UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL HICKMAN, et al.,

Plaintiffs,

v.

Case No. 2:07-cv-743
JUDGE GREGORY L. FROST
Magistrate Judge Terence P. Kemp

JARREL BURCHETT, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court for consideration of the Motion for Relief from Judgment (Rule 60b) filed by the Jackson County Defendants ("Defendants' Motion for Relief from Judgment") (Doc. # 76) and Plaintiffs' Memorandum in Opposition to Jackson County Defendants' Motion for Relief from Judgment (Doc. # 81). For the reasons set forth below, the Court **DENIES** Defendants' motion.

I. Background

Plaintiffs in this action are Michael Hickman and his company, H&H Industries, Inc. Plaintiffs deal in large tires used in mining operations. In the course of this business they operate airplanes and conduct some business in Jackson County, Ohio. Defendant Jarrell Burchett was a Special Deputy with the Jackson County Sheriff's Office and also served as a member of the Board of Trustees of the Jackson County Airport Authority.

On April 23, 2005, there had been a burglary at a residence in Jackson County where several guns valued at approximately $100,000 and cash were stolen. On that day, Plaintiffs' airplane was at the Jackson County Airport and it was searched to determine whether it was involved in the burglary. The parties dispute whether Defendant Burchett was involved in

having the airplane searched. No stolen items were found on the airplane and Plaintiffs were not charged with any crime.

On July 31, 2007, Plaintiffs brought this action under 42 U.S.C. § 1983 alleging that Defendant Burchett orchestrated the search of Plaintiffs' airplane in retaliation for Plaintiffs not keeping the airplane at the Jackson County Airport per Burchett's request. Plaintiffs also named as defendants Jackson County, Ohio, the Jackson County Commissioners, the Jackson County Sheriff (together with Burchett the "Jackson County Defendants"), and the Jackson County Airport Authority.

On April 17, 2008, the Magistrate Judge Kemp held a preliminary pretrial conference. (Docs. # 12, 14.) The Court entered a case management schedule and scheduled a jury trial for June 22, 2009. (Docs. # 15, 16, 17.) The parties conducted discovery and engaged in motion practice related to discovery disputes. (Docs. # 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 41, 42, 43, 44, 47, 48, 56, 57, 58, 59, 61.) No dispositive motions were filed.

The parties together filed a motion to continue the trial date, which this Court granted. (Docs. # 53, 54.) The trial was rescheduled for September 14, 2009. (Doc. # 54.)

The Jackson County Defendants filed a motion to continue the final pretrial conference, which this Court granted. (Doc. # 62.) The parties filed proposed pretrial orders, which this Court issued. (Docs. # 64, 65, 66, 67.) A final pretrial conference was held on July 31, 2009.

On July 30, 2009, the Jackson County Defendants sent a letter to Plaintiffs in which they stated, *inter alia*:

> In an attempt to resolve and finalize this case, the Jackson County Defendants and Jarrell Burchett jointly hereby make an offer of judgment of $1,500.00. Pursuant to Civil Rule if this offer is not accepted within ten days, then it will be deemed rejected. If the offer is not accepted and we proceed to

> trial and these Defendants are successful, which I believe they will be, then we will be seeking costs and attorney fees from your client.

(Doc. # 68-1 at 2.)

On August 11, 2009, Plaintiffs filed a notice of acceptance of the offer of judgement with this Court. (Doc. # 68.) In that notice, Plaintiffs indicated that pursuant to Rule 68(a) of the Federal Rules of Civil Procedure and 42 U.S.C. §§ 1983, 1988, Plaintiffs would submit their petition for costs and attorney fees accrued.

On August 13, 2009, this Court entered judgment against the Jackson County Defendants pursuant to Rule 68(a) of the Federal Rules of Civil Procedure. (Doc. # 69.)

After acceptance of the offer of judgment, Plaintiffs accepted a settlement offer from the remaining defendant, the Jackson County Airport Authority.

On August 15, 2009, the Jackson County Defendants filed a notice in which they stated:

> Notice is hereby given that the letter to Plaintiff making an Offer of Judgment was an amount that was inclusive of attorney fees. The Plaintiff, in acceptance of the Offer indicated an intent to file a Request for Attorney Fees, which show there was a misunderstanding by the Plaintiff as to the Offer.

(Doc. # 70) (emphases in original).

On August 26, 2009, Plaintiffs filed a motion for attorney fees and costs pursuant to Federal Rule of Civil Procedure 68 and 42 U.S.C. § 1988. (Doc. # 71.) Plaintiffs seek $53,736.96 in attorney fees and costs. The Court scheduled the motion for oral hearing to be held on September 15, 2009. (Doc. # 75.)

On September 9, 2009, the Jackson County Defendants filed their motion for relief from judgment that is the subject of this Opinion and Order. (Doc. # 76.) The following day, these defendants moved the Court to continue the oral hearing on attorney fees. (Doc. # 77.) On

September 11, 2009, the Court granted that motion and rescheduled the hearing for October 20, 2009. (Doc. # 78.) On September 16, 2009, the Jackson County Defendants filed a second motion to continue the hearing on attorneys fees (Doc. # 79), which this Court granted (Doc. # 80). The Court rescheduled the hearing for December 14, 2009.

II. Standard

The Jackson County Defendants invoke Rules 60(b)(1) and 60(b)(6) of the Federal Rules of Civil Procedure, which provides for relief from judgment in certain circumstances:

> (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 a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

To grant or deny a motion for relief from judgment under Rule 60(b) is within the sound discretion of the trial court. *Davis v. Jellico Cmty. Hosp. Inc.*, 912 F.2d 129, 133 (6th Cir. 1990) (citations omitted). " 'The general purpose of Rule 60(b) . . . is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done.' " *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 760 (6th Cir. 2002) (citations omitted).

III. Analysis

In addition to the Jackson County Defendants' request for relief under Rules 60(b)(1) and 60(b)(6), these defendants request that they be relieved from the judgment in this action by being granted permission to rescind the offer of judgment based upon mutual mistake as to the meaning of the offer. In opposition to the Jackson County Defendants' motion, Plaintiffs argue

that Rule 60 does not provide the relief requested, that there was no mutual mistake as to the meaning of the offer of judgment, and that if this Court reopens this action they will be prejudiced because they already accepted a settlement offer from the remaining defendant.

A. Fed. R. Civ. P. 60(b)(1)

The Jackson County Defendants request that this Court relieve it under Rule 60(b)(1) from the judgment entered against it because "there existed a mistake on behalf of counsel for the Defendants, an inadvertence as to the language used in the Offer of Judgment, and excusable neglect which would warrant the Court to grant a Relief from this Judgment." (Doc. # 76 at 5.) The Jackson County Defendants explain that because Plaintiffs case lacked merit there was the likelihood of a defense verdict if the case went to trial and thus it should have been understood that the offer was inclusive of attorney fees. Indeed, these defendants contend that sanctions under Rule 11 of the Federal Rules of Civil Procedure may have been applicable to Plaintiffs.

In opposition Plaintiffs predictably argue that the Jackson County Defendants' understanding of the merits of this action are in conflict with Plaintiffs' understanding, hence the necessity of a jury trial. Plaintiffs argue that the Jackson Defendants' Rule 11 argument is improper in that Plaintiffs conducted extensive pre-suit investigation, including the filing of a discovery action in Jackson County, Ohio, and has satisfied all Rule 11 requirements. Moreover, Plaintiffs point out that these defendants never invoked Rule 11 at any time during this case, nor did they have a basis to do so. With regard to the availability of Rule 60(b)(1) to relieve the Jackson County Defendants from the judgment entered against them in this case, Plaintiffs argue that an attorney's mistake as to the applicable law does not constitute the type of mistake, inadvertence, or excusable neglect for which Rule 60(b)(1) provides relief. Plaintiffs' arguments

are well taken.

Initially, the Court notes that there is nothing in the record to suggest that Plaintiffs would be subject to Rule 11 sanction if the Jackson County Defendants had at any time properly invoked that rule.

With regard to the law that is applicable to an offer of judgment, Rule 68 provides in relevant part:

> (a) Making an Offer; Judgment on an Accepted Offer. More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.

Fed. R. Civ. P. 68(a).

The "with costs then accrued" language in Rule 68 "directly implicates awards of attorney's fees [in] situations where such fees are made an element of 'costs'--whether by statute (42 U.S.C. § 1988 is the most familiar example) or as a matter of contract." *McCain v. Detroit II Auto Fin. Ctr.*, 378 F.3d 561, 563 (6th Cir. 2004) (citing *Marek v. Chesny*, 473 U.S. 1 (1985) ("And it was in the former respect [42 U.S.C. § 1988] that the Supreme Court addressed Rule 68 in the seminal decision that basically controls this case, *Marek v. Chesny*[.]")). The Supreme Court explained:

> The critical feature of this portion of the Rule is that the offer be one *that allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued*. In other words, the drafters' concern was not so much with the particular components of offers, but with the judgments to be allowed against defendants.
>
> If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount which in its discretion, it determines to be sufficient to cover the costs. In either case, however, the offer has allowed judgment to be entered

> against the defendant both for damages caused by the challenged conduct and for costs. Accordingly, it is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or, for that matter, whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that the judgment not include costs, a timely offer will be valid.

Marek, 473 U.S. at 6 (emphasis in original) (internal citation omitted).

The instant action was brought under 42 U.S.C. § 1983 and therefore the "with costs accrued" language includes the ability for Plaintiff to move for attorney's fees unless the "offer recites that costs are included or specifies an amount for costs," which it did not. *Id.* Consequently, to obtain relief under Rule 60(b)(1) from the properly entered judgment, counsel's mistake as to the law would be required to constitute a mistake, inadvertence, or excusable neglect. However, an attorney's mistake as to the law applicable to an issue does not constitute such mistake, inadvertence, or excusable neglect. *FHC Equities, L.L.C. v. MBL Life Assur. Corp.*, 188 F.3d 678, 685 (6th Cir. 1999) ("Plaintiff seems to have missed the cases in which the alleged 'mistake' was the attorney's misinterpretation of the law or a strategy decision, and the courts have found that Rule 60(b)(1) does not afford relief from judgment."); *Carter v. Yellow Freight Sys.*, Case No. 2:01-CV-1230, 2006 U.S. Dist. LEXIS 4250, at *27 (S.D. Ohio 2006) ("An attorney's failure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief [under Rule 60(b)(1)] from a judgment." (citations omitted)).

Accordingly, the Court **DENIES** Defendants' Motion for Relief from Judgment to the extent that it relies upon Rule 60(b)(1) of the Federal Rules of Civil Procedure.

B. Fed. R. Civ. P. 60(b)(6)

Rule 60(b)(6) of the Federal Rules of Civil Procedure grants federal courts authority to relieve a party of final judgment "for any other reason justifying relief" provided that motion is

made within reasonable time and is not premised on one of grounds for relief enumerated in Rule 60(b)(1) through 60(b)(5). *Liljeberg v Health Serv. Acquisition Corp.*, 486 U.S. 847 (1988). Rule 60(b)(6) does not particularize factors that justify relief from judgment, but extraordinary circumstances are required. *Id.*

Here, the Jackson County Defendants request relief under Rule 60(b)(6) because Plaintiffs have "no proof that the Defendant did any of the acts complained of in the Complaint. . . . [and] Defendants did not believe the Plaintiffs could succeed at trial, and thus the Defendants would not knowingly authorize a settlement which included an exorbitant and unrealistic attorney fee claim that would have to be paid by the Defendants." (Doc. # 76 at 7.) The essence of this argument is that the Jackson County Defendants believe that Plaintiffs' case lacks merit.

The Court concludes that a defendant's evaluation of the merits of a plaintiff's case falls far short of the extraordinary circumstances required to justify relief under Rule 60(b)(6). *See e.g., Gonzalez v Crosby*, 545 U.S. 524 (2005) (Rule 60(b)(6) relief not granted to inmate because change in law was not extraordinary circumstance due to, *inter alia*, inmate's lack of diligence in pursuing review of statute of limitations issue); *Mayhew v Int'l Mktg. Group*, 6 F. App'x 277 (6th Cir. 2001) (Rule 60(b)(6) relief granted because, *inter alia*, district court judgment directly conflicted with 17 U.S.C. § 303(b)). Indeed, disagreement as to the merits of a case is common to all cases that proceed to trial.

Moreover, the Court notes that reopening this action would cause prejudice to Plaintiffs because they accepted a settlement offer from the remaining defendant in this action only after the Jackson County Defendants made their offer of judgment.

Accordingly, the Court **DENIES** Defendants' Motion for Relief from Judgment to the

extent that it relies upon Rule 60(b)(6) of the Federal Rules of Civil Procedure.

C. Recision Based Upon Mutual Mistake

The Jackson County Defendants request that they be granted permission to rescind the offer of judgment based upon mutual mistake. Apparently, these defendants believe that recision of the offer of judgment would provide a basis for them to be relieved from the judgment entered against them in this action. The Jackson County Defendants argue that, although

> unilateral mistake is not sufficient to allow the mistaken party to limit or void the effect of another otherwise valid settlement agreement, the Courts have held that equity will provide affirmative relief by way of recision where one party made a mistake as to the meaning of a contract and the mistake was known to the other party. *Fisher v. Stoladruk Corp.*, 110, F.R.D. 74, 76 (E.D. Mich 1986).

(Doc. # 76 at 7.) This argument fails to obtain the relief these defendants request for two reasons.

First, although *Fisher* does speak to a Rule 68 offer of judgment, recision was contemplated by the court only because the offer had not yet been accepted and no judgment had been entered. Here, a judgment has been entered, leaving Rule 60 as the appropriate avenue of relief–not contract recision.

Second, assuming *arguendo* that mutual mistake leading to contract recision were an avenue that would provide relief, the argument fails because there was no mutual mistake. While it is clear that the Jackson County Defendants unilaterally made an offer of judgment that they believed did not include an amount for reasonable attorney's fees, Plaintiffs contend that they were unaware of these defendants' misunderstanding of the law when they accepted the offer of judgment and had no reasons to suspect they held such a misunderstanding considering that their attorney has practiced in the area of civil rights defense for many years. Plaintiffs

assert that, in the same manner as did these defendants, they would be successful at trial and would recover their attorney fees. Finally, Plaintiffs argue that it would "make no sense" that the offer of judgment included the attorney fees as the offer was only $1,500.00 and this case had been litigated for over two years. (Doc. # 81 at 6.) Plaintiffs' arguments are persuasive.

The Court concludes that the Jackson County Defendants' mistake as to the meaning of their offer of judgment was not known by Plaintiffs. Thus, if recision were available as a means to relieve the Jackson County Defendants from the judgment entered against them in this action, that argument would fail. Accordingly, the Court **DENIES** Defendants' Motion for Relief from Judgment to the extent that it relies upon recision of the offer of judgment based upon mutual mistake.

IV. Conclusion

Based on the foregoing, the Court **DENIES** Defendants' Motion for Relief from Judgment. (Doc. # 76.) The oral hearing on Plaintiffs' Motion for Attorney Fees shall be held on December 14, 2009 at 1:00 p.m., as previously scheduled. (Doc. # 80.)

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE