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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 MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)

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INTRODUCTION

A year and a half ago, on May 9, 2012, the Court issued a memorandum and order (Dkt. No. 50, the "Dismissal Order") granting Defendants' motions to dismiss Plaintiff Aaron Greenspan's complaint (the "Complaint"), and a memorandum and order (Dkt. No. 49, the "Denial Order," together with the Dismissal Order, the "Orders") denying Plaintiff's motion to file an amended complaint. Judgment (Dkt. No. 51, the "Judgment") dismissing the action was also entered on that date. Plaintiff appealed to the First Circuit Court of Appeals, (Dkt. No. 52), which affirmed this Court's decision on October 16, 2012. On October 22, 2012, Plaintiff filed a petition for panel rehearing, which the First Circuit denied on October 31, 2012. On February 19, 2013, Plaintiff filed a petition for writ of certiorari to the United States Supreme Court, which was denied on April 15, 2013.

Long after having his Complaint dismissed, long after twice being rebuffed by the First Circuit on appeal, and long after having his petition for certiorari denied by the Supreme Court, Plaintiff now returns to this Court to continue tilting at windmills with a Motion for Relief from a Judgment or Order Pursuant to Rule 60(b) (the "Motion"). The Motion is untimely, legally deficient, and nothing more than Plaintiff's attempt to relitigate issues that have already been finally decided against him. Defendants Random House, Inc., Benjamin Mezrich, and Mezco, Inc. ("Defendants") hereby oppose the Motion, which does not come close to 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).

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

ARGUMENT

I. Plaintiff's Request For Relief Under Rule 60(b)(1)-(3) Violates Rule 60(c)(1)'s Absolute One-Year Time Limit For Such Motions And Must Be Denied

Plaintiff seeks relief from the Court's Orders and Judgment under Rule 60(b) subsections (1) through (3). Subsection (c)(1) provides that a motion for relief under subsections (1), (2), and (3) must be made "no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. Pro. 60(c)(1). Failure to file the motion within the one-year time limit "is an absolute bar to relief from the judgment." *Gonzalez v. Walgreens Co.*, 918 F.2d 303, 305 (1st Cir. 1990) (affirming denial of Rule 60(b) motion as untimely where it was filed 14 months after judgment); *see also United States v. Berenguer*, 821 F.2d 19, 21 (1st Cir. 1987) (affirming denial of motion as untimely where it was filed one year and one week after judgment because the one-year time limit is "an absolute bar to motions filed after that period"). The Orders from which Plaintiff seeks relief were issued and the Judgment was entered on May 9, 2012. As mentioned above, he did not file the Rule 60(b) motion until November 6, 2013, nearly 18 months later. Accordingly, the one-year time limit "is an absolute bar to relief," and as to subsections (1), (2), and (3) the Motion must be denied as untimely.

To excuse his untimely filing of the Motion, Plaintiff makes the novel, but meritless, argument that the one-year time limit has not begun to run because he has yet to receive a "corrected version" of the Dismissal Order – apparently one not containing the purported "mistakes" Plaintiff identifies.[2] (Motion at 2-3.) He claims that the mistakes have the effect of "tolling the . . . one-year deadline and nullifying the outcome of the entire appeals process thus far." (*Id*. at 3.) Plaintiff offers no legal authority for this argument. Instead, he cites only to

[2] Plaintiff admits that he received copies of the orders and judgment via the Court's CM/ECF system and first class mail. (Motion at 2.)

Simon v. Navon, 116 F.3d 1, 3 (1st Cir. 1997), which is inapposite and, if anything, demonstrates that the one-year time limit was not tolled in this case. In *Simon*, in which the First Circuit *rejected* the argument that the one-year limit was tolled and *affirmed the denial* of a Rule 60(b) motion as untimely, the moving party argued that the one-year time limit ran from the date of the decision in a prior appeal, and not from the date of entry of judgment by the district court. *Id*. The court rejected this argument, noting that a subsequent order restarts the Rule 60(c)(1) clock only where the order "has disturbed or revised legal rights and obligations which, by [the] prior judgment, had been plainly and properly settled with finality." *Id*. Thus, this language, which Plaintiff quotes, refers *only* to the test for whether a deadline runs from a subsequent order, rather than the original judgment.[3] It has no bearing on whether the one-year time limit for Rule 60(b)(1) relief from mistake is tolled until the mistake is corrected.

Moreover, Plaintiff waited months, and sometimes years, to seek relief on his other Rule 60(b)(1)-(3) arguments. This delay is unreasonable, unexplained, and inexcusable. The other alleged "mistakes" (Motion at 8-9) were clear on the faces of the Orders issued May 9, 2012.[4] Similarly, Plaintiff's "new" evidence was all available long ago. (*See* Motion at 9-13, describing instant message conversations Plaintiff "found" in September 2012; posts in an on-line

[3] Although it is not clear whether Plaintiff is actually advancing this argument, *Simon* also confirms that the one-year deadline does not run from any of the appellate rulings in this matter, including the Supreme Court's denial of Plaintiff's petition for *certiorari*. The appellate rulings, which affirmed the Dismissal and Denial Orders in their entirety, did not "disturb[] or revise[] the legal rights and obligations" that had been settled by the Orders and Judgment.

[4] Plaintiff's belated raising of the Court's purported citation to the "wrong portion of Schedule A" is particularly egregious, considering that Plaintiff raised this *exact argument* in his opening brief to the First Circuit, filed June 14, 2012. Not only does this demonstrate that Plaintiff's delay in raising this issue before this Court is unreasonable, but it also reveals an independent ground for dismissing this argument: Plaintiff is simply seeking an impermissible "do over" of his unsuccessful appeal. 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").

discussion forum from June 2013 (which are irrelevant and inadmissible hearsay); and Twitter messages (also irrelevant hearsay) that started appearing in March 2012.)[5] Plaintiff also waited more than a year before seeking relief based on Defendants' supposed "misrepresentations." (*See* Motion at 13-15, describing deletion of an Amazon review prior to October 22, 2012[6], and statements in Defendants' briefs (Dkt. Nos. 40, 42) filed in February 2012.) [7]

II. Plaintiff Has Failed To Demonstrate "Exceptional Circumstances Justifying Extraordinary Relief" Under Rule 60(b)(5)-(6)

A. Plaintiff's Request For Relief Based on "New Legal Precedent" Fails

Plaintiff seeks relief from the Judgment pursuant to Rule 60(b)(5) on the basis of what he contends is purportedly "new, material legal precedent." (*See* Motion at 15-19.) However, the law is clear that 60(b)(5) simply does not provide for such relief.[8] "The mere emergence of controlling precedent in some other case that shows the incorrectness of the prior judgment is not sufficient" to merit relief under Rule 60(b)(5). *Comfort v. Lynn School Committee*, 560 F.3d 22,

[5] Plaintiff also raised the existence of the satirical Twitter account in his opening brief to the First Circuit.

[6] Again, Plaintiff is improperly seeking to relitigate his appeal, as he raised the *exact same argument* regarding the deletion of the review in his petition for rehearing. *Fafel*, 399 F.3d at 411.

[7] Under 60(b)(3), a "movant must demonstrate misconduct – such as fraud or misrepresentation – by clear and convincing evidence"; and must show that the misconduct "substantially . . . interfered with the aggrieved party's ability to fully and fairly prepare for and proceed [to judgment]." *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 21 (1st Cir. 2002). Plaintiff has presented no evidence of misconduct; not even his own affidavit or declaration. Moreover, there was no prejudice, as Plaintiff admits that the deletion occurred *after* judgment and that he saved a copy of the Amazon review.

[8] Rule 60(b)(5) provides for relief where "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 . . . ."

27 (1st Cir. 2009).[9] And to take advantage of 60(b)(5)'s language regarding prospective application of a judgment that "is no longer equitable," the judgment must be an "injunction[] [or] consent decree[] that involve[s] long-term supervision of changing conduct or conditions." *Id*. at 28. A judgment of dismissal does not apply. Rule 60(b)(5) is inapplicable here.

Moreover, the cited precedent does nothing to undermine the Judgment.[10] Plaintiff is incorrect that a decision of the Court of Appeals for the Federal Circuit is controlling on this Court. The District of Massachusetts case to which Plaintiff points is also not controlling. In any case, Plaintiff's argument amounts to nothing more than suggesting that the Orders were legally erroneous. This claim was already rejected by the First Circuit, and is in any case not cognizable under Rule 60(b). See *Fafel*, 399 F.3d at 411 (Rule 60(b) is not a substitute for appeal).

B. Plaintiff's Request for Relief Under Rule 60(b)(6) Fails

Plaintiff has not shown "exceptional circumstances justifying extraordinary relief" under Rule 60(b)(6).[11] *Teamsters*, 953 F.2d at 20. First, Plaintiff points to a series of articles

[9] In *Comfort*, after judgment and appeal, the United States 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 district court decision as "unconstitutional." Nevertheless, in addressing the plaintiff's subsequent Rule 60(b)(5) motion, the First Circuit held that the subsequent Supreme Court case did not present grounds for relief under 60(b)(5). *Id*. at 27.

[10] The request for relief under Rule 60(b)(5) is also untimely. Motions under 60(b)(5) must be "made within a reasonable time." Fed. R. Civ. Pro. 60(c)(1). The cases to which Plaintiff points were decided in March 28, 2012, January 25, 2013, and March 31, 2013. Plaintiff provides no evidence of any justification for waiting months, or even years, to seek relief based on the cases.

[11] The Rule 60(b)(6) request is also untimely. The articles regarding Mezrich's new book were published starting in March 2013. Plaintiff has provided no evidence of a reason justifying his months-long delay in seeking relief based on the articles. As for his *pro se* status, Plaintiff could have sought relief on that basis as soon as the judgment issued, 18 months ago. The delay is unreasonable and inexcusable, and is by itself grounds for denying relief.

purporting to describe inaccuracies in Mezrich's latest book because they "echo[] Plaintiff's allegations in this case." (Motion at 19.) "[A] motion under Rule 60(b)(6) is only appropriate when none of the first five subsections pertain. [Otherwise] the stringent, finality enforcing limitation period of 60(b)(1)-(3) would be eviscerated." *Simon*, 116 F.3d at 5. Here, Plaintiff is offering nothing more than "new" evidence. He cannot avoid the one-year time limit's "absolute bar" by doing so under 60(b)(6).[12]

Second, Plaintiff argues that his *pro se* status justifies "extraordinary relief" under Rule 60(b)(6). However, the Court specifically considered the Plaintiff's *pro se* status in denying his motion to file a first amended complaint.[13] (*See* Denial Order, Dkt. No. 49, at 2 ("pro se pleadings are to be liberally construed . . .).) "Rule 60(b)(6), like Rule 60(b) generally, is not a substitute for an appeal," and Plaintiff cannot challenge legal issues raised both before this Court and on appeal simply because they were decided against him. *Fafel*, 399 F.3d at 411. Plaintiff falls far short of demonstrating exceptional circumstances justifying extraordinary relief.[14]

CONCLUSION

The time is long past for this litigation to end. Plaintiff cannot be allowed to litigate the same issues *ad infinitum*. The Court should deny Plaintiff's Motion for Relief from a Judgment or Order Pursuant to Rule 60(b).

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[12] In any event, the articles are inadmissible and irrelevant hearsay.

[13] Plaintiff also addressed the *pro se* issue at length in his briefing to the First Circuit (*see* AOB at 4, 6, 32, 48; Reply at 27). And one of Plaintiff's "Questions Presented" in his petition for certiorari to the Supreme Court was whether *pro se* litigants should be granted at least one opportunity to file an amended complaint. (*See* Pet. for Cert. at i, 23-29.)

[14] Plaintiff's plea for special treatment under the law because of his *pro se* status is particularly difficult to swallow given that an attorney entered an appearance on his behalf in this matter, (*see* Dkt. No. 47), and that he conceded in his petition for certiorari that "[w]hile [he] can afford to hire lawyers . . . [he] actively choose[s] not to." (Pet. for Cert. at 26-27.)

Respectfully submitted,

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

By their attorneys,

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Dated: November 20, 2013
Boston, Massachusetts

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
Benjamin M. McGovern