

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,)
)
Plaintiff-Appellant,)
)
v.) No. 86-5289,
) 86-5290
WILLIAM H. WEBSTER, et al.,)
)
Defendants-Appellees.)
_____)

MEMORANDUM IN SUPPORT OF MOTION
FOR SUMMARY AFFIRMANCE

On December 7, 1984, this Court affirmed the decision of the United States District Court for the District of Columbia Circuit dismissing plaintiff's actions pursuant to the Freedom of Information Act ("FOIA") for the repeated and willful failure of plaintiff to comply with the district court's orders to respond to interrogatories propounded by defendant. This Court also affirmed the district court's award of attorneys' fees against plaintiff. The Court remanded the case to the district court 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) and whether the fee award should be made against plaintiff's attorney as well as against plaintiff. After extensive briefing of the attorneys' fees issue on remand, the sanction of attorneys' fees was assessed against plaintiff alone in a June 13, 1985 order.

On July 10, 1985, plaintiff moved pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from judgment.

He sought relief from the November 18, 1983 judgment dismissing his FOIA action, alleging that defendant and its representatives misrepresented facts to the district court, and that newly discovered evidence about the sufficiency of the FOIA document search required reopening of the case. Defendant opposed the motion on the grounds, inter alia, that Rule 60(b) specifically prohibits relief based on newly discovered evidence or proof of fraud if those allegations are made more than one year after the order was entered. Plaintiff's motion was directly entirely to seeking relief from the 1983 merits judgment and did not address the award of attorneys' fees made by the district court in its later order.

Plaintiff's primary allegation in his Rule 60(b) motion was that he received new evidence from Mark Allen, plaintiff in another FOIA action, who allegedly obtained the "new evidence" in response to a FOIA request. Plaintiff contended that the documents Mr. Allen received proved the existence of other documents in field office files which are responsive to plaintiff's FOIA request but which have not been provided to him by the Federal Bureau of Investigation ("FBI"). The documents include copies of what plaintiff alleges are the "ticklers" he was asking the FBI to search for in his FOIA request. In addition, plaintiff claimed that the FBI agent, Mr. John Phillips, who in his affidavits attested to the responses in this case, also made the responses in the other case. Plaintiff

argued that Mr. Phillips defrauded the court by not providing to plaintiff the information which was provided to Mr. Allen.

Defendants argued that these allegations were irrelevant because they addressed the district court's decision on the merits, made on November 18, 1983, more than twenty months before plaintiff's Rule 60(b) motion. None of plaintiff's claims went to the issue of the award of attorneys' fees for failure to respond to the discovery orders in this case. Defendants claimed that, since the district court's order was entered more than one year previously, plaintiff was out of time in which to raise these claims for relief.

On October 8, 1985, the district court denied plaintiff's Rule 60(b) motion to vacate judgment. The court also entered judgment that defendant FBI recover from plaintiff \$848.00 plus interest in attorney's fees. On October 14, 1985, plaintiff moved for reconsideration of the denial of his Rule 60(b) motion. His second motion was based on the same allegations as those raised in his Rule 60(b) motion. Defendant opposed the motion as a frivolous attempt to reopen matters beyond the time allowed by the Federal Rules for such a challenge. The district court denied plaintiff's motion for reconsideration on March 4, 1986.

On April 25, 1986, plaintiff appealed to this Court the March 4 denial of his motion for reconsideration. A briefing schedule was set which required plaintiff's brief to be filed on August 1, 1986. Plaintiff filed a motion on July 14, 1986, requesting an extension of briefing time on the grounds of ill-

health. After an extension was granted, plaintiff subsequently moved for a second extension, which was also granted, allowing plaintiff to file his brief on or before November 15, 1986.

ARGUMENT

Plaintiff's lengthy statement of issues on appeal is nothing more than a re-phrasing of the arguments he has already presented in his Rule 60(b) motion and his motion for reconsideration. This appeal merely represents plaintiff's third attempt to reopen the issues decided by this Court when it affirmed the district court's November 18, 1983 decision that plaintiff's FOIA action should be dismissed. Plaintiff's appeal does not address the limited issues decided by the district court on remand. Plaintiff's appeal is frivolous.

Rule 60(b) provides that a party may move for relief from judgment for several reasons, including "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)" and "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." F.R. Civ. P. 60(b)(2),(3). The rule also specifies that a motion on such grounds shall be made "not more than one year after the judgment, order, or proceeding was entered or taken." Id. The district court judgment from which plaintiff sought relief was entered on November 18, 1983. Plaintiff's Rule 60(b) motion was filed on July 10, 1985. It was based on allegations of new evidence and fraud. It was, therefore, untimely.

It is irrelevant that plaintiff's Rule 60(b) motion was filed within one year after the district court's decision on remand from this Court. The Rule 60(b) motion did not address the issues decided on remand. Since plaintiff's Rule 60(b) motion was untimely, the motion to reconsider is untimely. As the district court stated, it was "barred by the ironclad one-year time requirements imposed by Rule 60(b) from overturning its earlier dismissal." Plaintiff has done nothing in this appeal to remedy the untimeliness of the motions upon which it is based.

Furthermore, this appeal seeks review of a motion for reconsideration. The standard for appellate review of denial of such a motion is whether the district court abused its discretion. Thus, it is a more deferential standard than for review of a district court's findings of fact and conclusions of law or decision on a Rule 60(b) motion. It also affords plaintiff no right to attempt, as he does in his appellant's brief, to reargue the merits of the original decision.

The district court, in its March 4, 1986 order, fully considered the arguments that are now repeated by plaintiff in his brief. As the district court held, the savings clause in Rule 60(b) is not applicable to this case since plaintiff does not meet either of the exceptions to the one-year limit (slip op. at 7). Plaintiff also claims on appeal that he is entitled to relief from judgment under sections (5) and (6) of Rule 60(b) which are not subject to the one-year time limit. Plaintiff's argument under section (5), however, is simply that the judgment

is inequitable. His argument under section (6) is that the improper conduct of defendant justifies relief. These arguments are merely a repetition of his claims of new evidence and fraud in a different form that attempts to avoid the applicable time limit.

Moreover, the district court in its March 4, 1986 opinion conducted a painstaking review of all plaintiff's allegations and concluded that they were utterly unfounded. Plaintiff has failed in his brief, just as he failed in his motion for reconsideration, to raise any new or serious allegations. Instead, plaintiff has simply engaged in a discursive personal attack on the district court. Such conduct is an abuse of the Court's appeal process.

Defendants did not know the issues plaintiff intended to raise on appeal until they received plaintiff's brief, since plaintiff failed to file a statement of issues on appeal. Thus, it was only upon receipt of plaintiff's brief that it was clear that plaintiff raised no new issues but was simply repeating his earlier attempts to reopen the dismissal of his case that was affirmed by this Court. Accordingly, defendants respectfully submit that they were not able to meet the requirements of Local Rule 6(k) for filing dispositive motions within 45 days of the docketing of the appeal and request that they be allowed to move

for summary affirmance of the district court's March 14, 1988 decision on the grounds that plaintiff's appeal is frivolous

CONCLUSION

For the foregoing reasons, defendants submit that the decision of the district court should be affirmed.

Respectfully submitted,

Leonard Schaitman
LEONARD SCHAITMAN (FTS/202) 633-3441

Christine R. Whittaker
CHRISTINE R. WHITTAKER (FTS/202) 633
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, DC 20530

1 Defendants wish to avoid burdening the Court with a detailed response to the numerous repetitive allegations raised by plaintiff in his brief. Should the Court, however, decide that such a response is merited, defendants will file a full appellees' brief on the merits.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 1986, I served the foregoing Motion for Summary Affirmance and the Memorandum in Support of Motion for Summary Affirmance upon counsel by causing a copy to be mailed, postage prepaid, to:

Harold Weisberg
7627 Old Receiver Road
Frederick, MD 21701

Christine R. Whittaker

CHRISTINE R. WHITTAKER
Attorney