

Not Reported in F.Supp.2d, 2003 WL 21143086 (E.D.N.Y.)
(Cite as: **2003 WL 21143086 (E.D.N.Y.)**)

United States District Court,
E.D. New York.
Dr. Richard S. TROWBRIDGE, Lucille Donadio,
Richard Coriasco, Dr. Betty Jo Merritt, Patricia Brophy,
Dr. Alex Zemcov, and Dr. Michael Zebrower,
Individually and on behalf of all other Persons similarly
situated, Plaintiffs,
v.
INSTITUTE FOR BASIC RESEARCH IN DEVELOPMENTAL
DISABILITIES, Thomas A. Maul, the Office of Mental Retardation and Developmental
Disabilities, Jean S. Miller, the New York State Department of Mental Hygiene,
George C. Sinnott, New York State Department of Civil Service, Dr. Henryk M.
Wisniewski, Melvin Hicks, Peter Vietze, the Public Employees Federation,
AFL-CIO and Michael Fenko, Defendants.
No. 98 CV 3529 SJ.

March 3, 2003.

MEMORANDUM AND ORDER

JOHNSON, J.

*1 Plaintiffs Dr. Richard S. Trowbridge, Lucille Donadio, Richard Coriasco, Dr. Betty Jo Merritt, Patricia Brophy, Dr. Alex Zemcov, and Dr. Michael Zebrower (collectively, "Plaintiffs") bring the current motion to vacate this Court's previous Orders dismissing the action pursuant to Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"). For the reasons stated herein, the motion to vacate is DENIED.

PROCEDURAL BACKGROUND

Plaintiffs brought this action against multiple defendants alleging violation of the Age Discrimination in Employment Act ("ADEA"), the Labor Management Relations Act § 301, and 42 U.S.C. §§ 1983 and 2000e et seq. On October 24, 2000, this Court issued an Order dismissing Plaintiffs' Second Amended Complaint as to Defendants Public Employees Federation, AFL-CIO, and Michael Fenko ("the Union Defendants"). By Order dated January 25, 2001, the

Court dismissed the Second Amended Complaint as to Defendants Institute for Basic Research in Developmental Disabilities, Thomas A. Maul, the New York State Office of Mental Retardation and Developmental Disabilities, George C. Sinnott, the New York State Department of Civil Service, Melvin Hicks, and Peter Vietze (the "State Defendants"). And on April 4, 2001, this Court dismissed the Second Amended Complaint as to Defendants New York State Department of Mental Hygiene, Jean S. Miller, and Henry M. Wisniewski (the "Remaining Defendants"). FNL (See Defs.' Mem. in Opp. to Pls.' Mot. to Vacate ("Defs.' Mem.") at 4-6.)

FNL. The Orders dated October 24, 2000, January 25, 2001, and April 4, 2001 will hereafter be referred to as the "Dismissal Orders."

On April 9, 2001-the same date the Clerk of the Court issued the Judgment pursuant to this Court's April 4, 2001 Order-Plaintiffs filed a Notice of Appeal of this Court's Dismissal Orders. (*Id.* at 6.) Plaintiffs subsequently failed to comply with the Second Circuit's scheduling order, and the appeal was dismissed. (*Id.*)

On April 11, 2002, exactly one year after the Clerk of the Court's April 9, 2001 Judgment was entered on the court's docket, Plaintiffs filed the instant motion to vacate this Court's motions to dismiss. (*Id.*) Plaintiffs' motion is based on the following grounds:

- 1.) Material newly discovered evidence which by due diligence could not have been discovered in time to furnish grounds to change the decisions and orders of this Court.
- 2.) Fraud, misrepresentation and misconduct on part of State Defendants', Defendants' witness and their counsel was perpetrated on this Court and other Federal agencies, which if it had not taken place the Plaintiffs would have prevailed in their actions.
- 3.) And for such other and further relief the Court deems just and proper.

(Pls.' Not. of Mot. at 2.)

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DISCUSSION

I. [Rule 60\(b\)](#) Standard of Review

[Rule 60\(b\)](#) states that “the court may relieve a party ... from a final judgment, order or proceeding for the following reasons: ... (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); [or] (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party....” [Fed.R.Civ.P. 60\(b\)](#). A [Rule 60\(b\)](#) motion “shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the entry of the judgment, order, or proceeding was entered or taken.” *Id.* The rule goes on to state that, “[t]his rule does not limit the power of a court to entertain an independent action ... to set aside a judgment for fraud upon the court.” *Id.* (emphasis added).

*2 As the Second Circuit has noted, [Rule 60\(b\)](#) “allows extraordinary judicial relief” and should be “invoked only upon a showing of exceptional circumstances.” [Nemaizer v. Baker](#), 793 F.2d 58, 61 (2d Cir.1986) (citing [Ben Sager Chemicals Int'l. v. E. Targosz & Co.](#), 560 F.2d 805, 809 (7th Cir.1977); see also [United States v. Int'l Bhd. of Teamsters](#), 247 F.3d 370, 391 (2d Cir.2001) (“A motion for relief from judgment is generally not favored and is properly granted only upon a showing of exceptional circumstances.”). Accordingly, the decision to grant a motion to vacate is within the “sound discretion” of the district court. [Nemaizer](#), 793 F.2d at 61.

[Rule 60\(b\)](#) should not be used as a substitute for a timely appeal; it should be utilized by the courts to do “substantial justice ... yet final judgments should not ‘be lightly reopened.’” *Id.* (quoting [Seven Elves, Inc. v. Eskenazi](#), 635 F.2d 396, 401 (5th Cir.1981); see also [Mastini v. American Telephone & Telegraph Co.](#), 369 F.2d 378, 379 (2d Cir.1966) (rejecting a [Rule 60\(b\)](#) motion, and noting that “appellant was attempting to use a [Rule 60](#) motion to relitigate the merits of his claim”). The burden of proof is on the party seeking the relief. See [Int'l Bhd. of Teamsters](#), 247 F.3d at 391.

A. [Rule 60\(b\)\(2\)](#)-New Evidence

[1] A motion brought pursuant to [Rule 60\(b\)\(2\)](#) must allege that newly discovered evidence is available “which by due diligence could not have been discovered in time” for the disposition of the appealed order. See [Rule 60\(b\)\(2\)](#). To satisfy this “onerous standard,” the Second Circuit set forth the following test:

[T]he movant must demonstrate (1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant must have been justifiably ignorant of them despite due diligence, (3) the evidence must be admissible and of such importance that it probably would have changed the outcome, and (4) the evidence must not be merely cumulative or impeaching.

[Int'l Bhd. of Teamsters](#), 247 F.3d at 392 (quoting [United States v. IBT](#), 179 F.R.D. 444, 447 (S.D.N.Y.1998)). As applied to the instant action, it is clear Plaintiffs have failed to meet this high standard.

The facts upon which Plaintiffs assert their newly discovered evidence claim under [Rule 60\(b\)\(2\)](#) consists entirely of an affidavit by George Sigalos (“Affiant Sigalos”), who, along with Plaintiffs, worked with Defendant Melvin Hicks (“Defendant Hicks”) at Defendant Institute for Basic Research in Developmental Disabilities (“Defendant IBR”) beginning in 1987. (See Aff. of George Sigalos [“Sigalos Aff.”] at 1.) Affiant Sigalos describes various incidents involving Defendants Hicks, Wisniewski and Vietze in which these Defendants evidenced some intolerance for some of the Plaintiffs. (*Id.* at 2-6.)

Measured against the standard in *Teamsters*, Plaintiffs’ proof is lacking. The “newly discovered evidence” is information that was recently obtained by Plaintiffs, and it clearly existed at the time the dispositive motions were decided by this Court. Plaintiffs fail, however, to illustrate how, with due diligence, they could not have discovered the evidence, as *Teamsters* requires. See [Int'l Bhd. of Teamsters](#), 247 F.3d at 392. Furthermore, Plaintiffs make no attempt to argue how, even if the evidence had been available to the Court in making its determination on the Dismissal Orders, it “probably would have changed the outcome.” *Id.* In fact, even a generous reading of Affiant Sigalos’ testimony fails to suggest how this Court’s decision would have been changed at all. Accordingly, the portion of Plaintiffs’ motion to vacate based on newly discovered evidence fails for insufficiency.

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B. [Rule 60\(b\)\(3\)](#)-Fraud

*3 [2] Plaintiffs next argue that this Court should vacate its Dismissal Orders because the actions of the Defendants' attorney, the Attorney General of the State of New York, "amounted to a reckless disregard for the truth which constitutes a fraud upon the court by an officer of the court." (Pls.' Mem. in Support of R. 60(b) Mot. ["Pls.' Mot. "] at 5.) In the Plaintiffs' Notice of Motion, they base this argument on subdivision three of [Rule 60\(b\)](#), quoting from the Rule's provision for fraud and misrepresentation. (Pls.' Not. of Mot. at 2.) In making their arguments, however, Plaintiffs also seem to be arguing under [Rule 60\(b\)](#)'s "savings clause," which provides that a party can seek to "set aside a judgment for fraud upon the court." [Fed.R.Civ.P. 60\(b\)](#). The Second Circuit has recognized a distinction between the two provisions, and this Court notes the different standard appropriate for each. See [Hedges v. Yonkers Racing Corp.](#), 48 F.3d 1320, 1325-26 (2d Cir.1995) (discussing the differences between fraud on an adverse party and fraud upon the court). As it is clear to this Court that Plaintiffs allege that Defendants and their counsel have perpetrated a fraud *on the court*, as opposed to *on themselves* as adverse party, this Court will interpret their pleadings as alleging a motion under [Rule 60\(b\)](#)'s savings clause.^{FN2}

^{FN2} The explicit language of [Rule 60\(b\)](#)'s savings clause suggests that a party seeking relief under it must allege its claim by "independent action." See [Fed.R.Civ.P. 60\(b\)](#); see also [Gleason v. Jandrucko](#), 860 F.3d 556, 558 (2d Cir.1988) (analyzing the difference between [Rule 60\(b\)\(3\)](#) and the savings clause). As such, the instant motion would be improper under the Rule. The Court, however, will address the merits of Plaintiffs' claim as if it were brought in the context of an "independent action."

According to the Second Circuit, " 'fraud upon the court' as distinguished from fraud on an adverse party is limited to fraud which seriously affects the integrity of the normal process of adjudication." [Gleason v. Jandrucko](#), 860 F.2d 556, 559 (2d Cir.1988) (citing [Kupferman v. Consolidated Research & Mfg. Corp.](#), 459 F.2d 1072, 1078 (2d Cir.1972)). Fraud on the court involves more than harm to a single litigant

"because it threatens the very integrity of the judiciary and the proper administration of justice." [Gleason](#), 860 F.2d at 559 (citing [Hazel-Atlas Glass Co. v. Hartford-Empire Co.](#), 322 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250 (1944)); see also [Hedges](#), 48 F.3d at 1325 ("The concept of 'fraud on the court' 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 cannot perform in the usual manner its impartial task of adjudging cases.'" (citing [Kupferman](#), 459 F.2d at 1078)).

Plaintiffs' allegations of fraud upon the court consists entirely of all egations that Defendant Hicks made false statements to the Equal Employment Opportunity Commission ("EEOC") during its investigation of Plaintiffs' claims of wrongful termination prior to the filing of the instant case.^{FN3} (See Pls.' Mem. at 2.) At some point during the initial phases of this litigation, and prior to this Court's decisions resulting in the Dismissal Orders, Plaintiffs discovered that certain statements made by Defendant Hicks to the EEOC were apparently false. (See *id.* at 3, describing how Plaintiffs' counsel communicated to Defendants' counsel information regarding Defendant Hicks' false statements "[w]hile this action was pending.") The details of Defendant Hicks' allegedly fraudulent statements were, in fact, included in detail in Plaintiffs' Second Amended Complaint. (See Defs.' Mem. at 10.) As Defendants point out in their Memorandum of Law, this Court implicitly acknowledged these facts, and even credited them as true for purposes of deciding Defendants' motion to dismiss. (See Defs.' Mem. at 10; see also Cohen Aff., Ex. A.)

^{FN3} Plaintiffs also include in their motion arguments suggesting a failure on the part of the New York State Attorney General's Office to fulfill their legal obligations by not following through on certain alleged crimes committed by some of the Defendants. (See Pls.' Mem. at 6-7; Pls.' Reply Mem. at 2-5.) As with the allegations related to Defendant Hicks' statements to the EEOC, these allegations were also included in previous pleadings before this Court, and either acknowledged as true for the purposes of a motion to dismiss, or disregarded as irrelevant to the proceedings. As such, they are also determined to be irrelevant for the current motion.

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*4 Plaintiffs' claims, even if accepted as true, would not be sufficient to satisfy Plaintiffs' burden of showing that a fraud was perpetrated, either on the Court, or on Defendants' adversary.^{FN4} As noted, these very claims were before this Court and rejected during consideration of Defendants' motion to dismiss. See Gleason, 860 F.2d at 559 (noting that fraud was not shown where Rule 60(b) movant had an opportunity to argue the very issues raised during the court's determination on the decision movant sought to vacate). Moreover, the Second Circuit has held that fraud upon the court is not shown when the moving party presents evidence attacking the veracity of a witness who gave testimony in the original proceeding. *Id.* ("After-discovered evidence of alleged perjury by a witness is simply not sufficient for a finding of 'fraud upon the court.'" (citing Hazel-Atlas, 322 U.S. at 245)).

^{FN4} The analysis of Plaintiffs' burden has focused on a claim brought under the savings clause of Rule 60(b). The Court finds, however, that even if the motion were deemed to have been brought pursuant to Rule 60(b)(3), Plaintiffs' motion would similarly fail, because Plaintiffs have failed to show by clear and convincing evidence any proof of material misrepresentations or fraud. See Fleming v. New York Univ., 865 F.2d 478, 484 (2d Cir.1989) (analyzing requirements under Rule 60(b)(3)).

Plaintiffs have also failed to convince the Court that the instant motion is more than simply an attempt to relitigate the very same issues previously rejected by this Court in the Dismissal Orders. See Mastini, 369 F.2d at 379. On such insubstantial grounds, this Court does not find that the "extraordinary judicial relief" of vacating the Dismissal Orders is appropriate. Accordingly, this Court finds that Plaintiffs have failed to satisfy their burden, and the Rule 60(b) motion is denied.^{FN5}

^{FN5} Defendants also argue that Plaintiffs' Rule 60(b) motion should fail for lack of timeliness, because Plaintiffs served Defendants via Federal Express on April 11, 2002, exactly one year after the entry of the last of this Court's three Dismissal Orders, in violation of Rule 5(b) of the Federal Rules of

Civil Procedure. (Defs.' Mem. at 15-18.) Defendants rely for support on a Ninth Circuit opinion, which describes in detail why Federal Express does not comply with the requirements of Rule 5(b), and in particular, rejecting the rationale applied in an opinion from this Court's district, the Eastern District of New York. See Magnuson v. Video Yearteryear, 85 F.3d 1424, 1429-1431 (9th Cir.1996) (discussing and rejecting the decision in United States v. 63-29 Trimble Road, 812 F.Supp. 332 (E.D.N.Y.1992)). Because this Court holds that the motion fails on its merit, it need not decide the question of the motion's timeliness.

CONCLUSION

For the foregoing reasons, this Court DENIES Plaintiffs' motion to vacate its Dismissal Orders. The Clerk of the Court is directed to enter judgment for the Defendants, and to close the case.

SO ORDERED.

E.D.N.Y., 2003.

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