NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-2270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KYLE D. KENNARD, Plaintiff-Appellant, v. MEANS INDUSTRIES, INCORPORATED, Defendant-Appellee.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

(Filed Apr. 2, 2019)

Before: KEITH, KETHLEDGE, and THAPAR, Circuit Judges.

Kyle D. Kennard, proceeding pro se, appeals the district court's order denying his motion to set aside its judgment for fraud on the court pursuant to Rule 60(d) of the Federal Rules of Civil Procedure. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

After he had stopped working for Means Industries, Inc. (Means), and redeemed a $220,000 workers' compensation claim, Kennard applied for disability retirement benefits. Initially, the district court affirmed

Means's denial of this claim, but we reversed and remanded, instructing the district court to award benefits to Kennard. *See Kennard v. Means Indus., Inc.*, 555 F. App'x 555 (6th Cir. 2014). The district court awarded benefits to Kennard, but it returned the case to the plan administrator for a determination of the amount of benefits Kennard was due. After applying an offset based on the amount paid for the prior workers' compensation redemption, the plan administrator concluded that Kennard was not entitled to any amount of benefits. After the district court affirmed that decision, Kennard appealed, arguing that the district court violated our mandate by remanding to the plan administrator and that Means had forfeited its offset defense. We rejected both arguments and affirmed. *See Kennard v. Means Indus., Inc.*, 660 F. App'x 333 (6th Cir. 2016).

During the previous proceedings, Kennard was represented by counsel, but in September 2018, he filed a pro se motion asking the district court to set aside its judgment because, according to him, counsel for Means had committed fraud upon the court. The district court denied Kennard's motion as untimely under Rule 60(c). This appeal followed.

We review the denial of a Rule 60 motion for an abuse of discretion, and "[a] court abuses its discretion when it commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *Jones v. Ill. Cent. R.R.*, 617 F.3d 843, 850 (6th Cir. 2010) (quoting *In re Ferro Corp.*

Derivative Litig., 511 F.3d 611, 623 (6th Cir. 2008)). Even if an abuse of discretion occurred, we may nevertheless "affirm a decision of the district court for any reason supported by the record, including on grounds different from those on which the district court relied." *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 786 (6th Cir. 2016).

In his motion, Kennard invoked Rule 60(d), asking the district court to "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3). But the district court denied the motion as untimely, applying the one-year time limit applicable to a Rule 60(b) motion for garden-variety fraud. By doing so, the district court abused its discretion because that limit does not apply to a Rule 60(d) motion claiming a fraud on the court, "which has no time limitation." *Rodriguez v. Honigman Miller Schwartz & Cohn LLP*, 465 F. App'x 504, 508 (6th Cir. 2012).

We nevertheless affirm the denial of Kennard's motion because it is apparent from the record that no fraud on the court occurred. Fraud on the court is conduct "on the part of an officer of the court" that "is directed to the judicial machinery itself"; "is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth"; "is a positive averment or a concealment when one is under a duty to disclose"; and "deceives the court." *Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009). This primarily includes especially egregious conduct and "such flagrant abuses as bribing a judge, employing counsel to exert improper influence on the court, and jury tampering." *Gen. Med., P.C. v.*

Horizon/CMS Health Care Corp., 475 F. App'x 65, 71 (6th Cir. 2012). And generally, "[n]ondisclosure by a party or the party's attorney has not been enough" to support a finding of fraud on the court. 11 Charles Alan Wright et al., Federal Practice and Procedure § 2870, Westlaw (database updated Nov. 2018); *see also* 49 C.J.S. *Judgments* § 400, Westlaw (database updated Mar. 2019) ("[N]ondisclosure to the adverse party or the court of facts pertinent to the matter before it, without more, does not constitute a fraud on the court."); *cf. H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1118 (6th Cir. 1976) ("Allegations of nondisclosure during pretrial discovery are not sufficient to support an action for fraud on the court.").

Put simply, Kennard claims that counsel for Means defrauded the court by failing to disclose that it had discussed the setoff issue with Kennard's attorney during a February 2012 phone conference and had entered into a settlement with former Means employee John Welch and did not apply the setoff in Welch's case. Those failures to disclose are not enough to justify Rule 60(d) relief. And counsel's conduct was not especially egregious, nor is there any indication that counsel for Means had a duty to inform the court about a phone conference in which Kennard's attorney participated or that it had settled a similar case with another former employee.

Means also asks us to sanction Kennard. *See* 28 U.S.C. § 1912; Fed. R. App. P.38. Section 1912 permits us to "adjudge the prevailing party just damages for his delay, and single or double costs" when affirming

the district court's judgment. Similarly, under Rule 38, if we "determine[] that an appeal is frivolous, [we] may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." An appeal is frivolous when "it is obviously without merit *and* is prosecuted for delay, harassment, or other improper purposes." *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 308 (6th Cir. 2008) (quoting *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1212 (6th Cir. 1997)). We decline to impose sanctions on Kennard because there is no evidence that he lodged this appeal for an improper purpose and because, as a pro se litigant, he cannot "be held to the high standards to which members of the bar aspire or should aspire." *WSM, Inc. v. Tenn. Sales Co.*, 709 F.2d 1084, 1088 (6th Cir. 1983).

We **AFFIRM** the district court's denial of Kennard's Rule 60(d) motion, and we DENY Means's request for sanctions.

ENTERED BY ORDER
OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KYLE D. KENNARD,

Plaintiff,

v

MEANS INDUSTRIES, INC.,

Defendant.
/

Case No. 11-15079
Honorable
Thomas L. Ludington

ORDER DENYING PLAINTIFF'S MOTION TO REOPEN CASE

(Filed Oct. 12, 2018)

On November 17, 2011, Plaintiff Kyle Kennard removed this suit from Saginaw County Circuit Court. ECF No. 1. Kennard's complaint sought a judgment that he was entitled to a disability benefit from his employer's Employment Retirement Income Security Act (ERISA) plan. On June 13, 2013, the Court issued an opinion and order finding that the ERISA Plan Administrator's decision to deny benefits was not arbitrary or capricious. ECF No. 61. Kennard appealed, and the Sixth Circuit concluded that the Plan Administrator had failed to show that jobs existed which Kennard could perform given his medical limitations. ECF No. 65. The Sixth Circuit remanded and instructed the Court to "award Kennard disability retirement benefits." *Id.* at 6.

Although Kennard's entitlement to disability retirement benefits was thus established, the amount of the benefit needed to be determined. Accordingly, this Court remanded to the Plan Administrator to calculate the amount of benefits Kennard was entitled to. ECF No. 76. The Plan Administrator concluded that Kennard was not entitled to a benefit because he had received a workers' compensation benefit from Means that was coordinated with his long-term disability benefit. In other words, the already-received workers' compensation benefit was set off or credited against the long-term disability benefit, resulting in a full offset against the ERISA plan benefit. On July 7, 2015, the Court issued an opinion and order confirming that the Plan Administrator's decision to set off the benefits was pursuant to the plan provisions. ECF No. 91.

Kennard appealed, arguing that the Court had ignored the Sixth Circuit's direction to order payment of benefits when it remanded to the Plan Administrator for a calculation of benefits. Kennard also argued that Defendant Means had waived the setoff argument because it did not raise the argument before the Court during the original round of briefing on the motion for summary judgment and because the Sixth Circuit had rejected the setoff argument in the first appeal. In a split decision, the Sixth Circuit affirmed. ECF No. 97. The Sixth Circuit concluded that the Court's decision to remand for a calculation of benefits was consistent with its first order and further held that the setoff defense had not been waived "because Kennard had notice of it and ample opportunity to rebut it." *Id.* at 4.

Kennard sought review by the United States Supreme Court, but his petition for a writ of certiorari was denied on April 25, 2017. ECF No. 103.

On October 5, 2018, Kennard filed a motion to reopen the case. ECF No. 118. He alleges that Defendant Means and its counsel, Masud Labor Law Group ("Masud"), committed fraud in the case's prior court proceedings. He claims that Masud misstated facts to this Court and to the 6th Circuit about his workers' compensation redemption and its offset against the ERISA plan benefit. He further alleges that Masud withheld information from him and filed motions to limit discovery in order to restrict information from entering the proceedings.

Under Federal Rule of Civil Procedure 60(b), a court may grant relief from a final judgment due to "fraud . . . misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b). However, Rule 60(c)(1) requires that the motion be brought "no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). Appellate proceedings do not toll this time. *Young v. Green Oak Twp*, 2009 WL 817615, *1 (E.D. Mich. 2009); *The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1088 (10th Cir. 2005).

The judgment dismissing Kennard's complaint was entered over three years ago on July 7, 2015. ECF No. 92. Kennard appealed the decision, but as stated above, appellate proceedings do not toll the one year

time limit. Thus, Kennard's motion to reopen is untimely under Rule 60(b).

Accordingly, it is **ORDERED** that Plaintiff's motion to reopen case, ECF No. 118, is **DENIED**.

Dated: October 12, 2018

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

No. 18-2270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KYLE D. KENNARD,
Plaintiff-Appellant,
v.
MEANS INDUSTRIES, INCORPORATED,
Defendant-Appellee.

ORDER

(Filed Jun. 3, 2019)

BEFORE: KETHLEDGE and THAPAR, Circuit Judges.*

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

* The third member of the original panel, the Honorable Damon J. Keith, died on April 28, 2019. This order is entered by a quorum of the panel. 28 U.S.C. § 46(d).