argues in the Motion that Lexmark "comes full circle to Plaintiff's claims of defamation." (*See* Motion at 4.) This suggestion is plainly frivolous. *Lexmark* does not address defamation claims at all, and certainly does nothing to undermine this Court's finding that the statements at issue were not capable of defamatory meaning and/or were protected opinion. (*See* Dkt. No. 50 at 31-39.)

Comfort also demonstrates that Rule 60(b)(5)'s provision for relief where "applying [the judgment] prospectively is no longer equitable" does not help Plaintiff. This provision applies only to "judgments having prospective application," such as "injunctions and consent decrees that involve long-term supervision of changing conduct or conditions."[5] *Id*. at 28 (internal quotation omitted). It has no application to the judgment of dismissal at issue here.

In his reply in support of his first motion, Plaintiff did not even address, much less distinguish, the controlling language from *Comfort* above, which was cited in Defendants' opposition (Dkt. No. 63 at 4-5). Instead, he argued in a footnote that *Comfort* does not control solely because it cites *United States v. Kayser-Roth Corp.*, 272 F.3d 89 (1st Cir. 2001), purportedly "as an example of when Rule 60(b)(5) should apply." (Dkt. No. 66 at 9 n.8 (emphasis omitted).) This is plainly false, and does nothing to undermine the applicability of *Comfort*. First, the First Circuit *affirmed the denial* of the Rule 60(b)(5) motion in *Kayser-Roth*, so it could not, and does not, constitute an example of when relief is available. *See* 272 F.3d at 90. Second, *Kayser-Roth* concerned a declaratory judgment requiring the defendant to pay "future cleanup costs" associated with the release of chemicals from its subsidiary's facility. *Id*. Thus, it involved "long-term supervision of changing conduct or conditions," unlike the judgment of dismissal here. *See Comfort*, 560 F.3d at 28.

The Motion, which merely repeats arguments that the Court already rejected in denying Plaintiff's first Rule 60(b) motion, merits the imposition of sanctions. Plaintiff cannot be permitted to continue to file motions, based on the same frivolous arguments and without even addressing the controlling circuit law, every time there is a new court decision that Plaintiff

[5] *Theriault v. Smith*, 523 F.2d 601 (1st Cir. 1975), cited in the Motion, dealt with a consent decree, and is therefore inapposite here.

believes supports his position. His continued attempts to find solace in new decisions must come to an end.

CONCLUSION

Plaintiff's Motion for Relief from a Judgment or Order Pursuant to Rule 60(b) does not come close to demonstrating any "exceptional circumstances justifying extraordinary relief." It is frivolous, harassing, and deprives Defendants of the repose to which they have long been entitled. It must be denied, and Plaintiff should be sanctioned for continuing to harass Defendants with meritless motions.

Respectfully submitted,

RANDOM HOUSE, INC., MEZCO, INC., and BENJAMIN MEZRICH

By their attorneys,

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CERTIFICATE OF SERVICE

I, Benjamin M. McGovern, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

/s/Benjamin M. McGovern
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