

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

<b>TOTALLY EVERYTHING, INC., and</b>	:	<b>CIVIL ACTION</b>
<b>HI-TEK INTERNATIONAL, INC.,</b>	:	
	:	
<b>Plaintiffs,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>ATX RESEARCH, INC./</b>	:	
<b>ATX TECHNOLOGIES, INC.,</b>	:	
	:	
<b>Defendant.</b>	:	<b>No. 97-6981</b>

**MEMORANDUM -- ORDER**

AND NOW, this 10th day of April, 1998, upon consideration of the motion under Federal Rule of Civil Procedure 60 for Relief from Judgment or Order (Document No. 23) and the supplemental motion under Rule 60(b) (Document No. 24) of plaintiffs Totally Everything, Inc. ("Totally Everything") and Hi-Tek International, Inc. ("Hi-Tek"), and the memorandum and supplemental memorandum of defendant ATX Research, Inc./ATX Technologies, Inc. ("ATX") in opposition thereto (Document Nos. 25 and 26), having found and concluded that:

1. Totally Everything and Hi-Tek filed a complaint in this Court on November 13, 1997 against ATX entitled Plaintiffs' Complaint Requesting Temporary Restraining Order, Preliminary Injunction and Enforcement of Arbitration Under Federal Arbitration Act. The following day, November 14, 1997, plaintiffs filed a Petition for Temporary Restraining Order and Preliminary Injunction and To Enforce Arbitration. Totally Everything and Hi-Tek claimed that ATX breached its agreement with them to be exclusive distributors of ATX's OnGuard product within the Philadelphia and Washington, D.C. areas when ATX sold the product to Pep Boys Automotive Supercenters ("Pep Boys") for resale to the public within plaintiffs' exclusive areas.<sup>1</sup>

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<sup>1</sup> A hearing was held on plaintiffs' petition for a temporary restraining order on November 14, 1997, at the conclusion of which the request for a temporary restraining order was denied by this Court. After a period of expedited discovery, the parties presented their arguments and evidence at a preliminary injunction hearing on

In section 21 of the distributorship agreement signed by the parties, the plaintiffs and ATX agreed that “[a]ny controversy or claim arising out of the interpretation, application or enforcement of this Agreement which cannot be resolved by the parties shall be submitted to final, binding and confidential arbitration before three arbitrators. . . .” The day after the filing of the complaint, on November 14, 1997, ATX demanded arbitration with Totally Everything and Hi-Tek;

2. In an Order dated December 5, 1997 and entered on December 9, 1997 (Document No. 21), this Court granted the motion to dismiss the complaint by ATX on the grounds that this Court would not compel the parties to arbitrate in the absence of evidence that ATX had refused to arbitrate and that because both parties had agreed to arbitrate all controversies or claims under the agreement, there was no longer a judicable case or controversy between the parties;

3. Plaintiffs argue in support of their motion that this Court should grant them relief from the Order granting the motion to dismiss because correspondence between counsel for the parties between February 3 and February 25, 1998 reveals that ATX “engaged in a pattern of conduct” demonstrating its unwillingness to arbitrate the dispute between the parties. (Pls.’ Motion at 2).<sup>2</sup> Plaintiffs admit that this evidence, the letters between counsel and the attitude of ATX that can be inferred from the letters, did not exist when the Order was entered dismissing plaintiffs’ complaint, but argue that as such, the letters could not have been discovered by plaintiffs in the exercise of due diligence. (Pls.’ Motion at 7). In addition, the plaintiffs argue that they did not know that ATX had filed a complaint for declaratory judgment in Texas state court against them at the time of the December 1, 1997 hearing before this Court; thus, the plaintiffs argue, because the act of filing a complaint in a court is evidence of the refusal of ATX to arbitrate, this evidence would have supported their request to compel arbitration had they been able to discover it prior to the Order granting the motion to dismiss. The Texas complaint, although filed before the complaint in this Court, was not served on Totally Everything until December 1, 1997 and was not served on Hi-Tek until December 15, 1997;

4. ATX argues that the letters between counsel in February of 1998 do not constitute newly discovered evidence because they did not exist at the time the Order granting the motion to dismiss was entered. ATX also argues that the plaintiffs knew of the filing of the complaint in Texas before the December 5, 1997 Order was entered on December 9, 1997. In a supplemental memorandum in support of its position, ATX attached a copy of an Order from the state court in Texas granting the motion of ATX to compel arbitration. The Order, dated April 1, 1998, provides that

in the event that the United States District Court for the Eastern  
District of Pennsylvania denies [Totally Everything and Hi-Tek’s]

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December 1, 1997. This Court denied plaintiffs’ petition for a preliminary injunction on December 3, 1997.

<sup>2</sup> In the letters between counsel sent between February 3 and February 25, 1998, which are attached to plaintiffs’ motion, counsel for the parties disagreed over who the arbitrators should be, how many arbitrators should be selected and how, whether to have separate or consolidated arbitration for the claims of Totally Everything and Hi-Tek, and where the arbitration should be held. Although the letters indicate disagreement between the parties as to the details and logistics of arbitration, they do not indicate that either party was refusing to arbitrate.

Motion under Rule 60 for Relief from Judgment or Order or does not hear [Totally Everything and Hi-Tek's] Motion under Rule 60 for Relief from Judgment or Order within forty-five (45) days from the date of the signing of the Order, then the parties shall be ordered to arbitrate their disputes pursuant to this Order;

5. Rule 60(b) of the Federal Rules of Civil Procedure provides that “[o]n 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).”<sup>3</sup> Rule 59(b) provides that “[a]ny motion for a new trial shall be filed no later than 10 days after entry of the judgment.”

“[T]he phrase [newly discovered evidence] refers to evidence of facts in existence at the time of trial of which the aggrieved party was excusably ignorant.” United States v. 27.93 Acres of Land, More or Less, Situate in Cumberland County, 924 F.2d 506, 516 (3d Cir. 1991) (quoting Brown v. Pennsylvania R.R., 282 F.2d 522, 526-27 (3d Cir. 1960), cert. denied, 365 U.S. 818 (1961)). Thus, the existence of evidence of facts occurring after the hearing resulting in the judgment from which relief is sought is not a ground for relief under Rule 60(b)(2);

6. First, I find that the letters between counsel and any inferences that may be drawn from them do not constitute newly discovered evidence, as they did not exist at the time the Order dismissing the complaint was entered. Thus, this evidence is not grounds for relief from the Order under Rule 60(b)(2).

Second, I find that the plaintiffs were aware of the Texas lawsuit in November of 1997, as evidenced by a letter from Plaintiffs’ counsel to defense counsel dated November 18, 1997 (Def.’s Mem. Ex. C). The plaintiffs, in an exercise of due diligence, could have obtained a copy of the complaint before the December 1, 1997 hearing before this Court and certainly by December 19, 1997, in time to move for a new trial under Rule 59(b). Indeed, the plaintiffs conceded that Totally Everything was served with the Texas complaint on December 1, 1997, and Hi-Tek was served on December 15, 1997. Thus, even if ATX’s filing of the lawsuit in Texas was evidence of its refusal to arbitrate, as plaintiffs argue, this evidence was discoverable by plaintiffs in the course of due diligence within ten days of the date on which the Order of this Court was entered, December 19, 1997, and is not grounds for relief from the Order under Rule 60(b)(2);

it is hereby **ORDERED** that the motion and supplemental motion are **DENIED**.

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**LOWELL A. REED, JR., J.**

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<sup>3</sup> A motion under Rule 60(b)(6) may be granted for “any other reason justifying relief from the operation of the judgment.” Although plaintiffs quote this part of Rule 60 in their motion, they focused their arguments on newly discovered evidence and did not articulate any other persuasive reason justifying such relief.