

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

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| UNITED STATES OF AMERICA FOR THE | : | CIVIL ACTION |
| USE AND BENEFIT OF SKILL | : | |
| CONSTRUCTION COMPANY | : | NO. 98-449 |
| | : | |
| v. | : | |
| | : | |
| INSURANCE COMPANY OF NORTH AMERICA | : | |

M E M O R A N D U M

Broderick, J.

May 12, 1999

Plaintiff, Skill Construction Company, originated an action against Defendant, Insurance Company of North America, pursuant to the Miller Act, 40 U.S.C. § 270a et seq., in this Court in January, 1998. Plaintiff sought to recover monies allegedly due to it as a subcontractor of Boro Developers, Inc. ("Boro") on four construction projects. Defendant was Boro's surety on each of those projects. Boro was not named as a defendant. In June, 1998 counsel for Plaintiff informed the Court that the parties had reached an agreement that the action before this Court would be dismissed and a new action would be brought in state court. Based upon this representation by counsel, the Court entered an Order on June 3, 1998 dismissing the instant action with prejudice pursuant to Local Rule of Civil Procedure 41.1(b).

Presently before the Court is Plaintiff's motion for relief from the Order of dismissal pursuant to Federal Rule of Civil Procedure 60(b). Plaintiff alleges that it is entitled to have

this Court's Order dismissing this action with prejudice set aside on the grounds that an oral settlement agreement was reached whereby both parties consented that this litigation would be pursued in the Court of Common Pleas of Philadelphia County. Plaintiff asserts that this understanding was memorialized in a stipulation that was never executed by the parties. In furtherance of this alleged settlement agreement, Plaintiff filed an action in the Court of Common Pleas of Philadelphia County in December 1998 seeking recovery for monies allegedly due to it as Boro's subcontractor. Boro was also named as a defendant in that action. Defendant filed preliminary objections to Plaintiff's state court action asserting, inter alia, that the action is barred by res judicata because of the dismissal of the instant action with prejudice. Plaintiff contends that such action by Defendant was a breach of the settlement agreement in the instant action which entitles it, under Rule 60(b), to have the dismissal set aside and to proceed on its original complaint. Plaintiff's motion seeks relief pursuant to Rule 60(b)(5) and Rule 60(b)(6). Rule 60(b)(5) clearly has no application to the facts of this case, as Defendant recognized in its response, so the Court will construe Plaintiff's motion as seeking relief pursuant to Rules 60(b)(3) and 60(b)(6).

Defendant has filed a response to Plaintiff's motion asserting that no settlement agreement was ever reached. Thus, Defendant asserts that Plaintiff was premature in notifying the Court that the instant action could be dismissed. Since

Plaintiff was at fault in causing the original dismissal and Plaintiff has delayed in seeking to reinstate the action, Defendant asserts that Plaintiff is not entitled to relief under Rule 60(b)(6) or Rule 60(b)(3). Defendant further asserts that Plaintiff is not entitled to relief because no wrongdoing on the part of Defendant caused the dismissal. For the reasons stated below, Plaintiff's motion will be denied.

Local Rule of Civil Procedure 41.1(b) provides:

Whenever in any civil action counsel shall notify the Clerk of the judge to whom the action is assigned that the issues between the parties have been settled the Clerk shall, upon order of the judge to whom the case is assigned, enter an order dismissing the action with prejudice, without costs, pursuant to the agreement of counsel. Any such order of dismissal may be vacated, modified, or stricken from the records, for cause shown, upon the application of any party served within ninety (90) days of the entry of such order of dismissal.

Plaintiff did not move to set aside the Order of dismissal within ninety days of its entry. Therefore, Plaintiff must show more than "cause" to set aside this Court's order dismissing the instant action with prejudice. Instead, Plaintiff must satisfy one of the grounds for relief set forth in Rule 60(b). Federal Rule of Civil Procedure 60(b) provides, in relevant 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:...(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken....

A party seeking relief under Rule 60(b)(3) bears the burden of proving fraud or misrepresentation by clear and convincing evidence. See 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure Civil 2d § 2860 (1995). In order to justify reopening a settlement agreement on the ground of fraud under Rule 60(b)(3), the fraud must be material, that is the moving party must have been prevented, by the misconduct of the other party, from "fully and fairly presenting its case." Bandai America Inc. v. Bally Midway Mfg. Co., 775 F.2d 70, 73 (3d Cir. 1985). There also must not be "neglect on the part of the moving party in pursuing the facts." Id. The motion under Rule 60(b)(3) must be made within one year. Fed. R. Civ. P. 60(b).

It is well settled that relief under Rule 60(b)(6) is "extraordinary and may be granted only upon a showing of 'exceptional circumstances.'" United States Steel Corp. v. Fraternal Assoc. of Steel Haulers, 601 F.2d 1269, 1274 (3d Cir. 1979). Relief may only be granted if "extreme and unexpected hardship would occur" in the absence of such relief. Makenta v. University of Pennsylvania, No. Civ. A. 97-cv-5424, 1998 WL 964183 at *1 (E.D.Pa. Dec. 1, 1998). The moving party's burden is even greater when the order of dismissal, as here, stems from a settlement because "the broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made." 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure Civil 2d § 2864 (1995).

Although Plaintiff's motion was made within the one year limitation imposed by Rule 60(b)(3) and is therefore timely, Plaintiff has failed to demonstrate that it is entitled to relief. Plaintiff has not brought forth any evidence of fraud or misconduct on the part of Defendant which caused the dismissal to occur. In fact, Plaintiff, without a signed settlement agreement, notified the Court that the action could be dismissed. Plaintiff, despite being notified that the action was dismissed with prejudice, failed to take any action to set the Order of dismissal aside for more than six months. Therefore, any hardship which may have resulted from the entry of the dismissal Order was neither extreme nor unexpected.

Although it appears that the parties have an honest dispute over whether or not a settlement agreement was ever reached and what the terms of that agreement are, such a dispute does not entitle Plaintiff to relief absent a showing of misconduct by the opposing party. Plaintiff has made no such showing of misconduct. The mere breach of a settlement agreement is not grounds to set aside a judgment dismissing a case. See Sawka v. Healtheast, Inc., 989 F.2d 138, 140 (3d Cir. 1993). In the instant action, Plaintiff contends that a settlement agreement exists and yet, rather than seeking to enforce that settlement agreement, seeks to have its previous action reinstated as a penalty for the alleged breach of that agreement. Under these circumstances, there is "no basis upon which the judgment of dismissal could legitimately be set aside." Sawka v. Healtheast,

Inc., 989 F.2d 138, 141 (3d Cir. 1993).

Plaintiff, of course, has the option of filing a separate action on the settlement agreement itself. Id. at 140. This action must be filed, however, in a court with jurisdiction over such a breach of contract action because "[e]nforcement of the settlement agreement, [] whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378 (1994).

An appropriate Order follows.

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O R D E R

AND NOW, this 12th day of May, 1999; Plaintiff, Skill Construction Company, having filed a motion for relief under Federal Rule of Civil Procedure 60(b) from this Court's Order of June 3, 1998 dismissing the instant action with prejudice; Defendant, Insurance Company of North America, having filed a response thereto; for the reasons stated in the Court's Memorandum of this date;

IT IS ORDERED that Plaintiff's Motion for Relief from Order Dismissing Action with Prejudice (Document No. 6) is **DENIED**.

RAYMOND J. BRODERICK, J.