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

AUGUSTUS C. PATTERSON	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 04-CV-4202
	:	
GLAXOSMITHKLINE PHARMACEUTICAL COMPANY, ET AL.	:	

SURRICK, J. **MARCH 27, 2007**

MEMORANDUM & ORDER

Presently before the Court is Plaintiff's Motion To Formally Remove Petitioner's Attorney From Case #04-cv-4202, Sanction Petitioner's Attorney, Allow Pro Se Or Substitute Representation And Rule On Relief Requested Herein (Doc. No. 28). In accordance with the directive of the Third Circuit Court of Appeals in its Opinion dated October 25, 2006, we will treat Plaintiff's Motion as a Motion for Relief from Judgment under Federal Rule of Civil Procedure 60(b). For the following reasons, the Motion will be Denied.[1]

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On September 3, 2004, Plaintiff Augustus Patterson, proceeding pro se, filed a Complaint against Defendants GlaxoSmithKline ("Glaxo"), and two of their employees, George Hannum and Michael Manacchio (collectively, "Defendants"). Plaintiff alleged violations of Title VII of the Civil Rights Act, the Pennsylvania Human Relations Act, as well as various common law

[1] On December 13, 2006 a hearing was held on Plaintiff's Motion. The Court heard testimony from Plaintiff Augustus Patterson, Plaintiff's wife Maria Fay Patterson, Court Reporter Robin Vallentini, Reginald Allen, Esquire, and Alan Berkowitz, Esquire. (*See* Hr'g Tr. of Dec. 13, 2006.)

torts in connection with his employment and termination from Glaxo in 2004. (Doc. No. 1.) In October 2004, Plaintiff met attorney Reginald Allen, while Allen was meeting with another client at the EEOC Office in Philadelphia. (Hr'g Tr. at 65-66.) Plaintiff asked Allen if he would represent him in the instant action. (*Id.*) Allen agreed, and the two entered into a written fee agreement that provided that Allen would receive one-third of the proceeds of any settlement or judgment in favor of Plaintiff. (*Id.* at 66-67.) After discussing the case with Plaintiff, Allen filed an Amended Complaint, adding several claims to Plaintiff's initial pro se Complaint. (Doc. No. 7.)

The Parties proceeded through the normal course of discovery with Allen spending over 100 hours on Plaintiff's behalf reviewing documents and taking depositions. (Hr'g Tr. at 68-70; Hr'g Ex. D-11.) In June 2005, at the close of discovery, Defendants moved for summary judgment. (Doc. No. 16.) While Defendants' Motion was pending, the attorneys for the parties engaged in settlement discussions that included a Settlement Conference with the Court on July 8, 2005. (Hr'g Tr. at 70; Doc. No. 13.) Plaintiff initially sought $1.5 million in damages, however, Plaintiff lowered this demand to $200,000 during the Settlement Conference. (Hr'g Tr. at 22, 38, 67, 71.)[2] At the conclusion of the Settlement Conference, the parties were far apart on a settlement figure, but settlement discussions continued. (*Id*. at 71, 112.) In August 2005, Allen was able to negotiate an increase in the amount of the total settlement and communicated the details of his negotiations with Defendants' counsel, Alan Berkowitz, to Plaintiff. (*Id.* at 72-73, 112.) Allen also told Plaintiff that there was a strong possibility that Plaintiff's case would

[2] Plaintiff testified at the hearing that he told Allen in August and September of 2005 that he wanted $1.5 million to settle the case but that he would take $250,000 plus long-term disability benefits or workers compensation. (Hr'g Tr. at 38-40.)

be dismissed on summary judgment and urged him to settle. (*Id.* at 72-73.) Allen also agreed to lower his fee to thirty-percent. (*Id.*) Allen wanted Plaintiff to have a larger portion of the settlement because Plaintiff's family was undergoing financial difficulties since his termination from Glaxo. (*Id.* at 68.)

On August 31, 2005, Berkowitz made a final settlement offer to Allen. (*Id.* at 72-73, 111-12.) Under the terms of this offer, Glaxo would pay Plaintiff a lump-sum payment of $50,000 within fourteen days of Plaintiff signing a Settlement Agreement. (Hr'g Ex. D-10.) Plaintiff was required to apply for long-term disability benefits with the Hartford Insurance Company, which benefits totaled approximately $80,000 over a two-year period. (Hr'g Tr. at 11-12.) If Hartford denied Plaintiff's long term disability application, Glaxo would then pay Plaintiff an additional $30,000. (*Id.*) After receiving the offer from Berkowitz, Allen immediately called Plaintiff to relay the offer. (*Id.* at 73.) Allen advised Plaintiff of the principal terms of the settlement offer and Plaintiff accepted the offer. (*Id.*) Allen then called Berkowitz and told him that Plaintiff had accepted the offer. (*Id.* at 73, 112.) That same day, Berkowitz notified the Court in writing by fax of the Parties' agreement and asked that the matter be dismissed pursuant to Local Rule 41.1(b). (Hr'g Ex. D-5.) On September 1, 2005, an Order was entered dismissing Plaintiff's Complaint with Prejudice pursuant to Rule 41.1(b). (Doc. No. 27.)

On September 14, 2005, Berkowitz sent Allen a draft Settlement Agreement which incorporated the terms agreed upon by the parties on August 31, 2005. (Hr'g Ex. D-7.) On September 28, 2005, Allen responded in writing, proposing several minor changes to the Agreement itself and requesting that two separate checks be issued, one for Allen in the amount of $17,757.93 and the other for Plaintiff in the amount of $32,243.07. (Hr'g Ex. D-8.) On

October 3, 2005, Defendants' co-counsel, Andrea Kirshenbaum, sent Allen a letter informing him that she had incorporated Allen's proposed changes into the Settlement Agreement, including the request that two separate checks be issued. (Hr'g Ex. D-9.) On October 7, 2005, Kirshenbaum sent Allen a letter enclosing two copies of the final Settlement Agreement. (Hr'g Ex. D-10.)

On October 11, 2005, Allen met with Plaintiff and his family at Allen's home to review and sign the Settlement Agreement. (Hr'g Tr. at 80-81.) After reviewing the Agreement, Plaintiff became upset with Allen's fee. (*Id.* at 82.) Although the parties had agreed that Allen would receive thirty-percent of the total settlement amount, Plaintiff was upset that Allen was to receive a percentage of the second payment from Glaxo in the event that he failed to qualify for disability, but would not receive any additional money if Plaintiff in fact qualified for disability. (*Id.*) Plaintiff informed Allen that he would never sign the Settlement Agreement and stormed out of Allen's house. (*Id.* at 82-83.) Shortly thereafter, Allen and Plaintiff spoke again about the Agreement, and Allen informed Plaintiff that he would waive his fee on the second payment if Plaintiff would sign the Settlement Agreement. (*Id.* at 88.) Plaintiff responded that Allen should renegotiate a better settlement or he would be fired. (*Id.* at 90.) On October 31, 2005, Plaintiff fired Allen. (Hr'g Ex. D-14.) From that point forward, Plaintiff attempted to negotiate directly with Berkowitz regarding settlement of the case. (Hr'g Tr. at 114-15.)

On November 11, 2005 Plaintiff sent Berkowitz a letter which enclosed a "Counter Settlement Proposal Offer."[3] (Hr'g Ex. D-3.) Under Patterson's "CSPO," Plaintiff would receive $81,902.00 in total compensation from Defendants. (*Id.*) This was $1,902.00 more than

[3] Plaintiff refers to this in his correspondence as his "CSPO."

the settlement figure negotiated by Allen. (*Id.*) However, under Plaintiff's proposal, Plaintiff would receive the entire amount of the settlement proceeds. Allen had been fired. In response, Berkowitz wrote to Plaintiff informing him that he would not communicate with Plaintiff directly because Allen was still Plaintiff's counsel of record. (Hr'g Ex. D-13.) Berkowitz also informed Plaintiff that he believed that the parties had agreed upon a settlement. (*Id.*)

On December 6, 2005, Plaintiff filed the instant Motion requesting that the Court formally remove Allen from the case and permit Plaintiff to proceed pro se. (Doc. No. 28.) On December 7, 2005, Allen wrote the Court a detailed letter denying the allegations in Plaintiff's Motion. (Hr'g Ex. D-11.) On December 9, 2005, Plaintiff's Motion was denied. (Doc. No. 29.) Plaintiff filed an appeal in the Third Circuit from the denial of his Motion, arguing that Allen's fraudulent behavior warranted a reopening of this case. (Doc. No. 30.) Defendants argued that even if Plaintiff's Motion is construed as a motion filed under Federal Rule of Civil Procedure 60(b), it should be denied because Plaintiff delayed in filing his motion and because Plaintiff's actions are only a veiled attempt to renegotiate his settlement agreement for the purpose of avoiding the payment of attorney's fees to Allen.

On October 25, 2006, the Third Circuit determined that this Court did not abuse its discretion by denying Plaintiff's post-judgment motion "to the extent Plaintiff sought to remove his attorney so that he could pursue the matter in a pro se capacity or seek the assistance of another attorney given the court's entry of an order on August 31, 2005 dismissing the case with prejudice." *See Patterson v. GlaxoSmithKline Pharm. Co. et al.*, No. 05-5550 (3d Cir. Oct. 25, 2006). The Circuit Court also determined that Plaintiff's Motion to set aside this Court's Order of dismissal was untimely filed under Rule 41.1(b). (*Id.*) Nevertheless, the Court concluded that

Plaintiff's Motion could be construed as one filed pursuant to Rule 60(b). (*Id.*) The Court remanded the matter for further proceedings consistent with that determination. (*Id.*) Pursuant to the Third Circuit's directive, we held a Rule 60(b) hearing on December 13, 2006 to determine whether Allen had fraudulently entered into the Settlement Agreement on behalf of Plaintiff without authority from Plaintiff.

II. LEGAL STANDARD

Rule 60(b)(6) provides that a "court may relieve a party or a party's legal representative from a final judgment, order or proceeding . . . for any . . . reason justifying relief from operation of a judgment." Fed. R. Civ. P. 60(b)(6).[4] Courts consider Rule 60(b)(6) "a catch-all provision" under which relief should be granted "only in cases evidencing extraordinary circumstances.'" *Reform Party v. Allegheny County Dep't of Elections*, 174 F.3d 305, 311 (3d Cir. 1999)(en banc) (citations omitted)). The "general purpose of Rule 60(b) is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *Boughner v. Sec'y of Health, Educ., & Welfare*, 572 F.2d 976, 977 (3d Cir. 1978). When a party makes "a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment, their burden under Rule 60(b) is perhaps even more formidable than had they litigated and lost." *Phila. Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1120 (3d Cir. 1979). Accordingly, "[w]here the issue whether the dismissal order, entered based upon a representation that the matter had been settled, should be set aside turns on whether the attorney had express authority to settle the case, the burden of proof rests on the party asserting the authority." *Mowrer v. Warner-Lambert Co.*, No. Civ. A. 98-2908, 2000 WL

[4] We conclude that subsections (b)(1) through (b)(5) of Rule 60(b) do not apply here.

974394, at *5 (E.D. Pa. July 13, 2000).

III. DISCUSSION

The sole issue to be decided at this juncture is whether Allen had authority to enter into a settlement with Defendants on Plaintiff's behalf. Our jurisdiction in this case is predicated upon the presence of a federal question. However, we apply Pennsylvania law to this issue because the "settlement of a lawsuit and the relationship between an attorney and his or her client are areas traditionally governed by state law and there is no conflicting federal interest." *Id.* (citing *Tiernan v. Devoe,* 923 F.2d 1024, 1032-33 (3d Cir. 1991). The Pennsylvania Supreme Court has concluded that "an attorney can only settle his client's case if he or she has express actual authority to do so." *See Mowrer*, 2000 WL 974934, at *5 (citing *Farris v. J.C. Penney Co., Inc.*, 176 F.3d 706, 711 (3d Cir. 1999); *see also Reutzel v. Douglas*, 870 A.2d 787, 789-90 (Pa. 2005) ("The law in this jurisdiction is clear and well-settled that an attorney must have express authority in order to bind a client to a settlement agreement. . ."). "An agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not it is made in the presence of the court, and even in the absence of a writing." *Green v. John H. Lewis & Co.*, 436 F.2d 389, 390 (3d Cir. 1970). Morever, a "Settlement Agreement is still binding, even if it is clear that a party had a change of heart between the time [he] agreed to the terms of the settlement and when those terms were reduced to writing." *McCune v. First Judicial Dist. of Pa. Prob. Dep't,* No. Civ. A. 99-3249, 2000 WL 680819, at *1 (E.D. Pa. May 25, 2000) (internal citations omitted). Finally, "a party to a settlement agreement cannot avoid the agreement simply by arguing that she did not foresee the consequences of a particular term." *Mowrer*, 2000 WL 974934, at *6.

We conclude, based upon the evidence and testimony presented at the Rule 60(b) hearing that Allen had express authority to settle this case with Defendants on Plaintiff's behalf on August 31, 2005. At the hearing, Allen testified credibly as follows:

Kirshenbaum:	Prior to attending the settlement conference, did you discuss potential settlement terms with Patterson?
Allen:	Well, we did, and I believe you have a - - you may have a copy of the demand letter, revised demand letter, or demand letter, and I recall a figure of around $200,000, and I'm not sure, sitting here today, whether that was put into writing or not, but I recall that I, you know, had told him that I wanted to see if we could get him $200,000, or something like that.
Kirshenbaum:	And after the settlement conference before Judge Surrick in July 2005, did you continue to negotiate a potential settlement with Mr. Berkowitz?
Allen:	Well, I'm not sure that's the correct way to describe what happened. I continued to let Patterson know there was a danger that his case could be dismissed on summary judgment. It was a tight deadline in the time between responses for the summary judgment motion and trial. I did write him to let him know that I felt we needed to really try to settle the case to insure that he got some money. I did not want him to walk away with zero, and I did inform him that in my - - then I believed there was a possibility that his could be dismissed, and that he would have an uphill battle getting anything if he tried to appeal it, or that it won't be - - it wouldn't be anything substantial. So he authorized me to reach out to Mr. Berkowitz.
Kirshenbaum:	And how did he authorize you to reach out to Mr. Berkowitz?
Allen:	This is all through telephone conversations, cell phone conversations usually.
Kirshenbaum:	Do you remember when that conversation may have occurred?
Allen:	I don't recall exact dates.
Kirshenbaum:	Generally?

Allen: I know that when the case was settled, meaning that I gave him the last offer, which is the offer that's in the written settlement agreement, which talks about two different payments of 50. I believe it's 50, maybe a little bit more, and $30,000, something like that coming to a total of $80,000, but that caveat that he would use best efforts to obtain long-term disability payments, which would be worth approximately -- we believe this money would be tax free - - approximately $40,000 a year, so that if he applied and he got that, he would get two years at about 40,000, meaning 80,000 for those two years, plus the initial payment.

We actually started working towards that, and I made telephone calls on his behalf to the insurance company, I spoke to Dr. Frankel, agreed to come board (sic) and support the position that Mr. Patterson was disabled - -

Kirshenbaum: And so that you had that communication with Mr. Patterson informing him of the terms that you've just mentioned?

Allen: Well, going back to the acceptance of the offer, I spoke with Mr. Berkowitz, and like I said, I struggled hard to get more than the 50 plus 30, but he said GSK simply was not going to offer, that was their final offer.

Kirshenbaum: Okay.

Allen: I called Mr. Patterson - -

Kirshenbaum: I'm sorry. You called Mr. Patterson after you had that conversation with - -

Allen: Yes - -

Kirshenbaum: - - Mr. Berkowitz?

Allen: - - I called Mr. Patterson. I would say it was within a couple of minutes after I spoke to Mr. Berkowitz. I ran the proposal by him by telephone, a cell phone conversation, and this must have been in late August, as I believe there was previous testimony, I laid out the separate payments. He already testified he was aware of the contingency agreement. We talked about, you know, the possibility of this long-term disability. We didn't go into detail,

because we didn't know at the time what his long-term disability benefits might be. I believe it had something to do with, you know, his time with GSK - - I'm not certain - - but he agreed. I asked him to make sure that he agreed. I asked him, you know, Are you certain? And, you know, he told he was certain he wanted to settle.

Kirshenbaum: And then he - -

Allen: So I - -

Kirshenbaum: - - wanted to settle under the terms that you set out during that conversation?

Allen: Yeah, the terms that are in principle, that are outlaid (sic) in the settlement agreement.

(Hr'g Tr. at 71-72.) This testimony was supported by the testimony of Berkowitz who testified that after he made a final settlement offer to Allen on August 31, 2005, Allen told him that he had to discuss the offer with his client. (*Id.* at 112.) Allen then called Berkowitz back a short time later and informed him that he had talked to Plaintiff and Plaintiff had accepted the settlement offer. (*Id.*) Plaintiff claims that he never authorized Allen to settle this case. However, Plaintiff's words and his actions indicate otherwise.

After finalizing the Settlement Agreement with Defendants, Allen invited Plaintiff and Plaintiff's wife to his home to review the final draft and to sign the agreement. (*Id.* at 24.) After reviewing the Settlement Agreement, Plaintiff told Allen that the deal benefitted Allen more than it benefitted him. (*Id.* at 86-87.) Plaintiff indicated that the Agreement gave Allen an incentive not to aggressively pursue long-term disability benefits on his behalf because Allen would receive no attorney's fee if Plaintiff received those benefits but Allen would receive a contingent fee on the $30,000 payment if Plaintiff did not receive those benefits. On October 12, 2005,

Plaintiff's wife wrote Allen a letter which stated:

> By the unsigned agreement you generated with GSK, it benefits you not to contact and secure Long Term Disability for my Husband while at the same time this conduct generates a harmful loss for my Husband and our Family through lost income and insurance. And your much promoted "two bites of the Apple" that you miss guided (sic) my husband on, in my opinion is a proposed two bites of his apple for yourself, strongly, overwhelmingly, and harmfully against my husband's interest.

(Hr'g Ex. P-1.) Plaintiff also wrote a letter to Allen dated October 21, 2005, stating, "I will never sign the proposed GSK settlement presented to me by you, where the part of the failure is, you gain more if I gain less. . . ." (Hr'g Ex. P-2.) Sometime later in October 2005, Allen offered to waive his fee on the second payment from Glaxo if Plaintiff agreed to sign the agreement. Plaintiff refused. (Hr'g Tr. at 88.) Instead, Plaintiff fired Allen on October 31, 2005. (Hr'g Ex. D-14.)

Thereafter, in a series of letters, Plaintiff informed Berkowitz that he was no longer represented by Allen and that he had not agreed to the original Settlement Agreement of August 31, 2005. (Hr'g Tr. at 3, 12, 14.) Plaintiff's letters confirm that Allen told Plaintiff by telephone of the existence of the settlement proposal from Berkowitz, and they confirm that Plaintiff was having financial difficulties. Notwithstanding Plaintiff's statements during the Rule 60 hearing that his demand was $1.5 million but that he would settle the case for $250,000 plus long-term disability benefits or workers compensation, in the "CSPO" that Plaintiff sent to Berkowitz with the letter dated November 11, 2005, Plaintiff offered to settle the case for the total amount of $81,902.00. (Hr'g Ex. D-3.) This is only $1,902 more than the settlement amount originally negotiated by Allen on August 31, 2005. However, under Plaintiff's proposal, the proceeds from the settlement go directly to Plaintiff because he had fired Allen. Plaintiff testified in this regard

that he intended to sue Allen for legal malpractice and that the courts could determine if Allen was entitled to recover anything. (Hr'g Tr. at 55-60.)

We are satisfied that the record in this case demonstrates that Allen had express authority from Plaintiff to enter into the Settlement Agreement with Defendants on August 31, 2005, for a total settlement in the amount of $80,000. Allen testified that he had authority from Plaintiff to settle the case. Allen told the attorney for Defendants that he had such authority. After Allen received the final offer from Defendants on August 31, 2005, he immediately phoned Plaintiff to discuss the details of the settlement. After receiving Plaintiff's permission to settle, Allen immediately communicated with defense counsel advising that Plaintiff had accepted the settlement offer. Ultimately, Plaintiff himself corresponded with defense counsel and indicated a willingness to settle his case for $81,902.00, an amount that was almost exactly the same amount negotiated by Allen. There is nothing in Plaintiff's correspondence to Berkowitz or in the "CSPO" to indicate that Plaintiff wanted $1.5 million or even $250,000 to settle the case. Moreover, Plaintiff's testimony that in November 2005 he decided to reduce his settlement demand to $81,902.00 because he wanted to accommodate the court makes little sense.

The fact that Plaintiff, for whatever reason, became dissatisfied with Allen, after the fact, does not affect the validity of the Settlement Agreement that Plaintiff authorized Allen to enter into with Defendants on August 31, 2005. Accordingly, the Motion for Relief from Judgment under Federal Rule of Civil Procedure 60(b) will be denied.

An appropriate Order follows.

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

AUGUSTUS C. PATTERSON	:	
	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 04-CV-4202
	:	
GLAXOSMITHKLINE PHARMACEUTICAL COMPANY, ET AL.	:	

ORDER

AND NOW, this 27th day of March 2007, upon consideration of Plaintiff's Motion for Relief from Judgment under Federal Rule of Civil Procedure 60(b) (Doc. No. 28) and all papers submitted in support thereof and in opposition thereto, it is ORDERED that Plaintiff's Motion is DENIED and this action remains CLOSED.

IT IS SO ORDERED.

BY THE COURT:

R. Barclay Surrick, Judge