In the
United States Court of Appeals
For the Seventh Circuit.

Nos. 17-1645 & 17-1786

BENNIE KENNEDY,

Plaintiff-Appellant,

and

JOHN H. DAVIS,

Respondent-Appellant,

v.

SCHNEIDER ELECTRIC, formerly known as SQUARE D COMPANY,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division. No. 12-CV-122 – **Paul R. Cherry**, *Magistrate Judge*.

ARGUED JANUARY 10, 2018 – DECIDED JUNE 19, 2018

Before WOOD, *Chief Judge*, and HAMILTON, *Circuit Judge*, and BUCKLO, *District Judge*.*

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* Hon. Elaine E. Bucklo of the Northern District of Illinois, sitting by designation

HAMILTON, *Circuit Judge*. In 2012, Bennie Kennedy filed a lawsuit against his longtime employer, Schneider Electric. In 2014, the district court granted summary judgment for Schneider Electric. More than a year later, and without offering any new evidence, Kennedy's lawyer filed a motion to set aside the judgment for fraud on the court, accusing Schneider Electric's lawyers of suborning perjury. The district court denied that motion and exercised its discretion to impose sanctions on Kennedy's lawyer under Rule 11. Kennedy appeals the denial of his motion, and his lawyer appeals the sanction order. We affirm both decisions.

I. *Factual Background and Procedural History*

A. *The Initial Lawsuit*

Plaintiff Bennie Kennedy has decades of experience in the safe operation and maintenance of electric-power distribution equipment. From 2004 to 2010, he taught classes in electrical and industrial safety at an Illinois community college, Prairie State College. Kennedy did this teaching in addition to his day job with defendant Schneider Electric, whose proprietary power-distribution equipment he knows very well from years of first-hand experience. To protect its proprietary information, Schneider Electric requires its employees to obtain advance approval before they teach classes or submit articles for publication.

Without obtaining Schneider Electric's permission, in 2010 Kennedy published two articles about

power-distribution equipment in trade publications. Kennedy identified himself in these articles as a Prairie State instructor. When Schneider Electric's marketing staff caught wind of these articles in July 2010, a human resources manager contacted Prairie State to ask about the contents of Kennedy's course materials, which she worried might have contained proprietary information.

That fall, while reviewing the credentials of instructors expected to teach at the college the following spring, Prairie State officials realized that Kennedy did not possess the qualifications required to teach at the college. As Kennedy later admitted, he did not meet any of the three possible combinations of education and experience that would have qualified him to teach electrical safety classes at Prairie State. The following spring, after asking Kennedy for information about his credentials and reviewing his response, Prairie State decided not to rehire Kennedy as an adjunct instructor. Prairie State left open the possibility, though, that Kennedy could be reinstated in the future if he could prove that he had the required qualifications.

Almost a year later, Kennedy filed this lawsuit against Schneider Electric alleging defamation and malicious interference with an advantageous relationship. His complaint alleged that Schneider Electric's human resources staff had defamed him by calling Prairie State and expressing concern about his course materials. Kennedy further alleged that this telephone call resulted in the loss of his teaching position. Kennedy filed the case in state court, but after his lawyer

told Schneider Electric's lawyer that he would "venture to guess" that damages would be over $75,000, Schneider Electric removed the case to the Northern District of Indiana based on diversity jurisdiction under 28 U.S.C. § 1332.

Kennedy's lawsuit survived a Rule 12 motion to dismiss on the pleadings, but in 2014 the district court granted Schneider Electric's motion for summary judgment. Magistrate Judge Cherry, presiding with the consent of the parties under 28 U.S.C. § 636(c), found that the evidence showed beyond reasonable dispute that Prairie State "decided to revoke Plaintiff's teaching approval *solely* because he did not meet [Prairie State's] credentialing requirements" and not because of Schneider Electric's telephone call. Dkt. 49 at 15. The court entered final judgment in favor of Schneider Electric the same day. Kennedy did not appeal.

B. *The Rule 60 Motion and Sanctions*

More than a year after judgment was entered, Kennedy filed a motion to set aside the judgment for fraud on the court. The motion invoked Federal Rule of Civil Procedure 60(d)(3), which does not actually authorize relief but provides that the rest of Rule 60 does not limit a court's inherent power to set aside a judgment for fraud on the court. See Fed. R. Civ. P. 60(d)(3); see also Fed. R. Civ. P. 60(b) & (c)(1). A motion invoking this inherent power is not subject to the one-year limit for motions under Rule 60(b)(3). See *In re Golf 255, Inc.*, 652 F.3d 806, 809 (7th Cir. 2011); *Oxxford Clothes*

XX, Inc. v. Expeditors Int'l of Washington, Inc., 127 F.3d 574, 578 (7th Cir. 1997).

Kennedy's motion argued that summary judgment had been granted based on perjured deposition testimony and a perjured affidavit. He further asserted that Schneider Electric's lawyers knowingly submitted this allegedly perjured evidence to the district court. To support these serious accusations, Kennedy's lawyer pointed only to discrepancies in the evidence that had been submitted to the district court for and against the original motion for summary judgment. Because Schneider Electric's human resources manager could not supply a definition of "proprietary information" at her deposition, Kennedy argued that her telephone call to Prairie State could not actually have been for the purpose of protecting that information. From this shaky foundation, he proposed the conclusion that her testimony about her purpose must have been perjured. Kennedy also accused the human resources manager of lying about when she learned of his teaching activities.

In addition, Kennedy attacked an affidavit from a Prairie State official as "clearly false" because it did not address the fact that a full accrediting review of Prairie State had occurred in the 2008–2009 academic year while Kennedy was teaching there. Kennedy also thought the declaration was perjured because it said Prairie State's decision to revoke his teaching credentials had "no connection" to the call from Schneider Electric, yet in an email the same official had written: "I have concerns with regards to the liability of Mr.

Kennedy and the college based on the conversations with [Schneider Electric].” By submitting these documents in support of their summary judgment motion, Kennedy argued, Schneider Electric’s lawyers had committed fraud on the court.[1]

The district court denied Kennedy’s Rule 60 motion. Magistrate Judge Cherry explained that Kennedy had “failed to show how this rises to the level of fraud on the court” since the motion relied only on evidentiary discrepancies that were known at the time summary judgment was granted. Dkt. 72 at 7. These arguments were available at that time and “should have been made in a motion to reconsider or on appeal,” not in a later fraud-on-the-court motion invoking Rule 60(d)(3), *id.*, citing *In re Golf 255*, 652 F.3d at 809, which requires clear and convincing evidence of fraud to overturn a judgment, *Wickens v. Shell Oil Co.*, 620 F.3d 747, 759 (7th Cir. 2010). Since Kennedy advanced no new evidence to support his accusation that Schneider Electric’s lawyers knowingly committed fraud on the court, the district court also granted a motion for Rule 11 sanctions against Kennedy’s lawyer, John H.

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[1] Kennedy’s lawyer made various other claims regarding counterfeit evidence, statements by the district court, and conflicts of interest in the Rule 60 motion, but failed to present specific and coherent legal arguments on those issues to the district court. Kennedy’s briefs on appeal are no different. Consequently, those arguments are forfeited. See Fed. R. App. P. 28(a)(6)–(8); *Voelker v. Porsche Cars N. Am., Inc.*, 353 F.3d 516, 527 (7th Cir. 2003) (under Rule 28 “an appellant’s argument must provide both his contentions and the reasons for them,” including supporting authorities) (internal quotation marks omitted).

Davis, for the costs of having to defend against the Rule 60 motion. Dkt. 72 at 14–15; Dkt. 77 at 2 (finding defendant's proposed hourly rate and number of hours reasonable and awarding $10,627.16). Plaintiff Kennedy and lawyer Davis appealed the district court's decisions regarding the Rule 60 motion and the Rule 11 sanctions, respectively.

II. *Analysis*

A. *Rule 60 Motion to Set Aside the Judgment*

We review the denial of a Rule 60 motion deferentially, for an abuse of discretion. *McCormick v. City of Chicago*, 230 F.3d 319, 326–27 (7th Cir. 2000). As we have said often, Rule 60 relief is limited to "extraordinary" situations where a judgment is the inadvertent product of "special circumstances and not merely [the] erroneous application[] of law." *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). We use such language most often in affirming the denial of relief under Rule 60. At the same time, Rule 60 gives district courts the power and discretion to modify their judgments when truly new facts come to light or when the judge recognizes an error and believes it should be corrected. Still, even judges exercising that flexibility must be careful not to undermine too lightly the finality of their judgments. See *Mendez v. Republic Bank*, 725 F.3d 651, 657, 660 (7th Cir. 2013) (noting need to "balance the availability of post-judgment relief with finality interests," which is not a problem "in the rare case where a district judge recognizes

a clear legal or factual error" soon after entering judgment).

Rule 60 recognizes two types of fraud in the adversarial process that, if demonstrated within the proper timeframe, may merit relief from a final judgment. The first type is "fraud[,] . . . misrepresentation, or misconduct by an opposing party," Fed. R. Civ. P. 60(b)(3), which prevented the party seeking relief "from 'fully and fairly presenting' " his meritorious case at trial. *Wickens*, 620 F.3d at 759 (finding that discovery violation did not amount to fraud), quoting *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995). Parties asserting this type of fraud must move for relief within one year of "the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1).

The second type is "fraud on the court," see Fed. R. Civ. P. 60(d)(3), which we have described as fraud "directed to the judicial machinery itself" and involving "circumstances where the impartial functions of the court have been directly corrupted." *In re Whitney-Forbes, Inc.*, 770 F.2d 692, 698 (7th Cir. 1985) (citations omitted). Motions seeking relief in light of fraud on the court can be brought at any time after judgment because the "conduct . . . might be thought to corrupt the judicial process itself." *Oxxford Clothes*, 127 F.3d at 578. Examples include situations where "a party bribes a judge or inserts bogus documents into the record." *Id.*[2] But because a "motion to set aside a judgment

[2] In contrast, we have rejected allegations of fraud on the court where the record indicates "a technical violation of the

on the ground of fraud on the court has no deadline" and can be brought at any time under Rule 60(d)(3) to challenge final judgments, the definition of "fraud" contemplated by the rule must be "defined narrowly lest it become an open sesame to collateral attacks." *In re Golf 255*, 652 F.3d at 809 (internal quotations and citation omitted).[3]

We have therefore set a high bar for what constitutes fraud on the court under Rule 60(d)(3). Critically for this case, the alleged fraud must go beyond mere discrepancies in the record evidence available at the time judgment was entered. The fraud must have been the kind of fraud that ordinarily could not be discovered, despite diligent inquiry, within one year or even many years. *Id.* We explained in *Oxxford Clothes*: "A lie uttered in court is not a fraud on the liar's opponent if the opponent knows it's a lie yet fails to point this out to the court. If the court through irremediable obtuseness refuses to disregard the lie, the party has . . . a remedy by way of appeal." 127 F.3d at 578.

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rules" governing ex parte contacts with bankruptcy judges and "a serious infraction of those rules in an unrelated case." E.g., *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1019 (7th Cir. 1988).

[3] Rule 60 was amended in 2007 to move parts of old subsection (b) into new subsections (b), (c), (d) and (e). Cases from before 2007 refer more generally to Rule 60(b) when discussing both general fraud and misconduct of an opposing party (now styled as a Rule 60(b)(3) matter) and fraud on the court (now addressed under Rule 60(d)(3)). Whether the moving party presents the grounds for relief as fraud or as fraud on the court, the same deference extends to district court rulings on such motions.

This case presents a situation similar to *Cash v. Illinois Division of Mental Health*, 209 F.3d 695 (7th Cir. 2000), where the plaintiff lost in a Title VII bench trial. The plaintiff missed the deadline to file a Rule 59 motion for a new trial but later sought relief by filing a motion that this court labeled a Rule 60 motion to set aside the judgment. *Id.* at 697. Cash argued that the district court mishandled and misinterpreted the evidence at the bench trial. He sought a new trial where the district court would consider the same record all over again, with immaterial alterations. We affirmed the district court's denial of the Rule 60 motion. We explained that arguments:

> that the court wrongly excluded evidence, misinterpreted the evidence that was presented, and did not understand [the plaintiff's] theory of the case . . . cannot be shoehorned into grounds for Rule 60(b) relief. The rule is not an alternate route for correcting simple legal errors. Rather, it exists to allow courts to overturn decisions where "special circumstances" justify an "extraordinary remedy." See *Russell*, 51 F.3d at 749. Cash's appeal presents no such case. He simply tripped over the time clock and wants to be able to appeal as if he did not. Were we to allow appellants to follow this route, the rules governing the timeliness of appeal would quickly lose their bite, and one of the law's primary purposes – to settle disputes finally – would be undermined. Since Cash's arguments fall outside the class of mistakes Rule 60(b) exists to correct, they fail.

Id. at 698. This rationale applies with considerable force to a motion invoking Rule 60(d)(3) and alleging fraud on the court, a request for relief that can be brought at any time. See *In re Golf 255*, 652 F.3d at 809.

Nothing new came to light here. As the district court stressed, Kennedy had the opportunity to challenge this same evidence on summary judgment. If the court made a mistake back in 2014, Kennedy could have asked for reconsideration and/or appealed. He did neither. Instead, after more than a year he alleged fraud on the court based on only the evidence that had been presented on the original motion for summary judgment. If a disappointed party could win relief through Rule 60(d) by recycling discrepancies in the evidentiary record, few judgments in fact-intensive civil cases would be safe. We affirm the denial of Kennedy's Rule 60 motion.

B. *Rule 11 Sanctions*

We also review a district court's grant of Rule 11 sanctions for an abuse of discretion. *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.*, 850 F.3d 880, 883 (7th Cir. 2017). To succeed, parties challenging sanctions need to show that "the district court based its decision on an erroneous view of the law or a clearly erroneous evaluation of evidence." *Id.*, citing *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010); see also Fed. R. Civ. P. 11(c).

On appeal, attorney Davis summarizes his factual argument against the sanctions ruling this way: "It is redundant to continue discussing appeals, summary judgments, Rule 60(b) filings. The fact is that Appellant's attorney did *not* rush to file a document that goes after the integrity of a *fellow* attorney." As for law, he cites a 1993 district court case from Iowa that chastised the lawyer there for engaging in "bickering, haranguing, . . . general interference" and other examples of "Rambo Litigation." See *Van Pilsum v. Iowa State Univ. of Sci. & Tech.*, 152 F.R.D. 179, 180–81 (S.D. Iowa 1993) (adopting creative response under Rule 37 to discourage such discovery tactics). Neither of these points addresses whether or how the district court in this case abused its discretion in deciding to award sanctions against Davis personally.

We appreciate Mr. Davis's initial hesitation before leveling fraud accusations at another lawyer. But he then went ahead and did just that, and without presenting any new evidence of fraud. He offered only inferences and innuendo drawn from the original summary judgment record. Rule 11 "requires counsel to read and consider before litigating," which Davis claims to have done, but it also "establishes an objective test," *U.S. Bank Nat'l Ass'n, N.D. v. Sullivan-Moore*, 406 F.3d 465, 470 (7th Cir. 2005) (citation omitted), that asks whether the attorney engaged in "an inquiry reasonable under the circumstances" before filing a motion. Fed. R. Civ. P. 11(b). Davis makes no effort to explain how his investigations of the facts and law underlying the Rule 60 motion he filed were

reasonable. The district court awarded sanctions for having to respond to this motion, and Davis has not advanced a coherent argument that shows how this grant was an abuse of discretion. We affirm the decision of the district court imposing sanctions.

C. *Appellate Sanctions*

Finally, appellee Schneider Electric has asked for an additional sanctions award under Federal Rule of Appellate Procedure 38 against Kennedy and/or Davis for filing frivolous appeals. We deny this request because the request itself was procedurally improper. Rule 38 expressly requires that a party's demand for sanctions come in "a separately filed motion." Like many appellees before it, Schneider Electric merely included a "request" at the end of its merits brief. As we have observed before, "to be entitled to such fees [an appellee] would have had to ask for them in a separate motion . . . which [it] failed to do." *Hoyt v. Benham*, 813 F.3d 349, 356 (7th Cir. 2016), citing *Heinen v. Northrop Grumman Corp.*, 671 F.3d 669, 671 (7th Cir. 2012). And we cannot help but note the irony inherent in a party's procedurally improper request that the court sanction an opposing party for failing to comply with other procedural rules. See, e.g., *Northern Illinois Telecom*, 850 F.3d at 888–89 (reversing award of Rule 11 sanctions imposed after moving party failed to comply with required warning-shot/safe-harbor procedure under Rule 11(c)(2)); *Heinen*, 671 F.3d at 671 ("this court is not inclined to award sanctions in favor of a party that cannot be bothered to follow the rules itself"). While

Rule 38 authorizes the court to impose sanctions on its own initiative (after giving the potential target an opportunity to respond), the better course here is to signal as clearly as we can that this case should be over and done with.

Conclusion

The district court did not abuse its discretion in denying relief under Rule 60 or in imposing sanctions under Rule 11. The rulings of the district court are AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60501

[SEAL]

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

June 19, 2018

Before: DIANE P. WOOD, Chief Judge
DAVID F. HAMILTON, Circuit Judge
ELAINE E. BUCKLO, District Court Judge*

Nos. 17-1645 & 17-1786

BENNIE KENNEDY,
Plaintiff-Appellant,

and

JOHN H. DAVIS,
Respondent-Appellant,

v.

SCHNEIDER ELECTRIC formerly known as SQUARE D. COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 12-CV-122

Paul R. Cherry,
Magistrate Judge

* Hon. Elaine E. Bucklo of the Northern District of Illinois, sitting by designation.

The judgments of the District Court are **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

BENNIE KENNEDY, Plaintiff, v. SCHNEIDER ELECTRIC f/k/a SQUARE D COMPANY, Defendant.	))))))))	CAUSE NO. 2:12-CV-122-PRC

OPINION AND ORDER

(Filed Mar. 1, 2017)

This matter is before the Court on a Plaintiff's Rule 60(d)(3) Notice and Motion to Set Aside Judgment for Fraud on the Court [DE 60] filed by Plaintiff Bennie Kennedy on May 24, 2016, and on Defendant Schneider Electric's Motion for Sanctions [DE 68], filed on July 13, 2016.

PROCEDURAL BACKGROUND

Plaintiff originally filed his two-count Complaint in Lake County, Indiana, Circuit Court on February 10, 2012. The Complaint alleges that Defendant Schneider Electric, Inc., Plaintiff's employer, defamed him (Count I) and interfered with an advantageous relationship (Count II) when one of its employees contacted Prairie State College (PSC), the community college where Plaintiff taught part time.

This matter was removed to the United States District Court for the Northern District of Indiana on the basis of diversity of citizenship on March 20, 2012. On March 28, 2012, Defendants filed a Motion to Dismiss. On December 11, 2012, that motion was denied.

On March 7, 2014, Defendant filed a Motion for Summary Judgment. On April 25, 2014, Plaintiff filed a response to the Motion for Summary Judgment. In the response, which cited no case law, Plaintiff asked that summary judgment be granted in his favor. Attached to the response was an undated affidavit and exhibits to the affidavit. On May 8, 2014, Defendant filed a Rule 56 Motion to Strike the response and affidavit, including its attachments, and filed a separate reply to the response to the Motion for Summary Judgment. Plaintiff did not file a response to the Rule 56 Motion to Strike.

On September 5, 2014, the Court granted the Rule 56 Motion to Strike as to the affidavit and its attachments and denied it as moot as to the response. In the same Opinion and Order, the Court granted Defendant's Motion for Summary Judgment and denied Plaintiff's request for summary judgment in his favor. The Clerk of Court entered judgment in favor of Defendant the same day.

On May 24, 2016, Plaintiff filed the Motion to Set Aside Judgment. On July 1, 2016, Defendant filed a response. Plaintiff filed a reply on July 6, 2016. This motion is ripe and ready for ruling.

On July 13, 2016, Defendant filed the Motion for Sanctions. Plaintiff filed a response on July 19, 2016. Defendant has not filed a reply, and the time in which to do so has passed. This motion is also ripe and ready for ruling.

On May 8, 2013, the undersigned Magistrate Judge was advised that all non-Doe parties had filed forms of consent to have this case assigned to a United States Magistrate Judge to conduct all further proceedings and to order the entry of a final judgment in this case. The Doe Defendants were severed from this case, and this Court thus has jurisdiction to decide this case pursuant to 28 U.S.C. § 636(c).

ANALYSIS

I. MOTION TO SET ASIDE JUDGMENT

In the first sentence of the Motion to Set Aside Judgment, Plaintiff states that he is filing it pursuant to several subsections of Federal Rule of Civil Procedure 60. In his reply, however, Plaintiff clarifies that he is only bringing the motion under Rule 60(d)(3). In the briefing of this, a few preliminary matters have arisen, which the Court will resolve before turning to its analysis of the request to set aside the judgment.

A. Preliminary Matters

1. Request to Join Motion to Complaint against Prairie State College

Plaintiff states that the Court should "attach this motion to the Complaint filed simultaneously against Prairie State College." (Mot. at 25). Plaintiff has not set forth any legal basis or argument why such an action would be appropriate. Further, even if such a remedy were available or appropriate, Plaintiff has not identified any lawsuit filed against PSC with sufficient particularity, stating only that a Complaint was filed "simultaneously with this Motion." *Id.* at 24. This request is denied.

2. Admissibility of Plaintiff's Evidence

Defendant argues that emails that Plaintiff has submitted are hearsay. Plaintiff asserts that he has authenticated the emails via his affidavit. The emails at issue contain out of court statements, and, despite Plaintiff's statement that the emails show the writer's state of mind, Plaintiff presents them for the truth of the matter asserted in the emails. As such, these emails are hearsay, and the Court will not consider them in its analysis.

3. Professional Duties of Counsel

Plaintiff asks the Court to take judicial notice of the professional duty of attorneys to vigorously advocate for their clients. Plaintiff has not identified the

source of this duty. Per Northern District of Indiana Local Rule 83-5(e), Indiana's Rules of Professional Conduct and the Standards for Professional Conduct Within the Seventh Federal Judicial Circuit govern the conduct of attorneys practicing in this District.

The Court takes judicial notice of the following provisions in Indiana's Rules:

> **Rule 1.1 Competence:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> **Rule 1.3 Diligence:** A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> **Rule 3.1 Meritorious Claims and Contentions:** A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . .

Ind. R. Prof. Conduct 1.1, 1.2, & 3.1.

Additionally, the Preamble to the Standards for Professional Conduct Within the Seventh Federal Judicial Circuit provides: "In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve

human and societal problems in a rational, peaceful, and efficient manner."

Finally, though Plaintiff's counsel states that he mainly practices in state court, Plaintiff's counsel is admitted to practice in the Northern District of Indiana and therefore has a duty to become familiar with and comply with the District's local rules.

4. Request to Take Judicial Notice of "Public Community College Act"

Plaintiff asks the Court to take judicial notice of the "Public Community College Act." Plaintiff has not sufficiently identified the Act, such as providing a citation to the law or even identifying the legislative body that passed the act. This request is not well taken and is not granted.

5. Defendant's Request for Fees

Defendant requests that the Court order Plaintiff to pay the costs awarded to Defendant after entry of judgment in this litigation. The proper avenue for Defendant to pursue payment of these costs is through a motion for proceedings supplemental or a motion for writ of execution and not through its response here.

B. Fraud on the Court

Federal Rule of Civil Procedure 60(d)(3) clarifies that Rule 60 does not limit a court's power to set aside a judgment for fraud on the court. Fraud on the court

is often defined as actions that "defile the court." *In re Golf 255, Inc*., 652 F.3d 806, 809 (7th Cir. 2011) (collecting cases). Because there is no deadline for filing a motion to set aside judgment for fraud on the court, fraud on the court must be defined narrowly in order to avoid opening up civil judgments to perpetual collateral attacks. *Id.* (quoting *Oxxford Clothes XX, Inc. v. Expeditors Int'l of Washington, Inc.*, 127 F.3d 574, 578 (7th Cir. 1997); citing *Drobny v. Comm'r of Internal Revenue*, 113 F.3d 670, 678 (7th Cir. 1997)). "Precisely because there is no deadline for asserting fraud on the court, such a motion must allege the kind of fraud that ordinarily couldn't be discovered, despite diligent inquiry, within a year, such as in cases where there are no grounds for suspicion and the fraud comes to light serendipitously." *Ventre v. Datronic Rental Corp*., 482 F. App'x 165, 169 (7th Cir. 2012) (internal quotation marks omitted) (quoting *In re Golf 255, Inc.*, 652 F.3d at 809). "Fraud on the court is actionable only if it prejudices the adverse party." *Wickens v. Shell Oil Co.*, 620 F.3d 747, 759 (7th Cir. 2010) (citing *Oxxford Clothes XX, Inc*., 127 F.3d at 578).

Examples of fraud on the court include "bribery of a judge or exertion of other undue influence on him, jury tampering, and fraudulent submissions by a lawyer for one of the parties in a judicial proceeding, such as tendering documents he knows to be forged or testimony he knows to be perjured." *In re Golf 255, Inc.*, 652 F.3d at 809. Because "perjury by witnesses is a known danger and lawyers for the adverse party have ways of countering it through discovery, other investigatory

means, and cross-examination," perjury by a witness (provided that it is not suborned by a lawyer in the case) is not fraud on the court. *Id.* A lawyer's perjury, however, is fraud on the court. *Id.* The party seeking to set aside a judgment for fraud on the court must prove fraud by clear and convincing evidence. *Wickens*, 620 F.3d at 759 (citing *Ty Inc. v. Softbelly's, Inc.*, 517 F.3d 494, 498 (7th Cir. 2008)).

Plaintiff requests that the Court set aside the judgment due to fraud on the court. The main arguments Plaintiff makes for this relief are based on statements made by the undersigned Magistrate Judge in his September 5, 2014 Opinion and Order [DE 49] granting summary judgment in favor of Defendant and actions and statements made by Defendant's counsel in this litigation. The Court will address both of these bases and will then address other, less-developed arguments for relief presented by Plaintiff.

1. Statements of the Undersigned Magistrate Judge

Plaintiff takes issue with statements that the undersigned Magistrate Judge made in the September 5, 2014 Opinion and Order [DE 49] granting summary judgment in favor of Defendant in this litigation. The statements are as follows. "Plaintiff's brief, a mere eight pages long, does not cite a single case." (Op. and Order, 2, ECF No. 49). "The writing is ungrammatical, and the brief does not follow the formatting requirements listed in Northern District of Indiana Local Rule 5-4." *Id.* The Court also included the following citation

in support of its statement that this was not the first time that Plaintiff's counsel had made these errors before this Court.

> *See, e.g.*, *Brooks v. Menard, Inc.*, 2:10-CV-490-PRC, 2013 WL 6577514, at *1 (N.D. Ind. Dec. 16, 2013) ("The response brief is two pages in length. The 'Statement of Material Facts Indispute [sic]' lists no facts. Nearly every sentence has at least one spelling or grammatical error. Many sentences are incoherent. The brief wrongly cites rules and does not even cite a single case. Nor did Davis [Plaintiff's counsel] respond to [Defendant's] Motion to Strike or Motion for Summary Ruling.").

Id. at 2, n.1.

As the analysis in that Opinion and Order make clear, the Court granted summary judgment in favor of Defendant because there was no genuine issue of material fact as to damages for Counts I and II. Because the admissible evidence submitted with the summary judgment briefing showed that Plaintiff's alleged damages were not caused by Defendant, the Court granted summary judgment. The undersigned Magistrate Judge's statements regarding Plaintiff's counsel's advocacy were not part of the analysis of the merits of the Motion for Summary Judgment, and there is therefore no prejudice to Plaintiff due to the Court's statements. There is no actionable fraud on the court here. Further, there is no fraud; the statements are true and were not made

in order to exert any undue influence on the judicial process.

To the extent Plaintiff alleges that the Court committed legal error in considering the Olson and Hansel documents or in striking Plaintiff's affidavit and the attached exhibits, such an argument should have been made in a motion to reconsider or on appeal. Plaintiff's argument appears to be that he has evidence to contradict statements made by Olson and Hansel. Even if true, Plaintiff has failed to show how this rises to the level of fraud on the court. Further, because Plaintiff made these same arguments in his response to the Motion for Summary Judgment, this is not the sort of matter that "ordinarily couldn't be discovered, despite diligent inquiry, within a year." *In re Golf 255, Inc.*, 652 F.3d at 809.

2. Actions of Defendant's Counsel

Next, Plaintiff argues that Defendant knowingly submitted perjured documents to the Court. If true, this would be an example of fraud on the court. *See In re Golf 255, Inc.*, 652 F.3d at 809 (listing the tendering of testimony the attorney knows to be perjured as an example of fraud on the court). Plaintiff argues that the deposition of Gloria Olson and the declaration of Dr. Marie Hansel are perjured. However, Plaintiff's argument in support of this do not provide clear and convincing evidence that perjury has occurred or that Defendant's counsel knew of any perjury.

Additionally, Plaintiff argues that the alleged perjured statements by Olson and Hansel alone are sufficient for setting aside the judgment for fraud on the court. However, "simple perjury by a witness (perjury not suborned by a lawyer in the case)" is not fraud on the court. *In re Golf 255, Inc.*, 652 F.3d at 809. The possibility that witnesses may be untruthful is the sort of known danger that should be countered through discovery, other investigatory means, and cross-examination. *Id.* This argument is not well-taken as an argument of fraud on the court, but the Court will address Olson's and Hansel's statements in the context of the argument that Defendant's counsel knowingly submitted perjured statements to the Court.

Regarding Olson's deposition testimony, Plaintiff contends that it must be perjured as to when Olson learned that Plaintiff taught at PSC. Olson stated that she learned that Plaintiff was teaching at the college in 2010. Plaintiff argues that Olson should have known, because of articles published prior to 2010 that Plaintiff taught at PSC. However, Olson testified to what she *did know.* Plaintiff's argument of when Olson *should have known* does not show Olson's testimony to be perjured.

Plaintiff also argues that Olson must have committed perjury regarding proprietary information. Olson testified that she called PSC and asked it to provide Defendant with a copy of the syllabus for any course taught by Plaintiff to ensure that Defendant's proprietary information was not being misused. Plaintiff contends that this must be perjured testimony

because Olson was not able to provide a definition of proprietary information at her deposition. Plaintiff has again failed to show that Olson committed perjury. He has failed to show that Olson's purpose in contacting the college was not for the purpose of protecting Defendant's proprietary information. Further, Plaintiff has not identified any specific passage in which Olson has "no idea of what proprietary material represented," as Plaintiff asserts. (Reply at 11, ECF No. 66). Plaintiff's deposition testimony reveals at least a basic understanding of what constitutes Defendant's proprietary information.

Plaintiff also asserts that Dr. Marie Hansel's declaration is perjured. Plaintiff states that the declaration is false "on its face," but he points to no facial contradictions in the declaration. Instead, Plaintiff maintains that the timing of Dr. Hansel's review of Plaintiff's teaching credentials in light of the phone call from Olson is suspicious. Suspicious timing is not clear and convincing evidence of perjury and is not sufficient to impute knowledge of perjury on Defendant's counsel.

Plaintiff also contends that Plaintiff was qualified to teach at community colleges pursuant to the "Public Community College Act," which Plaintiff does not adequately identify in order to enable the Court to review the Act's provisions. Plaintiff states that Hansel must have perjured herself because she must have been aware of the Act. Hansel's declaration, however, states that Plaintiff failed to meet the Higher Learning Commission's requirements. She makes no statements about

Plaintiff's qualifications under the requirement of the "Public Community College Act." There is no direct conflict between what Plaintiff represents is in the Act and what Hansel states in her declaration. Plaintiff has not shown the declaration to contain perjury.

Plaintiff's sole contention is that, for the reasons he stated in asserting that Olson and Hansel committed perjury, Defendant's counsel must have known that Olson's deposition testimony and Hansel's declaration contained perjury. Based on this, Plaintiff asserts that Defendant's counsel's submission of these documents to the Court constitutes fraud on the court. Because Plaintiff has not met his burden to show that either Olson or Hansel committed perjury, Plaintiff has not shown that Defendant's counsel perpetrated fraud on the court. Plaintiff's request to set aside the judgment due to fraud on the court in the form of submission of known perjury is denied.

Plaintiff also asserts that Defendant's counsel's support of the Opinion and Order issued granting summary judgment in Defendant's favor is a conflict of interest, because Defendant's counsel represents Defendant and not the Court. Here, Defendant's counsel's support was in favor of a position favorable to Defendant. Plaintiff's assertion of impropriety here is not well-taken. Plaintiff also asserts that Defendant improperly referred to the *Brooks* case, as Defendant and its counsel took no part in that litigation. That case, however, is a matter of public record, and, because Plaintiff raised the issue in his motion, Defendant's discussion of the case was appropriate.

Plaintiff also contends that Defendant falsely stated that Plaintiff admitted his lack of qualification in his deposition. That Plaintiff conceded in his deposition that he did not meet PSC's requirements for his position was determined in ruling on the Motion for Summary Judgment in this matter. The Motion to Set Aside Judgment is not the proper vehicle for Plaintiff to relitigate this matter, and the argument is not well taken.

Also not well taken is the argument that Defendant is seeking to curry favor with the Court by characterizing as an "attack" the collective arguments that Plaintiff raised regarding the undersigned Magistrate Judge's statements in the Opinion and Order. The Court does not exist to serve as an editor for the parties' motions, briefs, and pleadings, and Defendant's word choice here does not warrant judicial review.

Plaintiff, in his reply brief, asserts that many statements that Defendant makes in its response brief are themselves instances of fraud on the Court. Without citing evidence in support, Plaintiff contends that Defendant's statement that Defendant has no relationship with PSC is deception by Defendant's counsel. Plaintiff states that Defendant's counsel made this statement without reference to the record and is impermissible testimony by Defendant's counsel. It is Plaintiff's burden, not Defendant's, to show fraud on the court by clear and convincing evidence, and Plaintiff has not met that burden here. Also contrary to Plaintiff's assertion that Defendant's counsel was "testifying" in Defendant's brief, the fact that the brief does

not cite to evidence for every statement does not render any portion of it testimony by Defendant's counsel. Plaintiff cited no law in support of his argument on this issue, and it is not well taken.

3. Other Underdeveloped Arguments

Plaintiff asserts that Defense counsel inserted "bogus" documents into the record. Far from providing clear and convincing evidence in support of such fraud, Plaintiff has not even identified any documents that he claims are counterfeit. This argument is not well taken.

Similarly, Plaintiff states that he has shown by clear and convincing evidence that there was an unconscionable plan or scheme to improperly influence the Court's Summary Judgment Opinion, but he has provided no evidence of such a plan or scheme, and he has further failed to state specifically what the plan or scheme was. This argument is not well taken.

Plaintiff also argues that PSC and Schneider colluded. Again, there is a lack of specificity to this argument and no clear and convincing evidence supporting it. This argument is not well taken.

II. MOTION FOR SANCTIONS

Defendant seeks sanctions under Federal Rule of Civil Procedure 11 regarding Plaintiff's Rule 60(d)(3) Motion to Set Aside the Judgment filed in this case on May 24, 2016. Defendant argues that Plaintiff's

motion (1) is a re-hashing of old evidence and has not been brought within a reasonable time, (2) lacks evidentiary support, and (3) is not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

Federal Rule of Civil Procedure 11(b) provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed. R. Civ. P. 11(b). Rule 11(c) allows the Court, on motion by a party, to impose sanctions, including attorney's fees, for a violation of Rule 11(b). *See* Fed. R. Civ. P. 11(c)(1)(A).

The Court may impose sanctions under Rule 11(c) for "submissions that are filed for an improper purpose or without reasonable investigation of the facts and law necessary to support their claims." *Senese v. Chicago Area I.B. of T. Pension Fund*, 237 F.3d 819, 823-24 (7th Cir. 2001) (citing Fed. R. Civ. P. 11(b), (c); *Fries v. Helsper*, 146 F.3d 452, 458 (7th Cir. 1998); *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 932-33 (7th Cir. 1989) (en banc)); *see also Cuna Mut. Ins. Soc. v. Office and Prof'l Employees Int'l Union, Local 39,* 443 F.3d 556, 561 (7th Cir. 2006) (holding that Rule 11(c) "allows courts to impose sanctions on a party if the requirements of Rule 11(b) are not met"); *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 963 (7th Cir. 1993).

In determining whether Rule 11 sanctions are warranted, the Court must "undertake an objective inquiry into whether the party or his counsel should have known that his position was groundless." *Cuna*, 443 F.3d at 560 (quoting *Nat'l Wrecking Co*., 990 F.2d at 963). As Rule 11 is an objective test, the Seventh Circuit Court of Appeals has repeatedly observed that

an "empty head but a pure heart is no defense," *U.S. Bank Nat. Ass'n, N.D. v. Sullivan-Moore*, 406 F.3d 465, 470 (7th Cir. 2005) (quoting *Chambers v. Am. Trans Air, Inc.*, 17 F.3d 998, 1006 (7th Cir. 1994)), and that Rule 11 "requires counsel to read and consider before litigating," *id.* (quoting *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986)).

Plaintiff's motion sought to set aside the judgment for fraud on the court. Out of the many assertions that Plaintiff made in support of his Motion to Set Aside the Judgment, only three of the contentions maintained that someone had taken an action that, if true, would possibly rise to the level of fraud on the court. These assertions are:

(1) Defendant's counsel submitted documents to the Court that Defendant's counsel knew to contain perjured statements;

(2) Defendant's counsel submitted bogus documents to the Court;

(3) Defendant's counsel made false statements to the Court.

Plaintiff also, in a conclusory manner, stated that he had shown an unconscionable plan to improperly influence the Court's decision on summary judgment. Out of these assertions and conclusory statement, only the first assertion—that Defendant's counsel knowingly submitted perjured materials to the Court—was supported by substantial argument. Plaintiff did not identify any documents that he purported to be bogus, and the Court, in its summary judgment ruling,

already resolved the issue—in Defendant's favor—of asserted false statements made by Defendant's counsel.

Though the assertion regarding knowing submission of perjury was supported with argument, the argument was insufficient. In essence, Plaintiff argued that there were statements in deposition testimony and in a declaration that could not be true because the deponent and declarant should have known other information or because the deponent knew little about proprietary information, and proprietary information was deponent's stated motivation for contacting PSC. Plaintiff's argument for fraud on the court lacked evidentiary support because there is no evidence that Defendant's counsel knew the statements to be perjured and because the arguments that the statements must be perjured are logically flawed.

Plaintiff's counsel signed the Rule 60(d)(3) Motion and presented it to the Court. Had Plaintiff's counsel made a reasonable investigation of the facts and law necessary to support a motion to set aside judgment for fraud on the court, he would have found that Plaintiff's Motion was not warranted by existing law. Plaintiff's counsel made no non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law. Pursuant to Rule 11(c), sanctions are warranted.

Defendant requests that it be awarded its reasonable costs and attorney fees incurred in responding to the Motion to Set Aside the Judgment and in bringing

the instant Motion for Sanctions. The Court finds that these sanctions "suffice[ ] to deter repetition of the conduct or comparable conduct by others similarly situated," Fed. R. Civ P. 11(c)(4), and grants the request. The sanction is imposed on Plaintiff's counsel, John H. Davis, and not Plaintiff. *See id.* at 11(c)(5)(A) ("The court must not impose a monetary sanction . . . against a represented party for violating Rule 11(b)(2). . . ."); *see also id.* at 11(c)(1) ("[T]he court may impose an appropriate sanction on any attorney . . . that violated the rule.").

CONCLUSION

Based on the foregoing, the Court hereby **DENIES** Plaintiff's Rule 60(d)(3) Notice and Motion to Set Aside Judgment for Fraud on the Court [DE 60].

Further, the Court **GRANTS** Defendant Schneider Electric's Motion for Sanctions [DE 68] and **ORDERS** Plaintiff's attorney John H. Davis to pay the reasonable attorney's fees and other expenses incurred by Defendant in responding to Plaintiff's Motion to Set Aside the Judgment and in bringing the instant motion.

The Court **ORDERS** Defendant to file, on or before **March 15, 2017**, a verified statement of expenses with supporting documentation. Any response must be filed within fourteen days of the statement being filed, and any reply must be filed within seven days of the filing of a response.

So ORDERED this 1st day of March, 2017.

s/ Paul R. Cherry
MAGISTRATE JUDGE
PAUL R. CHERRY
UNITED STATES
DISTRICT COURT

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 24, 2018

Before

DIANE P. WOOD, *Chief Judge*

DAVID F, HAMILTON, *Circuit Judge*

ELAINE E. BUCKLO, *District Judge**

Nos. 17-1645 & 17-1786

BENNIE KENNEDY,
Plaintiff-Appellant,

and

JOHN H. DAVIS,
Respondent-Appellant,

v.

SCHNEIDER ELECTRIC formerly known as SQUARE D COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 12-CV-122

Paul R. Cherry,
Magistrate Judge.

ORDER

On consideration of respondent's petition for panel rehearing in No. 17-1786, filed on July 6, 2018, all judges on the original panel have voted to deny the petition.

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* Of the Northern District of Illinois, sitting by designation.

Accordingly, the petition for panel rehearing filed by respondent Davis is DENIED.