UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

WILLIAM H. WEBSTER, et al.

Defendants.

Civil Action No. 78-0322

(CONSOLIDATED CASES)

HAROLD WEISBERG,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

Civil Action No. 78-420

MEMORANDUM

Plaintiff, Harold Weisberg, seeks access under the Freedom of Information Act, 5 U.S.C. § 552, to certain documents pertaining to the assassinations of President John F. Kennedy and Martin Luther King, Jr. allegedly maintained by the Dallas and New Haven field offices of the Federal Bureau of Investigation. In previous proceedings, this Court dismissed the action following the plaintiff's willful and repeated failure to follow the discovery orders entered by this Court. Presently before the Court is the plaintiff's motion for reconsideration of this Court's order, entered October 8, 1985, denying the plaintiff's Rule 60(b) motion to vacate judgment. For the reasons set forth

below, the plaintiff's motion for reconsideration is denied.

I.

Although an extensive discussion of the factual background of this case is unwarranted, a brief synopsis of the essential facts is necessary. Plaintiff, Harold Weisberg, brought this suit under the Freedom of Information Act (hereinafter cited as "FOIA" or "Act") in 1978, in an attempt to compel the Federal Bureau of Investigation (hereinafter cited as "FBI") to release certain documents relating to the assassinations of President John F. Kennedy and Martin Luther King, Jr. During the ensuing four years, the FBI conducted countless searches of the agency's files and released over 200,000 pages of documents responsive to the plaintiff's FOIA requests. Notwithstanding this extensive disclosure, the plaintiff repeatedly challenged the adequacy of the FBI's search effort.

After extensive discussion with the plaintiff, the FBI in December 1982, propounded interrogatories to Weisberg seeking to ascertain the precise basis upon which the plaintiff questioned the adequacy of the search. Weisberg immediately moved for a protective order. In February 1983, this Court denied the motion for a protective order and directed that the plaintiff respond.

Following this order, plaintiff filed objections to the interrogatories reciting essentially the same grounds as contained in his original motion for a protective order. The FBI then moved for an order compelling the plaintiff to respond.

This motion was granted by the Court on April 28, 1983 and the plaintiff was directed to file a response within thirty days from the date of entry of the order.

As the period for compliance neared expiration, counsel for Weisberg informed the defendant that plaintiff would not comply with the Court's discovery order, whereupon the defendant moved that the case be dismissed and that attorneys' fees be awarded. This Court granted that motion in light of the defendant's willful and repeated refusals to comply with the orders of the Court. Although the original judgment assessed attorneys' fees only against Weisberg, the judgment was later amended to assess fees against counsel for the plaintiff as well. Final judgment was entered on January 31, 1984. Weisberg v. Webster, No. 78-0322 and Weisberg v. Federal Bureau of Investigation, No. 78-420 (D.D.C. Jan. 31, 1984) (Consolidated).

On appeal, the Court of Appeals for the District of Columbia Circuit upheld this Court's dismissal of the plaintiff's case, finding that the plaintiff's actions in disregarding this Court's orders were both willful and without justification. Weisberg v. Webster, 749 F.2d 864, 871 (D.C. Cir. 1984). The Court of Appeals, however, remanded the case for determination 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). Weisberg v.Webster, 749 F.2d at 874-75. After reconsideration, this Court assessed attorneys' fees only against the plaintiff.

Following the decision on appeal, plaintiff moved pro se pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, for this Court to amend its original order dismissing plaintiff's case and awarding attorneys' fees. The basis for the plaintiff's Rule 60(b) motion was the plaintiff's acquisition of materials released by the FBI to a different FOIA litigant. Weisberg maintained that this newly acquired information proved the existence of records maintained in the Dallas and New Haven field offices of the FBI which were the subject of his original FOIA request but which the FBI failed to provide. Weisberg further asserted that these materials were released by the same FBI affiant in this case who previously represented to this Court that the information sought by plaintiff did not exist. After reviewing the record and considering the merits of the pleadings, this Court denied plaintiff's motion without opinion on October 8, 1985.

Proceeding upon additional grounds, but alleging no new evidence, Weisberg now moves that this Court reconsider its order denying the Rule 60(b) motion. Plaintiff thus seeks yet again to persuade this Court to reverse its order of dismissal and award of attorneys' fees in this case. In support of this motion, plaintiff again alleges that the newly discovered evidence requires that this Court reverse its earlier order dismissing the

plaintiff's case in light of the FBI's failure to conduct a good-faith search of its records in response to plaintiff's FOIA requests. Plaintiff further alleges that reversal is warranted in that the evidence demonstrates that the defendant engaged in a concerted campaign of misrepresentation, fraud, and delay in the conduct of this litigation and that this action was tantamount to perpetrating a fraud upon this Court.

II.

Whatever significance the new information possessed by the plaintiff may have to the plaintiff's FOIA suit, this Court is barred by the ironclad one-year time requirements imposed by Rule 60(b) from overturning its earlier dismissal.1/ This

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1/ Fed.R.Civ.P. 60(b) provides as follows:

> (b) Mistakes: Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in

requirement mandates that all motions based on newly discovered evidence be brought within one year from the date the judgment was entered by the Court. Goland v. Central Intelligence Agency, 607 F.2d 339, 372 (D.C. Cir. 1978). The period is not tolled during the pendency of an appeal. 2/ This time period

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Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

Although the strict timing requirements of Rule 60(b) apply only to subsections (1), (2), and (3) of the rule, the existence of any new documents probative of the thoroughness of the original FOIA search is plainly newly discovered evidence. See Goland v. Central Intelligence Agency, 607 F.2d 339, 370 (D.C. Cir. 1978). Thus, Clause 5, alluded to by the plaintiff, is not applicable.

2/ The Supreme Court has held that the District Court may entertain a Rule 60(b) motion without leave by the appellate court. Standard Oil Co. of California v. United States, 429 U.S. 17 (1976). As noted by the Court, the "trial court 'is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)'." Standard Oil Co., 429 U.S. at 19, quoting Wilkins v. Sunbeam Corp., 405 F.2d 165, 166 (10th Cir. 1968). Although the plaintiff appealed from this Court's order of dismissal, the appeal did not toll the time for making a Rule 60(b) motion. This is because a motion based upon newly discovered evidence can be made during the pendency of an appeal. Carr v. District of Columbia, 543 F.2d 917, 926 n.70 (D.C. Cir. 1976). If the plaintiff's appeal had resulted in a substantive change, then the time period would have commenced with the entry of the substantially modified order mandated by the appellate court. See Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U.S. 206 (1952). However, as far as the plaintiff's action is concerned, he now stands in the exact position as he did prior to the appeal. The Court of Appeals upheld this Court's dismissal of the plaintiff's action. A change in the liability of attorneys' fees occasioned by the remand from the appellate court is not a substantial substantive change sufficient to renew the plaintiff's right to bring a Rule 60(b) motion. Cf. Transit Casualty Co. v. Security Trust Co., 441 F.2d 788 (5th Cir. 1971) cert. denied 404 U.S. 883 ( ).

expired prior to the plaintiff's Rule 60(b) motion and thus this Court is precluded from reopening this case on the basis of the newly acquired information.

Although it is true, as argued by plaintiff, that Rule 60(b) contains a savings clause which provides that the one-year time limit "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding...or to set aside a judgment for a fraud upon the court," neither exception is applicable to the facts of this case. The plaintiff has not attempted to bring an independent action to overturn this Court's earlier dismissal and it is highly questionable whether he could prevail even if such an action were to be brought. Resort to an independent action based on newly discovered evidence may be had only under "stringent" circumstances rendering it "manifestly unconscionable that a judgment be given effect." Moore's Federal Practice ¶ 60.37[1] at 382; see Carr v. District of Columbia 543 F.2d 917, 927 (D.C. Cir. 1976); Greater Boston Television Corporation v. F.C.C., 463 F.2d 268, 279 (D.C. Cir. 1971), cert. denied 406 U.S. 950 (1972). The remedy is not available to those parties who themselves are at fault. Pickford v. Talbott, 225 U.S. 651, 658 (1912); Caputo v. Globe Indemnity Co., 41 F.R.D. 436. (E.D. Pa. 1967). In light of plaintiff's repeated failure to comply with the lawful discovery orders of

this Court, Weisberg cannot meet this test.3/

Plaintiff's charges that the defendant perpetrated a fraud upon the Court cognizable under Rule 60(b) are also unpersuasive. Out of deference to the plaintiff's pro se status, this Court has once again undertaken a review of the records in this case and has conducted an extensive hearing into the evidence supporting the plaintiff's arguments. This review, however, has failed to provide a foundation upon which to base even a suspicion that the defendants engaged in a systematic attempt to mislead the plaintiff and the Court. Proof of such fraud must be supported by clear and substantial evidence. See Bulloch v. United States, 721 F.2d 713, 719 (10th Cir. 1983). Rather, the information is cumulative and, at most, reflects merely upon the adequacy of the FBI's original search effort.

Moreover, even assuming arguendo that the plaintiff's averments amounted to fraud by means of misrepresentation or perjury, the plaintiff has advanced no grounds upon which to

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3/ In addition, this Court notes that the new information is primarily cumulative. In this regard, the Court of Appeals for the District of Columbia Circuit has noted that:

> [I]n an independent action seeking relief from a judgment on the basis of newly-discovered evidence and asking for a new trial the plaintiff must meet the same substantive requirements as govern a motion for like relief under Rule 60(b): he must show that the evidence was not and could not by due diligence have been discovered in time to produce it at trial; that it would not be merely cumulative; and that it would probably lead to a judgment in his favor.

Goland v. Central Intelligence Agency, 607 F.2d at 373 (footnote omitted) (emphasis added).

conclude that this fraud was directed at the Court. "Fraud upon the court", within the meaning of Rule 60(b), embraces "only that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. Fraud inter parties, without more, [is not] a fraud upon the court." Lockwood v. Bowles, 46 F.R.D. 625, 631 (D.D.C. 1969) (emphasis in original), quoting Moore's Federal Practice, ¶ 60.33 at 360; see also H. K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115 (6th Cir. 1976). Examples of such fraud include bribery of judges,[4] bribery of the jury,[5] or the involvement of an attorney (as an officer of the court) in the perpetration of the fraud.[6] Here, the alleged misrepresentation occurred, if at all, between

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[4] Root Refining Co. v. Universal Oil Products, Co., 169 F.2d 514 (3rd Cir. 1948) cert. denied sub nom., Universal Oil Products Co. v. William Whitman Co. 335 U.S. 912 (1949); Art Metal Works v. Abraham & Strauss, 107 F.2d 944 (2d. Cir. 1939) cert. denied 308 U.S. 261 (1939); Chicago Title & Trust Co. v. Fox Theatres Corp., (D.C.N.Y. 1960) 182 F.Supp. 18.

[5] Moore's Federal Practice, ¶ 60.33 at 358 n.47 and accompanying text.

[6] Cf. Hazel-Atlas Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). For a general discussion of this type of fraud, see Moore's Federal Practice, ¶ 60.33 at 358-59.

the two parties. Such misrepresentation is properly treated under clause 3 of Rule 60(b) and is thus barred by the one-year time limit imposed by the rule.7/

Plaintiff's further assertion that this Court has authority to reverse its earlier ruling pursuant to Rule 59(e) of the Federal Rules of Civil Procedure pertaining to the amendment of judgments is also in error. Rule 59(e) expressly requires that any motion for modification of judgment be entered within ten days from the entry of judgment.8/ This time period has expired.

Similarly, plaintiff's claim that this Court's earlier denial of his Rule 60(b) motion without findings of fact contravened Rule 52 of Federal Rules of Civil Procedure is without merit. Rule 52(a) requires written findings of fact only in actions tried without a jury or where motions for interlocutory

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7/ See Fed.R.Civ.P. 60(b). The apparent inconsistency between the imposition of a one-year time limit upon Rule 60(b) motions predicated upon fraud and misrepresentation occurring among litigants, and the absence of such a limitation in actions involving fraud upon the court, is readily reconciled. As has frequently been observed, "The possibility of a witness testifying falsely is always a risk in our judicial process, but there are safeguards within the system to guard against such risks." Lockwood v. Bowles, 46 F.R.D. at 632-33. In contrast, "fraud upon the court" envisions that fraud which impairs the ability of the court to perform its essential judicial function. Id.

8/ Fed.R.Civ.P. 59(e) provides as follows:

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

injunctions are granted or denied.9/ As the plaintiff's case was dismissed as a sanction for failure to comply with this Court's discovery orders, neither section is applicable.

In summary, the Court has again undertaken an exhaustive review of the records in this case. This protracted and expensive litigation has failed to yield either factual or legal grounds for reversal of the Court's earlier dismissal order of November 18, 1983. Accordingly, the order of October 8, 1985 denying the plaintiff's Rule 60(b) motion is reaffirmed.

An appropriate order follows.

United States District Judge

Dated: March 4, 1986

9/ Fed.R.Civ.P. 52(a) states in pertinent part that:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds for its action...Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(emphasis added).