4/22/04

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, Defendant.	)	Civil Action No. 98-1319 (PLF)

OPINION

This matter is before the Court for consideration of plaintiff's Motion for Reconsideration of the Court's Opinion and Order of November 13, 2003. In his motion and in a supplemental memorandum, plaintiff asserts that the Court incorrectly denied his motion for leave to file an amended complaint and wrongfully dismissed this case with prejudice. The government opposes the motion. Upon consideration of the parties' briefs and the relevant case law, the Court concludes that plaintiff's motion must be denied.

I. BACKGROUND

A more detailed discussion of the factual circumstances underlying this Freedom of Information Act case may be found in the Court's prior decisions in this action: Hall v. CIA, Civil Action No. 98-1319, Opinion (D.D.C. Aug. 10, 2000) ("Aug. 10, 2000 Op."); Hall v. CIA, Civil Action No. 98-1319, Memorandum Opinion and Order (D.D.C. July 22, 2002) ("July 22, 2002 Op."); Hall v. CIA, Civil Action No. 98-1319, Memorandum Opinion and Order (D.D.C.

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Attachment 8

Nov. 13, 2003) ("Nov. 13, 2003 Amendment Op."); and Hall v. CIA, Civil Action No. 98-1319, Memorandum Opinion (D.D.C. Nov. 13, 2003) ("Nov. 13, 2003 Dismissal Op."). In its August 10, 2000 Opinion, the Court considered the adequacy and scope of the search conducted by the CIA in response to plaintiff's FOIA request, as well as the application of certain FOIA exemptions, and determined that the declarations submitted by defendant were insufficient to enable the Court to evaluate the adequacy of the search. See Aug. 10, 2000 Op. at 8-13. It therefore ordered the defendant to file supplemental affidavits or declarations on this issue. Id. at 9. Subsequently, plaintiff moved the Court to reverse defendant's denial of a public interest fee waiver. The Court denied this motion on July 22, 2002. See July 22, 2002 Mem. Op. at 6. In its July 22, 2002 Memorandum Opinion, the Court also ordered the parties to file a joint report on or before August 26, 2002 "indicating whether or not plaintiff has committed to paying search and copying fees up to a specific amount." Id. at 7. The Court indicated that if plaintiff did not make such a commitment, it would dismiss plaintiff's case. See id.

By Joint Report of August 23, 2002, plaintiff agreed to pay search and copying fees up to $1,000 and to inform defendant which remaining issues plaintiff would like defendant to focus on in its search. See Joint Report of August 23, 2002 at 1. In response, defendant asserted that the case should be dismissed because plaintiff's commitment to pay $1,000 was inadequate to pay for the necessary search and copying. In a November 13, 2003 Memorandum Opinion, the Court dismissed the case, concluding that by refusing to pay the costs of the search plaintiff "constructively abandoned his request and [was] not entitled to receive any additional documents." Nov. 13, 2003 Dismissal Op. at 4.

Also on November 13, 2003, the Court denied plaintiff's motion for leave to file an amended and supplemental complaint. See Nov. 13, 2003 Amendment Op. at 2-3. In that motion, plaintiff sought to amend his complaint to include a claim for new searches based on a new FOIA request he had submitted and a request for a fee waiver based on his alleged status as a member of the news media. See Amended and Supplemental Complaint ("Am. Compl.") at 7-8. The Court denied the motion as a matter of discretion under Rule 15(a) of the Federal Rules of Civil Procedure, concluding that amendment of the complaint at such a late stage of the proceedings to add two new sets of allegations would result in undue delay and would prejudice the defendant. See Nov. 13 Amendment Op. at 2-3.[1]

In the instant motion for reconsideration, plaintiff makes four arguments: (1) that the Court was substantively incorrect in denying plaintiff a public interest fee waiver; (2) that the Court erred in dismissing plaintiff's complaint; (3) that the Court misapplied the liberal amendment provisions of Rule 15; and (4) that the Court should vacate its orders because plaintiff subsequently paid the amount for fees initially requested by defendant. See Memorandum of Points and Authorities in Support of Plaintiff's Motion for Reconsideration ("Pl.'s Recon. Mem.") at 1, 10. The Court will consider plaintiff's arguments in turn.

II. DISCUSSION

Plaintiff has filed his motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure, which provides for a motion to alter or amend a judgment. See FED. R.

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[1] With respect to other portions of the motion to amend, the Court concluded that granting it would be futile because the claims already had been resolved. See Nov. 13, 2003 Amendment Op. at 2.

CIV. P. 59(e). Rule 59(e) states, however, that a "motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Id. The last orders in this case, including the order dismissing the case, were issued on November 13, 2003. Plaintiff's Rule 59(e) motion therefore had to be filed on or before November 28, 2003, but defendant did not file his motion for reconsideration until December 1, 2003.[2] The Court may not extend the time prescribed for taking action under Rule 59(e), "except to the extent and under the conditions stated [in Rule 59(e).]." FED. R. CIV. P. 6(b). There is no condition stated in Rule 59(e) itself under which an extension is authorized. See Center for Nuclear Responsibility, Inc. v. Nuclear Regulatory Comm'n, 781 F.2d 935, 941 (D.C. Cir. 1986) ("Rule 59(e) motions are expressly limited to the 10-day period following entry of judgment, and the District Court simply has no power to extend that time limitation."). Plaintiff's motion under Rule 59(e) therefore is untimely.[3]

To address the merits of plaintiff's claims, the Court will treat plaintiff's motion as one made under Rule 60(b) of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 60(b); see also Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n,

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[2] Because the time for filing a motion for reconsideration under Rule 59 is less than 11 days, Rule 6(a) of the Federal Rules of Civil Procedure excludes "intermediate Saturdays, Sundays, and legal holidays." FED. R. CIV. P. 6(a). The judgment of dismissal was entered on November 13, 2003, which was a Thursday. November 27 was a legal holiday. With the holiday and four weekend days excluded, the deadline became Friday, November 28, 2003.

[3] Rule 6(e), extending a prescribed period by three days when a paper is served upon a party by mail or electronically, is inapplicable in this circumstance because the Court's orders were not "served" on plaintiff within the meaning of the Rule. See Fed. R. Civ. P. 6(e). While the clerk of a district court is required immediately to serve upon each party a notice of the entry of judgment, see FED. R. CIV. P. 77(d), the "critical point for measuring the time of a Rule 59(e) motion is not the date of service;" the ten days "begin with the clerk's ministerial act of entering the court's judgment in . . . the 'civil docket.'" Derrington-Bey v. District of Columbia Department of Corrections, 39 F.3d 1224, 1225 (D.C. Cir. 1994). "Rule 6(e) does not add 3 days to the 10 days allowed under Rule 59(e)." Id. at 1226.

781 F.2d at 939-40 (addressing a motion under the standards of both Rule 59(e) and Rule 60(b)(1)); Ward v. Kennard, 200 F.R.D. 137, 138 (D.D.C. 2001) (considering a motion to reconsider filed more than ten days after judgment as a Rule 60(b) motion); Computer Professionals for Social Responsibility v. United States Secret Service, Civil Action No. 93-0231, 1994 U.S. Dist. LEXIS 14372, at *2 (D.D.C. Oct. 7, 1994) (addressing an untimely Rule 59(e) motion under Rule 60(b)). The first three claims – (1) that the Court was substantively incorrect denying plaintiff a public interest fee waiver; (2) that it erred in dismissing plaintiff's complaint; and (3) that the Court misapplied the liberal amendment provisions of Rule 15 – are analyzed under Rule 60(b)(1). The remaining claim, that the Court should vacate its orders because plaintiff subsequently paid the amount for fees initially requested by defendant, is analyzed under Rule 60(b)(5).[4]

A. Rule 60(b)(1)

Rule 60(b)(1) provides for relief from judgment or order based on mistake or inadvertence. See FED. R. CIV. P. 60(b)(1). Although this Circuit has recognized that Rule

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[4] The Court notes that plaintiff might also intend for the Court to consider his claims under Rule 60(b)(6), which permits relief for "any other reason justifying relief from the operation of the judgment." See FED. R. CIV. P. 60(b)(6). Relief under Rule 60(b)(6), however, is reserved for "extraordinary circumstances." Goland v. CIA, 607 F.2d 339, 372-73 (D.C. Cir. 1979); see also Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 n.10 (1988). Relief under Rule 60(b)(6) is not available "unless the other clauses, (1) through (5), are inapplicable." Goland v. CIA, 607 F.2d at 372-73; see also Liljeberg v. Health Services Acquisition Corp., 486 U.S. at 864 n.10 ("This logic, of course, extends beyond clause (1) and suggests that clause (6) and clauses (1) through (5) are mutually exclusive"). "If the reasons offered for relief from judgment could be considered under one of the more specific clauses of Rule 60(b)(1)-(5), those reasons will not justify relief under Rule 60(b)(6)." 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.48[2] (3d ed. 2002). The Court concludes that no such circumstances exist here, however, and therefore plaintiff cannot rely on the Rule 60(b)(6) "catch-all."

60(b)(1) may be used to correct certain legal errors of the district court, it has been reluctant to extend Rule 60(b)(1) to the review of substantive legal reasoning. See Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n, 781 F.2d at 939. In D.C. Federation of Civic Ass'ns v. Volpe, 520 F.2d 451, 453 (D.C. Cir. 1975), the court upheld the grant of a Rule 60(b)(1) motion only because (1) there was a subsequent appellate decision that changed the law on which the district court had relied in rendering judgment, *and* (2) the motion for reconsideration was made within the time permitted for appeal from the district court decision being challenged. The court of appeals reasoned that "it is obviously sound administration for litigants to provide the District Courts with the opportunity to correct 'errors' of this sort, and to spare this court unnecessary appeals." Id.; see also 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.41[4][b][xii] (3d ed. 2002) (summarizing the D.C. Circuit's approach). The D.C. Circuit has repeatedly declined to extend the use of a Rule 60(b)(1) motion to address substantive legal reasoning beyond the circumstances of Volpe. See Computer Professionals for Social Responsibility v. United States Secret Service, 72 F.3d 897, 902 (D.C. Cir. 1996); Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n, 781 F.2d at 940.[5]

1. July 22, 2002 Memorandum Opinion

Plaintiff first objects to the Court's denial of a public interest fee waiver. See July 22, 2002 Mem. Op. at 6. Plaintiff asserts that the D.C. Circuit's subsequent decision in Judicial Watch, Inc. v. U.S. Dept. of Justice, 326 F.3d 1309 (D.C. Cir. 2003), revised the standard for

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[5] While this circuit has not directly addressed the issue, courts also have applied Rule 60(b)(1) to "permit the district court to reconsider and correct its own errors . . . if they are of an obvious nature amounting to little more than clerical errors." Fackelman v. Bell, 564 F.2d 734, 736 (5th Cir. 1977), quoted in Computer Professionals for Social Responsibility v. United States Secret Service, 1994 U.S. Dist. LEXIS 14372, at *4.

determining whether a public interest fee waiver was improperly denied by an agency and that the Court in this matter therefore placed too high a burden on plaintiff. The Court will not review this decision, however, because plaintiff's claim does not fall within the limited grounds of review carved out by the court in Volpe. Specifically, the time within which to file an appeal from this Court's decision of July 22, 2002 expired on September 20, 2002. See FED. R. APP. P. 4(a)(1)(B). In addition, Rule 60(b) states that a Rule 60(b)(1) motion shall be made not more than one year after the judgment was entered, which would have been July 22, 2003. See FED R. CIV. P. 60(b).

2. Opinion of November 13, 2003 Dismissing Plaintiff's Suit

In his motion for reconsideration, plaintiff also claims that the Court improperly dismissed plaintiff's lawsuit in its decision of November 13, 2003. See Pl.'s Recon. Mem. at 7-11. In support of this claim, plaintiff proffers the D.C. Circuit's recent opinion in Ciralsky v. CIA, 355 F.3d 661 (D.C. Cir. 2004), to demonstrate that the Court's substantive conclusion was incorrect. The argument again falls outside of the narrow grounds described in Volpe, however, because the final day for plaintiff to file an appeal from the November 13, 2003 decision dismissing plaintiff's suit was January 12, 2004, see FED. R. APP. P. 4(a)(1)(B), and Ciralsky was decided on January 30, 2004. See Ciralsky v. CIA, 355 F.3d at 661. In any event, the Court does not understand how the decision in Ciralsky has any bearing on the Court's decision in this case.

3. Opinion of November 13, 2003 Denying Leave to Amend and Supplement Complaint

Plaintiff next asks to the Court to revisit its decision in the Court's November 13, 2003 Opinion denying plaintiff leave to amend and supplement his complaint under Rule 15(a)

and (d) of the Federal Rules of Civil Procedure. Rule 15(d) provides that "[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting for the transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." FED. R. CIV. P. 15(d). The Court will not permit supplementation at this time both for the reasons stated in its November 13, 2003 Opinion and because there are no Volpe considerations that would justify doing so in these circumstances.

Plaintiff also claims that the Court wrongly denied him leave to amend his complaint, thereby precluding him from requesting a fee waiver on the basis of his asserted status as a representative of the news media pursuant to the FOIA's provision for fee waivers. See 5 U.S.C. § 552(a)(4)(A)(ii)(II); Nov. 13, 2003 Amendment Op. Plaintiff appears to be correct that he was entitled to file an amended complaint as of right and that the Court therefore should not have denied his motion. Rule 15(a) of the Federal Rules of Civil Procedure permits a party to amend his pleading once "as a matter of courses at any time before a responsive pleading is served. . . ." FED. R. CIV. P. 15(a). Plaintiff's motion to amend was filed before the government had filed a responsive pleading. See U.S. Information Agency v. Krc, 905 F.2d 389, 399 (D.C. Cir. 1990) (motion for summary judgment not a responsive pleading that prevents party from amending without leave of court). The Court therefore was wrong to deny plaintiff's motion to amend. See FED. R. CIV. P. 15(a).[6] This error falls under Rule 60(b)(1) as a mistake of an "obvious nature" amounting to little more than a clerical error or inadvertent decision. See Fackelman v. Bell, 564 F.2d at 736.

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[6] The error might not have been made, however, if plaintiff had simply exercised his right to file an amended complaint unaccompanied by a motion.

The Court nevertheless concludes that plaintiff's amendment of his complaint for the purpose of including the news media member fee waiver allegations would have been futile because of plaintiff's failure to exhaust his administrative remedies with regard to that issue, and thus the amended complaint promptly would have been dismissed. Any error this Court made therefore was harmless, thereby extinguishing plaintiff's claims. See FED. R. CIV. P. 61 ("[N]o error or defect in any ruling or order . . . is ground for . . . vacating modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.").

The FOIA does not allow for a direct application for the waiver of fees in federal court. See 5 U.S.C. § 552(a). Rather, the statute first requires the appeal of an adverse decision of an agency after a petitioner has exhausted administrative remedies, see 5 U.S.C. § 552(a)(4)(A)(vii), which does not occur until "the required fees are paid or an [administrative] appeal is taken from the refusal to waive fees." Oglesby v. United States Dep't of Army, 920 F.2d 57, 66 (D.C. Cir. 1990). In this case, plaintiff never petitioned defendant for a fee waiver as a representative of the news media; defendant therefore never made any determination with regard to such a claim. Allowing plaintiff to amend his complaint therefore would have been futile.[7]

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[7] Upon review of the administrative record, it is clear that plaintiff's initial fee waiver request was made under 5 U.S.C. § 552(a)(4)(A)(iii) as a public interest fee waiver of all copying and review costs. See Plaintiff's Motion for Waiver of Search and Copying Fees, Attachs 7-10 ("Mot. for Fee Waiver"). Furthermore, plaintiff's request for a waiver of "all fees," see id., Attach. 7, demonstrates that the request was one for a public interest waiver and not one for a representative of the news media, which limits fees to duplication costs, but does not eliminate them entirely. See 5 U.S.C. § 552(a)(4)(A)(ii)(II). In addition, defendant addressed plaintiff's request for a fee waiver as one in the public interest and made its decision based on those grounds. See Mot. for Fee Waiver, Attach. 11 (letter explicitly discussing plaintiff's request under public interest fee waiver provision, 5 U.S.C. § 552(a)(4)(A)(iii)).

B. Rule 60(b)(5): Payment of Fees Following the Court's November 13 Orders

Plaintiff also asserts that he now has paid the full amount of search fees and that for this reason the Court's November 13 Orders should be set aside. See Pl.'s Recon. Mem. at 7. The government notes, however, that plaintiff's payment of the fees came only after this Court's warning that payment must be made in full or the case would be dismissed, and after an order of dismissal subsequently was entered. See United States Response at 7. As the Supreme Court has noted, "[t]he authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted." Link v. Wabash R.R., 370 U.S. 626, 629 (1962).

Rule 60(b)(5) provides that a court may set aside a judgment if it is "no longer equitable that the judgment should have prospective application." FED. R. CIV. P. 60(b)(5). For a motion to qualify for such relief, however, the moving party bears the burden of demonstrating a "significant change in circumstances that justifies modification" under Rule 60(b)(5). Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992). Plaintiff "may meet [his] initial burden by showing a significant change either in factual conditions or in law." Id. at 384. Courts apply this standard only to situations in which unforeseen circumstances make a decree "unworkable because of unforeseen obstacles," not when a moving party has changed the circumstances himself by reversing a position; that is, because such a change in position is "foreseeable." See id. at 385. In addition, Rule 60(b)(5) would not apply in this circumstance because the Court's dismissal of plaintiff's case has no prospective application. See Twelve John Does v. District of Columbia, 841 F.2d 1133, 1138 (D.C. Cir. 1988) (Rule 60(b)(5) applies only when an order compels a party to perform, or orders a party not to perform, any future act or

requires the court to supervise any continuing interaction between a party and the other parties to the case). The Court therefore denies plaintiff's motion.[8]

III. CONCLUSION

The grounds for reconsideration are extremely narrow under Rule 60(b) of the Federal Rules of Civil Procedure. The Court will not review its own substantive legal reasoning and risk allowing Rule 60(b)(1) to "operate as a substitute for an appeal." Anderson v. Chevron Corp., 190 F.R.D. 5, 190 (D.D.C. 1999). The Court therefore will not revisit the Court's rulings denying a public interest fee waiver and leave to supplement plaintiff's complaint. To the extent that the Court erred in denying plaintiff the right to file an amended complaint to add a news media fee waiver claim, the error was harmless because plaintiff failed to exhaust his administrative remedies to seek a fee waiver before coming to court and the complaint therefore would have been dismissed. Accordingly, the Court will not vacate, modify, or otherwise disturb its earlier orders. Finally, plaintiff's payment of the fee after the Court already had dismissed his case on November 13, 2003 does not effect the Court's decision, because plaintiff's change of

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[8] Such action under Rule 60(b)(5) usually is addressed in response to a motion to revise a consent decree, which the parties entered into unaware of the change in circumstances. See, e.g., Rufo v. Inmates of Suffolk County Jail, 502 U.S. at 383-84; Pigford v. Veneman, 292 F.3d 918, 927 (D.C. Cir. 2002).

position was within his own control and thus was foreseeable, and because the order had no prospective application. The Court therefore denies plaintiff's motion for reconsideration.

A separate Order consistent with this Opinion shall issue this same day.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE:

4/22/04

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, Defendant.	)	Civil Action No. 98-1319 (PLF)

FINAL ORDER AND JUDGMENT

On August 10, 2000, the Court granted in part and denied in part defendant's motion for summary judgment and ordered that defendant was to provide the Court with supplemental affidavits or declarations demonstrating the adequacy of its search for records responsive to plaintiff's FOIA request and justifying the nondisclosure of any additional records that were discovered. Before submitting supplemental affidavits or declarations, defendant filed a motion to require the plaintiff to commit to payment of search and copying fees. Plaintiff opposed defendant's motion and argued that he was entitled to a public interest fee waiver. On July 22, 2002, the Court denied plaintiff's motion for a public interest fee waiver and ordered that plaintiff had to commit to paying search and copying fees before any additional searches would be conducted and before the supplemental affidavits or declarations required by the August 10, 2000 Order would be filed. The Court indicated that if plaintiff did not commit to paying search and copying fees up to a certain amount, the case would be dismissed. On

November 13, 2003, the Court concluded that plaintiff had constructively abandoned his request by refusing to commit to pay for the searches he requested and noted that the defendant therefore was not required to file any supplemental affidavits or declarations. The Court ordered that judgment be entered for defendants and the case dismissed. In the Opinion issued this same day, the Court has explained its reasoning in declining to revisit that determination. Accordingly, for the reasons stated herein and in the Court's previous Opinions, it is hereby

ORDERED that final judgment is entered for defendant on all claims; it is

FURTHER ORDERED that plaintiff's motion for reconsideration of the Court's November 13, 2000 Orders [98] is DENIED; it is

FURTHER ORDERED that this case is DISMISSED with prejudice from the docket of this Court; and it is

FURTHER ORDERED that this Order and Judgment shall constitute a FINAL JUDGMENT in this case. This is a final appealable order. See FED. R. APP. P. 4(a).

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: