UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DANIEL HAMPTON,

Plaintiff,

- against-

DENIS MCDONOUGH, in his Official Capacity as Secretary of the United States Department of Veterans Affairs,

Defendant.
----------X

JUDGMENT

17-cv-05711 (JMW)

WICKS, Magistrate Judge:

The court has ordered that:

(1) plaintiff Daniel Hampton recover nothing, (2) the action be dismissed on the merits, and (3) that no costs be awarded to either party.

This action was tried by a jury with Judge Wicks presiding and the jury has rendered its verdict.

Dated: February 1, 2023
Central Islip, New York

Brenna B. Mahoney
Clerk of the Court

By: /s/ Doreen Flanagan
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DANIEL HAMPTON,

Plaintiff,

-against-

DENIS MCDONOUGH, *in his Official Capacity as Secretary of the United States Department of Veterans Affairs*,

Defendant.

----------X

MEMORANDUM AND ORDER

17-CV-5711 (JMW)

A P P E A R A N C E S:

Daniel Hampton
25 Belford Avenue
Bayshore, NY 11706
Pro Se Plaintiff

Megan Jeanette Freismuth, Esq.
Thomas Russell Price, Esq.
Vincent Lipari, Esq.
Assistant United States Attorneys
United States Attorney's Office
Eastern District of New York
610 Federal Plaza
Central Islip, New York 11722
Attorney for Defendant

WICKS, Magistrate Judge:

Plaintiff Daniel Hampton is a former employee of the Veteran Affairs Medical Center in Northport ("VAMC"), New York. Plaintiff commenced this case against Defendant Denis

McDonough,[1] in his official capacity as the Secretary of the United States Department of Veterans Affairs, alleging *quid pro quo* sexual harassment, hostile work environment, atmosphere of adverse actions, and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 ("Title VII"). (DE 1.) Following summary judgment motion practice, only Plaintiff's retaliation claim remained in the case to be tried. (DE 51.) As relevant to that claim, Plaintiff alleged that the VAMC retaliated against him for filing an Equal Employment Opportunity ("EEO") complaint against his supervisor on November 16, 2015 by terminating his employment on April 16, 2016.

The undersigned presided over a three-day jury trial addressing the sole remaining claim this case, namely, retaliation from January 31, 2023 to February 1, 2023. (DE 74; DE 77.) Plaintiff was represented by counsel all throughout the trial. The issues of fact for trial were whether the VAMC took an adverse action against Plaintiff after he filed an EEO complaint, and if so, whether Plaintiff's filing of the EEO complaint was the "but-for" cause of the adverse action. (*See* DE 81.) The parties each presented witnesses and documentary evidence at trial. (*See* DE 78; DE 80.) The jury eventually returned a unanimous verdict in favor of Defendant, finding that Plaintiff had not proven by a preponderance of evidence that Defendant took an adverse action against him. (DE 77; DE 81.) A final judgment was entered accordingly. (DE 82.) Plaintiff appealed the final judgment, and that appeal has been stayed pending resolution of Plaintiff's post-trial motions. (DE 89.) Plaintiff filed an appeal *pro se.* (DE 89.)

On February 6, 2023, Plaintiff initiated a series of *pro se* filings purporting to seek relief under various state and federal laws. (DE 83-87.) On March 7, 2023, Plaintiff filed an amended

[1] Denis McDonough was automatically substituted for Robert Wilkie as a Defendant in accordance with Fed. R. Civ. P. 25(d). (Electronic Order dated Jan. 26, 2023.)

motion that supplanted and superseded his prior filings, rendering them moot. (DE 88.) This filing is liberally construed by the Court as moving for relief from final judgment under Fed R. Civ. P. 60(b)(3) and, in the alternative, a new trial under Fed R. Civ P. 59(a)(1)(A).[2] (Electronic Order dated Mar. 8, 2023.) Plaintiffs' counsels' motion to withdraw was filed on April 14, 2023, and that application was granted. (*See* DE 102.)

Defendant was directed to, and did, file an opposition to Plaintiff's motions. (DE 91.) Plaintiff filed a reply. (DE 94.) Plaintiff also filed a letter requesting that the Court allow him to submit four flash drives containing audio and video files in support of his motions -- a request Defendant also opposes.[3] (DE 92; DE 93.)

For the reasons stated herein, Plaintiff's motions (DE 88; DE 92) are hereby **DENIED**.

I. DISCUSSION

A. Consideration of New Evidence

The Court declines the invitation to consider any new material submitted by Plaintiff in support of his filings including, *inter alia*, deposition excerpts, emails between Plaintiff and his counsel, various online documents, and four flash drives containing audio and video files that Plaintiff seeks to submit to the Court. (*See* DE 88 at 5-15; DE 92; DE 94 at 10-30.) As Defendant argues, Plaintiff does not offer any evidence that was not available to him or his counsel before trial. (DE 96 at 1-2.) Though Plaintiff does not expressly explain what the four

[2] Plaintiff's motion also includes language referring to a judgment notwithstanding the verdict, presumably under Rule 50(b). (DE 88 at 1.) However, "[a] post-trial Rule 50(b) motion for judgment as a matter of law is properly made only if a Rule 50(a) motion for judgment as a matter of law has been made before submission of the case to the jury." *Bracey v. Bd. of Educ. of City of Bridgeport*, 368 F.3d 108, 117 (2d Cir. 2004). Since Plaintiff did not make a Rule 50(a) motion before the case was submitted to the jury, the Court does not address this request. *See id.*

[3] On February 27, 2023, Plaintiff attempted to deliver a flash drive to the Court, which the Court declined to accept, and the item was returned to Plaintiff without docketing or consideration. (*See* DE 87.)

flash drives contain (*see* DE 92), Plaintiff's other filings reference a recording of a pretrial preparation session with his trial counsel, and "2 videos of calls made to 2 different VA hospitals in 2018" by Plaintiff regarding the process of converting an employee from temporary to permanent. (DE 88 at 2.)

First, Plaintiff's pre-trial conversations with trial counsel are of no moment for the reasons discussed below. *See infra* § I.C.i. Second, the evidence offered by Plaintiff either existed before trial, was disclosed during discovery, or could have been disclosed during discovery by Plaintiff before discovery closed on February 28, 2019. (*Id*.) For example, putting aside the typical evidentiary concerns such as authenticity, admissibility, relevance, as to the recordings of calls Plaintiff made in 2018, despite the availability of those recordings, Plaintiff did not attempt to present them at trial. Nor did Plaintiff present the deposition transcript excerpts or various other documents Plaintiff now relies on. Thus, this evidence does not provide a basis for relief from final judgment under Rule 60(b) and is not properly before the Court. *See State St. Bank & Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 176 (2d Cir. 2004) ("Where a movant admits that a letter that the other party supposedly concealed was already present in the movant's files, it cannot claim that it was prevented from fully presenting its case." (internal quotation marks omitted)); *see also Patel v. Lutheran Med. Ctr., Inc.*, 775 F. Supp. 592, 596 (E.D.N.Y. 1991) ("Under Rules 59(e) and 60(b)(2) evidence which was in the possession of the party before the judgment was rendered . . . is not newly discovered and does not entitle him to relief." (internal quotation marks omitted)).

B. Rule 60(b)(3) Motion

Rule 60(b) generally provides that "[o]n motion and just terms" a party may be relieved from, *inter alia,* a final judgment for mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud. Fed. R. Civ. P. 60(b). Rule 60(b)(3) specifically allows the Court

to relieve a party from final judgment for "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). Rule 60(b), however, is considered "a mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional circumstances." *Juliao v. Charles Rutenberg Realty, Inc.*, No. 14-CV-808 (JMA) (AYS), 2020 WL 2513443, at * 2 (E.D.N.Y. May 15, 2020) (internal quotation and citation omitted).

Relief under Rule 60(b)(3) "is only available if the moving party establishes by clear and convincing evidence that the opposing party engaged in fraud or other misconduct." *Tyson v. City of N.Y.*, 81 F. App'x 398, 400 (2d Cir. 2003) (summary order). Rule 60(b) is not a procedural vehicle to obtain a second bite at the apple, a request for relief "cannot serve as an attempt to relitigate the merits." *Id*. "To obtain relief, the movant must have been prevented from fully and fairly presenting his case." *Breslow v. Schlesinger*, 284 F.R.D. 78, 82 (E.D.N.Y. 2012). "The burden of proof on a Rule 60(b) motion is on the party seeking relief from the earlier judgment or order." *Obra Pia Ltd. v. Seagrape Invs. LLC*, No. 19-CV-7840 (RA), 2021 WL 1978545, at *2 (S.D.N.Y. May 18, 2021).

i. Application

Plaintiff fails to establish any form of fraud or misconduct by Defendant. Plaintiff simply concludes that: "This is exactly what the defendant did [when] they allowed their witnesses to go up on the stand and misrepresent themselves and others that were within the VA health system. They allowed their witnesses to commit fraud." (DE 88 at 3.) Reading Plaintiff's filings in the most liberal light, Plaintiff makes the following arguments that appear to relate to his request for Rule 60(b)(3) relief: (1) Defendant failed to provide a complete copy of Plaintiff's electronic

personnel file, (2) Defendant's case was built on false witness testimony given by conspiring witnesses, and (3) Plaintiff received ineffective assistance of counsel. (DE 88 at 1-2.)

First, neither Plaintiff nor his counsel raised to the Court that Defendant failed to produce any requested discovery that was necessary for trial, let alone the personnel file that Plaintiff now asserts was incomplete. Defendant also represents that a complete copy of Plaintiff's personnel file was produced during discovery, and Defendant never received a deficiency letter regarding missing records. (DE 91 at 11-12.) More importantly, Plaintiff's argument does not support a finding of any type of fraud or misconduct.

Second, Plaintiff attempts to re-litigate his case using trial testimony, unintroduced deposition testimony, and other documents in order to connect dots to support his assertion that even though certain documents should have been in his personnel file, they were not. (DE 88 at 1-2.) Plaintiff concludes that Defendant's witnesses "conspired" against him. (DE 88 at 1-2; DE 94.) Plaintiff does not point to any actual evidence of a conspiracy against him or any evidence that anyone at the VAMC actually tampered with his personnel file. Plaintiff instead points to a slew of evidence, such as online websites, deposition testimony not presented at trial, trial testimony of Defendant's witnesses, and more, to show inconsistences, which Plaintiff believes disprove the testimony of Defendant's witnesses. (*See* DE 94.) However, the jury was presented with the parties' desired evidence and witnesses, and it was their province to make credibility determinations accordingly. *See Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 725 (2d Cir. 2010) ("[T]he assessment of a witness's credibility is a function reserved for the jury."). That the jury perhaps found a theory Plaintiff never advanced at trial unpersuasive is unsurprising to say the least. However, Plaintiff had every opportunity to present his evidence, cross-examine the witnesses, and make his credibility contentions to the jury.

Third, Plaintiff avers that he received ineffective assistance of counsel. Plaintiff states that despite his insistence, his trial counsel did not involve him in all aspects of the case including which witnesses to call, and with respect to certain agreements made with Defendant. (DE 88 at 2.) Chief among Plaintiff's grievances is that, without his knowledge, trial counsel stipulated with Defendant's counsel that the parties would not mention, or present evidence related to, *inter alia*, Plaintiff's already dismissed sexual harassment and hostile work environment claims. (*Id*; *see* DE 63 (stipulation).)

Plaintiff does not provide any evidence to support a finding that his trial counsel acted fraudulently. Instead, Plaintiff seems to disagree with his trial counsels' handling of certain matters. Those grievances, regardless of how meritorious, do not provide a basis for relief under Rule 60(b)(3) or, even reading Plaintiff's motion liberally, under Rule 60(b)(1). "Relief from counsel's error is usually sought pursuant to Rule 60(b)(1) on the theory that such error constitutes mistake, inadvertence or excusable neglect." *Webb v. City of New York*, No. 08-CV-5145 (CBA) (JO), 2010 WL 3394537, at *3 (E.D.N.Y. Aug. 23, 2010) (internal quotation marks and citations omitted). However, attorney negligence is not sufficient grounds for relief and "a person who selects counsel cannot thereafter avoid the consequences of the agent's acts or omissions." *See Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir. 1986) ("Mere dissatisfaction in hindsight with choices deliberately made by counsel is not grounds for finding the mistake, inadvertence, surprise or excusable neglect necessary to justify Rule 60(b)(1) relief.").

Plaintiff's ineffective assistance of counsel argument is misplaced since "a lawyer's purported shortcomings present no cognizable ground for relief in a civil matter, where the Sixth Amendment right to counsel does not apply." *Singh v. Home Depot U.S.A., Inc.*, 580 F. App'x 24, 25 (2d Cir. 2014) (summary order). Moreover, as Plaintiff admits, he became aware of the

subject stipulation the first day of trial when it was mentioned by the undersigned. (DE 88 at 2.) Ultimately, he decided not to raise the issue with the Court because his trial counsel supposedly advised him that mentioning sexual harassment would cause the case to be thrown out. (DE 88 at 2.) Nonetheless, Plaintiff had the opportunity to raise the issue with the Court then, or to press the issue further with his trial counsel but elected not to do so.

Plaintiff has not carried his burden for Rule 60(b)(3) relief, which requires clear and convincing evidence of fraud or misconduct. *See Castro v. Bank of New York Mellon*, 852 F. App'x 25, 30 (2d Cir. 2021) (summary order) ("[U]nsubstantiated assertion[s] do[] not satisfy the clear-and-convincing standard required to show fraud."). Plaintiff has not shown any fraud or misconduct by Defendant, let alone that he lacked the opportunity to present his case fully and fairly. The choices of Plaintiff and his trial counsel notwithstanding, Plaintiff had every opportunity to present witnesses, cross-examine Defendant's witnesses regarding any alleged inconsistencies, and to introduce evidence to support his case. (*See* DE 91 at 6-9.) Accordingly, Plaintiff's request for relief from the final judgment is denied.

C. Rule 59(a)(1)(A) Motion

Pursuant to Rule 59(a)(1)(A) "the court may, on motion, grant a new trial on all or some of the issues—and to any party . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed R. Civ P. 59 (a)(1)(A). "The decision whether to grant a new trial under Rule 59 'is committed to the sound discretion of the trial judge.'" *Crews v. Cty. of Nassau*, 149 F. Supp. 3d 287, 292 (E.D.N.Y. 2015) (quoting *Stoma v. Miller Marine Servs., Inc.*, 271 F. Supp. 2d 429, 431 (E.D.N.Y. 2003)). "Grounds for granting a new trial include verdicts that are against the weight of the evidence, substantial errors in the admission or rejection of evidence, and non-harmless errors in jury instructions, and

verdict sheets." *Sass v. MTA Bus Co.*, 6 F. Supp. 3d 229, 233 (E.D.N.Y.), *adhered to on reconsideration*, 6 F. Supp. 3d 238 (E.D.N.Y. 2014) (internal citations omitted).

"A motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Id*. (quoting *Snyder v. N.Y.S. Educ. Dep't*, 486 Fed. Appx. 176, 177 (2d Cir. 2012)); *see also Manley v. AmBase Corp.*, 337 F.3d 237, 245 (2d Cir. 2003) (same). The Court may grant a new trial "even if there is substantial evidence supporting the jury's verdict," however, as the Second Circuit has made clear, the Court "should only grant such a motion when the jury's verdict is '*egregious*.'" *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir. 1998) (emphasis added).

i. Application

In pursuit of a new trial, Plaintiff asserts that the witnesses and arguments presented by Defendant prejudiced the jury such that "the jury was unable to fairly review the credible evidence presented at the trial and render a fair verdict." (DE 88 at 3.) Plaintiff argues that Defendant implied at trial that Plaintiff's harassment complaint was related to Plaintiff taking time off work rather than sexual harassment. (DE 88 at 3.) In Plaintiff's view, Defendant should have informed the jury that Plaintiff's supervisor was made aware that Plaintiff made a complaint about being sexually harassed. (DE 88 at 3.) Plaintiff continues: "It is obvious since the overwhelming evidence, in this case, proved that Plaintiff was left in a hostile work environment and retaliated against and then wrongfully terminated due to the negligence of Defendant, that the defense did not allow the jury to fairly view the evidence and return a fair and just verdict." (DE 88 at 3.)

Plaintiff's arguments not only reflect a misunderstanding of legal process and the law, but they also represent an impermissible attempt to relitigate the merits of the case. First, Plaintiff fails to point to any evidence showing that Defendant created an implication that Plaintiff filed an EEO complaint because Plaintiff was being harassed for his time and leave practices. As Defendant states, evidence related to Plaintiff's time and leave was permissible to establish how an almost nine-day absence shortly before Defendant started to review Plaintiff's file explains why Defendant's employees were looking into Plaintiff around the time Plaintiff had filed an EEO complaint. (DE 91 at 7.) Plaintiff's trial counsel cross-examined all of the witnesses that testified regarding Plaintiff's time and leave and argued to the jury that Defendant's explanation was not credible. (DE 91 at 7.) Plaintiff also did not object to any testimony regarding time and leave. Thus, Plaintiff's dissatisfaction with that aspect of his employment being presented at trial, is not a basis for claiming prejudice, nor does it warrant a new trial.

Second, Plaintiff's core issue appears to be with his inability to make mention of his already dismissed sexual harassment and hostile work environment claims. Those claims were clearly dismissed on summary judgment. (DE 51.) The parties stipulated that details related to those claims would not be mentioned. (DE 63.) Additionally, the exact type of harassment Plaintiff complained of was not materially relevant to the two disputed elements of a Title VII retaliation claim in this case -- whether Plaintiff suffered an adverse action, and whether his EEO complaint was the but-for cause of that action. (*See* DE 71 at 1 (Joint pretrial order detailing claims and defenses that remain to be tried).)

Plaintiff cannot fabricate prejudice resulting from the strategic decision of his own trial counsel, which stipulated that certain matters would not be raised during trial. The effect on the mechanics of trial by a stipulation between the parties and of the dismissal of Plaintiff's prior

claims may not be apparent to Plaintiff. Nonetheless, a misunderstanding of legal process does not equate to a miscarriage of justice. At bottom, Plaintiff has failed to put forth evidence that shows that the jury's verdict was egregious or that the verdict was a miscarriage of justice. (*See* DE 91 at 6-9.) Accordingly, Plaintiff's request for a new trial is denied.

II. CONCLUSION

For the foregoing reasons, Plaintiff's motions (DE 88; 92) are **DENIED** and Defendant is directed to serve a copy of this Memorandum and Order upon Plaintiff, and file proof of service of the same on ECF on or before **May 1, 2023.**

Dated: Central Islip, New York
April 28, 2023

SO ORDERED:

/S/ *James M. Wicks*
JAMES M. WICKS
United States Magistrate Judge

23-305-cv
Hampton v. McDonough

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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 7th day of May, two thousand twenty-four.

Present:

DENNIS JACOBS,
WILLIAM J. NARDINI,
STEVEN J. MENASHI,
Circuit Judges.

DANIEL HAMPTON,

Plaintiff-Appellant,

v. 23-305-cv

DENIS RICHARD MCDONOUGH, in his official capacity as Secretary of the United States Department of Veterans Affairs,

Defendant-Appellee.

For Plaintiff-Appellant: KISSINGER N. SIBANDA, Livingston, NJ

For Defendant-Appellee: MEGAN J. FREISMUTH (Varuni Nelson, Rachel G. Balaban, *on the brief*), Assistant United States Attorneys, *for* Breon Peace, United States Attorney for the Eastern District of New York, Central Islip, NY

Appeal from an order of the United States District Court for the Eastern District of New York (James M. Wicks, *Magistrate Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal is **DISMISSED**.

Plaintiff-Appellant Daniel Hampton challenges an order of the United States District Court for the Eastern District of New York (James M. Wicks, *Magistrate Judge*), entered on April 28, 2023, denying his motion for judgment notwithstanding the verdict under Federal Rule of Civil Procedure 60(b)(3) or, in the alternative, for a new trial under Federal Rule of Civil Procedure 59(a)(1)(A) ("post-trial motions"). Hampton, a former employee of the U.S. Department of Veterans Affairs, sued the VA Secretary in 2017 claiming hostile work environment, retaliation, and sexual harassment, in violation of 42 U.S.C. § 2000e *et seq*. Only the retaliation claim survived pretrial proceedings, and at a January 2023 trial where Hampton was represented by counsel, the jury found the Secretary not liable, as reflected in a judgment dated February 1, 2023, and entered on February 2, 2023. On February 27, 2023, Hampton, newly *pro se*, filed his post-trial motions. On March 7, 2023, Hampton, still *pro se*, filed a timely notice of appeal from the judgment entered on February 2. On March 14, 2023, this Court stayed Hampton's appeal pending the resolution of his post-trial motions, which the district court denied on April 28, 2023. On May 6, 2023, new appellate counsel filed a notice of appearance with this Court, which lifted the stay of Hampton's appeal on May 12, 2023. Hampton never filed a new or amended notice of appeal from the district court's April 28 order denying his post-trial motions. We assume the parties' familiarity with the case.

On appeal, Hampton challenges only the district court's April 28 order denying his post-trial motions; he does not challenge the underlying judgment that was entered on February 2. *See,*

e.g., Appellant's Br. at 7 ("Appellant . . . seeks reversal of Order and Opinion dated April 28th, 2023."). But, as the Secretary points out, Hampton never filed a notice of appeal designating the post-trial orders. Although he did file a timely notice of appeal on March 7 designating the "2-01-23 Judgment," App'x 19, that notice of appeal cannot be read, under even the most generous reading, as contemplating an appeal from post-trial orders that had not yet been entered. *See Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 93 (2d Cir. 2014) (noting that the cross-appellant "never filed any additional or supplemental notice of appeal designating [a] subsequent order as the subject of a cross-appeal," and thus finding that it "cannot reasonably read [cross-appellant's] notice of cross-appeal to contemplate review of an order that did not issue until nearly two months afterwards"). Hampton therefore failed to comply with Federal Rule of Appellate Procedure 4(a)(4)(B)(ii), which requires that "[a] party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A) [which includes Rule 59 and 60 motions], or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."[1]

Hampton argues that Rule 4(a)(4)(B)(ii) is not a jurisdictional bar, but only a mandatory claim-processing rule that is subject to equitable exceptions, and that he should be excused for any failure to comply with that rule due to his earlier *pro se* status and confusion stemming from a procedural order entered by this Court at an earlier stage of his appeal. We need not decide whether

[1] The Secretary has not argued that Hampton's failure to file any amended notice of appeal at all (much less a timely one) also violates Federal Rule of Appellate Procedure 3(a)(1), which provides that an appeal "from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." Because we conclude below that Hampton's failure to comply with Rule 4(a)(4)(B)(ii) bars his appeal, we need not reach the question of whether it would be independently barred by Rule 3, or whether that rule is jurisdictional.

Rule 4(a)(4)(B)(ii) is jurisdictional because even assuming, *arguendo*, that it is a mandatory claim-processing rule, Hampton clearly did not comply with the terms of that rule by filing a notice of appeal designating the post-trial orders *at all* (let alone an untimely one). Because the Secretary properly objected to the timeliness of Hampton's appeal, his appeal of the district court's ruling on the post-trial orders is therefore barred, full stop. *See United States v. Frias*, 521 F.3d 229, 234 (2d Cir. 2008) ("Our determination that Rule 4(b) is not jurisdictional [but rather a mandatory claim-processing rule], . . . does not authorize courts to disregard it when it is raised. When the government properly objects to the untimeliness of a defendant's criminal appeal, Rule 4(b) is mandatory and inflexible.").

And assuming further Hampton were correct *both* that Rule 4(a)(4)(B)(ii) is a mandatory claim-processing rule *and* that it is subject to equitable exceptions,[2] there are no equitable considerations here that could conceivably excuse Hampton's noncompliance. Although Hampton was *pro se* when he filed his March 7 notice of appeal of the February 2 judgment, he had retained appellate counsel as of May 6. His counsel had until late June 2023 (60 days after the entry of the April 28 order denying his post-trial motions, *see* Fed. R. App. P. 4(a)(1)(B)) either to file a new notice of appeal of the April 28 order or to amend his existing notice of appeal. But Hampton's appellate counsel did neither, and counsel's failure to comply with the Rules cannot be attributed to, or excused by, Hampton's earlier *pro se* status. Counsel's contention at oral argument that this

[2] It is doubtful that Rule 4(a)(4)(B)(ii) is subject to equitable exceptions. Rule 4(a)(4)(B)(ii) implements 28 U.S.C. § 2107(a), which provides that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." We have held that equitable exceptions are unavailable when a mandatory claim-processing rule is statutory. *Donnelly v. Controlled Application Rev. & Resol. Program Unit*, 37 F.4th 44, 57 (2d Cir. 2022) ("Judge-made exceptions may be available for judge-made exhaustion requirements. But we cannot rewrite a statute."); *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 n.3 (2017) ("We have reserved whether mandatory claim-processing rules may be subject to equitable exceptions."); *Weitzner v. Cynosure, Inc.*, 802 F.3d 307, 311 (2d Cir. 2015), *as corrected* (Oct. 27, 2015) (holding that the 28-day time limit under Federal Rule of Appellate Procedure 4(a)(4)(A)(vi) is a claim-processing rule).

Court's March 14 order staying Hampton's appeal of the February 2 judgment pending the resolution of his later-filed post-trial motions somehow signaled to Hampton that he was excused from the requirement to file a second notice of appeal of the post-trial orders, *see* Oral Argument Audio Recording at 03:38–07:39, *Hampton v. McDonough* (No. 23-305), is similarly unavailing. Although Hampton was *pro se* when this Court entered the stay, shortly thereafter he retained appellate counsel, who should have understood that the stay did not relieve him of the requirement to file another notice of appeal of the post-trial orders.

* * *

Accordingly, we **DISMISS** the appeal.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: May 07, 2024
Docket #: 23-305cv
Short Title: Hampton v. Wilkie

DC Docket #: 17-cv-5711
DC Court: EDNY (CENTRAL ISLIP)
DC Judge: Wicks

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: May 07, 2024
Docket #: 23-305cv
Short Title: Hampton v. Wilkie

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 17-cv-5711
DC Court: EDNY (CENTRAL ISLIP)
DC Judge: Wicks

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature