

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-3906

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Aug 23, 2018

DEBORAH S. HUNT, Clerk

JAMES L. WHEELER,)
v.)
Plaintiff-Appellant,)
v.) ON APPEAL FROM THE UNITED
UNITED STATES OF AMERICA,) STATES DISTRICT COURT FOR
Defendant-Appellee.) THE NORTHERN DISTRICT OF
Ohio)

O R D E R

Before: MERRITT, CLAY, and BUSH, Circuit Judges.

James Wheeler, a federal prisoner proceeding pro se, appeals the district court's denial of his Federal Rule of Civil Procedure 60(b) motion for relief from the judgment entered in his Federal Tort Claims Act ("FTCA") action. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In June 2004, Wheeler was convicted of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), RICO conspiracy, and conspiracy with intent to distribute narcotics. The district court subsequently issued a forfeiture order based on Wheeler's RICO convictions. On appeal, this court reversed the RICO convictions and affirmed the narcotics conspiracy conviction. *See United States v. Wheeler*, 535 F.3d 446 (6th Cir. 2008). On February 8, 2010, the district court entered an order partially vacating the preliminary order of forfeiture. *United States v. Wheeler*, No. 3:03-cr-00739-JGC-1, dkt. entry 2120 (N.D. Ohio Feb. 8, 2010).

EX A

In July 2014, Wheeler commenced an action against the United States under the FTCA, alleging that the government's forfeiture of real property in connection with his criminal case violated the FTCA because the property was sold at auction after his RICO convictions were overturned. The government moved to dismiss Wheeler's complaint, arguing that (1) Wheeler failed to timely file an administrative tort claim within two years of accrual of his claim, as required by the FTCA, *see 28 U.S.C. §§ 2401(b), 2675(a)*, and (2) the complaint failed to state a claim upon which relief could be granted because the government never obtained title to the real properties at issue and was not responsible for the alleged sale of the properties at auction. Wheeler opposed the government's motion and filed a motion for summary judgment.

A magistrate judge recommended that the government's motion to dismiss be granted. Under the FTCA, a tort claim against the United States is barred unless the claim is presented to the "appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). The magistrate judge accepted the government's position that Wheeler's claim accrued on August 1, 2008, the date that we reversed his RICO convictions. Alternatively, the magistrate judge found that Wheeler "surely [would have been] on notice as of December 29, 2008, the date of the mandate issued by the Sixth Circuit following [the denial of Wheeler's] petition for rehearing en banc." The magistrate judge concluded that, using either date of accrual, Wheeler's claim was barred because he did not file his administrative claim until April 2011. On January 18, 2017, over Wheeler's objections, the district court adopted the magistrate judge's report and recommendation and granted the government's motion to dismiss.

Wheeler did not file a timely appeal from the district court's judgment. But in July 2017, he filed a motion for relief from judgment, pursuant to Rule 60(b). For the first time, Wheeler argued that the proper date of accrual is February 8, 2010, the date that the district court entered its order partially vacating the forfeiture order. He also stated that, in granting the motion to dismiss, the court "pointed to no legal authority, yet rejected [his] argument that the date on which the Supreme Court denied [c]ertiorari was determinative, in accordance with *Clay v. United States*, 537 U.S. 522 (2003)[.] and *Heck v. Humphrey*, 512 U.S. 477 (1994)." Construing Wheeler's motion as seeking relief under both subsections (1) and (6) of Rule 60(b), the district

court denied the motion. Noting that Wheeler failed to present his argument for the February 8, 2010, accrual date in his objections to the magistrate judge's report and recommendation, the court concluded that his motion presented no extraordinary circumstances that would justify relief under Rule 60(b) and sought only to relitigate the merits of the case by presenting a new argument for the first time rather than to show some sort of judicial error that would warrant relief under Rule 60(b)(1). The court also addressed Wheeler's argument that the court erred by not applying *Clay* and *Heck* and found that neither case applied to Wheeler's current challenge.

Wheeler now appeals from the denial of his Rule 60(b) motion. In his appellate brief, Wheeler raises the same arguments regarding the accrual date of his FTCA claim that he raised in the district court. In addition, he invokes the "unclean hands" doctrine. Wheeler asks this court to "[r]everse the [d]istrict [c]ourt's order granting accelerated [j]udgment" and grant his motion for summary judgment.

When reviewing the denial of a Rule 60(b) motion, we do not review the underlying judgment; instead, our "review is limited to whether the district court abused its discretion in denying the Rule 60(b) motion." *Yeschick v. Mineta*, 675 F.3d 622, 628 (6th Cir. 2012) (citing *Burnley v. Bosch Ams. Corp.*, 75 F. App'x 329, 332 (6th Cir. 2003); *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001)). "A district court abuses its discretion when it relies on erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Tanner v. Yukins*, 776 F.3d 434, 442 (6th Cir. 2015) (quoting *Randleman v. Fid. Nat'l Title Ins.*, 646 F.3d 347, 351 (6th Cir. 2011)). Rule 60(b) provides several potential reasons for which relief from a final judgment or order may be granted: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . , misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged . . . ; or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). Relief under subsection (6) "requires a showing of exceptional or extraordinary circumstances." *E. Brooks Books, Inc. v. City of Memphis*, 633 F.3d 459, 465 (6th Cir. 2011) (citing *Ackermann v. United States*, 340 U.S. 193, 202 (1950)).

The district court did not abuse its discretion in denying Wheeler's Rule 60(b) motion. In that motion, Wheeler argued that the court should have used February 8, 2010—the date of the district court's order vacating the forfeiture order—as the date for the accrual of his tort claim against the United States. But, as the district court observed, Wheeler did not raise this argument in his objections to the magistrate judge's report and recommendation. Nor did he raise this argument in his response to the government's motion to dismiss or in his motion for summary judgment. The district court properly rejected this new argument. "Rule 60(b) does not allow a defeated litigant a second chance to convince the court to rule in his or her favor by presenting new explanations, legal theories, or proof." *Tyler v. Anderson*, 749 F.3d 499, 509 (6th Cir. 2014) (citing *Jinks*, 250 F.3d at 385).

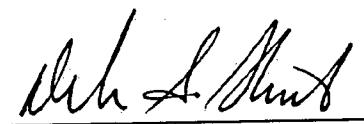
As for Wheeler's argument that, in accordance with *Clay* and *Heck*, his tort claim did not accrue until the Supreme Court denied his petition for certiorari, the district court properly concluded that neither case was applicable. As the district court explained, *Clay* concerns only when a conviction becomes final for the purposes of calculating the time for filing a 28 U.S.C. § 2255 motion. *See Clay*, 537 U.S. at 524. And although *Heck* requires a conviction to be invalidated before a defendant can recover damages, there is nothing in that decision to support Wheeler's argument that invalidation occurs only upon the Supreme Court's decision on certiorari. *See Heck*, 512 U.S. at 486-87. In fact, *Heck* confirms that invalidation can occur as early as a reversal on direct appeal. *See id.* (holding that before a plaintiff can recover damages in a 42 U.S.C. § 1983 civil suit for an allegedly wrongful conviction or imprisonment, he "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."). Moreover, Wheeler's petition for a writ of certiorari to the Supreme Court had nothing to do with the reversal of his RICO convictions; it concerned only his narcotics conspiracy conviction. He therefore knew that his RICO convictions had been invalidated as soon as we decided his appeal.

Finally, because Wheeler did not raise the unclean hands doctrine in the district court, he may not do so on appeal. "As a rule, [this court] will not review issues if they are raised for the

first time on appeal.” *Jolivette v. Husted*, 694 F.3d 760, 770 (6th Cir. 2012) (citation omitted). Consideration of newly raised issues is “permitted in ‘exceptional cases or particular circumstances,’ or when the rule would produce a ‘plain miscarriage of justice.’” *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557, 558 (1941)). No exceptional circumstances are present to warrant consideration of this issue for the first time on appeal. In any event, Wheeler’s assertion that the government acted in bad faith is unsupported by any citation to the record and is wholly conclusory.

Accordingly, we **AFFIRM** the district court’s order.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES LEE WHEELER,)	Case No.: 3:15 CV 366
)	
Plaintiff)	
)	
v.)	JUDGE SOLOMON OLIVER, JR.
)	
UNITED STATES OF AMERICA,)	
)	
Defendant)	<u>ORDER</u>

I. INTRODUCTION

Now pending before the court is Plaintiff James Wheeler's ("Plaintiff" or "Wheeler") Motion for Relief From Judgment (ECF No. 48). For the following reasons, the court denies the Motion.

II. FACTS AND PROCEDURAL HISTORY

On July 9, 2014, Plaintiff filed a Complaint (ECF No. 1), which he amended on August 27, 2014. In his Amended Complaint (ECF No. 7), Plaintiff alleged that the United States Government's forfeiture of real property in connection with Plaintiff's criminal case violated the Federal Tort Claims Act ("FTCA"), since the property was sold at auction after Plaintiff's conviction under the Racketeer Influenced and Corrupt Organizations Act ("RICO") was overturned. (ECF No. 7, at ¶¶ 12-13.) Plaintiff sought the value of his sold property, which he represented was worth no less than \$1,127,000.00. (ECF No. 7, at ¶ 10.) On May 11, 2015, Defendant United States of America ("Defendant" or "United States") filed a Motion to Dismiss (ECF No. 27). On July 6, 2015, Plaintiff

EX B

filed a Motion for Summary Judgment (ECF No. 32). On July 29, 2015, Defendant filed a Motion to Strike Plaintiff's Sur-Reply (ECF No. 35).

On January 25, 2016, Magistrate Judge James R. Knepp, II ("Judge Knepp") issued a Report and Recommendation ("R. & R.") (ECF No. 42), in which he recommended that the court grant the United States's Motion to Dismiss and deny Plaintiff's Motion for Summary Judgment and Defendant's Motion to Strike. Judge Knepp based his recommendation on the FTCA's statute of limitations, which bars any tort claim against the United States "unless it is presented to the 'appropriate Federal agency within two years after such claim accrues' and then brought to federal court 'within six months' after the agency acts on the claim." (ECF No. 42, at 5) (quoting *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1629 (2015) (quoting 28 U.S.C. § 2401(b))).

Judge Knepp found that, while Plaintiff did file his claim within six months of a constructive denial from the appropriate federal agency, Plaintiff failed to present it to the agency within the required two-year period. (ECF No. 42, at 8.) Judge Knepp rejected Plaintiff's arguments that the proper date of accrual should be either the date the United States Supreme Court denied certiorari or the day of Plaintiff's resentencing. (*Id.* at 7.) Rather, Judge Knepp held that accrual began on either the day the Sixth Circuit reversed Plaintiff's RICO conviction or the day the Sixth Circuit denied rehearing en banc, because on either day, Plaintiff was put on notice that the United States no longer had any claim to his property; thus, his injury began. (*Id.*) Notably, both dates occurred more than two years prior to when Plaintiff filed his claim with the appropriate federal agency, making his claim time-barred. (*Id.* at 6-7.) Furthermore, Judge Knepp found that the application of equitable tolling did not apply to Plaintiff's claim because Plaintiff failed to establish that he was entitled to its benefits. (*Id.* at 8.)

On February 16, 2016, United States District Court Judge David A. Katz (“Judge Katz”) adopted Judge Knepp’s R. & R. (First Order Adopting R. & R. (“Judge Katz’ Order”), ECF No. 43.) Because Plaintiff had not filed objections, Judge Katz adopted the R. & R. solely on the basis that Plaintiff failed to object. (*Id.*)

However, unknown to Judge Katz, Plaintiff had timely delivered his Objections (ECF No. 44) to prison officials within the proper window as to make his objections timely; yet they did not appear on the docket until six days after Judge Katz issued his Order. (Order, ECF No. 47, at 1.) Defendant responded to Plaintiff’s Objections but did not contest their timeliness. (*Id.*) Thus, on January 18, 2017, Chief Judge Solomon Oliver, Jr. (“Judge Oliver”), who was at this time overseeing the present case, vacated Judge Katz’ Order, reviewed Plaintiff’s Objections and the record *de novo*, and re-adopted the R. & R. (Second Order Adopting R. & R. (“Judge Oliver’s Order”), ECF No. 47.)

In his Motion for Relief from Judgment, Plaintiff now argues that the proper date of accrual should be the date the district court entered its Order vacating the Forfeiture Order. (ECF No. 48, at 3.) Plaintiff also contends that the court adopted the R. & R. while ignoring United States Supreme Court precedent. (*Id.* at 2.)

III. LAW AND ANALYSIS

A court may grant a 60(b) motion only if the movant demonstrates one of the following:

- (1) mistake, inadvertence, surprise, or excusable neglect; (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); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). The party seeking relief under Rule 60(b) must establish the grounds for such relief by clear and convincing evidence. *See Crehore v. United States*, 253 F. App'x 547, 549 (6th Cir. 2007).

Here, Plaintiff brings his claim under Rule 60(b)(6). The Sixth Circuit has held that "courts should apply Rule 60(b)(6) only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989). Thus, absent exceptional or extraordinary circumstances, relief under Rule 60(b)(6) will not be warranted. The court notes, however, that Plaintiff's claim may be more properly considered under Rule 60(b)(1), as an allegation of judicial error. Therefore, the court will consider the Motion under that standard as well.

Rule 60(b)(1) only applies to judicial error where a judgment is the result of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Courts in this Circuit have denied relief where a 60(b) movant fails to articulate and demonstrate actual judicial error, and instead challenges a ruling on the merits, emphasizing that "Rule 60(b) does not allow a defeated litigant a second chance to convince the court to rule in his or her favor by presenting new explanations, legal theories, or proof." *See Tyler v. Anderson*, 749 F.3d 499, 509 (6th Cir. 2014) (internal quotations omitted).

Here, Plaintiff's primary argument is that this court failed to consider the district court's Order which vacated the Forfeiture Order as the accrual date, a date which would make his filing with the appropriate federal agency timely. Importantly, however, Plaintiff made no such argument in his Objections to the R. & R. (ECF No. 44.) Instead, he argued that the two possible dates of accrual are the date that the United States Supreme Court denied certiorari or the date that Plaintiff

was resentenced. (*Id.*) Plaintiff presents no extraordinary circumstances. Thus, his claim fails under Rule 60(b)(6). And because Plaintiff essentially seeks relitigation by presenting a new argument for the first time, his claim fails under Rule 60(b)(1). *See Tyler*, 749 F.3d at 509. Thus, Plaintiff's argument that the proper date of accrual should be when the district court vacated the Forfeiture Order fails.

Plaintiff also contends that the court erred by not applying *Clay v. United States*, 537 U.S. 522 (2003), and *Heck v. Humphrey*, 512 U.S. 477 (1994). In his Objections to the R. & R., Plaintiff argued that *Clay* stood for the proposition that the finality of a conviction should be the date certiorari was denied or the date on which an application for certiorari was required to be filed. (ECF No. 44, at 3.) He also argued that *Heck* stood for the proposition that “a cause of action for damages does not accrue for damages attributable to an unconstitutional conviction or sentence until the conviction or sentence has been invalidated.” *Id.* This court previously found that neither case was applicable when it issued its Order adopting the R. & R. (ECF No. 47, at 3.)

In short, *Clay* addresses finality in regard to “calculating the one year period for filing a Motion to Vacate under 28 U.S.C. § 2255.” *Id.* *Clay* does not address finality as it relates to the reversal of a conviction on direct appeal. Here, because the present question is based on the direct reversal of a sentence rather than collateral review, *Clay* is inapplicable. And while *Heck* does require a conviction to be invalidated before certain challenges may be mounted, the case establishes that invalidation may occur as early as reversal on direct appeal. *Heck*, 512 U.S. 486-87 (“[A] § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.”).

Furthermore, the court notes that Plaintiff's forfeiture was predicated on his RICO conviction, and his petition for certiorari was unrelated to the RICO conviction. (Def.'s Opp'n to Pl.'s Obj. to R. & R., ECF No. 45, at 3.) Consequently, as it relates to the present question of forfeiture, Plaintiff knew that his sentence was finalized when it was reversed on direct appeal. He need not have waited for the United States Supreme Court to deny certiorari. Since neither of Plaintiff's cited cases are applicable to his current challenge, the court did not err in adopting the R. & R. over Plaintiff's Objections related to those cases.

Consequently, Plaintiff has failed to show the existence of exceptional or extraordinary circumstances which would persuade the court to grant his Motion. Additionally, he has failed to show that the district court erred in adopting the R. & R. Thus, the court denies Plaintiff's Motion for Relief.

IV. CONCLUSION

Accordingly, the court denies Petitioner James Wheeler's Motion for Relief From Judgment (ECF No. 48).

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

August 16, 2017

No. 17-3906

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 31, 2018
DEBORAH S. HUNT, Clerk

JAMES L. WHEELER,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

BEFORE: MERRITT, CLAY, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

John S. Shantz

Deborah S. Hunt, Clerk

Ex C