IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Dr. Terrie Sizemore,

Plaintiff,

v.

Heather Lynn Hissom, et al,

Defendants.

Case No. 2:12-cv-1166

Judge Graham

Magistrate Judge Abel

OPINION AND ORDER

This matter is before the Court on the Plaintiff's Motion for Relief from Judgment (doc. 47), Motion to Stay (doc. 48), and Motion for Leave to File Reply (doc. 53). For the reasons that follow, the Court will deny the Plaintiff's Motion for Relief from Judgment (doc. 47); deny the Plaintiff's Motion to Stay (doc. 48); and grant the Plaintiff's Motion for Leave to File Reply (doc. 53).

I. Background

The Plaintiff, a licensed veterinarian, brought suit under 42 U.S.C. § 1983 against the Defendants for alleged constitutional violations committed during their civil investigation and prosecution of the Plaintiff before the Ohio Veterinary Medical Licensing Board (the Board) and their conduct during subsequent state court proceedings. Generally, the Plaintiff accused the Defendants of three types of misconduct: "1) Intimidating plaintiff and threatening her with legal action; 2) ignoring legal arguments and facts presented by plaintiff and making false allegations and promoting alternate 'fraudulent' legal arguments in judicial or disciplinary proceedings; and 3) refusing to investigate or protect plaintiff from other defendants' actions." Opinion & Order at 5–6, doc. 33. On January 31, 2013, the Defendants filed Motions to Dismiss (docs. 15 & 16),

which the Court subsequently granted on May 5, 2013, based on the Plaintiff's failure to state a claim upon which relief could be granted.

On May, 8, 2013, the Plaintiff filed a Motion for Reconsideration (doc. 37). In her Motion, she asserted that:

> Plaintiff has pled sufficiently pursuant to the Federal Rules of Civil Procedure. In addition, Plaintiff has pled facts pertaining to the allegations of fraud. Plaintiff has pled sufficient facts that these Defendants acted outside the scope of their employment. At no time has any Defendant pled argument that entitles them to have this Federal action dismissed.

Pl.'s Mot. for Reconsideration at 1, doc. 37. The Plaintiff took particular issue with the Court's dismissal of the case prior to discovery, arguing that it was unjust for the Court to dismiss her claims without permitting her the opportunity to discover evidence in support of those claims. Id. at 4–5.

In ruling on the Plaintiff's Motion for Reconsideration, the Court noted that "[s]everal of plaintiff's arguments in support of her motion for reconsideration are attempts to re-argue the merits of the motion to dismiss already considered and granted by the Court." Opinion & Order at 3, doc. 46. Nonetheless, the Court addressed the Plaintiff's concerns that dismissal of her claims prior to discovery resulted in a manifest injustice, explaining that "the Court has held that even if discovery resulted in evidence supporting all of her allegations, she would still not be entitled to the relief she claims . . . In such a situation, the plaintiff has no right to proceed with discovery and her claims are properly dismissed." Id. at 3.

Six months after the denial of her Motion for Reconsideration, the Plaintiff filed a Motion for Relief from Judgment (doc. 47), Motion to Stay (doc. 48), and Motion for Leave to File Reply (doc. 53).

II. Standard of Review

Federal Rule of Civil Procedure 60(b) provides:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

"Relief under Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation." Ford Motor Co. v. Mustangs Unlimited, Inc., 487 F.3d 465, 469 (6th Cir. 2007) (brackets, citation, and internal quotation marks omitted). "[T]he party seeking relief under Rule 60(b) bears the burden of establishing the grounds for such relief by clear and convincing evidence." Info–Hold, Inc. v. Sound Merchandising, Inc., 538 F.3d 448, 454 (6th Cir. 2008) (citing Crehore v. United States, 253 F. App'x 547, 549 (6th Cir. 2007)).

III. Discussion

The Plaintiff identifies five grounds for relief from the Court's judgment in this case: (1) mistake and excusable neglect; (2) newly discovered evidence; (3) fraud and misconduct by the Defendants; (4) the judgment is void; and (5) relief under Rule 60(b)(6). The Court addresses each of these arguments in turn.

A. *Rule 60(b)(1)*

First, the Plaintiff argues that the Court "made a mistake in dismissing Plaintiff's action on the basis of her being required to first seek immunity determination in the Court of Claims." Pl.'s Mot. for Relief from J. at 4, doc. 47. In the Plaintiff's view, she complied with Rule 8's pleading requirement and the Defendants were not entitled to immunity. Therefore, she maintains that the Court should not have granted the Defendants' Motion to Dismiss.

Rule 60(b)(1) is "intended to provide relief to a party in only two instances: (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order." United States v. Reyes, 307 F.3d 451, 455 (6th Cir. 2002) (citing Cacevic v. City of Hazel Park, 226 F.3d 483, 490 (6th Cir. 2000)). A "claim of legal error in the underlying judgment falls within the definition of mistake under Rule 60(b)(1) ." Reyes, 307 F.3d at 456 (citing Pierce v. United Mine Workers of Am., Welfare & Ret. Fund for 1950 & 1974, 770 F.2d 449, 451 (6th Cir. 1985)).

Here, the Plaintiff offers vague and conclusory arguments in support of her contention that the Court erred in granting the Defendants' Motion to Dismiss. Generally, the Plaintiff asserts that the Defendants were not entitled to immunity and that her § 1983 claims were properly pled pursuant to Rule 8. These arguments do not establish by clear and convincing evidence that the Court made a substantive mistake of law or fact in its final judgment or order. Moreover, parties may not use Rule 60(b) motions as "a second chance to convince the court to rule in his or her favor by presenting new explanation, new legal theories, or proof," Jinks v. Allied Signal, Inc., 250 F.3d 381, 385 (6th Cir. 2001) (citing Couch v. Travelers Ins. Co., 551

F.2d 958, 959 (5th Cir. 1977)), and a Rule 60(b) motion is not a substitute for an appeal, Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989). The Plaintiff's argument is therefore without merit.

Second, the Plaintiff contends that relief from judgment is warranted under Rule 60(b)(1) because of her confusion regarding her appellate rights. Although difficult to understand, it appears the Plaintiff failed to timely appeal this Court's Order granting the Defendant's Motion to Dismiss because an Ashland County Court of Common Pleas declared her a vexatious litigator and ordered her "not to take any further action in any Court in Ohio." Pl.'s Mot. for Relief from J. at 7. Apparently, the Plaintiff mistakenly interpreted this to mean that she could not continue prosecuting any lawsuit, including the present case, in state or federal court in Ohio. Therefore, the Plaintiff argues that she should be permitted the opportunity to appeal the Court's Order granting the Defendant's Motion to Dismiss.

This argument is unrelated to the Court's Order granting the Defendant's Motion to Dismiss despite being framed in terms of a Rule 60(b) motion. Rather than seeking relief from the Court's judgment, the Plaintiff is effectively asking this Court to grant her leave to file an otherwise untimely appeal based on her misunderstanding of the state court's order declaring her a vexatious litigator. Rule 60(b) does not provide for this form of relief.[1]

B. *Rule 60(b)(2)*

[1] In its Order (doc. 46) on the Plaintiff's Motion for Reconsideration (doc. 37) and Motion for Extension of Time to Appeal (doc. 41), the Court explained that the Plaintiff's filing of a motion for reconsideration under Rule 59(e), "suspend[ed] the running of the time for the filing of a notice of appeal. See Fed. R. App. Pro. 4(a)(4)." Order at 4, doc. 46. Further, the Court stated, "both plaintiff and defendants appear to be under a misconception that Judge Pokorny's order declaring plaintiff to be a vexatious litigator in some way limits the extent to which she may appear as a pro se litigant in this United States Court." Id. The Court clarified that "Judge Pokorny's order requiring his express permission to proceed in any Ohio trial court is inapplicable to the federal courts of the United States." Id.

Next, the Plaintiff argues that newly discovered evidence demonstrates that Defendant McKew presented perjured testimony to the Ashland County Court of Common Pleas on May 10, 2013 at a hearing concerning a motion requesting that the Plaintiff be declared a vexatious litigator.

A motion for relief from judgment under Rule 60(b)(2) can be granted only based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). To prevail, a "'movant must demonstrate (1) that it exercised due diligence in obtaining the information and (2) [that] the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment.'" HDC, LLC v. City of Ann Arbor, 675 F.3d 608, 615 (6th Cir. 2012) (quoting Good v. Ohio Edison Co., 149 F.3d 413 (6th Cir. 1998)).

Although the Plaintiff asserts that she has newly discovered evidence, she does not describe that evidence with any particularity and has not submitted it in support of her Rule 60(b) motion. In addition, the Plaintiff does not present any argument that this newly discovered evidence could not have been discovered in a timely fashion with reasonable diligence. Finally, the newly discovered evidence relates to a separate state court proceeding concerning that court's finding that the Plaintiff was a vexatious litigator and the Plaintiff makes no attempt to explain how that evidence would have produced a different result in the present case if available to the Court prior to its judgment. The Plaintiff's Rule 60(b)(2) argument is therefore without merit.

C. *Rule 60(b)(3)*

Under Rule 60(b)(3), the Plaintiff argues:

> fraud is the basis for her entire litigation in the District Court . . . This entire action is based upon fraud as well as the deprivation of discovery/disclosure

> would constitute abuse of discretion by this District Court-permitting relief per 60(b) and default judgment. Plaintiff has proven fraud and provided sufficient evidence of fraud. Fraud has been such a nature to have prevented the Plaintiff from presenting the merits of her case.

Pl.'s Mot. for Relief from J. at 11–12. According to the Plaintiff, Defendants Cole and Kessler "concealed material facts that would confirm all allegations made by Plaintiff and this constitutes witness tampering and this permits her relief." Id. at 13. Presumably, the Plaintiff contends that the Defendants have perpetrated a fraud on the court.

In the context of Rule 60(b)(3), the Sixth Circuit defines fraud as "the knowing misrepresentation of a material fact, or concealment of the same when there is a duty to disclose, done to induce another to act to his or her detriment." Info-Hold, Inc. v. Sound Merchandising, Inc., 538 F.3d 448, 456 (6th Cir. 2008) (citing Black's Law Dictionary 685 (8th ed. 2004); 37 Am. Jur. 2d Fraud and Deceit § 23 (2001); 12 Moore's Federal Practice § 60.43[1][b] (3d ed. 1999)). "Fraud on the court refers to 'the most egregious conduct involving a corruption of the judicial process itself.'" General Medicine, P.C. v. Horizon/CMS Health Care Corp., 475 F. App'x 65, 71 (6th Cir. 2012) (quoting 11 Charles Alan Wright et al., Federal Practice & Procedure § 2870 (West 2011)). To demonstrate a fraud on the court, a moving party must present clear and convincing evidence of five elements: "'1) [conduct] on the part of an officer of the court; that 2) is directed to the judicial machinery itself; 3) is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; 4) is a positive averment or a concealment when one is under a duty to disclose; and 5) deceives the court.'" Johnson v. Bell, 605 F.3d 333, 339 (6th Cir. 2010) (quoting Carter v. Anderson, 585 F.3d 1007, 1011 (6th Cir. 2009)).

Here, in imprecise terms, the Plaintiff repeatedly accuses the Defendants of committing fraud but presents no evidence in support of those accusations. Nor does the Plaintiff identify the

material facts that she accuses the Defendants of concealing. Moreover, the Plaintiff fails to explain how the Defendants' alleged fraud impacted the Court's decision to grant the Defendants' Motion to Dismiss. Cf. Info–Hold, Inc., 538 F.3d at 455 (Rule 60(b)(3) "clearly requires the moving party to show that the adverse party committed a deliberate act that adversely impacted the fairness of the relevant legal proceeding"). For these reasons, the Plaintiff's Rule 60(b)(3) fraud argument fails.

D. *Rule 60(b)(4)*

The Plaintiff's next argument is difficult to understand. It appears that she believes that the Court should grant her relief under Rule 60(b)(1) and that having established grounds for relief under Rule 60(b)(1), the Court's judgment is now void.

The Plaintiff appears to misunderstand the meaning of Rule 60(b)(4). Rule 60(b)(4) allows a court to "relieve a party . . . from a final judgment, order, or proceeding" when "the judgment is void." "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." United States Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 271 (2010). The Plaintiff has not provided any evidence of a jurisdictional error or a violation of due process that deprived her of notice or the opportunity to be heard. Therefore, the Plaintiff's Rule 60(b)(4) argument fails.

E. *Rule 60(b)(6)*

In conclusion, the Plaintiff relies on Rule 60's catchall provision, (b)(6), as an alternative basis for relief from the Court's judgment. The Plaintiff maintains:

> Judge Graham was required to have knowledge of the_facts and permit discovery. No reasonable person would come to the conclusion the Defendant parties have 'done no wrong,' that any party was entitled to immunity, that deprivation of Constitutional rights required immunity determination in the Court of Claims, and that the merits listed in the action were/are irrelevant when clearly the facts and evidence and laws would lead any reasonable party to a different conclusion.

Pl.'s Mot. for Relief from J. at 17. The Plaintiff further insists that the Defendants extorted and coerced her in an attempt to enter into an illegal settlement agreement. Id. In the Plaintiff's view, the Court "did not protect the Plaintiff's interests equally as the government parties." Id.

Relief from judgment under Rule 60(b)(6) is available only in exceptional or extraordinary circumstances. McCurry ex. rel. Turner v. Adventist Health Sys./Sunbelt, Inc., 298 F.3d 586, 596 (6th Cir. 2002); Olle v. Henry & Wright Corp., 910 F.2d 357, 365 (6th Cir. 1990). The subsections of Rule 60(b) are "mutually exclusive," Pioneer Inv. Servs. Co. v. Brunswick Assocs., Ltd. P'ship, 507 U.S. 380, 393 (1993), and subsection (6) "can be used only as a residual clause in cases which are not covered under the first five subsections of Rule 60(b)," Pierce, 770 F.2d at 451. "The decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." Thompson v. Bell, 580 F.3d 423, 442 (6th Cir. 2009) (quoting Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefits Fund, 249 F.3d 519, 529 (6th Cir. 2001)) (alteration omitted).

The Plaintiff has not presented evidence of "exceptional or extraordinary circumstances" that would justify relief from the Court's judgment under Rule 60(b)(6). Instead, the Plaintiff restates arguments that she has previously raised in her Rule 60(b) motion, her response to the Defendants' Motion to Dismiss, and her Motion for Reconsideration. The Plaintiff maintains that the Court committed legal error in granting the Defendants' Motion to Dismiss. This type of

argument is exclusive to Rule 60(b)(1) and is therefore not an appropriate basis for relief from judgment under Rule 60(b)(6). See Pierce, 770 F.2d at 451(subsection (6) "can be used only as a residual clause in cases which are not covered under the first five subsections of Rule 60(b)").

IV. Motion to Stay

On January 13, 2014, five days after filing her Motion for Relief from Judgment, the Plaintiff filed a Motion to Stay (doc. 48). In her Motion to Stay, the Plaintiff stated that she:

> Respectfully requests a stay of the proceedings here regarding the post judgment motion filed by this Plaintiff for relief pursuant to FRCP 60(b).
>
> In the interest of justice, Plaintiff has requested an immediate appeal of an expected denial of her 60(b) motion filed here. She has filed for a stay of this District Court's proceedings in the Sixth Circuit Court of Appeals as well as she is now filing here.

Pl.'s Mot. to Stay at 1, doc. 48. It is well-settled that appeals can be taken from final denial of a motion to vacate a judgment. 15B Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 3916 (2d ed. 2013). However, an appeal cannot be taken before the trial court has completed action on the motion. Absent the Court first ruling on the Plaintiff's Motion for Relief from Judgment, she would not be permitted to appeal. The Court will therefore deny the Plaintiff's Motion to Stay.

V. Conclusion

For the foregoing reasons, the Court (1) DENIES the Plaintiff's Motion for Relief from Judgment (doc. 47); DENIES the Plaintiff's Motion to Stay (doc. 48); and GRANTS the Plaintiff's Motion for Leave to File Reply (doc. 53).

IT IS SO ORDERED.

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: April 11, 2014