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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
OCT 20 2023
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ENTREPRENEUR MEDIA, INC., a
California Corporation,
Plaintiff-Appellee,

v.

SCOTT SMITH,
Defendant-Appellant.

No. 22-55459
D.C. No. 2:98-cv-03607-PA-PLA
Central District of California, Los Angeles

ORDER

Before: W. FLETCHER, CALLAHAN, and BENNETT,
Circuit Judges.

The motion for an extension of time to respond
to the motion to dismiss (Docket Entry No. 38) is
granted. The response has been filed.

A review of the record, the opening brief, and

the parties' briefing on the motion to dismiss demonstrates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating summary affirmance standard). We treat appellee's motion to dismiss (Docket Entry No. 35) as a motion for summary affirmance and grant the motion. The judgment is summarily affirmed.

All other pending motions are denied as moot.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 98-3607 PA (PLAx)

Date April 7, 2022

Title Entrepreneur Media, Inc. v. Scott Smith

Present: The Honorable PERCY ANDERSON,
UNITED STATES DISTRICT JUDGE

Kamilla Sali-Suleyman
Deputy Clerk

Not Reported
Court Reporter

N/A
Tape No.

Attorneys Present for Plaintiffs:
None

Attorneys Present for Defendants:
None

Proceedings: IN CHAMBERS — COURT ORDER

Before the Court is a Motion to Vacate Renewal of Judgment, or, Alternatively, Correct the Judgment (“Motion to Vacate”) (Docket No. 436) filed by defendant Scott Smith (“Defendant”), who is appearing pro se. The Court previously vacated the hearing date. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.

Plaintiff Entrepreneur Media Inc. (“Plaintiff”) commenced this action for trademark infringement in May 1998. Plaintiff obtained a Judgment against Defendant in July 2003 (the “2003 Judgment”). The 2003 Judgment was affirmed by the Ninth Circuit in July 2004. In February 2012, Plaintiff obtained a Renewal of Judgment by Clerk (the “2012 Renewed Judgment”). On January 20, 2022, Plaintiff again applied for Renewal of Judgment, which the Clerk issued on January 21, 2022 (the “2022 Renewed Judgment”). The 2022 Renewed Judgment included the original Judgment amount from the 2003 Judgment plus post-judgment interest calculated when the original Judgment was renewed in 2012 (which came to \$1,685,260.44) and post-judgment interest of \$1,681,105.04, for a total Renewed Judgment of \$3,366,365.48. In seeking post-judgment interest in the amount of \$1,681,105.04, Plaintiff erroneously relied on California Code of Civil Procedure section 685.010’s 10% post-judgment interest rate rather than the federal post-judgment interest rate established by 28 U.S.C. § 1961.

Defendant filed his Motion to Vacate on

February 24, 2022. In his Motion to Vacate, Defendant contends that the Judgment should be vacated in its entirety “based on previous and ongoing misconduct and fraud” and alternatively seeks to correct the 2022 Renewed Judgment to reflect the interest accrued at the lower federal post-judgment interest rate. If the federal interest rate had been used in the 2022 Renewed Judgment, the total post-judgment interest from February 2, 2012 through March 24, 2022 would be \$22,354.45 instead of the \$1,681,105.04 initially requested by Plaintiff, and the total 2022 Renewed Judgment would be \$1,863,593.36.

This matter was reassigned to this Court after Defendant filed his Motion to Vacate due to the unavailability of the previously-assigned judicial officer. A review of the docket and the parties’ papers in support of and in opposition to the Motion to Vacate reveals that the parties have been involved in multiple disputes for more than 20 years in multiple state and federal courts. Defendant’s Motion, in fact, seeks to use that history of litigation and the apparent admonishments issued by some of the courts overseeing those other disputes as a basis for vacating the original 2003 Judgment in this action.

After Plaintiff filed its Opposition to the Motion to Vacate, Defendant filed an Ex Parte Application for Enlargement of Time to File Reply (Docket No. 449). According to Defendant, he needed additional time to obtain a transcript of the conference of counsel that the Court ordered the parties to participate in after Defendant filed his Motion to Vacate, he is searching for counsel to assist him in briefing the Motion to

Vacate, and he anticipates filing a Motion to Disqualify Plaintiff's Counsel, which he would like decided prior to the Court's consideration of his Motion to Vacate. However, before the Court could issue a ruling on Defendant's Ex Parte Application, Defendant filed his Reply. The Court therefore concludes that this matter is fully briefed and that Defendant's Ex Parte Application is moot. Even if it were not moot, the Court concludes that none of the reasons Defendant relies upon for an extension of time to file a Reply warrant an additional continuance. This matter is adequately briefed for the Court to assess the merits of the Motion to Vacate, and neither the participation of counsel, should Defendant obtain one, nor a transcript of the conference of counsel that occurred after Defendant filed his Motion to Vacate, would alter the Court's analysis of the pending Motion to Vacate. Additionally, the Court notes that Defendant previously filed a Motion to Disqualify Plaintiff's Counsel in an action pending in Sacramento Superior Court. That Court denied both the Motion to Disqualify and Defendant's Motion for Reconsideration.¹ At a minimum, because the grounds

¹ Plaintiff requested that the Court take judicial notice of the Superior Court's order denying Defendant's Motion for Reconsideration. Defendant filed an objection to Plaintiff's Request for Judicial Notice, and a Request for Judicial Notice of his own. The Court takes judicial notice of only the fact of the filing of Defendant's Motion to Disqualify and Reconsider and the Superior Court's denial of those Motions, but not of any of the facts in those Motions or the Superior Court's Order. *See Fed. R. Evid. 201.* None of the other facts contained in the parties' Requests for Judicial Notice are necessary for the Court's resolution of the Motion to Vacate.

on which Defendant seeks to disqualify Plaintiff's counsel apparently existed for several years without Defendant moving to disqualify Plaintiff's counsel in this action, and do not go to the merits of the 2003 Judgment, the Court will not delay its consideration of the Motion to Vacate.

Because Plaintiff's Application to Renew the Judgment was filed in aid of its enforcement of the original 2003 Judgment, these proceedings implicate Federal Rule of Civil Procedure 69(a)(1), which provides: "The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Fed. R. Civ. P. 69(a)(1); *see also In re Levander*, 180 F.3d 1114, 1121 (9th Cir. 1999) (noting that Rule 69(a) "permits judgment creditors to use any execution method consistent with the practice and procedure of the state in which the district court sits."). A request for the renewal of a judgment is not one for independent relief; it is "an automatic, ministerial act accomplished by the clerk of the court." *Goldman v. Simpson*, 160 Cal. App. 4th 255, 262, 72 Cal. Rptr. 3d 729, 733 (2008); *see also* Cal. Code Civ. P. § 683.150 ("Upon the filing of the application [for renewal of judgment], the court clerk shall enter the renewal of the judgment in the court records.").

Defendant's Motion to Vacate seeks relief pursuant to both California Code of Civil Procedure section 683.170 and Federal Rule of Civil Procedure 60(b). California Code of Civil Procedure section

683.170(a) provides: “The renewal of a judgment pursuant to this article may be vacated on any ground that would be a defense to an action on the judgment, including the ground that the amount of the renewed judgment as entered pursuant to this article is incorrect....” Cal. Civ. Proc. Code § 683.170. Although Federal Rule of Civil Procedure 69(a) adopts state law procedures for certain aspects of proceedings in execution of judgments, the Court concludes that the substantive law supplied by Federal Rule of Civil Procedure 60(b) related to relief from judgments, and not the California Code of Civil Procedure, applies to Defendant’s Motion to Vacate.² Federal Rule of Civil Procedure 60(b) states:

- (b) **Grounds for Relief from a Final Judgment, Order, or Proceeding.** 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

² The Court’s resolution of the Motion to Vacate would be the same were it to apply California Code of Civil Procedure section 683.170(a).

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).

In his Motion to Vacate, Defendant relies primarily on Rule 60(b)(5) to support his efforts to vacate the Judgment. Defendant's Reply adds arguments concerning Rules 60(b)(3), 60(b)(4), and 60(b)(6). Rule 60(c) establishes the timing requirements for a Rule 60(b) motion, and requires that such a motion "must be made within a reasonable time – and for reasons (1), (2), and (3) 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); *see also*

Lyon v. Agusta S.P.A., 252 F.3d 1078, 1088 (9th Cir. 2001). What constitutes “reasonable time” depends upon the facts of each case, “taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties.” *Lemoge v. United States*, 587 F.3d 1188, 1196-97 (9th Cir. 2009) (quoting Fed. R. Civ. P. 60(c)).

Here, whether based on Plaintiff’s alleged fraud related to Plaintiff’s now-deceased founder’s criminal past – information of which was published in newspapers more than a decade before the filing of this action in 1998 – or any of Rule 60(b)’s other provisions, Defendant’s Motion to Vacate is untimely as to the 2003 Judgment and the portions of the 2022 Renewed Judgment that are based on the 2003 Judgment. The simple fact is that the information on which Defendant relies in his Motion to Vacate was available to Defendant for years and in some instances decades. Plaintiff’s 2022 Application to Renew Judgment does not allow Defendant to raise what would otherwise be untimely grounds to vacate the 2003 Judgment. Nor has Defendant established either the diligence or inability to discover the information on which he relies earlier. As a result, the Court concludes that, except as to the amount of post-judgment interest sought in the 2022 Renewed Judgment, Defendant has not sought relief from the 2003 Judgment (or 2012 Renewed Judgment) “within a reasonable time” for purposes of Rule 60(c).

In addition to being untimely, Defendant’s Motion to Vacate does not satisfy the substantive

requirements of Rule 60(b). Whether Defendant's allegations concerning fraud are considered brought under Rule 60(b)(3) or Rule 60(d)(3), none of the evidence or argument relied upon by Defendant satisfy the "high burden" on a party seeking relief from judgment based on fraud on the court. *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1104 (9th Cir. 2006). "[I]n order to provide grounds for relief, the fraud must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Id.* (internal quotation marks and citations omitted). "Fraud on the court" is read narrowly to mean "only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Jones v. Wainwright*, 333 F. App'x 317, 318 (9th Cir. 2009). Defendant's allegations of fraud are untimely and substantively inadequate to justify relief from the 2003 Judgment.

Rule 60(b)(4) "applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010). The Supreme Court has explained that "[a] judgment is not void . . . simply because it is or may have been erroneous" and that "a motion under Rule 60(b)(4) is not a substitute for a timely appeal." *Id.* at 270-71, 130 S. Ct. at 1377. None of the alleged grounds asserted by Defendant fall within the categories of

error contemplated by Rule 60(b)(4). Defendant does not, and cannot reasonably, contend that he was deprived of notice or an opportunity to be heard prior to the issuance of the 2003 Judgment.

Rule 60(b)(5) is typically used to modify consent decrees or injunctions rather than to relieve a party from a monetary judgment. *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383, 112 S. Ct. 748, 760, 116 L. Ed. 2d 867 (1992) (“[A] party seeking modification . . . bears the burden of establishing that a significant change in circumstances warrants revision If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstances.”); *System Fed’n No. 91 v. Wright*, 364 U.S. 642, 647-48, 81 S. Ct. 368, 371, 5 L. Ed. 2d 349 (1961) (“There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief. Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided. . . . A balance must thus be struck between the policies of res judicata and the right of the court to apply

modified measures to changed circumstances.”).

Here, Defendant has not established changed circumstances that would justify relief from the 2003 Judgment. The litigation history between the parties that has occurred in other actions litigated since the issuance of the 2003 Judgment does not provide a sufficient basis for relief from the 2003 Judgment. It is for the courts presiding over the parties in those other actions to police potential litigation abuses occurring in those actions and none of what Defendant complains of that has occurred in this action since the issuance of the 2003 Judgment would justify vacating the 2003 Judgment. To hold otherwise would trivialize the finality of that 2003 Judgment.

Finally, a movant seeking relief under Rule 60(b)(6) must show “extraordinary circumstances” justifying the reopening of a final judgment.” *Gonzalez v. Crosby*, 545 U.S. 524, 535, 125 S. Ct. 2641, 2649, 162 L. Ed. 2d 480 (2005). The Ninth Circuit has stated that “Rule 60(b)(6) relief normally will not be granted unless the moving party is able to show both injury and that circumstances beyond its control prevented timely action to protect its interests.” *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Additionally, Rule 60(b)(6) must be based on grounds other than those encompassed by Rules 60(b)(1) through 60(b)(5). *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863, 108 S. Ct. 2194, 2204, 100 L. Ed. 2d 855 (1988) (stating that “Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from a final judgment . . . provided that the motion . . . is not premised on one of the grounds

for relief enumerated in clauses (b)(1) through (b)(5)"). Defendant fails to establish "exceptional circumstances" to meet his burden to establish entitlement to relief from the 2003 Judgment.

Defendant alternatively seeks to modify the 2022 Renewed Judgment to reflect post-judgment interest at the rate established by 28 U.S.C. § 1961 rather than at California's post-judgment interest rate. In its Opposition, Plaintiff does not dispute that it initially sought post-judgment interest at the wrong rate and has submitted a proposed Amended Renewed Judgment with the correct post-judgment interest rate. Defendant's challenge to the post-judgment interest contained in the 2022 Renewed Judgment is timely under Rule 60(b) and otherwise meritorious. The Court therefore grants Defendant's Motion to Vacate only to the extent of the amount of post-judgment interest.

For all of the foregoing reasons, the Court grants in part and denies in part Defendant's Motion to Vacate. The Court orders the Clerk to issue the Amended Renewed Judgment submitted by Plaintiff (Docket No. 446, Att. 1). The Court denies Defendant's Motion to Vacate in all other respects and denies Defendant's Ex Parte Application for Enlargement of Time to File Reply.

IT IS SO ORDERED.

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fed. R. Civ. P. 60 (b) – (d) provides:

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. 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.

(c) TIMING AND EFFECT OF THE MOTION.
(1)Timing. A motion under Rule 60(b) must be made within a reasonable time-and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.(2)Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to: (1) entertain an independent action to relieve a party from a judgment, order, or proceeding; (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or (3) set aside a judgment for fraud on the court.

Fed. R. Civ. P. 69 (a) provides:

(a) IN GENERAL.(1)Money Judgment; Applicable Procedure. A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution-and in proceedings supplementary to and in aid of judgment or execution-must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

Cal. Code Civ. Proc. § 683.170 (a)-(c) provides:

(a) The renewal of a judgment pursuant to this article may be vacated on any ground that would be a defense

to an action on the judgment, including the ground that the amount of the renewed judgment as entered pursuant to this article is incorrect, and shall be vacated if the application for renewal was filed within five years from the time the judgment was previously renewed under this article.(b) Not later than 60 days after service of the notice of renewal pursuant to Section 683.160, the judgment debtor may apply by noticed motion under this section for an order of the court vacating the renewal of the judgment. The notice of motion shall be served on the judgment creditor. Service shall be made personally or by mail. (c) Upon the hearing of the motion, the renewal may be ordered vacated upon any ground provided in subdivision (a), and another and different renewal may be entered, including, but not limited to, the renewal of the judgment in a different amount if the decision of the court is that the judgment creditor is entitled to renewal in a different amount.