

Tuesday, October 12, 2021

order Order on Motion for Leave to File Excess Pages Tue 10/12 4:24 PM

Judge Mark G. Mastroianni: ELECTRONIC ORDER entered ALLOWING IN PART AND DENYING IN PART⁹⁸ Plaintiff's Rule 60(b) Motion and Motion to File Excess Pages. The motion to file excess pages is allowed; the remainder of the motion is denied. On May 11, 2021, the court dismissed the Second Amended Complaint for failure to state a legal basis for relief. (Dkt. No. 89.) After moving for, and being denied reconsideration, Plaintiff appealed the dismissal. He now brings this motion to alter the judgment under Rule 60(b). (Dkt. No. 98, "Plf. Memo.") The court lacks jurisdiction to hear Plaintiff's Rule 60(b) motion because of his pending appeal. See *Small Justice LLC v. Xcentric Ventures LLC*, 2015 WL 5737135, at *2 (D. Mass. Sept. 30, 2015) (citing *Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997)). Because Plaintiff proceeds pro se, however, the court liberally construes his motion as one pursuant to Rule 62.1 for an indicative ruling on his Rule 60(b) motion: "If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1. The court has considered Plaintiff's bases for his Rule 60(b) motion and finds them without merit. Plaintiff's Rule 62.1 motion for an indicative ruling is therefore denied. See *Small Justice LLC*, 2015 WL 5737135, at *2. Rule 60(b) states that "[o]n motion and just terms, the court may relieve a party... from a final judgment for... (3) misconduct by an opposing party;... or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). "[R]elief under Rule 60(b) is extraordinary in nature and... motions invoking that rule should be granted sparingly." *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 19 (1st Cir. 2002). "[A] party who seeks recourse under Rule 60(b) must persuade the trial court, at a bare minimum, that his motion is timely; that exceptional circumstances exist, favoring extraordinary relief; that if the judgment is set aside, he has the right stuff to mount a potentially meritorious claim or defense; and that no unfair prejudice will accrue to the opposing parties should the motion be granted." *Id.* (affirming denial of motion). Plaintiff has shown neither "exceptional circumstances" nor the ability to "mount a potentially meritorious claim" were the judgment vacated and the case remanded. See *id.* Plaintiff argues that Defendant Aiden Kearney's "misconduct" under Rule 60(b)(3) was "distribut[ing] content to punish and discredit [Plaintiff's] first witnesses, which prevented [Plaintiff] from presenting all [of his] evidence, arguing [his] best case, or receiving representation." (Plf. Memo. at 4.) According to Plaintiff, Defendants Google's and Facebook's misconduct was enabling Defendant Kearney's unflattering posts. (*Id.* at 12-13.) Plaintiff made these same arguments in prior filings, and, in any event, they are simply incredible. See *Karak*, 288 F.3d at 21 (finding misconduct "did not inhibit [movant] from fully and fairly preparing his case"). Plaintiff also moves for relief under Rule 60(b)(6)'s catchall provision by rearguing his basis for state action under 42 U.S.C. § 1983. Plaintiff repeats arguments that the court has considered and dismissed, e.g., Defendant Kearney had "loyal officers in every police department in Massachusetts that sen[t] him stories;" Defendants Facebook and Google allowed Defendant Kearney to post publicly-available information about Plaintiff's criminal prosecution on Kearney's blog; and Defendants Facebook and Google "failed to train" employees to delete Kearney's posts. (Plf. Memo. at 10-16) (emphasis original). None of these arguments comes close to alleging a basis to attribute Defendants' behavior to the state under Section 1983. (See Dkt. 89 (May 11, 2021 order dismissing complaint).) To obtain relief under Rule 60(b), Plaintiff "must give the trial court reason to believe that vacating the judgment will not be an empty exercise." *Small Justice LLC*, 2015 WL 5737135, at *2 (internal quotation marks omitted). Plaintiff has not met his burden. See *id.* (denying Rule 62.1 motion "because the Plaintiffs have not established that the Rule 60(b) motion they wish to assert is potentially meritorious") (internal quotation marks omitted). Plaintiff also argues that the court did not afford him "notice and an opportunity to be heard" to defend his claims. (Plf. Memo. at 5.) Plaintiff has had ample opportunity to be heard, having filed two amended complaints, briefing and affidavits in support of two motions for a temporary restraining order, an oversized opposition brief to Defendants' motion to dismiss, an oversized brief in support of the current motion, as well as additional miscellaneous filings, all of which the court has reviewed. In order to proceed to discovery and on to trial, a litigant bears the burden of alleging facts that would support a legal basis for relief. The court finds the Plaintiff has not done so. For the foregoing reasons, Plaintiff's Rule 62.1 Motion for an indicative ruling on his Rule 60(b) Motion is denied. (Figuera, Tamara)