

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES Z. YELVERTON, JR. : CIVIL ACTION
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 v. :
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 JOSEPH LEHMAN, et al. :
 : NO. 94-6114

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 4th day of September, 1998, upon consideration of Plaintiff's Motion to Vacate Judgment (Doc. No. 48, filed August 10, 1998), Motion for Relief from Judgment under Federal Rule of Civil Procedure 60(b)(2) (Doc. No. 49, filed August 10, 1998), the Commonwealth's Response to Plaintiff's Motion to Vacate Judgment (Doc. No. 50, filed August 11, 1998), the Plaintiff's Response to the Commonwealth's Response (Doc. No. 52, filed August 26, 1998), and the Commonwealth's Sur-Reply in Opposition to Plaintiff's Motion to Vacate Judgment (Doc. No. 52, filed August 27, 1998), **IT IS ORDERED**, for the reasons set forth in the following Memorandum, that Plaintiff's Motion to Vacate Judgment and Plaintiff's Motion for Relief from Judgment are **DENIED**.

MEMORANDUM

1. **Facts and Procedural History:** Plaintiff was convicted of

rape and eight counts of burglary in 1990 and sentenced to serve a minimum of ten (10) and a maximum of thirty (30) years in a Pennsylvania Correctional facility. On August 17, 1994, when plaintiff had approximately five (5) years remaining on his minimum sentence, he applied for pre-release/furlough status, the guidelines for which are set forth in Administrative Directive DC-ADM 805 (effective 2/18/84)("DC-ADM 805"). At the time of plaintiff's application, DC-ADM 805 provided that inmates who had served at least one half the minimum sentence and at least nine months in a state facility, and who had a clean prison record, were eligible to apply for pre-release status. Before plaintiff's application was processed, however, DC-ADM 805 was revised, effective November 12, 1994, to require inmates to be within nine (9) months of completing their minimum sentences to be eligible for pre-release. Under the revised regulation, plaintiff's application was denied.

Plaintiff then filed the within action against the Commonwealth of Pennsylvania in the United States District Court for the Eastern District of Pennsylvania, alleging that the application of the revised regulations to his petition for pre-release status violated his rights under the Due Process and Equal Protection clauses of the United States Constitution and 42 U.S.C. §§ 1981, 1982, and 1983. The case was assigned to Judge

Daniel H. Huyett.¹

The Commonwealth filed a motion for summary judgment on August 17, 1995. In its brief in support of its motion for summary judgment, the Commonwealth tangentially referred to an incident involving the plaintiff that caused a Class II misconduct report to be placed in plaintiff's prison record.² Under both versions of DC-ADM 805, the original and revised versions, an inmate may have one (1) Class II reprimand on his record and still be eligible for pre-release status, provided that he meets the other requirements in the regulations. DC-ADM 805 § 94.3(a)(4).

On June 3, 1996, Judge Huyett granted the Commonwealth's motion for summary judgment. Yelverton v. Lehman, No. CIV.A. 94-6114, 1996 WL 296551 (E.D. Pa. June 3 1996). Specifically, the court found that plaintiff met all the requirements for pre-release eligibility under the earlier version of DC-ADM 805, including having a clean prison record, id. at *1, but concluded that plaintiff had suffered no constitutional deprivation as a result of the denial of pre-release. Id. at *8.

On August 8, 1998, over two (2) years and two (2) months after summary judgment was granted, plaintiff filed the instant

¹ On August 11, 1998, this case was reassigned from the calender of the late Judge Huyett to this Court.

² The Commonwealth twice referred to the report in its brief and attached a copy as Exhibit D-7.

motions under Federal Rule of Civil Procedure 60(b) to have the summary judgment order vacated on the grounds of newly discovered evidence and fraud.³ Plaintiff argues that his discovery that the Commonwealth referred to his Class II reprimand constitutes newly discovered evidence, and that the Commonwealth's reference was fraudulent.

2. Newly Discovered Evidence: Federal Rule of Civil Procedure 60(b) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

Fed.R.Civ.P. 60(b)(2). The standard applicable to a Rule 60(b)(2) motion is analogous to that which governs Rule 59. 11 Charles Wright, Arthur Miller and Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2808, 86 (2d ed. 1995). That standard requires that the new evidence: (1) be material and not merely cumulative, (2) could not have been discovered before the conclusion of the litigation through the exercise of reasonable

³ In his Response to Commonwealth's Response to Plaintiff's Motion to Vacate Judgment, plaintiff raised for the first time the issue of fraud. As it is not mentioned in plaintiff's motions, it is not properly before the Court. The Court, nevertheless, will address it.

diligence and (3) would probably have changed the outcome of the litigation. See Compass Technology, Inc. v. Tseng Laboratories, Inc., 71 F.3d 1125, 1130 (3d Cir. 1995)(listing elements of a Rule 59 claim). Further, the party requesting such relief "bears a heavy burden" which requires "more than a showing of the potential significance of the new evidence." Id. (citing Plisco v. Union R. Co., 379 F.2d 15, 16 (3d Cir. 1967)). Thus, Rule 60(b) motions "should be granted only where extraordinary justifying circumstances are present." Bohus v. Beloff, 950 F.2d 919, 930 (3d Cir. 1991).

Plaintiff's claims do not meet this standard. As plaintiff admits, the "newly discovered evidence" was an exhibit to the Commonwealth's brief in support of its motion for summary judgment. Plaintiff's failure to read diligently the Commonwealth's motion does not constitute excusable ignorance or neglect.

Additionally, when Judge Huyett granted the Commonwealth's motion for summary judgment, he found that it was undisputed that plaintiff had a "clean prison record." Yelverton, 1996 WL 296551, at *1. A fortiori, the Commonwealth's reference to plaintiff's prison record had no bearing on Judge Huyett's decision, and plaintiff's motion to vacate the judgment must be denied.

3. Fraud: To reopen a judgment under Rule 60(b)(3), plaintiff

must show "(1) that the adverse party engaged in fraud or other misconduct, and (2) that this conduct prevented the moving party from fully and fairly presenting his case." Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983); Piergrossi v. Karcewski, No. CIV.A. 93-4190, 1995 WL 393804, at *2 (E.D. Pa. June 30, 1995). Such fraud must be demonstrated by "clear and convincing" evidence. Brown v. Pennsylvania R.R. Co., 282 F.2d 522, 527 (3d Cir. 1960); Pesca v. Board of Trustees, Mason Tenders' District Council Pension Fund, 176 F.R.D. 110, 115 (S.D.N.Y. 1997).

Plaintiff has fallen far short of meeting this burden. He has made no attempt to show that the Commonwealth's reference to his prison record was fraudulent, or that he was prevented from fully and fairly presenting his case as a consequence. In short, there is no such evidence. Additionally, as the Court has already found, the reference had no effect on the ultimate disposition of the motion for summary judgment. Cf. Bandai America Inc. v. Bally Midway Mfg. Co., 775 F.2d 70, 73 (3d Cir. 1985)(denying Rule 60(b)(3) motion in part because statements were not material to the outcome of the litigation). Thus, plaintiff's claim for fraud also must be denied.

4. Timeliness: Assuming arguendo that plaintiff could overcome these serious deficiencies in the merits of his claim, the Court would be required to dismiss his motion as untimely. A motion

under Federal Rule of Civil Procedure 60(b)(2) and (3) must be made within one (1) year after the judgment, order, or proceeding was entered or taken. Fed.R.Civ.P. 60(b). See also, Fed.R.Civ.P. 6(b)(explicitly restricting power to enlarge one year limitation for motion under 60(b) to provisions in that rule); Fed.R.Civ.P. 60(b) advisory committee's note (discussing one year restriction). Plaintiff filed his motions more than two (2) years after Judge Huyett granted the Commonwealth's motion for summary judgment. Consequently, the Court may not entertain the motions and they are denied on that alternative ground.

BY THE COURT:

JAN E. DUBOIS, J.