

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

JACOB GREENSPAN,)

Plaintiff,)

v.)

BROTHERS PROPERTY)
CORPORATION, BROTHERS)
PROPERTY MANAGEMENT)
CORPORATION, VICTOR FULLER,)
Individually and in his official capacity,)
ANA REINA, Individually and in her)
official capacity, and OLIVER ROOSKENS,)
Individually and in his official capacity,)

Defendants.)

IN THE COURT OF COMMON PLEAS

CASE NO. 2014-CP-10-4445

RECEIVED

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SC Court of Appeals

BY

JULIE J. ARMSTRONG
CLERK OF COURT

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ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

This matter is before this Court on the Motion for Relief from Judgment Under Rule 60(b) of the South Carolina Rules of Civil Procedure for Fraud Upon the Court filed by Plaintiff Jacob Greenspan ("Plaintiff's Motion"). This Court heard oral argument on this motion on February 28, 2017.¹ Having heard the parties' oral arguments and considered the parties' filings related to this motion, Plaintiff's motion is hereby **DENIED**.

FACTUAL BACKGROUND

I. Dismissal of Plaintiff's Amended Complaint By Circuit Court

This case stems from Plaintiff's employment with Defendant Brothers Property Management Corporation, which is doing business as Charleston Harbor Resort and Marina, a hotel, restaurant, and marina facility located in Mt. Pleasant, South Carolina. Plaintiff was terminated from his position in June 2012.

¹ Only Brothers Property Corporation and Brothers Property Management Corporation (collectively, "Defendants") have been served with process in this case.

Plaintiff initiated this lawsuit on July 18, 2014 by filing his original Complaint in this Court. Defendants then removed this case to federal court. On October 30, 2014, Plaintiff filed his Amended Complaint. On November 4, 2014, Plaintiff filed a motion to remand this case to state court. On November 17, 2014, Defendants filed a motion to dismiss Plaintiff's Amended Complaint on the grounds that Plaintiff failed to state a claim upon which relief may be granted. While Defendants' motion to dismiss was pending, Plaintiff's motion to remand this case to state court was granted on April 30, 2015.

On June 15, 2015, Plaintiff filed a Motion for Extension of Time to respond to Defendants' Motion to Dismiss Plaintiff's Amended Complaint. Plaintiff specifically requested an extension until June 29, 2015 to file a response to Defendants' motion to dismiss. Plaintiff failed, however, to file a response to Defendants' motion by this self-imposed deadline or at any subsequent point.

On June 23, 2015, the Court notified the parties that a hearing regarding Defendants' motion to dismiss and Plaintiff's motion for extension of time would be held on July 29, 2015. Plaintiff does not dispute that he received this notice. Nevertheless, Plaintiff admits that he chose not appear at the hearing.

At the outset of the July 29, 2015 hearing, the Court noted that Plaintiff was not present even though he received notice of the hearing. (Transcript of July 29, 2015 Hearing at 2:6-17.) The Court then heard Defendants' counsel's arguments in support of their motion to dismiss. Defendants' counsel began by explaining the procedural history of this matter, including the fact that Plaintiff filed a motion to remand this case from federal court to state court "[a]nd [Defendants] heard—kind of argued about" whether this matter should be remanded. (*Id.* at 2:23-3:3.) In response, the Court asked, "So [Plaintiff] has been appearing for hearings up until

now?" (*Id.* at 3:4-5.) Defendants' counsel replied, "He didn't appear for any hearings, but he did file a motion to remand in federal court and did that." (*Id.* at 3:6-8.) The July 29, 2015 hearing was the first hearing in this case. Defendants' counsel then stated that Plaintiff had not responded to Defendants' motion to dismiss despite the fact that his self-imposed deadline to do so expired one month earlier on June 29, 2015. (*Id.* at 3:10-4:2.)

At the conclusion of Defendants' counsel's oral argument, the Court stated it would grant Defendants' motion. (*Id.* at 12:10-11.) The Court directed Defendants' counsel to submit a proposed order granting its motion and specifically informed Defendants' counsel, "[T]he [proposed] order should reflect [Plaintiff] failed to appear after notice and did not challenge the motion." (*Id.* at 12:11-22.) On August 24, 2015, the Court granted Defendants' motion on the grounds that each of Plaintiff's claims failed as a matter of law and because Plaintiff failed to respond to Defendants' motion to dismiss in any respect.

II. Dismissal of Plaintiff's Appeal by the Court of Appeals

On September 29, 2015, Plaintiff filed his Notice of Appeal of the Court's order granting Defendants' motion to dismiss with the South Carolina Court of Appeals. On October 14, 2015, Plaintiff filed a Motion for Leave of the Court of Appeals to File a Motion Seeking Relief Under Rule 60(b) of the South Carolina Rules of Civil Procedure on the grounds that this Court failed to resolve factual disputes in his favor when it granted Defendants' motion to dismiss. Plaintiff also argued that Defendants' motion did not "accurately represent[] the factual allegations made within Plaintiff's . . . Amended Complaint" (*Id.* at 2.) The Court of Appeals denied Plaintiff's motion.

Plaintiff's initial appellate brief was due November 20, 2015. However, he failed to file his initial brief or request an extension of time to do so by this deadline. On December 9, 2015

(19 days after the deadline to file his initial brief), Plaintiff filed a Motion for Extension of Time to File Initial Brief in which he requested an extension of 30 days until January 8, 2016 to file his initial appellate brief. Plaintiff's motion was granted on December 14, 2015. Plaintiff subsequently requested and received two additional extensions of time to file his initial appellate brief until February 29, 2016, a deadline that Plaintiff specifically requested. Plaintiff failed to file his initial brief by this self-imposed deadline. On April 7, 2016, the Court of Appeals dismissed Plaintiff's appeal for failure to file his initial brief and designation of matter.

On April 25, 2016, Plaintiff filed a Motion for Reinstatement and/or Motion for Leave to Serve and File Documents Out of Time to Remedy Default in which he asked the Court of Appeals to reinstate his appeal and/or allow him to serve and file his initial appellate brief out of time. On July 23, 2016, however, Plaintiff filed a motion asking the court to withdraw his appeal. On August 11, the Court of Appeals entered an order granting Plaintiff's July 23 request to withdraw his appeal. On November 17, 2016, Plaintiff filed the instant Motion.

STANDARD OF REVIEW

Rule 60(b) of the South Carolina Rules of Civil Procedure provides that "the court may relieve a party . . . from a final judgment" only for the specific reasons set forth in the Rule, which include "fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3), SCRPC. Motions seeking relief from judgment due to the intrinsic fraud of an opposing party or opposing counsel are subject to Rule 60(b)(3)'s one-year limitation from the date of the entry of the judgment from which relief is sought. Rule 60(b), SCRPC; *Mr. G v. Mrs. G*, 320 S.C. 305, 307-08, 465 S.E.2d 101, 102-03 (Ct. App. 1995) (citation omitted). However, the Court's inherent authority to set aside a judgment based on a party's engagement in extrinsic fraud (meaning fraud upon the Court) is not subject to a statute of limitations. *Chewning v. Ford*

Motor Co., 354 S.C. 72, 80, 579 S.E.2d 605, 609-10 (citing Rule 60(b), SCRCPP; *Hagy v. Pruitt*, 339 S.C. 425, 529 S.E.2d 714 (2000)).

Extrinsic fraud exists when a party's misrepresentations or omissions are so egregious that they induce a litigant to forgo presenting his case or deny him the opportunity to be heard. *Chewning*, 354 S.C. at 81, 579 S.E.2d at 610 (quoting *Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). On the other hand, intrinsic fraud occurs when a "party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary but has unreasonably neglected to do so." *Mr. G*, 320 S.C. at 308, 465 S.E.2d at 103 (internal quotation marks omitted). "A claim of intrinsic fraud goes to the merits of the prior proceeding which the moving party should have guarded against at the time." *Id.* (citations and internal quotation marks omitted). *See also Evans v. Gunter*, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988) (intrinsic fraud "should be discovered during the litigation itself, and to permit such relief [from a final judgment due to intrinsic fraud] undermines the stability of judgments.").

ANALYSIS

I. Plaintiff Is Not Entitled to Relief Under Rule 60(b) Because He Failed on Multiple Occasions to Pursue His Claims.

Plaintiff admits that he chose not to appear at the July 29, 2015 hearing and failed in multiple instances to meet filing deadlines (including multiple self-imposed filing deadlines) and otherwise follow the South Carolina Rules of Civil Procedure and South Carolina Appellate Court Rules. Specifically, in addition to electing not to attend the July 29, 2015 hearing, Plaintiff failed to file a response to Defendants' motion to dismiss even though he filed a motion to request an extension of time until June 29, 2015 to do so. Plaintiff also admittedly failed to file his requisite initial appellate brief with the South Carolina Court of Appeals despite receiving

multiple extensions of time to do so. The Court notes that in his final motion for extension of time, Plaintiff specifically requested an extension until February 29, 2016 to file his initial appellate brief. Nevertheless, Plaintiff failed to file his appellate brief by this self-imposed deadline or at any subsequent point before the Court of Appeals dismissed his appeal on April 7, 2016, more than six months after Plaintiff filed his Notice of Appeal. Further, Plaintiff withdrew his motion to reinstate his appeal. Because Plaintiff has repeatedly chosen not to pursue his claims in this case and failed on multiple occasions to abide by the South Carolina Rules of Civil Procedure and South Carolina Appellate Court Rules, he is not entitled to relief from the dismissal of his Amended Complaint pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure.

II. Plaintiff Has Failed to Meet the Requisite Standard to Obtain Relief Under Rule 60(b).

Plaintiff's motion must also be denied because he has failed to demonstrate that Defendants committed fraud on the Court. It is axiomatic that a statement must be false to be fraudulent. *See, e.g., Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 445 (Ct. App. 2003) (setting forth the elements of fraud, which includes a statement's falsity); *Chewing*, 354 S.C. at 78, 579 S.E.2d at 608 ("Fraud on the court . . . requires a showing that one has acted with an intent to deceive or defraud the court.") (internal quotations and citations omitted). The transcript of the July 29, 2015 hearing demonstrates that Defendants' counsel's statements on which Plaintiff's motion is based were true and thus cannot support Plaintiff's claim that Defendants committed fraud on the Court.

Plaintiff first claims that Defendants' counsel committed fraud in describing the procedural history of this case in a manner that Plaintiff characterizes as "misleading" with the intent "to provide this Court with the misimpression that [Plaintiff] was in the habit of failing to

appear for hearings or that he otherwise lacked respect for the court system in general.” (Plaintiff’s Motion at 20.) This allegation is without merit. In response to the Court’s question regarding whether Plaintiff had appeared for any hearings while this case was being adjudicated in federal court, Defendants’ counsel stated, “He didn’t appear for any hearings, but he did file a motion to remand in federal court and did that.” (Transcript of July 29, 2015 Hearing at 3:6-8.) This statement is true and therefore not fraudulent. No hearings took place while this case was pending in federal court, and thus neither party could not have attended any. However, as Defendants’ counsel stated, Plaintiff filed a motion to remand this matter from federal court to this Court. By acknowledging that Plaintiff filed a motion to remand while this case was pending in federal court, Defendants’ counsel informed the Court that Plaintiff had participated in this case, contrary to Plaintiff’s claim.

Plaintiff also alleges that Defendants’ counsel committed fraud by stating that Defendants’ motion to dismiss had been pending for more than eight months, and Plaintiff had not responded to it. (Plaintiff’s Motion at 21-22.) This statement is true. Defendants filed their motion to dismiss on November 17, 2014, and the hearing regarding this motion occurred on July 29, 2015, a period of more than eight months. During this time period, Plaintiff admits that he never responded to Defendants’ motion. As such, Plaintiff’s claim that this statement was fraudulent is without merit.

Finally, Plaintiff inaccurately claims that Defendants’ counsel committed fraud on the Court by misrepresenting the factual allegations in his Amended Complaint. As a threshold matter, while Plaintiff purports to argue that Defendants’ counsel fraudulently represented some of the facts alleged in the Amended Complaint, his arguments focus solely on the legal grounds advanced by Defendants’ counsel in support of its motion to dismiss, not on Defendants’



counsel's statements regarding Plaintiff's factual allegations. (*See id.* at 23-37.) In fact, Plaintiff does not identify a single factual allegation that Defendants' counsel articulated incorrectly in its motion to dismiss or its oral argument in support of its motion. Instead, Plaintiff cites several cases and threadbare legal conclusions in his Amended Complaint (for instance, that an employment contract existed between Plaintiff and Defendants or that Defendants owed a fiduciary duty to Plaintiff) in an attempt to rebut Defendants' legal arguments that his Amended Complaint should be dismissed. This is insufficient to support his claim that Defendants committed fraud on the Court based on their counsel's representations of the Amended Complaint's factual allegations.

III. Plaintiff's Motion Is Time-Barred.

As discussed previously, motions seeking relief from judgment due to the intrinsic fraud of an opposing party or opposing counsel are subject to Rule 60(b)(3)'s one-year limitation from the date of the entry of the judgment from which relief is sought. Rule 60(b), SCRPC; *Mr. G*, 320 S.C. at 307-08, 465 S.E.2d at 102-03 (citation omitted) ("A party may not use intrinsic fraud to mount an attack upon a judgment if the judgment is more than one year old."). However, the Court's inherent authority to set aside a judgment based on a party's engagement in extrinsic fraud (meaning fraud upon the Court) is not subject to a statute of limitations. *Chewning*, 354 S.C. at 80, 579 S.E.2d at 609-10 (citing Rule 60(b), SCRPC; *Hagy v. Pruitt*, 339 S.C. 425, 529 S.E.2d 714 (2000)). Accordingly, the question of whether Plaintiff's motion is timely depends upon whether he alleges Defendants' counsel engaged in intrinsic or extrinsic fraud.

Plaintiff admits that he chose not to file a response to Defendants' motion to dismiss and chose not to appear at the July 29, 2015 hearing. Plaintiff does not allege that he relied on any representations of Defendants when he decided not to respond to Defendants' motion to dismiss

or appear at the July 29, 2015 hearing. In short, Plaintiff had numerous opportunities to pursue the claims in his Amended Complaint, yet by his own admission willfully and repeatedly chose not to do so. Therefore, even if the Court accepts Plaintiff's allegations regarding Defendants' counsel's allegedly fraudulent statements as true, these statements (at worst) constitute intrinsic fraud, meaning fraud from which a party has unreasonably neglected to protect himself. *Mr. G*, 320 S.C. at 308, 465 S.E.2d at 103. Therefore, Plaintiff's claims are subject to the one-year statute of limitations for claims under Rule 60(b)(3). Because Plaintiff filed the instant motion more than one year after the Court dismissed his Amended Complaint, the motion is time-barred.

IV. Plaintiff Impermissibly Attempts to Use Rule 60(b) as a Substitute for an Appeal.

Rule 60(b) may not be used as a substitute for an appeal, particularly when a party previously had an opportunity to pursue his claims before the trial court and on appeal. *See Smith Cos. of Greenville v. Hayes*, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993) (60(b) motion is no substitute for an appeal, particularly when party seeking relief had the opportunity to litigate his claims before the trial court and on appeal); *Tench v. S.C. Dep't of Educ.*, 347 S.C. 117, 121, 553 S.E.2d 451, 453 (2001) (citing *Smith Cos.*, 311 S.C. at 358, 428 S.E.2d at 900) ("A party may not invoke [Rule 60(b)] where it could have pursued the issue on appeal."). As discussed previously, Plaintiff purports to seek relief under Rule 60(b) for Defendants' counsel's alleged fraudulent misrepresentations about the procedural history of this case and the factual allegations in the Amended Complaint. Plaintiff's arguments, however, focus solely on Defendants' legal arguments in support of their motion to dismiss, not Defendants' counsel's representations of the procedural posture of this lawsuit or Plaintiff's factual allegations.

For instance, Plaintiff claims that Defendants' counsel misrepresented Plaintiff's allegations in support of his four causes of action for breach of fiduciary duty. (Plaintiff's

Motion at 25-27.) Defendants' counsel argued at the July 29, 2015 hearing that these causes of action failed as a matter of law because (1) in South Carolina, the at-will employment relationship, standing alone, is insufficient to create a fiduciary relationship; and (2) two of the claims were untimely. (Transcript of July 29, 2015 Hearing at 9:21-10:6.) Plaintiff does not challenge Defendants' counsel's representations of the factual allegations supporting these claims in the Amended Complaint. Rather, he challenges Defendants' legal arguments and contends that the at-will employment relationship, by itself, can constitute a fiduciary relationship. (Plaintiff's Motion at 26-27.) Plaintiff also contests Defendants' legal arguments, not their representations of the factual allegations in the Amended Complaint, in his assertions that his fraud and breach of contract claims were wrongly dismissed. (See, e.g., *id.* at 28.) In essence, Plaintiff attempts to use Rule 60(b) to once again appeal the dismissal of his Amended Complaint. Because Rule 60(b) may not be used as a substitute for an appeal, Plaintiff's Motion fails.

V. Because Plaintiff Alleges Defendants Engaged In Intrinsic Fraud, He Cannot Obtain Relief Under Rule 60(b).

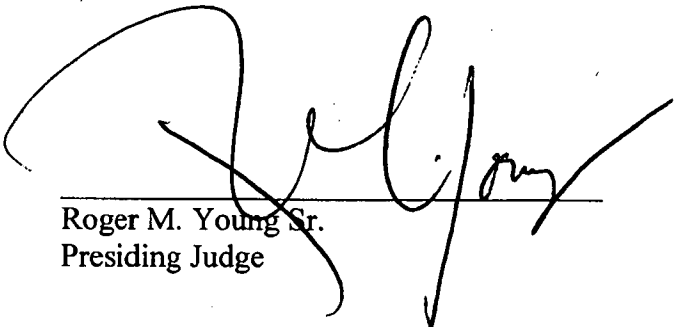
It is well-established that relief under Rule 60(b) for fraud upon the court is only available in cases in which a party has engaged in extrinsic fraud. *Chewning*, 354 S.C. at 80, 579 S.E.2d at 610 (citation omitted) ("In order to secure equitable relief on the basis of fraud, the fraud must be extrinsic."). Conversely, relief from a final judgment under Rule 60(b) is never available in cases of intrinsic fraud. *Id.* at 82, 579 S.E.2d at 610. Specifically, "[e]quitable relief from a judgment is denied in cases of intrinsic fraud, on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable;" *Id.*; see also *Mr. G*, 320 S.C. at 308, 465 S.E.2d at 103.

As discussed previously, Plaintiff alleges that Defendants engaged in extrinsic fraud. However, Plaintiff fails to offer any evidence to demonstrate that Defendants' alleged misrepresentations prevented him from presenting his case or induced him not to pursue his claims. Rather, he candidly admits that he elected not to file a written response to Defendants' motion to dismiss or appear for the July 29, 2015 hearing. (Plaintiff's Motion at 4-5.) Accordingly, his allegations constitute allegations of intrinsic fraud, and he is not entitled to relief under Rule 60(b).

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff's Motion for Relief from Judgment Under Rule 60(b) of the South Carolina Rules of Civil Procedure for Fraud Upon the Court is **DENIED**.

IT IS SO ORDERED!



Roger M. Young Sr.
Presiding Judge

March 9, 2017