Reyes et al v. Larimer County Planning Commission, The et al Doc. 125

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-03115-STV

PEDRO REYES,

Plaintiff,

v.

JEFF JENSESN,
GARY GERRARD, and
LARIMER COUNTY COMMUNITY PLANNING DEPARTMENT,

Defendants.

ORDER

Magistrate Judge Scott T. Varholak

This matter comes before the Court on Plaintiff's Motion for Relief Under Federal Rule of Civil Procedure 60(b) and (d)(3) and Motion for Relief Under Federal Rule of Civil Procedure Rule 62.1 (the "Motions"). [##114, 116] The Motions are before the Court on the parties' consent to have a United States magistrate judge conduct all proceedings in this action and to order the entry of a final judgment. [##48, 49] This Court has carefully considered the Motions and related briefing, the entire case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the Motions. For the following reasons, the Motions are **DENIED.**

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I. BACKGROUND

This case arises out of a public hearing before the Larimer County Planning Commission on August 15, 2018.[1] [*See generally* #20] Plaintiff and his wife, Teresita Reyes, attended the hearing and signed in to indicate that they wished to speak. [#95-1, SOF9-11] Mr. Jensen, the Chair of the Planning Commission, explained the rules that would be followed during the hearing, including that each person on the list would be allowed two minutes to testify, in order to keep the meeting moving forward. [*Id.* at SOF6, SOF14; *see also* #94 (Video Recording at 2:34:48-2:35:22)]

Ms. Reyes was the second person called to speak during the public comments. [#95-1, SOF16] Mr. Jensen then called Plaintiff, who was next on the list. [*Id.* at SOF18] Plaintiff asked twice, "Can I give my time to her?," referring to Ms. Reyes. [*Id.* at SOF19] Mr. Gerrard clarified to Mr. Jensen that Plaintiff was asking to defer his time to Ms. Reyes. [*Id.* at SOF20] Mr. Jensen replied to Plaintiff, "No, sir. You cannot do that. You're welcome to come and speak if you'd like." [*Id.* at SOF21] Plaintiff responded, "No. Thank you." [*Id.* at SOF22] Neither Plaintiff nor Ms. Reyes informed the Planning Commission staff, either during or prior to the hearing, that Plaintiff required an accommodation, or that Plaintiff needed Ms. Reyes to speak for him. [*Id.* at SOF26-27] Neither Mr. Jensen nor Mr. Gerrard were aware that Plaintiff had a disability for which an accommodation was needed in order for him to provide his testimony. [*Id.* at SOF31]

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[1] The undisputed facts are drawn from the Separate Statement of Facts filed with Plaintiff's Response in opposition to Defendant's Motion for Summary Judgment. [#95-1 at 6-31] The Court refers to the sequentially numbered facts set forth in the Statement of Facts as "SOF#." Defendants have provided evidentiary support for their Separate Statement of Facts. [*See generally* #91] The Court occasionally cites directly to the exhibits or other filings cited by the parties to provide additional context.

Plaintiff and Ms. Reyes, proceeding pro se, filed the instant action in December 2018. [#1] United States Magistrate Judge Gordon G. Gallagher conducted an initial review of the original complaint pursuant to 28 U.S.C. § 1915 and D.C.COLO.LCivR 8.1, which ultimately resulted in Plaintiff filing three amended complaints. [##5, 14, 18, 20] On March 21, 2019, Senior United States District Judge Lewis T. Babcock reviewed the Third Amended Complaint, dismissing certain claims as frivolous and dismissing Ms. Reyes from the case entirely, leaving only a Title II ADA claim, asserted against the Planning Department and against Mr. Jensen and Mr. Gerrard in their official capacities, and a due process claim, asserted against Mr. Jensen in his individual capacity. [#21]

Defendants filed a Motion for Summary Judgment on June 7, 2019. [#50] After an unsuccessful settlement attempt [*See* ##74, 85], Defendants filed a Renewed Motion for Summary Judgment on January 30, 2020. [#87] The Court issued a detailed order on June 19, 2020, granting the motion and dismissing the case. [#108] On July 2, 2020, Plaintiff filed a notice of appeal. [#110] Plaintiff then filed the instant Motions for relief pursuant to Rules 60(b) and 62.1 on July 13, 2020. [##114, 116] On July 23, 2020, the Court of Appeals for the Tenth Circuit abated the appellate proceedings until this Court disposes of the Motions. [#121] Defendants filed responses to both Motions on August 3, 2020. [##122, 123]

II. STANDARD OF REVIEW

Relief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances. *Rogers v. Andrus Transp. Services*, 502 F.3d 1147, 1153 (10th Cir. 2007); *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1242 (10th Cir. 2006). Rule 60(b) is not available "to reargue an issue previously addressed by the court when the

reargument merely advances new arguments or supporting facts which were available for presentation at the time of the original argument." *FDIC v. United Pacific Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998) (quoting *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir.1996)). Parties seeking relief under Rule 60(b) must overcome a high hurdle because such a motion "is not a substitute for an appeal." *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., Inc.*, 909 F.2d 1437, 1440 (10th Cir. 1990). Whether to grant a Rule 60(b) motion rests within the trial court's discretion. *See Allender*, 439 F.3d at 1242.

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). "The *Haines* rule applies to all proceedings involving a pro se litigant." *Id.* at 1110 n.3. The Court, however, cannot be a pro se litigant's advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

III. ANALYSIS

An appeal of a final order divests the trial court of jurisdiction over that order, including the power to grant relief from judgment. *U.S. v. Holmes*, No. 08–cv–02446–PAB–CBS, 2013 WL 709053, *1 (D. Colo. Feb. 25, 2013). However, under Federal Rule of Civil Procedure 62.1(a), "[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." FED. R. CIV. P. 62.1. Thus, the proper procedure for a movant

seeking Rule 60 relief after an appeal has been filed is to ask the trial court to issue a ruling under Rule 62.1. *In re Buerge*, No. 11–20325, 2013 WL 934836, *1 (Bankr. D. Kan. Mar. 7, 2013).

Plaintiff has sought an appeal in this case [#110] and therefore properly moves under Rule 62.1 for relief from this Court's Order [#108] granting Defendants' Renewed Motion for Summary Judgement [#87] and dismissing this case. [*See generally* #116] Plaintiff specifically argues that he is entitled to relief from judgment under Rule 60(b), subsections (1) (for mistake, inadvertence, surprise, or excusable neglect); (2) (for newly discovered evidence); (3) (for fraud, misrepresentation, or other misconduct of an adverse party); and (6) (for any other reason justifying relief from the operation of the judgment). [*See generally* #114] Plaintiff also argues for relief under Rule 60(d)(3) for fraud upon the court. [*Id.*] The Court will examine each argument in turn.

"Relief under 60(b)(1) for mistake or inadvertence . . . cannot be obtained unless the party makes some showing of why he was justified in failing to avoid mistake or inadvertence. Gross carelessness is not enough. Ignorance of the rules is not enough, nor is ignorance of the law." *White v. Cassey*, 30 F.3d 142, 1994 WL 395902, at *2 (10th Cir. 1994) (unpublished) (citations omitted); *see also Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990) ("Carelessness by a litigant . . . does not afford a basis for relief under Rule 60(b)(1)."). "[T]he kinds of mistakes by a party that may be raised by a Rule 60(b)(1) motion are litigation mistakes that a party could not have protected against." *Cashner*, 98 F.3d at 577.

Here, Plaintiff cites his own inadvertence in failing to name the City of Fort Collins as a Defendant in the Complaint and states that he is unrepresented.[2] [#114 at 1] This Court denied a previous motion by Plaintiff to join the City of Fort Collins under Rule 21 [#113], noting in part that Plaintiff filed multiple amended pleadings during the course of this case, none of which named Fort Collins. [#118] In the instant Motion, Plaintiff provides no new factual basis for his inadvertence claim and does not explain why his failure was justified. Therefore, because Plaintiff has not provided additional information indicating justified mistake or inadvertence, the Motion is DENIED as to Rule 60(b)(1).

Plaintiff also argues that he is entitled to relief under Rule 60(b)(2), which provides relief where evidence is newly discovered which could not have been discovered by due diligence prior to judgement. [#114 at 2]; FED. R. CIV. P. 60(b)(2). However, Plaintiff fails to indicate what, if any, new evidence has been discovered. Plaintiff instead seeks information regarding the Court's justification for dismissing his claims against Larimer County for lack of jurisdiction, which the Court detailed in a previous order. [*Id.*; *see* #108] Therefore, because Plaintiff does not possess newly discovered evidence, the Motion is DENIED as to Rule 60(b)(2).

Plaintiff next argues for relief due to "fraud upon the court" pursuant to Rules 60(b)(3) and 60(d)(3). [#114 at 2-3, 9]. Rule 60(b)(3) allows relief from a final judgment based on "fraud ..., misrepresentation, or misconduct by an opposing party." FED. R. CIV. P. 60(b)(3). To obtain relief under Rule 60(b)(3), a litigant must provide clear and convincing proof that an adverse party committed fraud, misrepresentation, or

[2] The Court notes that although Plaintiff is currently proceeding pro se, this Court previously appointed counsel in this matter and counsel participated for a number of months. [*See* #62, #67, #82]

misconduct. *Anderson v. Dep't of Health and Human Serv.*, 907 F.2d 936, 952 (10th Cir. 1990). Moreover, "the challenged behavior must *substantially* have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed at trial." *Woodworker's Supply Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999) (emphasis in original).

Rule 60(d)(3) provides: "This rule does not limit a court's power to . . . set aside a judgment for fraud on the court." [#114 at 9] "Fraud on the court ... is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury." *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir.1985). "'Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the court.'" *Weese v. Schukman*, 98 F.3d 542, 552-53 (10th Cir. 1996) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)).

Plaintiff's arguments regarding fraud appear to be based on a factual dispute noted in the Court's Order granting Summary Judgment. [#108] The Court explained that although Defendants claimed Mr. Jensen had informed hearing attendees that speaking time could not be deferred, the transcript and video recording of the hearing showed that this instruction was not given. [*Id.* at 3, n.2] As such, the Court found "that Mr. Jensen did not give such an instruction, but this fact is not material to the Court's analysis." [*Id.*] Beyond noting that Defendants asserted this incorrect fact, Plaintiff provides no evidence that the statement stemmed from fraud or misconduct, rather than mistake, faulty memory, or some other reason. [#114] And Plaintiff makes no allegations that the

statement was "directed at the judicial machinery itself." *Bulloch*, 763 F.2d at 1121. Moreover, the Court found in Plaintiff's favor as to this fact, which was, in any event, not material in the Court's determination of summary judgment. [#108 at 3, n.2]; *Woodworker's Supply*, 170 F.3d at 993. Plaintiff has therefore not shown by clear and convincing evidence that Defendants committed fraud upon Plaintiff or the Court, and the Motion is DENIED as to Rules 60(b)(3) and 60(d)(3).

Finally, Plaintiff argues for relief under Rule 60(b)(6), which provides that the court may relieve a party from final judgment for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6). "Rule 60(b)(6) has been described by [the Tenth Circuit] as a grand reservoir of equitable power to do justice in a particular case." *Van Skiver v. U.S.*, 952 F.2d 1241, 1244 (10th Cir. 1991) (quotation omitted). "[A] district court may grant a Rule 60(b)(6) motion only in extraordinary circumstances and only when necessary to accomplish justice."[3] *Cashner*, 98 F.3d at 579. The district court has substantial discretion in a Rule 60(b)(6) motion. *Id.* at 580.

In this Motion, Plaintiff reasserts arguments for fraud this Court has rejected in the above 60(b)(3) and (d)(3) analysis. [#114 at 3-8] As such, his Rule 60(b)(6) argument on this point appears to be duplicative and is not permitted. *See In* re *Gledhill*, 76 F.3d 1070, 1080 (10th Cir. 1996) ("A court may not premise Rule 60(b)(6) relief . . . on one of the specific grounds enumerated in clauses (b)(1) through (b)(5)."). Plaintiff also reasserts arguments analyzed and rejected by the Court in previous orders, without

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[3] For example, extraordinary circumstances have been found when enforcement of the judgment was made inequitable by events not contemplated by the moving party, *Cashner*, 98 F.3d at 579, and where the plaintiff would be left without a remedy due to the running of the statute of limitations, *LeBlanc v. Cleveland*, 248 F.3d 95, 100-01 (2d Cir. 2001).

providing new facts.[4][5] This, too, is not permitted. *FDIC*, 152 F.3d at 1272 (explaining Rule 60(b) is not available "to reargue an issue previously addressed by the court when the reargument merely advances new arguments or supporting facts which were available for presentation at the time of the original argument"). Even under the most liberal consideration of the Motion, Plaintiff provides no evidence of extraordinary circumstances that would necessitate, in the interest of justice, relief under Rule 60(b)(6). Therefore, the Court DENIES the Motion as to 60(b)(6).

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motions for Relief Under Fed. R. Civ. P. 60(b) and 60(d)(3) [#114] and for Relief under Fed. R. Civ. P. 62.1 [#116] are **DENIED**.

DATED: September 10, 2020

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

[4] The arguments presented in the Motion that have already been addressed by the Court include: (1) that Defendants violated Plaintiff's Due Process rights [#114 at 4; #108 at 14]; (2) that Defendants violated Plaintiff's First Amendment rights [#114 at 4; #108 at 19]; (3) that Defendants violated the Equal Protection Clause [#114 at 7; #108 at 19]; and (4) Plaintiff's claim under 42 U.S.C. § 1983 [#114 at 8; #21 at 5-8].

[5] Plaintiff additionally makes arguments against the City of Fort Collins, which is not before the Court as a Defendant. [#114 at 4; #118]