Legal Document

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

Document 62

View Document

View Docket

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AARON GREENSPAN,	)	**CIVIL ACTION**
	)	**NO.: 1: 11-CV-12000-RBC**
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.	)	

DEFENDANT COLUMBIA PICTURES INDUSTRIES, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR RELIEF FROM A JUDGMENT OR ORDER PURSUANT TO RULE 60(B)

Dustin F. Hecker, BBO # 549171
POSTERNAK BLANKSTEIN & LUND LLP
The Prudential Tower
800 Boylston Street
Boston, MA 02199
Telephone: (617) 973-6100
Facsimile: (617) 367-2315

Kevin T. Baine (*pro hac vice*)
Megan A. Hughes (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 12th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029

Attorneys for Defendant Columbia Pictures Industries, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER AUTHORITIES

Plaintiff Aaron Greenspan ("Plaintiff") initiated this lawsuit as part of his long running quest for recognition as the creator of social networking website Facebook.com. He is also the author of a memoir depicting, *inter alia*, his version of the founding of that website. Defendant Benjamin Mezrich (together with his company Defendant Mezco, Inc., "Mezrich") is the author of a book *The Accidental Billionaires* ("Mezrich's book") concerning the founding of Facebook. Mezrich's book was published by Defendant Random House, Inc. ("Random House"). Defendant Columbia Pictures Industries, Inc. ("Columbia") is the film company behind the blockbuster motion picture *The Social Network* ("Columbia's film") based on Mezrich's book. Plaintiff brought this suit alleging that Mezrich's book and Columbia's film infringed the copyright protecting Plaintiff's memoir. Plaintiff also alleged various Lanham Act violations based on the classification of Mezrich's book as non-fiction and on purportedly misleading Amazon reviews of Mezrich's book.[1] On May 9, 2012, the Court dismissed the Complaint for failure to state a claim upon which relief can be granted and denied as futile Plaintiff's motion to amend. ECF Nos. 49-51. The Court of Appeals for the First Circuit affirmed in a summary order on October 16, 2012, and denied Plaintiff-Appellant's motion for panel rehearing on October 31, 2012. The Supreme Court denied Greenspan's petition for a writ of certiorari on April 15, 2013.

More than a year after this Court's final judgment, Plaintiff now seeks another opportunity to pursue claims that this Court has already found to be futile. Plaintiff has failed to show that he is entitled to the extraordinary relief offered by Rule 60(b). Columbia respectfully requests that Plaintiff's motion be denied.[2]

[1] Plaintiff originally brought his Lanham Act claims against all Defendants, but proposed dropping those claims with respect to Columbia in his proposed amended complaint. *Compare* ECF No. 1 at 26 *with* ECF No. 41 Ex. A at 41.
[2] Columbia also joins in the separate response filed by Mezrich and Random House, and incorporates the arguments advanced in that memorandum.

ARGUMENT

Relief pursuant to Rule 60(b) is "extraordinary in nature" and "rare." *Fisher v. Kadant, Inc.*, 589 F.3d 505, 512 (1st Cir. 2009); *Comfort v. Lynn Sch. Comm.*, 560 F.3d 22, 26 (1st Cir. 2009). Such motions are granted only "sparingly" and require "more than merely casting doubt on the correctness of the underlying judgment." *Fisher*, 589 F.3d at 512. Plaintiff bears the burden of proving that his motion is timely, that exceptional circumstances warrant extraordinary relief, that he has a potentially meritorious claim in the event that the judgment is set aside, and that relief under Rule 60(b) will not unfairly prejudice Defendants. *Id.* He cannot, and does not, meet this burden.

Many of the grounds upon which Plaintiff seeks relief relate to his Lanham Act claims. Plaintiff himself agreed to drop the Lanham Act claims against Columbia in his amended complaint. *Compare* ECF No. 1 at 26 *with* ECF No. 41 Ex. A at 41. In any event, Plaintiff has not proven that his motion is timely and he has not demonstrated extraordinary circumstances that warrant relief from this Court's judgment under any provision of Rule 60(b). Nor has Plaintiff demonstrated any new circumstances that would show he has a meritorious claim.

I. Plaintiff's Motion is Untimely

As a threshold matter, Plaintiff's request for relief is untimely. Plaintiff has not shown that his motion was filed within a "reasonable time" as required by Rule 60(c)(1). Plaintiff's nearly eighteen month delay since entry of the Court's May 9, 2012 final judgment cannot be construed as reasonable. *See, e.g.*, *Cotto v. United States*, 993 F.2d 274, 280 (1st Cir. 1993) (finding delay of sixteen months after final judgment unreasonable).

Moreover, to the extent Plaintiff's motion is based on Rule 60(b)(1)-(3) it is barred absolutely by the express terms of the rule. A motion under Rule 60(b)(1)-(3) must be

made within a year after the entry of judgment. Fed. R. Civ. P. 60(c)(1). Where no appeals court has disturbed the trial court's judgment, the one-year time limit is an "absolute bar" to Rule 60(b) relief. *Boston Gas Co. v. Century Indem. Co.*, 754 F. Supp. 2d 268, 271 (D. Mass. 2010). This Court's final judgment issued on May 9, 2012 and was affirmed in its entirety on appeal. Thus, the time for any motion pursuant to Rule 60(b)(1)-(3) ran on May 9, 2013.[3]

II. The Court Did Not Make a Mistake that Warrants Relief Under Rule 60(b)(1)

Judicial mistake warrants relief from a judgment under Rule 60(b)(1) only where the Court has made a "substantive mistake of law or fact." *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996). None of the purported errors discussed in Plaintiff's motion qualify as substantive mistakes, and none of them touch upon the Court's opinions with respect to Columbia.[4]

With respect to his Lanham Act claims, Plaintiff alleged in the Complaint that Mezrich and Random House falsely labeled Mezrich's book non-fiction even though that book allegedly left out details of Plaintiff's involvement in the founding of Facebook.com. The Court, citing a wiki answers website, dismissed these claims in part because the term non-fiction "only means that the literature is based on true stories or events, not that every statement is in fact demonstrably true." ECF No. 50 at 27-28. Plaintiff now points to three purported errors in this portion of the Court's opinion: (1) a typographical error in the title of Defendant Ben Mezrich's

[3] While Plaintiff maintains that alleged typographical errors in the Court's final judgment renders it invalid, and that therefore the one-year limit has not yet run, he cites no authority that supports this novel theory. Pl.'s Mem. at 2-3. The only Rule 60(b) case Plaintiff cites merely reiterates that the one-year deadline runs from the date of the trial court's judgment unless an appeal substantially altered that judgment. *Simon v. Navon*, 116 F.3d 1, 3 (1st Cir. 1997). *Simon* does not support the proposition that purported typographical errors toll the one-year deadline imposed by Rule 60(c)(1).

[4] As noted, *supra*, Plaintiff's motion pursuant to Rule 60(b)(1) is untimely because more than a year has passed since the Court's final judgment. Fed. R. Civ. P. 60(c)(1). There is no reason that Plaintiff could not have discovered any of these alleged mistakes within the year permitted by Rule 60. For example, Plaintiff acknowledges that he noticed the Court's quotation did not match a web page cited in the Court's opinion while this matter was on appeal, and that he later found the correct web site through a Google search. Pl.'s Mem. at 5 n.3 & 6-7. There is no reason that Plaintiff could not have performed this simple web search within a year of final judgment.

book, (2) a typographical error in a website address cited by the Court, and (3) the Court's quotation of only a portion of the definition of "non-fiction" found at the allegedly correct website.

Plaintiff has failed to show that any of these purported errors is material to the Court's opinion dismissing the Complaint. Mere typographical errors in the title of a book do not qualify as a substantive mistake of fact. And even had the Court quoted the entire definition of non-fiction on the allegedly correct website, the Court's opinion would not change. Plaintiff argues that the definition on that website reads in full:

> Nonfiction means it is true. The antonym of nonfiction is fiction. Fiction means not real, fake. Non-fiction are books based on true stories or events. When I was young I could always remember the difference by thinking **N**on-**F**iction= **N**ot **F**ake and **F**iction = **F**ake. :)

Pls. Mem. at 5. But Plaintiff does not explain how the purportedly complete definition would alter the Court's opinion. The portion the Court cited, "[n]on-fiction are books based on true stories or events," is consistent with the remainder of the definition. As the Court observed, non-fiction may encompass "contrasting accounts of the same events." ECF No. 50 at 28 n.9. For example, history textbooks are replete with competing accounts of previous events, all intending to be true. And none are expected to include every detail that might possibly pertain to the events described.

Fundamentally, Plaintiff is pressing his familiar argument that any error or omission in Mezrich's book is sufficient grounds for a Lanham Act claim. The Court has already considered and rejected this argument, and Plaintiff points to nothing new warranting reconsideration of that judgment.

Plaintiff also argues that the Court mistakenly believed the term "advertorial," which he used in the Complaint to refer to allegedly misleading and deceptive reviews of Mezrich's book, was a typographical error. ECF No. 49 at 3 n.3. However, Plaintiff has not explained how this purported error is material to the Court's opinion denying leave to amend the Complaint.

Finally, Plaintiff argues that the Court cited the incorrect portion of a transcript of allegedly defamatory statements made by Mezrich. Plaintiff argues that the Court should have considered a different statement that appears on the very next page as that cited in the Court's opinion. ECF No. 1, Schedule A at 32-33; ECF No. 50 at 38. There is no reason to think that the Court did not consider Mezrich's statements in context. Moreover, Plaintiff has not shown how these statements would alter the Court's ruling that Mezrich's statement are expressions of opinion, and not actionable as defamation.

III. Plaintiff's Purported Newly Discovered Evidence Does Not Warrant Relief Under Rule 60(b)(2)

Plaintiff also seeks relief from the judgment under Rule 60(b)(2) on the grounds of allegedly newly discovered evidence. Rule 60(b)(2), which "aims to correct erroneous judgments based on the unobtainability of evidence" allows the Court to reopen a case "only if the evidence could not have been discovered through the exercise of due diligence and the new evidence would probably have changed the outcome." *Logan v. Woods Hole*, No. 06 Civ. 10938, 2010 WL 2025126, at *12 (D. Mass. Feb. 22, 2010) (internal citations and quotation marks omitted). None of this purported evidence would have altered the Court's decision to dismiss the Complaint. Some of it is not even new, and would have been available to Plaintiff through the exercise of due diligence while this case was still pending.

Plaintiff argues that he is entitled to reopen this matter because of the following alleged "new evidence": (1) transcripts of instant message conversations that took place from 2003 to 2005 between Plaintiff and Mark Zuckerberg, now CEO of Facebook, Inc., (2) allegations of fake reviews against Mezrich's new book, (3) a report connecting an allegedly fake review of Mezrich's book to the spouse of an individual who is Mezrich's agent and the former executive assistant to the producer of Columbia's film, and (4) disparaging comments about Plaintiff on a Twitter account made by an unknown individual.

Much of this purported "evidence" existed prior to the Court's final judgment in this matter.[5] The instant messages apparently resided on Plaintiff's computer years before he filed the Complaint, and Plaintiff himself admits that he sought to attach the Twitter comments as Exhibit H to his proposed amended complaint. Pl.'s Mem. at 13.

But even if Plaintiff could not have discovered any of this alleged "evidence" while this case was pending, none of it would alter the Court's judgment that Plaintiff failed to state a claim against Columbia. The only purportedly "new evidence" that relates to Columbia is the report suggesting that the former executive assistant to the producer of Columbia's film is now Mezrich's agent and is married to the author of an allegedly fake review of Mezrich's book. Plaintiff does not explain the relevance of this report, or how it would have altered the Court's opinion.

In any event, this allegedly "new evidence" is merely cumulative. *See Morón-Barradas v. Dep't of Educ. of Commonwealth of Puerto Rico*, 488 F.3d 472, 482 (1st Cir. 2007) (affirming denial of Rule 60(b)(2) motion when new evidence was merely cumulative of evidence available at summary judgment). The Court has already considered Plaintiff's claims

[5] As discussed *supra*, Plaintiff's request that the Court consider this purportedly "new evidence" is also untimely pursuant to Rule 60(c)(1).

that individuals connected to Defendants in various ways authored reviews of Mezrich's book, and found that failure to reveal such connections is not a Lanham Act violation. ECF No. 49 at 3 n.3. The discovery of another alleged connection does nothing to alter the Court's holding. Likewise, the Court has already considered some conversations between Plaintiff and Zuckerberg, which were attached to Plaintiff's earlier briefing. ECF No. 29 at Ex. E.

IV. Defendants Have Not Engaged in Fraud, Misrepresentation, or Misconduct Under Rule 60(b)(3)

Plaintiff seeks relief from the judgment pursuant to Rule 60(b)(3) on the grounds that the deletion of an Amazon review of Mezrich's book, written by someone who is not a party to this case, suggests misrepresentation or misconduct by Defendants.[6]

To succeed on his Rule 60(b)(3) motion, Plaintiff must (1) demonstrate misconduct by clear and convincing evidence and (2) "show that the misconduct foreclosed full and fair preparation or presentation of [his] case." *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 20-21 (1st Cir. 2002) (alteration in original). Plaintiff has met neither requirement.[7] There is no evidence whatsoever that any Defendant deleted the review at issue. And far from "substantially . . . interfere[ing]" with his ability to fully prepare, Plaintiff acknowledges that he saved a copy of the review, and referenced it in both the original and proposed amended complaints. *Id.* at 21.

Nor would preservation of the review have altered the outcome of this case. The Court held that failure to reveal a reviewer's connection to a book's author is not a Lanham Act violation. ECF No. 49 at 3 n.3. This holding would not change even if the Court were able to read the review on Amazon's website today.

[6] Plaintiff also suggests that statements made by attorneys for Mezrich and Random House in prior briefs constituted misrepresentations. Plaintiff is merely rehashing the arguments he has unsuccessfully pursued throughout this litigation.

[7] Nor has Plaintiff explained his failure to file his Rule 60(b)(3) motion during the one-year period authorized under Rule 60(c)(1). Plaintiff acknowledges that he discovered the deletion of the review at issue while this matter was before the First Circuit. The appellate court issued the mandate on appeal on November 9, 2012, six months before one year after this Court's final judgment expired.

V. The Court's Judgment Does Not Depend on any Judgments that Have Been Reversed or Vacated Pursuant to Rule 60(b)(5)

Rule 60(b)(5) permits relief from a judgment when the "judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). Plaintiff contends that changes in the law since briefing on the motion to dismiss was completed warrants revisiting the Court's decision.[8] But "[t]he law could not be clearer" that a "change in legal principles or precedent—even an important one—is insufficient to invoke relief" under Rule 60(b)(5). *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 541 F. Supp. 2d 429, 431 (D. Mass. 2008) (internal quotation marks omitted). In any event, the cases Plaintiff cites did not change the law in any relevant respect.[9]

Plaintiff argues that, under the Federal Circuit's opinion in *Hall v. Bed Bath & Beyond, Inc.*, § 43(a) of the Lanham Act applies to advertising that is facially true but nevertheless likely to mislead or confuse consumers. *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1366 (Fed. Cir. 2013). But *Hall* itself relies on precedent dating years prior to this litigation. *Id.* (citing *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 112 (2d Cir. 2010) and *Johnson & Johnson * Merck Consumer Pharm. Co. v. SmithKline Beecham Corp.*, 960 F.2d 294, 297 (2d Cir. 1992)). If Plaintiff disagreed with the Court's opinion on this issue, he was free to make that argument on appeal.

---

[8] Plaintiff further contends that changes in the wiki answers website cited by the Court operate as new legal precedent. As discussed *supra*, Plaintiff has not shown how the content of this website would alter the Court's opinion in this matter.

[9] Plaintiff also takes issue with the Court's citation to a patent case for the proposition that a claim for unfair competition requires an allegation of bad faith, and argues that bad faith is only required to prove unfair competition in patent matters. *See Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1353 (Fed. Cir. 1999); *Applera Corp. v. Michigan Diagnostics, LLC*, 594 F. Supp. 2d 150, 162-63 (D. Mass. 2009). However, the Court's opinion did not turn on any requirement of bad faith. The Court dismissed Greenspan's Lanham Act claims because he failed to allege facts sufficient to show that Defendants made any misrepresentations, that any alleged misrepresentations were likely to influence consumer's purchasing decisions, or that Plaintiff suffered any loss of sales or goodwill associated with his products. ECF No. 50 at 26-28. In any event, Plaintiff was free to pursue this argument on appeal.

Plaintiff also mistakenly argues that changes in defamation law support reopening this matter. First, Plaintiff argues that a recent Supreme Court opinion permits an action for libel *per quod* or slander where a plaintiff pleads an actual pecuniary loss resulting from a communication that is defamatory when coupled with some extrinsic fact. *Fed. Aviation Admin. v. Cooper*, 132 S. Ct. 1441, 1451 & n.5 (2012). As Plaintiff acknowledges, *Cooper* issued before this Court's final judgment. *Cooper* was available to the Court at the time that the Complaint was dismissed and Plaintiff was free to rely on this argument on appeal. In any event, *Cooper* does not represent a change in law and relies on a case from 2004 and several treatises that are decades old. *Id.* (citing *Doe v. Chao*, 540 U.S. 614, 625 (2004); 3 Restatement of Torts § 575, Comments a & b (1938); D. Dobbs, *Law of Remedies* § 7.2 (1973); and 1 D. Haggard, *Cooley on Torts* § 164 (4th ed. 1932)).

Second, Plaintiff argues that a recent opinion upheld *Sharratt v. Hous. Innovations, Inc.*, 310 N.E.2d 343 (Mass. 1974), a case that Plaintiff relied on in his opposition to Columbia's motion to dismiss. *Williams v. Massachusetts Coll. of Pharmacy & Allied Health Scis.*, No. 12 Civ. 10313, 2013 WL 1308621, at *6 n.6 (D. Mass. Mar. 31, 2013). But *Williams* merely cited *Sharratt* for the proposition that Massachusetts abolished the distinction between *per se* and *per quod* defamation, a proposition that is not at issue in this litigation. *Id.* Plaintiff also argues that *Williams* affirms the proposition that opinions may imply the existence of undisclosed defamatory facts, but this again is nothing new. *Id.* at *6 (citing *Driscoll v. Bd. of Trs. of Milton Acad.*, 873 N.E.2d 1177, 1188 (Mass. App. Ct. 2007)). And in any event, a case that merely upholds prior precedent does not qualify as a change in the law.

VI. No Other Reasons Justify Relief Pursuant to Rule 60(b)(6)

Finally, Plaintiff seeks relief from the judgment under a provision covering "any other reason that justifies relief," arguing that Mezrich's ongoing activities justify revisiting the

Court's decision. Fed. R. Civ. P. 60(b)(6). However, Plaintiff is only entitled to relief pursuant to Rule 60(b)(6) in "extraordinary circumstances." *Dahdah v. Peacetime, LLC*, No. 08 Civ. 11391, 2013 WL 3943524, at *3 (D. Mass. July 25, 2013). In any event, Mezrich's ongoing activities do not support reopening litigation against Columbia.

Plaintiff also makes one last plea to allow him to amend the Complaint because he should be given more leeway as a *pro se* plaintiff. But the Court has already found his proposed amendment to be futile, and that decision was affirmed on appeal. Plaintiff has not suggested any revisions that would render it otherwise.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for relief from the judgment should be denied.

Respectfully submitted,

By: /s/ Dustin F. Hecker

Dustin F. Hecker, BBO # 549171
POSTERNAK BLANKSTEIN & LUND LLP
The Prudential Tower
800 Boylston Street
Boston, MA 02199
Telephone: (617) 973-6100
Facsimile: (617) 367-2315

Kevin T. Baine (*pro hac vice*)
Megan A. Hughes (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 12th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029

Attorneys for Defendant Columbia Pictures Industries, Inc.

DATED: November 20, 2013

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AARON GREENSPAN,	)	**CIVIL ACTION**
	)	**NO.: 1: 11-CV-12000-RBC**
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.	)	

CERTIFICATE OF SERVICE

I, Dustin F. Hecker, certify that a true and correct copy of Defendant Columbia Pictures Industries, Inc.'s Memorandum of Law in Opposition to Plaintiff's Motion for Relief from a Judgment or Order Pursuant to Rule 60(b) was filed through the ECF System on this 20th day of November 2013 and will be sent electronically to all counsel of record.

/s/ Dustin F. Hecker
Dustin F. Hecker

Date: November 20, 2013