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MEMORANDUM* OPINION OF THE NINTH CIRCUIT (JUNE 20, 2018)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LILLIAN M. JONES, M.D.,

Plaintiff-Appellant,

v.

HAWAII RESIDENCY PROGRAM, INC.; ET AL.,

Defendants-Appellees.

No. 17-16949

D.C. No. 1:07-cv-00015-HG-KSC

Appeal from the United States District Court for the District of Hawaii Helen W. Gillmor, District Judge, Presiding

Submitted June 12, 2018**

Before: RAWLINSON, CLIFTON, and NGUYEN, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Lillian M. Jones, M.D., appeals pro se from the district court's order denying her motion to set aside the judgment. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1166 (9th Cir. 2017). We affirm.

The district court did not abuse its discretion by denying Jones's motion for relief under Federal Rule of Civil Procedure 60(d)(3) because Jones failed to establish by clear and convincing evidence a fraud on the court. *See United States v. Estate of Stonehill*, 660 F.3d 415, 443-45 (9th Cir. 2011) (a party seeking to set aside a judgment on the basis of fraud on the court must demonstrate by clear and convincing evidence an effort to undermine the workings of the adversary process itself or prevent the judicial process from functioning in the usual manner); *Pizzuto v. Ramirez*, 783 F.3d 1171, 1180 (9th Cir. 2015) ("[A] party bears a high burden in seeking to prove fraud on the court, which must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." (citation and internal quotation marks omitted)).

The district court did not abuse its discretion by denying Jones's motion for reconsideration because Jones failed to demonstrate any grounds warranting relief. *See Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (setting forth standard of review and grounds for relief under Fed. R. Civ. P. 59(e) and 60(b)).

AFFIRMED.

MINUTE ORDER OF THE DISTRICT COURT OF HAWAII (AUGUST 25, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

LILLIAN M. JONES,

v.

HAWAII RESIDENCY PROGRAMS, INC., NALEEN ANDRADE, M.D.; COURTENAY MATSU, M.D.; CHRISTIAN DERAUF, M.D.,

CV NO. 07-00015 HG-KSC

Before: Helen GILLMOR Judge.

I. Background

On November 30, 2007, the Court issued an ORDER GRANTING DEFENDANTS HAWAII RESIDENCY PROGRAM INC., NALEEN ANDRADE, M.D., COURTENAY MATSU, M.D., AND CHRISTIAN DERAUF, M.D.'S MOTIONS FOR SUMMARY JUDGMENT. (ECF No. 84).

On the same date, the Court entered Judgment in favor of the Defendants. (ECF No. 85).

More than nine years later, on April 3, 2017, Plaintiff, proceeding pro se, filed PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT OF THE

HAWAII RESIDENCY PROGRAMS, INCORPORATED, ET AL. (ECF No. 103).

After further briefing by the Parties, on July 12, 2017, the Court issued an ORDER DENYING PLAINTIFF'S FILING ENTITLED, "MOTION TO SET ASIDE JUDGMENT OF THE HAWAII RESIDENCY PROGRAMS, INCORPORATED, ET AL." (ECF No. 111).

On July 24, 2017, Plaintiff, proceeding pro se, filed MOTION TO RECONSIDER ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT OF THE HAWAII RESIDENCY PROGRAMS, INCORPORATED. (ECF No. 112).

On August 8, 2017, Defendant Hawaii Residency Programs, Inc. filed DEFENDANT HAWAII RESIDENCY PROGRAMS, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT OF THE HAWAII RESIDENCE PROGRAMS, INCORPORATED. (ECF No. 114).

On August 22, 2017, Plaintiff filed REPLY TO DEFENDANT HAWAII RESIDENCY PROGRAMS, INC'S OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT OF THE HAWAII RESIDENCY PROGRAMS, INCORPORATED. (ECF No. 115).

II. Plaintiff's July 24, 2017 Motion For Reconsideration

The Court construes the Plaintiff's filing liberally given her pro se status. *Ballisteri v. Pacific Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

A. Standard of Review

A party may ask the court to reconsider and amend a previous order pursuant to Federal Rule of Civil Procedure 59(e). *White v. Sabatino*, 424 F.Supp.2d 1271, 1274 (D. Haw. 2006).

Fed. R. Civ. P. 59(e) offers "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003).

A motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. *Na Mamo O Aha Ino v. Galiher*, 60 F.Supp.2d 1058, 1059 (D. Haw. 1999).

The Ninth Circuit Court of Appeals has set forth the following grounds justifying reconsideration pursuant to Rule 59(e):

(1) to correct manifest errors of law or fact upon which the order rests;

(2) to present previously unavailable evidence;

(3) to prevent manifest injustice; or,

(4) to amend the order due to an intervening change in controlling law.

Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011).

B. Reconsideration Is Not Warranted

Plaintiff claims that she was the victim of fraud by the Hawaii Residency Programs, Inc. and Richard Philpott. The Court finds no basis for the allegation of fraud.

Plaintiff's July 24, 2017 Motion to Reconsider claims that the Court should have analyzed her Motion pursuant to Fed. R. Civ. P. 60(d)(3) instead of Fed. R. Civ. P. 60(b)(3).

1. There Was No Manifest Error of Law in the Court's Analysis

Reconsideration is not warranted. In Plaintiff's April 3, 2017 Motion, she requested relief on allegations of fraud by an opposing party. Plaintiff argued that Richard Philpott, CEO of Defendant Hawaii Residency Programs, Inc., engaged in fraud. (Pla.'s April 3, 2017 Motion at pp. 7-20, ECF No. 103-1).

Fed R. Civ. P. 60(b)(3) provides that the Court may set aside a final judgment based on fraud, misrepresentation, or misconduct by an opposing party. A motion that claims there was fraud by an opposing party falls within the scope of Fed. R. Civ. P. 60(b)(3). *Reed v. Schriro*, 2009 WL 2259976, *2, n.5 (D. Ariz. July 28, 2009). The Court liberally construed Plaintiff's April 3, 2017 Motion as seeking relief pursuant to Fed. R. Civ. P. 60(b)(3).

The Court denied Plaintiff's Motion, finding there was no evidence of fraud. The Court analyzed all of the evidence attached to Plaintiff's Motion and found that there was no evidence that Defendant Hawaii Residency Programs, Inc. or Richard Philpott engaged in fraud. (Court's July 12, 2017 Order at pp. 7-13, ECF No. 111).

Plaintiff has not identified any facts or law of a strongly convincing nature to induce the Court to reverse its prior decision. Plaintiff cites to no intervening change of controlling law or new evidence.

Plaintiff's mere disagreement with the Court's previous order is an insufficient basis for reconsideration. *White*, 424 F.Supp.2d at 1274; *Leong v. Hilton Hotels Corp.*, 689 F.Supp. 1572, 1573 (D. Haw. 1988).

2. Plaintiff Is Not Entitled to Relief Pursuant to Fed. R. Civ. P. 60(d)(3)

There is no basis for reconsideration based on Plaintiff's argument that she seeks to set aside the Court's 2007 Judgment pursuant to Fed. R. Civ. P. 60(d)(3) rather than Fed. R. Civ. P. 60(b)(3).

The standard to set aside a judgment pursuant to Fed. R. Civ. P. 60(d)(3) is higher than the standard for relief pursuant to Rule 60(b)(3). A claim that fails under Rule 60(b)(3) automatically fails under Rule 60(d)(3). *United States v. Sierra Pacific Indus., Inc.*, 862 F.3d 1157, 1167 (9th Cir. 2017); *Reed v. Schriro*, 2009 WL 2259976, *2 (D. Ariz. July 28, 2009) (finding a claim that fails under Rule 60(b)(3) automatically fails under the higher fraud standard required to prevail under Rule 60(d)(3)).

Rule 60(d)(3) requires more than a simple showing of fraud, misrepresentation, or misconduct by an opposing party as set forth in Rule 60(b)(3). *Fuller v. Johnson*, 107 F.Supp.3d 1161, 1170 (W.D. Wash. 2015).

Rule 60(d)(3) relief is only available if a plaintiff shows fraud that "defiles the court or is perpetrated by officers of the court." *United States v. Chapman*, 642 F.3d 1236, 1240 (9th Cir. 2011). The fraud must be aimed at the court itself. *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003). The fraud must rise "to the level of an unconscionable plan or scheme which is designed to improperly

influence the court of its decision." *Id.* A plaintiff must provide clear and convincing evidence of fraud upon the court. *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1104 (9th Cir. 2006). Relief from judgment for fraud upon the court is available only to prevent a grave miscarriage of justice. *Sierra Pacific Indus., Inc.*, 862 F.3d at 1167.

The Court determined in its July 12, 2017 Order that "[n]o evidence, much less clear and convincing evidence, has been provided of fraud upon the Court." (Court's July 12, 2017 Order at pp. 7-13, ECF No. 111). Plaintiff has provided no new facts or law that alter the Court's analysis. There is no evidence of an unconscionable plan or scheme aimed at the Court as required under Fed. R. Civ. P. 60(d)(3). Relief under Fed. R. Civ. P. 60(d)(3) is not warranted.

Plaintiff's MOTION TO RECONSIDER ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT OF THE HAWAII RESIDENCY PROGRAMS INCORPORATED (ECF No. 112) is DENIED.

Submitted by: Rachel Sharpe, Courtroom Manager

ORDER DENYING PLAINTIFF'S FILING ENTITLED "MOTION TO SET ASIDE JUDGMENT OF THE HAWAII RESIDENCY PROGRAMS, INCORPORATED, ET AL." (ECF NO. 103) (JULY 12, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

LILLIAN M. JONES,

Plaintiff,

v.

HAWAII RESIDENCY PROGRAMS, INC., UNIVERSITY OF HAWAII; NALEEN ANDRADE, M.D.; COURTENAY MATSU, M.D.; CHRISTIAN DERAUF, M.D.; TERRY LEE, M.D.; IQBAL AHMED, M.D.; SHEILA SCHIEL,

Defendants.

Civ. No. 07-00015 HG-KSC

Plaintiff Lillian M. Jones, proceeding pro se, filed a Motion to Set Aside Judgment. Plaintiff seeks to vacate the Judgment entered by this Court on November 30, 2007.

Plaintiff filed her Motion pursuant to Fed. R. Civ. P. 60(b). Plaintiff's Motion is untimely. There is no factual or legal basis upon which to set aside the

2007 Judgment. There are no extraordinary circumstances that would merit relief as requested.

Plaintiff's MOTION TO SET ASIDE JUDGMENT OF THE HAWAII RESIDENCY PROGRAMS, INCORPORATED, ET AL. (ECF No. 103) is DENIED.

PROCEDURAL HISTORY

On January 12, 2007, Plaintiff filed a Complaint. (ECF No. 1).

On June 8, 2007, Plaintiff filed an Amended Complaint. (ECF No. 40).

On November 29, 2007, the Court issued an ORDER GRANTING DEFENDANT UNIVERSITY OF HAWAII'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT. (ECF No. 83).

On November 30, 2007, the Court issued an ORDER GRANTING DEFENDANTS HAWAII RESIDENCY PROGRAM INC., NALEEN ANDRADE, M.D., COURTENAY MATSU, M.D., AND D. CHRISTIAN DERAUF, M.D.'S MOTIONS FOR SUMMARY JUDGMENT. (ECF No. 84).

On the same date, the Court entered Judgment in favor of the Defendants. (ECF No. 85).

More than nine years later, on April 3, 2017, Plaintiff filed PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT OF THE HAWAII RESIDENCY PROGRAMS, INCORPORATED, ET AL. (ECF No. 103).

On May 12, 2017, Defendant Hawaii Residency Programs, Inc. filed DEFENDANT HAWAII RESIDENCY PROGRAMS, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT

OF THE HAWAII RESIDENCY PROGRAMS INCORPORATED. (ECF No. 107).

On May 15, 2017, Defendant Hawaii Residency Programs, Inc. filed an ERRATA. (ECF No. 108).

On June 5, 2017, Plaintiff filed PLAINTIFF'S REPLY TO DEFENDANT HAWAII RESIDENCY PROGRAMS, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT OF THE HAWAII RESIDENCY PROGRAMS INCORPORATED. (ECF No. 109).

The matter is being decided without a hearing pursuant to District of Hawaii Local Rule 7.2(d).

STANDARD OF REVIEW

Federal Rule of Civil Procedure 60(b) permits relief from final judgments, orders, or proceedings. Rule 60(b) provides six separate bases for relief. The rule provides, as follows:

> 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.

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

A successful motion for reconsideration must accomplish two goals. First, a motion for reconsideration must demonstrate some reason why the Court should reconsider its prior decision. Second, the motion must set forth facts or law of a "strongly convincing" nature to induce the Court to reverse its prior decision. *Jacob v. United States*, 128 F.Supp.2d 638, 641 (D. Haw. 2000).

Mere disagreement with a court's analysis is not a sufficient basis for relief pursuant to Fed. R. Civ. P. 60(b). *Sierra Club v. City and Cnty. of Honolulu*, 486 F.Supp.2d 1185, 1188 (D. Haw. 2007) (citing *Haw. Stevedores, Inc. v. HT & T Co.*, 363 F.Supp.2d 1253, 1269 (D. Haw. 2005)).

The decision to grant relief pursuant to Rule 60(b) is committed to the sound discretion of the court. *Navajo Nation v. Confederated Tribes and Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003).

ANALYSIS

I. Consideration for Pro Se Litigants

The Court recognizes that Plaintiff is proceeding pro se. Pro se pleadings are construed liberally. *Ballisteri v. Pacific Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Pro se litigants are not, however, excused from complying with the Federal Rules of Civil Procedure and the Local Rules for the District Court for the District of Hawaii. *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1107 (9th Cir. 2000). Pro se litigants must comply with the same rules of procedure that govern other litigants. *Motoyama v. Haw. Dep't of Transp.*, 864 F.Supp.2d 965, 975 (D. Haw. 2012).

Only Defendant Hawaii Residency Programs, Inc. has been served with the Motion to Set Aside Judgment. (Pla.'s Certificate of Service attached to her Motion, ECF No. 103-9). Defendant Hawaii Residency Programs, Inc. argues that service was defective, but it waived the deficiency of service for purposes of the Motion. (Def.'s Opp. at p. 5, ECF No. 107).

There is no evidence that any other Defendant was served. Hawaii Residency Programs, Inc. is the only Defendant subject to the Motion.

II. The Rule 60(b)(3) Motion Is Untimely

This matter concerns a Judgment entered in favor of Defendant Hawaii Residency Programs, Inc. on November 30, 2007. (ECF No. 85). Plaintiff had filed an Amended Complaint alleging federal constitutional claims and state law claims against the Defendant

Hawaii Residency Programs, Inc., and other defendants. Plaintiff objected to her dismissal from the Defendant's medical residency program. (ECF No. 40).

On November 30, 2007, the Court issued an Order that granted summary judgment in favor of Defendant Hawaii Residency Programs, Inc. (Nov. 30, 2007 Order Granting Summary Judgment, ECF No. 84). The Court ruled that Defendant Hawaii Residency Programs, Inc. was entitled to summary judgment because Plaintiff was unable to bring federal constitutional claims against it pursuant to 42 U.S.C. § 1983. (*Id.* at p. 13). The Court found that Defendant Hawaii Residency Programs, Inc. was not a state actor. (*Id.*) The Court declined supplemental jurisdiction and dismissed Plaintiff's state law claims without prejudice. (*Id.* at pp. 16-17).

On April 3, 2017, Plaintiff filed the current Motion. The Motion seeks to vacate the Judgment based on "fraud" pursuant to Fed. R. Civ. P. 60(b)(3). (Pla.'s Motion at pp. 1-3, ECF No. 103).

A motion filed pursuant to Rule 60(b)(3), for fraud upon the Court, must be made no later than one year following entry of the challenged judgment. Fed. R. Civ. P. 60(c)(1); *Krakauer v. Indymac Mortg. Srvs.*, Civ. No. 09-00518ACK-BMK, 2013 WL 1181289, *3 (D. Haw. Mar. 19, 2013).

Judgment was entered on November 20, 2007. (ECF No. 85). The Motion was filed more than nine years later, on April 3, 2017. (ECF No. 103). The Motion filed pursuant to Fed. R. Civ. P. 60(b)(3) is untimely. Fed. R. Civ. P. 60(c)(1); *Hollis-Arrington v. Cendant Mortg. Corp.*, 465 Fed. Appx. 675 (9th Cir. 2012).

The Court lacks jurisdiction to consider the untimely Motion filed pursuant to Fed. R. Civ. P. 60(b)(3). *Nevitt v. United States,* 886 F.2d 1187, 1188 (9th Cir. 1989) (a district court lacks jurisdiction to consider an untimely motion to set aside a judgment).

III. The Rule 60(b) Motion to Set Aside Judgment Lacks Merit

Even if the Court had jurisdiction to consider the Rule 60(b)(3) Motion, the Court has not been provided with a legal or factual basis upon which to vacate the Judgment entered on November 30, 2007.

To prevail on a Motion filed pursuant to Fed. R. Civ. P. 60(b)(3), the moving party must prove by clear and convincing evidence that the judgment was obtained through fraud, misrepresentation, or other misconduct and that the conduct complained of prevented the losing party from fully and fairly presenting its side of the case. *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004).

No evidence, much less clear and convincing evidence, has been provided of fraud upon the Court. The Rule 60(b) Motion argues that the Chief Executive Officer of the Hawaii Residency Programs, Inc., Arthur Richard Philpott, misrepresented the relationship between the Defendant and the State of Hawaii in 2007. (Pla.'s Memo. at pp. 6-17, ECF No. 103-1). The Motion specifically claims that Philpott misled the Court into finding that the Defendant Hawaii Residency Programs, Inc. was not a state actor. (*Id.*) There is no evidence to support the claim.

The Motion cites to multiple sections of the Hawaii Revised Statutes and the Internal Revenue Code as a

basis for the theory that the Defendant Hawaii Residency Programs, Inc. should have been treated as a state actor. The argument is not well taken.

None of the sources cited in the Motion support the claim. Mere dissatisfaction with the 2007 Order and Judgment of the Court is not a sufficient basis to set it aside. *White v. Sabatino*, 424 F.Supp.2d 1271, 1274 (D. Haw. 2006); *Haw. Stevedores, Inc. v. HT & T Co.*, 363 F.Supp.2d 1253, 1269 (D. Haw. 2005).

IV. The Six Exhibits Attached to the Motion Do Not Support Vacating the Judgment

There are six exhibits attached to the Rule 60(b)(3) Motion. None of the exhibits provide a basis upon which to set aside the 2007 Judgment.

A. Exhibits 1, 2, and 4 Were Previously Available

Three of the exhibits, Exhibits 1, 2, and 4, were all available at the time of the proceedings that led to the Judgment. Rule 60(b)(3) requires that the evidence of fraud be previously undiscoverable by due diligence before or during the proceedings. *Casey*, 362 F.3d at 1260.

Exhibit 1 was a letter from Daryl Matthews, M.D., Ph.D. to the Board of Medical Examiners on Plaintiff's behalf that was dated September 7, 2006. (2006 Letter attached as Ex. 1 to Pla.'s Motion, ECF No. 103-2).

Exhibit 2 is a copy of a certificate from the University of Hawaii to Plaintiff stating that she satisfactorily performed the duties of pediatrics, psychiatry, and child and adolescent psychiatry from July 1, 2001 to June 30, 2002. (UH Certificate attached as Ex. 2 to Pla.'s Motion, ECF No. 103-3).

Exhibit 4 is a copy of the 2003-2004 Agreement for Appointment to Residency Training entered into between Defendant Hawaii Residency Programs, Inc. and Plaintiff, dated January 2004. (2003-2004 Agreement, attached as Ex. 4 to Pla.'s Motion, ECF No. 103-5).

Exhibits 1, 2, and 4 were all previously available during the 2007 proceedings. Exhibits 1, 2, and 4 do not provide a basis to set aside the Court's November 30, 2007 Judgment.

B. Exhibit 5 Presents No New Facts

Exhibit 5 was submitted in support of the Rule 60(b)(3) Motion. Exhibit 5 is a letter dated March 19, 2010 that was written by Plaintiff and sent to the Accreditation Counsel for Graduate Medical Education. (ACGME Letter dated March 19, 2010, attached as Ex. 5 to Pla.'s Motion, ECF No. 103-6).

Exhibit 5 does not provide the Court with any new facts to support a finding of fraud upon the Court. The letter repeats Plaintiff's theory of the case regarding the Defendant Hawaii Residency Programs, Inc. and its relationship to the University of Hawaii. The 2010 letter does not contain new information or new facts to support there having been a fraud upon the Court in 2007.

C. Exhibits 3 and 6 Do Not Support a Finding of Fraud

Exhibit 3, attached to the Rule 60(b)(3) Motion, consists of a portion of a chart that outlines some of the current affiliations of the University of Hawaii Medical School. (Chart attached as Ex. 3 to Pla.'s Mo-

tion, ECF No. 103-4). It is entitled "JABSOM Graduate Medical Education Organization Struct." The Motion asserts that the chart was obtained from the University of Hawaii Medical School website. (Declaration of Lillian M. Jones at ¶ 5, ECF No. 103-8).

Exhibit 6 is a 2013 Statement of Institutional Commitment to Graduate Medical Education by the University of Hawaii, John A. Burns School of Medicine. (UH Statement signed January 25, 2013, attached as Ex. 6 to Pla.'s Motion, ECF No. 103-7). The Statement of Commitment is signed by University of Hawaii executives and provides that the Medical School agrees to meet or exceed compliance with the Accreditation Council for Graduate Medical Education requirements. (*Id.*)

The Rule 60(b)(3) Motion asserts that Exhibits 3 and 6 demonstrate that the Defendant Hawaii Residency Program, Inc. is no longer a "charity organization" and is now established as a "public charity." (Motion at p 2., ECF No. 103). The Motion claims the Defendant is a state actor and argues there was fraud upon the Court in 2007.

Neither Exhibit 3 nor Exhibit 6 support such a claim. The evidence demonstrates that the Defendant Hawaii Residency Programs, Inc. and the University of Hawaii changed their relationship in 2012. The change in relationship occurred well after Plaintiff was a resident. The evidence of the change in relationship does not support a finding of fraud in 2007.

Defendant Hawaii Residency Programs, Inc. submitted a Declaration from its Chief Executive Officer Arthur Richard Philpott. (Declaration of Arthur Richard Philpott dated May 8, 2017, ("Philpott Decl.") attached

to Def.'s Opp., ECF No. 107-3). Philpott explained that in 2012, five years after the Court issued its Judgment, the Defendant Hawaii Residency Programs, Inc. redefined its relationship with the University of Hawaii. (*Id.* at ¶ 8). Philpott stated, in detail, as follows:

> In Summer 2012, [Defendant Hawaii Residency Programs, Inc. ("HRP")] and the University of Hawaii ("UH") entered into extended negotiations to redefine their relationship, respective responsibilities, and authority in regard to Graduate Medication Education. This ultimately resulted in an Agreement between UH and HRP dated June 21, 2012, and later amended in the First Amended Agreements between UH and HRP dated December 26, 2012.
>
> The result of the 2012 Agreements was that the relationship between HRP and UH was redefined to change the organizational structure of Graduate Medical Education and substitute the University of Hawaii Board of Regents as the Governing Body for Graduate Medical Education as opposed to the HRP Board of Directors. Further, the employment of the Designated Institutional Official (DIO), the individual with the academic authority and responsibility for the Residency Programs, changed from HRP to UH JABSOM. This resulted in UH JABSOM faculty member becoming the DIO on July 1, 2012 and replacing me as the DIO.
>
> In addition, the University pledged to assume ultimate responsibility for the Residency Programs as reflected in the Statement of

> Institutional Commitment to Graduate Medical Education (attached as Plaintiff's Exhibit 6) and executed by the University of Hawaii's and UH JABSOM's most senior officials in January 2013.
>
> Plaintiff's Exhibit 3 did not exist at the time this Court entered its 2007 Order. I know this because the Officer of the DIO and the Advisory Council were created after the change in the DIO in 2012.

(Philpott Decl. at ¶¶ 8-11, ECF No. 107-3).

Philpott stated that despite the changes, the Defendant Hawaii Residency Programs, Inc. remains a Section 501(c)(3) non-profit organization, which is a separate entity from the University of Hawaii Medical School. (*Id.* at ¶ 12)

There is no basis to find that Defendant Hawaii Residency Programs, Inc. engaged in fraud upon the Court in 2007. The changes in the relationship between Defendant and the University of Hawaii did not occur until 2012. There is no evidence that the Court 2007 Judgment was unfairly obtained by fraud. *Bunch v. United States*, 680 F.2d 1271, 1283 (9th Cir. 1982); *DeSaracho v. Custom Food Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir. 2000) (citing *In re M/V Peacock*, 809 F.2d 1403, 1405 (9th Cir. 1987)).

V. There are No Extraordinary Circumstances That Warrant Relief

There is no basis for the Court to set aside the Judgment issued on November 30, 2007. There are not any extraordinary circumstances that would merit relief

pursuant to Fed. R. Civ. P. 60(b)(6). *Latshaw v. Trainer Worthaw & Co.*, 452 F.3d 1097, 1103-04 (9th Cir. 2006).

[. . .]

CONCLUSION

Plaintiff's Filing entitled, "MOTION TO SET ASIDE JUDGMENT OF THE HAWAII RESIDENCY PROGRAMS, INCORPORATED, ET AL." (ECF No. 103) is DENIED.

The Clerk of Court is DIRECTED TO CLOSE THE CASE.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 12, 2017.

/s/ Helen Gillmor
United States District Judge

ORDER GRANTING DEFENDANT UNIVERSITY OF HAWAII'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT (NOVEMBER 30, 2007)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

LILLIAN M. JONES,

Plaintiff,

v.

HAWAII RESIDENCY PROGRAMS, INC., UNIVERSITY OF HAWAII; NALEEN ANDRADE, M.D.; COURTENAY MATSU, M.D.; D. CHRISTIAN DERAUF, M.D.; TERRY LEE, M.D.; IQBAL AHMED, M.D.; SHEILA SCHIEL,

Defendants.

Civ. No. 07-00015 HG BMK

Before: Helen GILLMOR, Chief United States District Judge

Plaintiff, a former employee of the Hawaii Residency Program, commenced this civil rights action pursuant to 42 U.S.C. § 1983 challenging her dismissal from the Triple Board residency program. Plaintiff seeks damages, lost earnings, and an order directing defendants to expunge from her records all derogatory information.

The University of Hawaii moves for dismissal of Plaintiff's Amended Complaint. Plaintiff's claims against the University of Hawaii are barred by the Eleventh Amendment to the United States Constitution.

The Court GRANTS the University's motion to dismiss Plaintiff's Amended Complaint as to the University of Hawaii. The doctrine of sovereign immunity bars suits brought by a private party against a state university absent the State of Hawaii's consent or Congressional abrogation. Pursuant to 28 U.S.C. § 1367(c)(3) the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims.

PROCEDURAL HISTORY

On June 8, 2007, Plaintiff Lillian Jones filed an Amended Complaint, and Exhibits A-C. (Doc. 40.)

On August 29, 2007, the University of Hawaii filed a Motion to Dismiss Plaintiff's Amended Complaint. (Doc. 51.)

On October 11, 2007, Plaintiff filed an Opposition to the motion to dismiss. (Doc. 71.)

On October 23, 2007, Plaintiff filed a document entitled "Plaintiff's Amended Opposition to the University of Hawaii To Dismiss Plaintiff's Amended Complaint" and a Supplementary Exhibit "U" in support of her memoranda in opposition.[1] (Doc. 79 and 80.)

---

[1] Plaintiff's pleading entitled "Amended Opposition to the University of Hawaii To Dismiss Plaintiff's Amended Complaint" and Plaintiff's Supplementary Exhibit "U" were filed without the permission of the Court, in violation of Rule 15 of the Federal Rules of Civil Procedure. Plaintiff does not have leave of the Court to file additional claims, and any additional claims in

This matter came on for hearing on October 29, 2007.

BACKGROUND

The facts in the Amended Complaint are taken as true when the Court considers a motion to dismiss pursuant to Fed. R. Civ. P., Rule 12(b)(6).

Lillian Jones, a former employee of Hawaii Residency Program Inc. ("Residency Program") and participant in the Triple Board Program, brings this civil rights action against the University of Hawaii pursuant to 42 U.S.C. § 1983. (Amended Complaint at ¶1 ("This action arises under the Fourteenth Amendment codified at U.S.C. 42 Section 1983."), Doc. 40.)

Defendant University of Hawaii is a state institution. (Doc. 40 at 2, ¶ 6.) The University of Hawaii was the employer of the individually named Defendants in this action. (Doc. 40 at 4, ¶ 10; 8, ¶ 32, and 10, ¶ 41.)

The underlying amended complaint raises claims under § 1983 and state intentional tort law.

In Count One, entitled "Deprivation of Constitutionally protected property and liberty rights," Plaintiff alleges federal constitutional violations of her property and liberty interests, and violation of her procedural and substantive due process rights arising from her dismissal from the Triple Board Residency Program.

Plaintiff's amended opposition are without legal effect. *Murray v. Archambo*, 132 F.3d 609, 612 (10th Cir. 1998). In the interest of a fair hearing of this matter, the Court has considered the arguments raised and exhibit proffered.

In Count Two, the complaint alleges intentional tort state law claims characterized as defamation, interference with contract, and malicious misrepresentation.

STANDARD OF REVIEW

The Court may dismiss a complaint as a matter of law pursuant to Fed. R. Civ. P., Rule 12(b)(6) where it fails "to state a claim upon which relief can be granted." Rule 8(a)(2) of the Fed. R. Civ. P. requires "a short and plain statement of the claim showing that the pleader is entitled to relief." This complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears "that recovery is very remote and unlikely"); *Kimes v. Stone*, 84 F.3d 1121, 1129 (9th Cir. 1996) ("[a]ll that is required is that the complaint gives 'the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.'") (quoting *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 870 (9th Cir. 1991)).

While the Court's review is generally limited to the contents of the complaint, the Court may consider documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice without converting the motion to dismiss into a motion for summary judgment. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ("Review is limited to the contents of the complaint"); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (the courts may consider certain materials without converting the motion to dismiss into a

motion for summary judgment); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994) (documents whose contents are alleged in a complaint and whose authenticity is not questioned by any party may also be considered).

In evaluating a complaint when considering a Fed. R. Civ. P., Rule 12(b)(6) motion to dismiss, the Court must presume all factual allegations of material fact to be true and draw all reasonable inferences in favor of the non-moving party. *Roe v. City of San Diego*, 356 F.3d 1108, 1111-12 (9th Cir. 2004); *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (the complaint must be liberally construed, giving the plaintiff the benefit of all proper inferences).

Conclusory allegations of law and unwarranted inferences, though, are insufficient to defeat a motion to dismiss. *Pareto*, 139 F.3d at 699; *In re VeriFone Securities Litigation*, 11 F.3d 865, 868 (9th Cir. 1993) (conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert denied*, 454 U.S. 1031 (1981) (the Court does not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations"). Additionally, the Court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations contradicting the exhibits attached to the complaint. *Sprewell*, 266 F.3d at 988.

Although the Federal Rules adopt a flexible pleading policy, to survive a Rule 12(b)(6) motion to dismiss the factual allegations must be sufficient to raise a right to relief above the speculative level. *Bell*

Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007). While detailed factual allegations are not needed, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels, conclusions, or "a formulaic recitation of the elements of a cause of action." *Id.* at 1964. Dismissal is appropriate under Rule 12(b)(6) if the facts alleged do not state a claim to relief that is "plausible on its face." *Id.* at 1974.

ANALYSIS

I. Plaintiff's Federal Constitutional Claims Against the University of Hawaii are Barred By Eleventh Amendment Immunity

The applicability of the doctrine of sovereign immunity must be determined when the Court considers civil rights claims brought against a state entity; that is, whether the State of Hawaii has waived Eleventh Amendment immunity, and whether 42 U.S.C. § 1983 contains language specifically abrogating the States' sovereign immunity.

1. The Doctrine of Sovereign Immunity

The doctrine of sovereign immunity, as set out in the Eleventh Amendment of the United States Constitution, generally bars the federal courts from entertaining suits brought by a private party against a state or its instrumentality absent a state's consent or Congressional abrogation. *See Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). The Eleventh Amendment of the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

The United States Supreme Court has held that the Eleventh Amendment acts to bar suits against a state by citizens of that same state. *Hans v. Louisiana*, 134 U.S. 1 (1890).

In particular, the Eleventh Amendment proscribes money damages against both state school entities and state school officials who are sued in their official capacities. *See Belanger v. Madera Unified School District*, 963 F.2d 248, 251 (9th Cir. 1992).

2. The State of Hawaii Has Not Waived Sovereign Immunity

In order to waive sovereign immunity, a State's consent must be expressed unequivocally. *Pennhurst*, 465 U.S. at 99. The State of Hawaii has not waived its sovereign immunity from suit in federal court. Although the State has waived its immunity for torts of its employees, such actions against the State must be brought in state court. Haw. Rev. Stat. §§ 662-2,-3.[2] In *John Doe v. State of Haw. Dept. of Educ.*, 351

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[2] In relevant part, the Hawaii Legislature provided:

> The purpose of this Act is to expressly restate, reiterate, and declare the intent of the legislature in amending section 661-1 and 662-3, Hawaii Revised Statutes, in 1978 to extend jurisdiction to district courts in tort actions on claims against the State and certain other

F.Supp.2d 998, 1018 (D.Haw. 2004), it was explained that "[a]lthough the State of Hawaii generally waives . . . sovereign immunity as to torts of its employees in the Hawaii State Tort Liability Act . . . this waiver only applies to claims brought in state courts and does not constitute a waiver of the State's Eleventh Amendment immunity."

Plaintiffs' federal constitutional claims against the University of Hawaii, brought pursuant to 42 U.S.C. § 1983, are barred by Eleventh Amendment immunity:

> On and after July 1, 1998, UH could be sued in this court in connection with official actions or omissions only if UH had unequivocally waived its sovereign immunity or Congress had exercised its power under the Fourteenth Amendment to override UH's Eleventh Amendment immunity. . . . the court finds that UH continues to have sovereign immunity.

Mukaida v. Hawaii, 159 F.Supp.2d 1211 (D. Hawaii, 2001) (interpreting HRS 304-6, re-codified as HRS 304A-108).

> claims against the State, was originally and is now to extend jurisdiction for such actions and claims against the State to state district courts, and not to extend jurisdiction for such actions and claims to federal district courts.

Act 135, 1984 Haw. Sess. Laws § 1 at 258.

3. 42 U.S.C. § 1983 Does Not Abrogate Sovereign Immunity

Congress has the power to abrogate the sovereign immunity of the States, pursuant to Section 5 of Amendment XIV of the United States Constitution: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Congress, though, must do so in unmistakably clear language. The United States Supreme Court was clear in *Will*, that Congress had no intent to abrogate the States' Eleventh Amendment immunity when enacting 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65-66 (U.S. Mich. 1989); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 73 (U.S. Fla. 2000) (Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute).

The State of Hawaii has not waived sovereign immunity, and Congress, in passing 42 U.S.C. § 1983, did not abrogate Eleventh Amendment immunity of state governments.

II. Plaintiff Fails to State a Claim Pursuant to 42 U.S.C. § 1983

Even if the doctrine of sovereign immunity was not applicable, Plaintiff has failed to state a claim pursuant to 42 U.S.C. § 1983 because the University of Hawaii is not a "person" within the meaning of the statute, and because § 1983 does not support a claim for vicarious liability.

1. The University of Hawaii Is Not a Person Within the Meaning of 42 U.S.C. § 1983

The University of Hawaii is not a person within the meaning of 42 U.S.C. § 1983. *Howlett v. Rose*, 496 U.S. 356, 376 (1990). The term "person" as used in 42 U.S.C. § 1983 excludes states and state entities. *Id.* ("Since this Court has construed the word "person" in § 1983 to exclude States, neither a federal court nor a state court may entertain a § 1983 action against such a defendant."); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983."). Plaintiff fails to state a § 1983 claim because the University of Hawaii is not a "person" within the meaning of the statute.

2. 42 U.S.C. § 1983 Does Not Support Claims for Vicarious Liability

A claim that an entity is vicariously liable for the actions of an employee does not state a claim pursuant to 42 U.S.C. § 1983. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981). § 1983 does not support a claim based on a *respondeat superior* theory of liability. *Id.* To the extent that Plaintiff's claims rest on this basis, they fail to present a federal claim. (Doc. 40 at ¶¶ 32 and 41.)

Plaintiff can prove no set of facts in support of her claim which would entitle her to relief. The doctrine of sovereign immunity acts as a bar to Plaintiff's federal civil rights claims. Additionally, Plaintiff fails to state a claim pursuant to 42 U.S.C. § 1983. For these reasons, Defendant University of Hawaii's Motion to Dismiss is GRANTED. The federal constitu-

tional claims against the University of Hawaii are DISMISSED WITH PREJUDICE.

III. State Tort Claims

As there are no remaining federal law claims, pursuant to 28 U.S.C. § 1367(c)(3) the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims.[3] Plaintiff's state law claims for intentional torts (Count II) are DISMISSED WITHOUT PREJUDICE.

CONCLUSION

Plaintiff's Amended Complaint fails to state a claim against the University of Hawaii.

For the foregoing reasons,

Defendant's Motion to Dismiss (Doc. 51) is GRANTED.

(1) All federal constitutional claims against the University of Hawaii are DISMISSED WITH PREJUDICE.

(2) Pursuant to 28 U.S.C. § 1367(c)(3) the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims, and these state law claims for intentional torts (Count II) as against the University of Hawaii are DISMISSED WITHOUT PREJUDICE.

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[3] The Court has no diversity jurisdiction over this matter. Plaintiff and the Defendant Doctors are residents of the State of Hawaii. The University of Hawaii is an institution of the State of Hawaii, and the Residency Program is a private non-profit Hawaii corporation. (Amended Complaint at 2, Doc. 40.)

There are no remaining claims against the University of Hawaii.

IT IS SO ORDERED.

DATED: November 29, 2007, Honolulu, Hawaii.

/s/ Helen Gillmor
Chief United States District Judge

ORDER OF THE NINTH CIRCUIT DENYING PETITION FOR REHEARING (OCTOBER 4, 2018)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LILLIAN M. JONES, M.D.,

Plaintiff-Appellant,

v.

HAWAII RESIDENCY PROGRAM, INC.; ET AL.,

Defendants-Appellees.

No. 17-16949

D.C. No. 1:07-cv-00015-HG-KSC
District of Hawaii, Honolulu

Before: RAWLINSON, CLIFTON, and NGUYEN, Circuit Judges.

Jones's petition for panel rehearing (Docket Entry No. 26) is denied.

No further filings will be entertained in this closed case.