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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

SUBROTO ROY, Plaintiff, vs. UNIVERSITY OF HAWAII et. al., Defendants.	CIV. NO. 90-00101 ACK

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b)

BACKGROUND

On May 23, 1995, Plaintiff filed a motion pursuant to Fed. R. Civ. P. 60(b) for relief from this Court's Findings Of Fact, Conclusions Of Law, and Judgment ("Judgment") of June 23, 1992.

The Court DENIES this motion for the reasons articulated below.

FACTS

On October 8, 1991, this Court filed its Order Partially Granting And Partially Denying Defendants' Motion To Dismiss Or In The Alternative Motion For Summary Judgment. That Order specifically dismissed nine of the ten counts asserted by Plaintiff, including Plaintiff's claim alleging denial of due process. The Court did not dismiss Plaintiff's Title VII disparate treatment claim.

On June 23, 1992, this Court filed its Judgment, whereby the Court found in favor of Defendants that Plaintiff had not been discriminated against based upon his national origin.

On July 29, 1994, the Ninth Circuit affirmed this Court's

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Judgment.

DISCUSSION

Plaintiff's motion requesting relief from this Court's June 23, 1992 Judgment fails on both procedural and substantive grounds.

I. Procedural Failure

Procedurally, Plaintiff has not complied with the deadline for filing a Fed. R. Civ. P. 60(b) motion. Rule 60(b) imposes a one-year time limit on motions for relief from judgment on grounds of fraud, misconduct, or misrepresentation. This time limit extends from the date that judgment is entered. Valmont Indus., Inc. v. Yuma Mfg. Co., 50 F.R.D. 408, 409 (D.C. Colo. 1970) (holding that motion seeking relief from judgment shall be made not more than one year after the judgment was entered); Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 701-702 (2d Cir. 1972) (same). In the case at bar, Plaintiff filed his motion nearly three years after this Court entered its Judgment; this is well beyond the time limitation applicable to Rule (60)(b)(3) motions covering fraud, misconduct, and misrepresentation.

Plaintiff argues that the time limitation should not effect his motion, primarily "since one year has not passed since the 9th Circuit's opinion of July 29, 1994 or denial of writ of certiorari by the Supreme Court." Plaintiff's Letter To Judge Kay (regarding Plaintiff's Motion For Relief From Judgment) at 2; see also Roy v. University of Hawaii, Civ. No. 92-16385 (9th Cir. July 29, 1994). However, pendency of an appeal does not extend

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the one-year limit. Nevitt v. U.S., 886 F.2d 1187, 1188 (9th Cir. 1989) (holding that the one-year limitation period for filing Rule 60(b) motions is not tolled during appeal); Gulf Coast Bldg. & Supply Co v. International Bhd. of Elec. Workers, et. al., 460 F.2d 105, 108 (5th Cir. 1972) (same); see also 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2866 (1973).

Plaintiff also claims that the one-year time limitation should not apply in this case because Rule 60(b) creates an exception to this deadline in cases demonstrating "fraud upon the court." As the Tenth Circuit stated in Wilkin v. Sunbeam Corp., 466 F.2d 714 (1972), "[t]he term 'fraud upon the court' is a nebulous concept." Id. at 717. The Supreme Court has interpreted this exception as "referring to very unusual cases involving 'far more than injury to a single litigant.'" Wright & Miller, § 2870, at 253 (quoting Hazel-Atlas Gas Co. v. Hartford Empire Co., 322 U.S. 238, 246 (1944)). Hence, courts have not applied the concept of fraud upon the court to "cases in which the wrong, if wrong there was, was only between the parties in the case." Id. at 253-54. Because Plaintiff's allegations in the motion at issue solely concern the relationship between his attorney and the opposing party's attorney, such allegations, even if true, would not constitute fraud upon the court.

The corruption of judicial officers may also indicate fraud upon the court. See Wilkin, 466 F.2d at 717 ("[a] clear example [of fraud upon the court] is the corruption of judicial

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officers"); Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514, 534 (3d Cir. 1948) (vacating a judgment for fraud upon the court when new evidence showed that the successful party's attorney compensated the judge for his decision). An attorney's designation as a judicial officer for the purpose of applying this standard is confined to his interaction with the court (i.e., the judge or the jury). See Root Refining Co., 169 F.2d at 534; 7 Moore, Federal Practice § 60.33, at 60-357 to -358 (the employment of counsel to influence the court, including the jury, constitutes fraud upon the court); Kupferman v. Consolidated Research and Manufacturing Corp., 459 F.2d 1072, 1078-79 (an attorney's loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court, and when he departs from that standard, he perpetrates a fraud upon the court). In the present case, Plaintiff's allegations of fraud on the part of his attorney do not involve the court but rather the opposing counsel; therefore, such allegations, even if true, would not represent fraud upon the court. In any event, Plaintiff presents no persuasive evidence of fraud on the part of the attorneys in this case.

Finally, Plaintiff argues that the one-year deadline for filing a Rule 60(b)(3) motion should not apply in this case because the Court is obligated "to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights." Plaintiff's Reply to Defendants' Memorandum at 4 (quoting Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983)). In

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the case at bar, the Court finds that in order to permit this motion to go forward, it would have to nearly triple the time allowable for filing a Rule 60(b)(3) motion. Such an extension would constitute more than a "reasonable allowance." Additionally, weighing against the interest of the pro se Plaintiff are the interests served by the time limitations provided in Rule 60: namely, the Defendants' and the Court's interest in finality.

Accordingly, Plaintiff's motion is denied for his failure to timely file pursuant to Rule 60(b).

II. Substantive Failure

Plaintiff's motion is also denied on substantive grounds because his motion and exhibits, when viewed in conjunction with the record, do not demonstrate clear and convincing evidence of fraud. Atchinson, Topeka and Santa Fe Railway Co. v. Barrett, 246 F.2d 846, 849 (9th Cir. 1957) (holding that "in respect to fraud and misrepresentation at least, the 'clear and convincing evidence' criteria is applicable"). Plaintiff contests the validity of Defendants' testimony challenging his claim of fraud and cites the Ninth Circuit's opinion for support; he refers to the Ninth Circuit's finding that "[Plaintiff] Roy points out inconsistencies in several witnesses' testimony . . . ." Plaintiff's Motion For Relief From Judgment at 1; Plaintiff's Reply to Defendants' Memorandum In Opposition To Motion For Relief From Judgment at 2, 4, 6 (quoting Roy, No. 92-16385, at 6). Evidently, however, Plaintiff has failed to recognize the

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context in which he cites this opinion, because the Ninth Circuit also states that Plaintiff "offers no evidence to negate the real possibility that the inconsistencies might arise from a faulty memory or confusion over events four years in the past." Roy, No. 92-16385, at 6. Indeed, the Ninth Circuit ultimately affirmed this Court's Judgment which Plaintiff is now attempting to vacate.

Another contention made by Plaintiff is that this Court's failure to apply the "mixed motive" standard of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) warrants relief from the June 23, 1992 Judgment. This argument is not persuasive however as the Ninth Circuit applied the "mixed motive" standard to the facts of this case and still found no reason to reverse this Court's Judgment for the Defendants. See Roy, No. 92-16385, at 10 (holding that "[e]ven under Price Waterhouse, Roy has failed to prove that the district court's finding of no discrimination was clearly erroneous.").

Finally, Plaintiff refers to this Court's October 8, 1991 dismissal of his due process claim as a basis for granting his motion for relief from judgment. But, as the Ninth Circuit has stated, "the requirements of the Due Process Clause apply only when a liberty or property interest is at stake," and "[t]he reasons given for Roy's termination do not implicate a liberty interest." Roy, No. 92-16385, at 4, 5. Thus the Ninth Circuit affirmed this Court's ruling on summary judgment. Accordingly, Plaintiff's due process claim, like his other substantive

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arguments, is without merit.

CONCLUSION

In sum, Plaintiff's motion for relief from judgment pursuant to Rule 60(b) fails on both procedural and substantive grounds; Plaintiff did not file the motion within the one-year time limit provided by the rule, and his substantive arguments are without merit.

For the reasons articulated above, the Court DENIES Plaintiff's motion.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 28 1995.

Chief United States District Judge