

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,)	
)	
Plaintiff,	)	Civil Action No.
	)	78-322 & 78-420
v.)	
	)	(Consolidated)
FEDERAL BUREAU OF INVESTIGATION,)	
)	
Defendant.)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S RULE 60(b) MOTION

INTRODUCTION

On November 18, 1983, this Court dismissed plaintiff's actions pursuant to the Freedom of Information Act ("FOIA") for the repeated and willful failure of the plaintiff to comply with this Court's orders to respond to interrogatories propounded by the defendant. On December 7, 1984, the Court of Appeals for the District of Columbia affirmed that decision and remanded the case to this Court for determination, inter alia, of whether the government's petition for attorneys' fees incurred in the litigation met the requirements of National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982). After extensive briefing of the attorneys' fees issue on remand, which this Court characterized as a "second major litigation," the sanction of attorneys' fees was assessed against the plaintiff in a June 13, 1985 order.

The plaintiff now moves pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from judgment based on his allegations that the defendant and its representatives

misrepresented facts to this Court, and that newly discovered evidence about the sufficiency of the FOIA document search require reopening of this case. Plaintiff's motion should be summarily dismissed because it is a frivolous attempt to relitigate a matter unrelated to the final order from which he seeks relief, and is abusive of the process of the Court.

ARGUMENT

Plaintiff alleges that he has newly discovered evidence and proof of fraud, both of which he claims are grounds for his Rule 60(b) motion; however, Rule 60(b) specifically prohibits relief on these grounds if the new evidence is provided more than one year after the order is entered. Rule 60(b), Federal Rules Of Civil Procedure. Weisberg's primary allegation is that new evidence has come to his attention from Mark Allen, plaintiff in another FOIA case, who allegedly got the "new evidence" pursuant to a FOIA request. Weisberg believes the references in the documents prove the existence of other documents in field office records which are subject to his FOIA request but which the FBI did not provide. The documents include copies of what Weisberg alleges are the "ticklers" he was asking the FBI to search for pursuant to this FOIA request. In addition, Weisberg argues that the FBI affiant, Mr. John Phillips, who attested to the responses in this case was also responsible for responses in the other case. Without discussing the circumstances of the other case at all, Weisberg concludes that Mr. Phillips was defrauding this Court by not providing the information to Weisberg which was provided to Allen.

Weisberg is regurgitating for this Court one more time an argument that has already been extensively briefed -- the defendant has repeatedly explained in argument and by affidavit that the Dallas and New Orleans FBI field offices, like all others, do not maintain tickler systems. To the extent that any ticklers have ever been turned over to any requestor, including the alleged source of Weisberg's latest documents, the documents are coming from FBI Headquarters -- not the Dallas or New Orleans field offices as Weisberg would like to believe. See, Defendant's Reply To Plaintiff's Opposition To Summary Judgment, July 2, 1982. Nothing presented in Weisberg's latest pleading shows that the "new evidence" came from Dallas or New Orleans, as his FOIA request specifically required.

In any event, all of these allegations are irrelevant because they go to the decision of this Court on the merits made over twenty months ago as to the adequacy of the search in this case. None of these claims go to the issue of the award of attorneys' fees for Weisberg's inexcusable failure to respond to discovery orders in this case. This Court's order on the merits of this case was entered well over a year ago, and the plaintiff is therefore out of time in which to raise these two claims for relief.

Furthermore, as Weisberg admits, he received this allegedly "new evidence" as this case was being appealed. See, Plaintiff's Memorandum, pp. 19-20. If this evidence was cause

for relief from judgment Weisberg had the opportunity to present it in his arguments on the merits to the Court of Appeals, or he could have brought it before this Court while the appeal was pending. See, Wright & Miller, Federal Practice And Procedure, § 2873.¹

Weisberg presents no information in his Rule 60(b) memorandum relevant to the judgment of this Court that his egregious violations of Rule 33 of the Federal Rules of Civil Procedure warranted dismissal of the case. Because no new evidence or proof of fraud was raised in a timely fashion by Weisberg showing that he did not violate Rule 33, or that the abuse was somehow excusable, this Court should dismiss this motion.

Moreover, the Court would be justified in sanctioning Weisberg for flagrant abuse of the Court's process and for violation of Rule 11 of the Federal Rules of Civil Procedure. Pursuant to Rule 11, the signer of a pleading, whether or not he

¹ A District Court only has authority to consider a Rule 60(b) motion after an appellate court has ruled on a matter if the motion presents material not before the appellate court and if the motion is not a frivolous attempt to relitigate the claim. Standard Oil Co. of Cal. v. United States, 429 U.S. 17, 18 (1976). Not only is Weisberg's motion out of time, as shown above, but it appears to be no more than a rehashing of old issues and a belated attempt to present evidence which should have been presented earlier. Further, the Supreme Court stated in Standard Oil, supra, that the same interests in finality of the litigation apply in all cases involving a Rule 60(b) motion. Id. at 19. This case has gone on for seven years and the final resolution reached by this Court on the merits and affirmed by the Court of Appeals should not be overturned on the basis of Weisberg's rehashing of old arguments.

or she is an attorney, is certifying that the pleading is well-founded in fact and law and that it is not interposed for any improper purpose, such as harrassment, unnecessary delay, or increased cost of litigation. Rule 11, Federal Rules of Civil Procedure. On the pretext of a motion for relief from an order which found that Weisberg had violated Rule 33 of the Federal Rules of Civil Procedure, Mr. Weisberg now files a rambling 37 page memorandum which attempts to relitigate the issue of adequacy of the FOIA search by defendant. Weisberg's actions must not be tolerated by the Court because they appear to be dilatory tactics to avoid payment of fees.²

CONCLUSION

WHEREFORE, the defendant respectfully requests the Court to dismiss plaintiff's Rule 60(b) motion for the above-stated reasons and grant whatever further relief to the defendant which the Court finds appropriate.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

WILLIAM F. WELD
United States Attorney

² To date, there has been no judgment entered enforcing the Court's June 13, 1985 order granting defendant attorney's fees. The defendant respectfully asks the Court to correct the oversight in order to allow the defendant to execute the judgment for attorney's fees which have been awarded. A proposed judgment is provided as Attachment A to this memorandum.

Barbara L. Gordon
BARBARA GORDON

Renee M. Wohlenhaus
RENEE M. WOHLLENHAUS

Attorneys, Civil Division
Department of Justice, Room 3334
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-5532
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,)
)
Plaintiff,) Civil Action No.
) 78-322 & 78-420
v.)
) (Consolidated)
FEDERAL BUREAU OF INVESTIGATION,)
)
Defendant.)

JUDGMENT

This action came on for hearing before the Court, Honorable John Lewis Smith, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the defendant, United States of America, recover of the plaintiff, Harold Weisberg the sum of \$848, with interest thereon at the rate of 10 per cent.

Dated, at Washington, D.C., this ____ day of _____,
1985.

CLERK OF THE COURT

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,)	
)	
Plaintiff,	)	Civil Action No.
	)	78-322 & 78-420
v.)	
	)	(Consolidated)
FEDERAL BUREAU OF INVESTIGATION,)	
)	
Defendant.)	

ORDER

Upon consideration of Federal Defendant's Opposition To Plaintiff's Rule 60(b) Motion To Vacate Judgment, and the arguments of the parties, it appearing to the Court that good cause having been shown therefore, it is hereby

ORDERED, that plaintiff's motion to vacate judgment is hereby denied.

DATED: _____


UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of Washington, D.C. I am over eighteen years of age and not a party to the within action; my business address is 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530. I served a copy of the within DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO VACATE by mailing same in a sealed envelope, postage pre-paid, to the addressee:

Mr. Harold Weisberg
7627 Old Receiver Road
Frederick, Maryland 21701

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 22, 1985 at Washington, D.C.


RENEE M. WOHLLENHAUS
Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,)
)
 Plaintiff,) Civil Action No.
) 78-322 & 78-420
 v.)
) (Consolidated)
 FEDERAL BUREAU OF INVESTIGATION, ¶
)
 Defendant.)

DEFENDANT'S OPPOSITION TO PLAINTIFF'S RULE 60(b) MOTION

INTRODUCTION

On November 18, 1983, this Court dismissed plaintiff's actions pursuant to the Freedom of Information Act ("FOIA") for the repeated and willful failure of the plaintiff to comply with this Court's orders to respond to interrogatories propounded by the defendant. On December 7, 1984, the Court of Appeals for the District of Columbia affirmed that decision and remanded the case to this Court for determination, inter alia, of whether the government's petition for attorneys' fees incurred in the litigation met the requirements of National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982). After extensive briefing of the attorneys' fees issue on remand, which this Court characterized as a "second major litigation," the sanction of attorneys' fees was assessed against the plaintiff in a June 13, 1985 order.

The plaintiff now moves pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from judgment based on his allegations that the defendant and its representatives

misrepresented facts to this Court, and that newly discovered evidence about the sufficiency of the FOIA document search require reopening of this case. Plaintiff's motion should be summarily dismissed because it is a frivolous attempt to relitigate a matter unrelated to the final order from which he seeks relief, and is abusive of the process of the Court.

*Truthfulness
belonging*

*Why
60(b)
m*

ARGUMENT

Plaintiff alleges that he has newly discovered evidence and proof of fraud, both of which he claims are grounds for his Rule 60(b) motion; however, Rule 60(b) specifically prohibits relief on these grounds if the new evidence is provided more than one year after the order is entered. Rule 60(b), Federal Rules Of Civil Procedure. Weisberg's primary allegation is that new evidence has come to his attention from Mark Allen, plaintiff in another FOIA case, who allegedly got the "new evidence" pursuant to a FOIA request. Weisberg believes the references in the documents prove the existence of other documents in field office records which are subject to his FOIA request but which the FBI did not provide. The documents include copies of what Weisberg alleges are the "ticklers" he was asking the FBI to search for pursuant to this FOIA request. In addition, Weisberg argues that the FBI affiant, Mr. John Phillips, who attested to the responses in this case was also responsible for responses in the other case. Without discussing the circumstances of the other case at all, Weisberg concludes that Mr. Phillips was defrauding this Court by not providing the information to Weisberg which was provided to Allen.

Weisberg is regurgitating for this Court one more time an argument that has already been extensively briefed -- the defendant has repeatedly explained in argument and by affidavit that the Dallas and New Orleans FBI field offices, like all others, do not maintain tickler systems. To the extent that any ticklers have ever been turned over to any requestor, including the alleged source of Weisberg's latest documents, the documents are coming from FBI Headquarters -- not the Dallas or New Orleans field offices as Weisberg would like to believe. See, Defendant's Reply To Plaintiff's Opposition To Summary Judgment, July 2, 1982. Nothing presented in Weisberg's latest pleading shows that the "new evidence" came from Dallas or New Orleans, as his FOIA request specifically required.

In any event, all of these allegations are irrelevant because they go to the decision of this Court on the merits made over twenty months ago as to the adequacy of the search in this case. None of these claims go to the issue of the award of attorneys' fees for Weisberg's inexcusable failure to respond to discovery orders in this case. This Court's order on the merits of this case was entered well over a year ago, and the plaintiff is therefore out of time in which to raise these two claims for relief.

Furthermore, as Weisberg admits, he received this allegedly "new evidence" as this case was being appealed. See, Plaintiff's Memorandum, pp. 19-20. If this evidence was cause

Based on
Phillips
memo
MS

PHILLIPS
admittedly
one system?

did it
went to

Based on
Phillips
memo

for relief from judgment Weisberg had the opportunity to present it in his arguments on the merits to the Court of Appeals, or he could have brought it before this Court while the appeal was pending. See, Wright & Miller, Federal Practice And Procedure, § 2873.¹

having opportunity

Weisberg presents no information in his Rule 60(b) memorandum relevant to the judgment of this Court that his egregious violations of Rule 33 of the Federal Rules of Civil Procedure warranted dismissal of the case. Because no new evidence or proof of fraud was raised in a timely fashion by Weisberg showing that he did not violate Rule 33, or that the abuse was somehow excusable, this Court should dismiss this motion.

Moreover, the Court would be justified in sanctioning Weisberg for flagrant abuse of the Court's process and for violation of Rule 11 of the Federal Rules of Civil Procedure. Pursuant to Rule 11, the signer of a pleading, whether or not he

withheld

¹ A District Court only has authority to consider a Rule 60(b) motion after an appellate court has ruled on a matter if the motion presents material not before the appellate court and if the motion is not a frivolous attempt to relitigate the claim. Standard Oil Co. of Cal. v. United States, 429 U.S. 17, 18 (1976). Not only is Weisberg's motion out of time, as shown above, but it appears to be no more than a rehashing of old issues and a belated attempt to present evidence which should have been presented earlier. Further, the Supreme Court stated in Standard Oil, supra, that the same interests in finality of the litigation apply in all cases involving a Rule 60(b) motion. Id. at 19. This case has gone on for seven years and the final resolution reached by this Court on the merits and affirmed by the Court of Appeals should not be overturned on the basis of Weisberg's rehashing of old arguments.

or she is an attorney, is certifying that the pleading is well-founded in fact and law and that it is not interposed for any improper purpose, such as harrassment, unnecessary delay, or increased cost of litigation. Rule 11, Federal Rules of Civil Procedure. On the pretext of a motion for relief from an order which found that Weisberg had violated Rule 33 of the Federal Rules of Civil Procedure, Mr. Weisberg now files a rambling 37 page memorandum which attempts to relitigate the issue of adequacy of the FOIA search by defendant. Weisberg's actions must not be tolerated by the Court because they appear to be dilatory tactics to avoid payment of fees.²

CONCLUSION

WHEREFORE, the defendant respectfully requests the Court to dismiss plaintiff's Rule 60(b) motion for the above-stated reasons and grant whatever further relief to the defendant which the Court finds appropriate.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

WILLIAM F. WELD
United States Attorney

² To date, there has been no judgment entered enforcing the Court's June 13, 1985 order granting defendant attorney's fees. The defendant respectfully asks the Court to correct the oversight in order to allow the defendant to execute the judgment for attorney's fees which have been awarded. A proposed judgment is provided as Attachment A to this memorandum.

Barbara K. Gordon
BARBARA GORDON

Renée M. Wohlenhaus
RENEE M. WOHLLENHAUS

Attorneys, Civil Division
Department of Justice, Room 3334
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-5532
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,)	
)	
Plaintiff,	)	Civil Action No.
	)	78-322 & 78-420
v.)	
	)	(Consolidated)
FEDERAL BUREAU OF INVESTIGATION,)	
)	
Defendant.)	

JUDGMENT

This action came on for hearing before the Court, Honorable John Lewis Smith, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the defendant, United States of America, recover of the plaintiff, Harold Weisberg the sum of \$848, with interest thereon at the rate of 10 per cent.

Dated, at Washington, D.C., this ____ day of _____,
1985..

CLERK OF THE COURT

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,)	
)	
Plaintiff,	)	Civil Action No.
	)	78-322 & 78-420
v.)	
	)	(Consolidated)
FEDERAL BUREAU OF INVESTIGATION,)	
)	
Defendant.)	

ORDER

Upon consideration of Federal Defendant's Opposition To Plaintiff's Rule 60(b) Motion To Vacate Judgment, and the arguments of the parties, it appearing to the Court that good cause having been shown therefore, it is hereby

ORDERED, that plaintiff's motion to vacate judgment is hereby denied.

DATED: _____

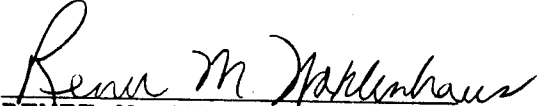
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of Washington, D.C. I am over eighteen years of age and not a party to the within action; my business address is 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530. I served a copy of the within DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO VACATE by mailing same in a sealed envelope, postage prepaid, to the addressee:

Mr. Harold Weisberg
7627 Old Receiver Road
Frederick, Maryland 21701

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 22, 1985 at Washington, D.C.


RENEE M. WOHLLENHAUS
Department of Justice