APPENDIX **Pages**

E.D.N.Y -Bklyn
04-cv-1846
Chen, J.

United States Court of Appeals

For the

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd of June, two thousand twenty-two.

Present:

Pierre N. Leval,
Denny Chin,
Steven J. Menashi,
Circuit Judges.

James R. Turner,

Plaintiff-Appellant,

v. 22-295

Federal Aviation Administration, et al.,

Defendants-Appellees.

Appendix A
1-A

Appellant, pro se, moves for in forma pauperis status and "to extend time to file claim" in his appeal from a January 2019 order denying his motion to reopen. Upon due consideration, it is hereby ORDERED that, to extend Appellant's motion seeks an extension of time to appeal, the motion is DENIED, and the appeal is DISMISSED for lack of Jurisdiction. *See* 28 U.S.C. 2107; Bowels v. Russell U.S. 205,214 (2007); Eli Lilly & Co., 645 F.3d 347, 356 (2d Cir. 2011). Appellant's motion to proceed in forma pauperis is DENIED as moot.

FOR THE COURT:

Catherine O' Hagan Wolfe, Clerk of Court

/s/

{Seal of Court}

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of July, two thousand twenty-two,

Present: Pierre N. Leval,
Denny Chin,
Steven J. Menashi
Circuit Judges,

James R. Turner,

Plaintiff- Appellant

ORDER

Docket No. 22-295

v.

Federal Aviation Administration, Port Authority of New York and New Jersey, FJC Security Services, Inc.,

Defendants- Appellees.

Appellants James R. Turner filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED that the motion is denied.

For the Court:

Catherine O' Hagan Wolfe,

Clerk of Court

/s/

{Seal of Court}

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

This Summary Order Will Not Be Published In The Federal Reporter And May Not Be Cited As Precedential Authority To This Or Any Other Court, But May Be Called To The Attention Of This Or Any Other Court In A Subsequent Stage Of This Case, In A Related Case, Or In Any Case For Purposes Of Collateral Estoppel Or Res Judicata.

At a stated term of the United States Court of Appeals for Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 7th day of March, two thousand and six.

PRESENT:

HON. SONIA SOTOMAYOR,
HON. REENA RAGGI,
Circuit Judges,
HON. MIRIAM GOLDMAN CEDARBAUM,
*District Judge**

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*The Honorable Miriam Goldman Cedarbaum, United States District Judge for the Southern District of New York, sitting by designation.

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JAMES R. TURNER,

Plaintiff-Appellant,

v. No. 05-2413-cv

FEDERAL AVIATION ADMINISTRATION, PORT AUTHORITY OF NEW YORK AND NEW JERSEY, F.J.C SECURITY SERVICES, INC.,

Defendants-Appellees.

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APPEARING FOR APPELLANT: James R. Turner, *pro se*, Brooklyn, New York

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgement of the United States District Court for the Eastern District of New York (Trager, J.) is AFFIRMED.

James R. Turner appeals from a judgment of the district court dismissing his Federal Tort Claims Act, 28 U.S.C. 1346, 2671 *et seq.* ("FTCA"), complaint pursuant to 28 U.S.C. 1915(e)(2)(B), and from an order denying Turner's Fed. R. Civ. P. 59(e) motion to reconsider. We assume the parties' familiarity with the facts of this case, its relevant procedural history, and the issues on appeal.

This Court reviews a district court's *sua sponte* dismissal of a complaint pursuant to 28 U.S.C. 1915(e) *de novo. Giano v. Goord, 250 F.3d 146*,149-50(2d Cir.2001)." A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Todd v. Exxon Corp.*, 275 F.3d 191, 197-98 (2d Cir 2001) (citation and internal quotation marks omitted). A district court's denial of a party's motion to alter or amend judgment under Rule 59(e) is reviewed for an abuse of discretion. *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105

(2d Cir. 2004).

The district court did not err in dismissing Turner's complaint as untimely. Turner did not file suit against the Port Authority within one year after the accrual of his claim, nor did he allege that he had served a sixty-day notice of claim on the Port Authority, as required by New York law. *See* N.Y Unconsol. Law 7107 (Mc Kinney 2000); *Yonkers Contracting Co., Inc. v. Port Auth. Trans-Hudson Corp.*, 93 N.Y.2d 375,378-79, 690 N.Y.2d 512, 515 (1999) (holding that the one-year limitation period is a condition precedent to suit, which cannot be toll under New York law). Moreover, it was not error for the district court to decline to toll the two-year statute of limitations period under the FTCA. Neither Turner's response to the district court's order to show cause nor his supplement medical documentation demonstrated an adequate justification for tolling the limitation period, particularly because the record indicated that Turner had pursued other legal claims during the time period in

question. *See Boos v. Runyon,* 201 F.3d 178, 185 (2d Cir. 2000) (a party seeking equitable tolling on grounds of mental disability must provide "a particularized description of how [his] condition adversely affected [his] capacity to function generally or in relationship to the pursuit of [his] rights"). Thus, the district court lacked subject matter jurisdiction over Turner's FTCA claim and properly dismissed it. *See Johnson v. Smithsonian Inst.,* 189 F.3d 180, 189 (2d Cir. 1999).

Finally, we find no abuse of discretion in the denial of Turner's Rule 59(e) motion because the district court did not commit error or manifest injustice in concluding that equitable tolling was not appropriate in this case. *See Wood v. FBI,* 432 F.3d 78, 85 n.4 (2d Cir. 2005).

For these reasons, the district court's judgment is AFFIRMED.

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By: /s/_____

A TRUE COPY

Thomas W. Asreen, Acting Clerk

by /s/_____

DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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JAMES R. TURNER III

Plaintiff, Civil Action No

-against- CV-04-1846 (DGT)

UNITED STATES; PORT AUTHORITY OF

NEW YORK AND NEW JERSEY, ORDER AND

Defendants CIVIL JUDGMENT

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Trager, J.

By order dated June 2, 2004, the Court directed plaintiff to show cause why this complaint should not be dismissed for lack of subject matter jurisdiction. After granting plaintiff's two requests for extensions, plaintiff filed an affirmation on August 26, 2004. In large part, the affirmation is not responsive to the Court's order.

To the extent plaintiff admits that he filed a late claim due to psychiatric illness, this is insufficient to equitably toll the limitation periods. "[T]he question of whether a person is sufficiently mentally disabled to justify tolling of a limitation period is under the law of this Circuit, highly case-specific." Boos v. Runyon, 201 F.3d 178, 184 (2d Cir. 2000). The burden lies with the party seeking tolling to provide that it is appropriate. Columbo v. United States Postal Service, 293 F.Supp.2d 219, 233 (E.D.N.Y. 2003) (citing cases). Because "mental illnesses are as varied as physical illnesses...conclusory and vague claim, without a particularized description... is manifestly insufficient to justify any further inquiry into tolling. "Boos. 201 F.3d at 185. The Court finds that tolling is unwarranted because plaintiff provides no description of his psychiatric illness, the duration of his psychiatric illness, or how such illness affected his ability to comply with the statutory deadlines set forth in the Court's Order.

ORDERED, ADJUDGMENT AND DECREED:

That the complaint is hereby dismissed pursuant to 28 U.S.C. 1915(e)(2)(B). The Court certifies pursuant to 28 U.S.C. 1915(a)(3) that any appeal would not be taken in good faith and therefore *in forma pauperis* status is denied for purpose of an appeal.

Dated: Brooklyn, New York

September 9, 2004

/s/_____

David G. Trager

United States District Judge

THIS DOCUMENT WAS ENTERED ON THE DOCKET

ON _____.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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JAMES R. TURNER III,

Plaintiff,

-against-

NOT FOR PUBLICATION

MEMORANDUM & ORDER
04-CV-1846 (PKC) (LB)

FEDERAL AVIATION ADMINISTRATION;

PORT AUTHORITY OF NEW YORK & NEW

JERESY; F.J.C. SECURITY SERVICES, INC.,

Defendants.

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PAMELA K. CHEN, United States District Judge:

On December 27, 2018, Plaintiff James R. Turner III ("Plaintiff") filed a motion to reopen the above captioned case. (Dkt.26.) For the reasons set forth below, plaintiff's motion is denied.

BACKGROUND

On April 29, 2004, Plaintiff filed this action against the Federal Aviation Administration ("FAA"), the Port Authority of New York and New Jersey ("Port Authority"), and F.J.C. Security Systems ("FJC") for personal injuries pursuant to the Federal Tort Claims Act("FTCA"). (Dkt. 1.) Plaintiff alleged that, during the course of his employment as a security guard for FJC in a locker room at John F. Kenney Airport, he was attacked on January 19. 1997 by an assailant who was able to obtain access to a restricted area. (*Id.* At ECF[1] 4-5.) Plaintiff also alleged that he filed a police report with the Port Authority Police on January 22, 1997. (*Id.* at ECF 5.) Two days later, Plaintiff was terminated. (*Id.)* Plaintiff received an award of $31,419,47 from the Crime Victims Board on July 9, 2002. (*Id* at ECF 9.) Plaintiff filed an administrative FTCA claim with the FAA on January 17,

[1] Citation to "ECF" refer to the pagination generated by the Court's electronic docketing system and not the document's internal pagination.

2003. (*Id* at ECF 7.) This claim was denied on May 30,2003. (*Id.)*

By Memorandum and Order dated June 2, 2004, the Honorable David G. Trager found that Plaintiff's personal injury claim against the Port Authority was time-barred, and that the FTCA claim was also time-barred and filed against the wrong parties.[2] (Dkt.3.) Judge Trager, however, directed that the United States be substituted as a defendant in the FTCA action and granted Plaintiff 30 days to show cause why his complaint should not be dismissed as untimely against both the Port Authority and the United States. (*Id.* at ECF 23.) Plaintiff filed an affirmation alleging that he filed his claims late because of psychiatric illness. (Dkt. 9., at ECF 34.) By Order dated September 8, 2004, the Court concluded that Plaintiff affirmation was "not responsive" because he failed to explain how his psychiatric illness

[2] A tort claim against the United States must be filed within two years from the date the claim arose and the federal action must be filed within six months from the date the federal agency issues a final decision. 28 U.S.C. 3401(b)

warranted equitable tolling of the limitations periods. (Dkt. 11., at ECF 42.) Judgment dismissing Plaintiff's complaint was entered on September 16, 2004. (*Id.* at ECF 43.)

On September 27, 2004, Plaintiff filed a motion for reconsideration of the September 9, 2004 Order. (Dkt. 12.) Plaintiff then submitted supporting papers on November 10, 2004 and a "motion for expedition" on February 1, 2005. (Dkt. 13; Dkt. 14.) By Order dated February 17, 2005, Judge Trager denied Plaintiff's motion for reconsideration. (Dkt. 15.) Although Plaintiff's supporting papers showed that he began receiving mental treatment in October 1998, this treatment began after the limitations period on the claim against the Port Authority had already expired on January 19, 1998, and nothing in the Plaintiff's papers showed that he was prevented from filing a timely claim before that date. (Dkt. 15, at ECF 52.) with respect to the FTCA claim, Judge Trager acknowledged that Plaintiff had submitted a letter from a doctor explain how he had trouble complying with

deadlines because of his illness, but Plaintiff's submission did not provide the "particularized description" of Plaintiff's mental illness that would be sufficient to justify tolling period for the FTCA claim. (*Id.*)

On March 7, 2006, the United States Court of Appeals for the Second Circuit affirmed Judge Trager's decision. *Turner v, Fed. Aviation Admin.*, 169 F. App'x 641 (Cir. 2006). The Second Circuit, noting that the one-year limitation period for a claim against the Port Authority is a condition precedent to suit that cannot be tolled under New York Law, held that Plaintiff's claim against the Port Authority was untimely because he had failed to file suit within one year and also failed to file a timely notice of claim with the Port Authority. *Id.* at 642 (citing *YONKERS Contracting Co., Inc Port Auth. Trans-Hudson Corp.*, 712 N.E.2d 678, 680 (1999)). With respect to the FTCA claim, the Second Circuit affirmed Judge Trager's decision to decline to toll the two-year statute of limitations. *Id.* In its summary order, the Second Circuit

explained that Plaintiff's supporting papers did not demonstrate "an adequate justification for tolling the limitation period, particularly because the record indicated that [plaintiff] has pursed other legal claims during the time the period in question." *Id.* It also found no abuse of discretion in Judge Trager's denial of Plaintiff's reconsideration motion. *Id.*

On February 13, 2009, Plaintiff filed a second motion to "vacate [and] reinstate." (Dkt. 18.) By Order dated September 30, 2009, Judge Trager denied Plaintiff's motion, finding that it was untimely under Rules 60(b)(1) and (2) of the Federal Rules of Civil Procedure because the motion was filed over one year after the entry of judgment and Plaintiff had failed to show extraordinary circumstances that warranted relief under Rule 60(b)(6). (Dkt. 21, at ECF 144-146.) He further concluded that Plaintiff had failed to provide any valid basis for vacating the Court's decision. (*Id* at ECF 146-47.)

The incident that gave rise to Plaintiff claim occurred more than 29 years ago, and over 14 years have passed since Plaintiff filed his complaint. Nevertheless, Plaintiff now submits a third motion seeking to reopen his case. (Dkt. 26.) The Court liberally construes Plaintiff motion seeking to reopen this case as a motion for relief from judgment under Federal Rules of Civil Procedure 60(b).

DISCUSSION

Federal Rule of Civil Procedure 60(b) allows a court to relieve a party from a final judgment based on:

> (1)mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have 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 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) All motions under Rule 60 (b) must be made within a reasonable time, and motions under subsections (1), (2), (3), (4), and (5) may be no later than one year after the entry of judgment. *Stevens v. Miller,* 676 F.3d 62, 67 (2d Cir. 2012). Rule 60(b) is "a mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional circumstances." *Ruotolo v. City of New York,* 514 F.3d 184, 181 (2d Cir. 2008) (internal quotation marks omitted). Under any circumstance, a Rule 60(b) motion may be properly denied where it seeks only to relitigate issues already decided. *See United Airlines, Inc. v. Brien,* 588 F.3d 158, 176 (2d Cir. 2009) (warning that a Rule

60 motion "may not be used as a substitute for appeal' and that a claim based on legal error alone is "inadequate."" (quoting *Matarese v. LeFevre,* 801 F2d 98, 107 (2d Cir. 1986); *Zerman v. Jacobs,* 751 F.2d 82, 85 (2d Cir. 1985) (dismissing as frivolous an appeal from the denial of Rule 60(b) motion, where the appellant "continue[d] to relitigate the same issue that the district court [previously] decided" and the Second Circuit affirmed).

Plaintiff moves to reopen this case by alleging that he was "mentally unstable at the time of filing because he was suffering from an "Unspecified Trauma and Stressor-Related Disorder." (Dkt. 26, at ECF 157.) In doing so , Plaintiff repeats the same claims he previously raised in his complaint and subsequent motions; indeed, most of the exhibits accompanying Plaintiff present motion are the same document introduced to supplement his pervious filings. To the extent Plaintiff includes new documents, these document do not demonstrate extraordinary circumstances

warranting relief from the judgment of dismissal under Rule 69(b). Rather, they appear to pertain to treatment Plaintiff received since Judge Trager denied Plaintiff's last Rule 60 (b) motion in 2009. (*See, e.g.* Dkt. 26-4.)

In fact, Plaintiff's latest motion suffers from the same deficiencies that undermined his prior motion seeking similar relief. The motion is untimely to the extent he seeks to supplement the record with new evidence. The one-year bar for new evidence under 60(b)(2) is "absolute." *Warre v. Garvin,* 219 F.3d 111, 114(2d Cir. 2000). Plaintiff's motion was filed more than 14 years after judgment was entered on September 16, 2004 dismissing the complaint. Such an extraordinary delay is unreasonable. *CF. Williams v. Lutheran Medical Center,* No. 12- CV-1881)(SJ)(VVP) 2018 WL 3235536 (E.D.N.Y. 2018) (finding a four-year delay was "not reasonable"); *Johannes Baumgartner Wirstschafts-Und Vermogensberatung GmbH* V. Salzman, 969 F. Supp. 2d 278, 293 9E.D.N.Y. 2013) (finding a 22-month delay

unreasonable). Moreover, to the extent the motion could be construed as brought pursuant to Rule 60(b)(6), which does not have a one-year limitation period, it was not filed within a reasonable time and the reason for the extensive delay were already considered in the denial of Plaintiff's prior motions.

Even if this Court found Plaintiff's motion to be filed within a reasonable time, Plaintiff has not identified any new exceptional circumstances that would warrant granting a Rule 60(b)(6(motion. *Miller v. Norton,* No. 04-CV3223 (CBA), 2008 WL 1902233, at *6 (E.D.N.Y. 2008), *aff'd sub nom. Miller v. Kempthorne, 375 F. App'x 384 (2d Cir. 2009). Judge Trager already considered Plaintiff allegations of psychiatric illness and found that this condition did not prevent Plaintiff from pursuing his legal claims.* (See Dkt. 21 at ECF 146-47.) Even liberally construing Plaintiff's motion to raise the strongest argument that it suggests, the Court finds that Plaintiff simply recycles argument repeatedly

rejected by Judge Trager. Thus, Plaintiff fails to show he is entitled to relief from the judgment dismissing his complaint.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for relief from judgment is denied. The Court certifies pursuant to 28 U.S.C. 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *Coppedge V. United States,* 369 U.S. 438, 444-45 (1962).

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: January 22, 2019
Brooklyn, New York