UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
v.	:	00 Civ. 1781 (CM)
SPACE HUNTERS, INC. and JOHN McDERMOTT,	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO VACATE JUDGMENT

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Preliminary Statement

Plaintiff the United States of America (the "Government"), by its attorney Lev. L. Dassin, Acting United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in opposition to defendants' motion to vacate judgment pursuant to Federal Rule of Civil Procedure 60(b)(3).

Defendants seek to vacate the judgment resulting from a trial conducted in 2002 in which a jury found that defendants violated the Fair Housing Act by discriminating against an individual, Keith Toto, a man with a hearing impairment. Defendants claim that contrary to Mr. Toto's testimony at trial and the Government's representations to the Court, Mr. Toto was working for the Fair Housing Council of Northern New Jersey (the "Fair Housing Council") as a tester when he first contacted defendant Space Hunters, Inc. ("Space Hunters") seeking an apartment. Defendants' motion, filed more than six years after the conclusion of that trial, is barred by the one-year limitation period for Rule 60(b)(3) motions. Moreover, defendants had a full and fair opportunity to investigate this issue at the time of the 2002 trial and during the six years that have since passed. Finally, defendants have failed to present clear and convincing evidence of misrepresentation on the part of the Government. In fact, the scant "evidence" submitted by defendants lacks credibility and is completely undercut by declarations of employees of the Fair Housing Council, as well as a declaration from Mr. Toto, confirming what has been true since the beginning of this case – that Keith Toto has never worked as a tester for the Fair Housing Council.

Procedural History

This litigation dates back to 2000; assuming the Court's familiarity with this action, its procedural history is set forth briefly below.

On March 8, 2000, the United States commenced this action through the filing of a complaint alleging violations of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601 et seq. Following a motion to dismiss, the district court dismissed all but one of the counts alleged in the complaint. See United States v. Space Hunters, Inc., 429 F. 3d 416, 419 (2d Cir. 2005). In October 2002, a jury found that defendants had violated the Fair Housing Act by refusing to accept calls placed by Mr. Toto through a relay service operator, and awarded compensatory damages in the amount of $1500. Id. at 423. Following the trial, defendants moved for judgment as a matter of law, and the Government moved for injunctive relief. Id. In November 2004, the district court denied defendants' motion and granted the Government's motion, permanently enjoining defendants from violating the Fair Housing Act and requiring various record-keeping and monitoring obligations for a period of three years. United States v. Space Hunters, Inc., No. 00 Civ. 1781(RCC), 2004 WL 2674608 (S.D.N.Y. Nov. 23, 2004). The Government appealed the district court's decision to strike the Government's claim for punitive damages, and defendants cross-appealed the district court's denial of their motion for a judgment as a matter of law. Space Hunters, 429 F. 3d at 429-30. The Second Circuit upheld the denial of defendants' motion and found that the district court erred in dismissing the other counts of the complaint and by refusing to allow the jury to consider punitive damages. Id.

On remand, the parties entered into stipulation pursuant to Fed. R. Civ. P. 41(a)(1), in which the Government agreed to dismiss the remaining counts of the complaint and to proceed to trial solely on the issue of punitive damages. Affirmation of E. Christopher Murray, dated December 17, 2008 ("Murray Aff."), Exh F. As this Court is aware, after trial, a jury returned a verdict awarding punitive damages against defendants in the amount of $150,000. On December

21, 2007, the Court signed the judgment awarding the sum of $150,000 to the United States.[1] Murray Aff., Ex. A. Defendants filed the current motion before the Court on December 22, 2008.

ARGUMENT

DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE IT IS UNTIMELY AND DEFENDANTS HAVE FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF A MISREPRESENTATION

A. Legal Standard for Motion filed Pursuant to Fed. R. Civ. P. 60(b)(3)

To sustain a claim for relief under Rule 60(b)(3) based on the alleged misconduct of an adverse party, "a movant 'must show that the conduct complained of *prevented the moving party from fully and fairly presenting his case.*'" State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada, 374 F.3d 158, 176 (2d Cir. 2004) (quoting Taylor v. Texas Corp., 831 F.2d 255, 259 (11th Cir. 1987) (citations and internal quotation marks omitted) (emphasis added)); see also Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983) (same). Such a motion "cannot be granted absent *clear and convincing evidence of material misrepresentations* and cannot serve as an attempt to relitigate the merits." Fleming v. New York Univ., 865 F.2d 478, 484 (2d Cir. 1989) (emphasis added). A motion filed pursuant to Fed. R. Civ. P. 60(b)(3) is considered untimely unless it is *filed within one year after the entry of the judgment* or order. Fed. R. Civ. P. 60(c)(1) (emphasis added); see also Kotlicky v. United States Fidelity & Guar. Co., 817 F.2d 6, 9

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[1] The judgment was entered on the docket on December 26, 2007. See Docket Entry No. 77. The Court subsequently entered a so-ordered stipulation, dated June 10, 2008, in which the United States agreed to stay the execution of judgment provided that defendants pay the Government $35,000 pursuant to a monthly schedule. See Docket Entry No. 78.

(2d Cir. 1987) (internal quotations and citations omitted); Greenberg v. Chrust, No. 01 Civ. 10080 (RWS), 2004 WL 585823, at *3 n.5 (S.D.N.Y. March 25, 2004).

While a motion under Fed. R. Civ. P. 60(b) is addressed to the sound discretion of the trial court, see Sterling v. Kuhlman, No. 97 Civ. 2825 (RWS), 2006 WL 177404 (S.D.N.Y. Jan. 25, 2006) (citations omitted), such motions are "generally not favored." American Tissue, Inc. v. Arthur Andersen L.L.P., No. 02 Civ. 7751 (SAS), 2005 WL 712201, at *2 (S.D.N.Y. Mar. 28, 2005) (quoting United States v. International Bhd. of Teamsters, 247 F.3d 370, 391 (2d Cir. 2001) (internal quotation marks omitted)). Indeed, in order to prevail on Rule 60(b) motion, "[a] movant under Rule 60(b) must demonstrate 'exceptional circumstances' justifying the extraordinary relief requested." Employers Mut. Cas. Co. v. Key Pharm., 75 F.3d 815, 824-25 (2d Cir. 1996); Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 461 (2d Cir. 1994); Night Hawk Ltd. v. Briarpatch Ltd., L.P., No. 03 Civ. 1382 (RWS), 2004 WL 1375558, at *2 (S.D.N.Y. June 17, 2004); Batac Development Corp. v. B&R Consultants, Inc., No. 98 Civ. 0721 (CSH), 2000 WL 307400, at *3 (S.D.N.Y. March 23, 2000) (A court may not "lightly invoke the 'extraordinary judicial relief' of annulling a final judgment.") (citing Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986)). In addition, "[i]n evaluating a Rule 60(b) motion, the courts of this circuit also require that the evidence in support of the motion be highly convincing, that the movant show good cause for the failure to act sooner, and that no undue hardship be imposed on the other parties as a result." Night Hawk Ltd., 2004 WL 1375558, at *2 (citing Kotlicky, 817 F.2d at 9; Williams v. New York City Dep't of Corrections, 219 F.R.D. 78, 84 (S.D.N.Y. 2003)); see also Gordon v. City of New York, 228 F.R.D. 515, 516 (S.D.N.Y. 2005).

B. The Court Should Deny Defendants' Motion as Untimely

Defendants motion is untimely as it is filed more than six years after judgment was entered after trial on October 23, 2002. See Docket Entry No. 23; Fed. R. Civ. P. 60(c)(1). The Second Circuit has held that the one-year limitation period for Rule 60(b) motions is "absolute." Warren v. Garvin, 219 F.3d 111, 114 (2nd Cir. 2000) (internal quotations and citation omitted). Although defendants purport to challenge the validity of the judgment entered on December 26, 2007 awarding punitive damages, see Defendants' Memorandum of Law in Support of Motion to Vacate Judgment Pursuant to Fed R. Civ. P. (60)(b) ("Defs' Mem."), the crux of defendants' claim before this Court is that at the 2002 trial, the Government allegedly misrepresented to the Court that Keith Toto was a victim and not a tester for the Fair Housing Council. See Defs' Mem. at 6-18.

As defendants must concede in their motion papers, the alleged misrepresentation of Keith Toto's status as a tester took place at the 2002 trial, not the 2007 punitive damages trial. See id. Thus, defendants quote Mr. Toto's testimony from the 2002 trial during which he mistakenly testified that he was a tester, but then corrected himself by explaining that he had not understood the word "tester," and that he has never worked for HUD or the Fair Housing Council. Defs' Mem. at 7-18. Defendants now argue that Mr. Toto was lying when he clarified his testimony to explain that had never worked for HUD or the Fair Housing Council. Id. at 20. Defendants do not quote any of Mr. Toto's testimony, or for that matter any other testimony or evidence, from the 2007 trial. See Defs' Mem. at 6-19. Accordingly, defendants are really seeking to vacate the judgment issued after trial in 2002, not the judgment issued after the punitive damages trial in December 2007. Simply put, defendants should not be permitted to

pretend that their current motion concerns the 2007 judgment in order to circumvent the "absolute" one-year time limitation for filing a motion pursuant to Fed. R. Civ. P. 60(b)(3).

Defendants offer no explanation for waiting six years to challenge the Government's representation that Keith Toto never worked for the Fair Housing Council as a tester. Defendants' failure to file this motion sooner is particularly striking in light of the fact that Defendants were represented by the same attorney, E. Christopher Murray, in 2002 as they are now. As demonstrated by the excerpts from the trial transcripts provided by defendants, Mr. Murray had a full and fair opportunity to challenge and investigate the Government's assertions regarding Mr. Toto's employment at the time of the trial. Defendants' delay is simply inexplicable. Defendants could have requested discovery regarding Mr. Toto's employment status when the issue first arose at trial. Instead, defendants chose not to pursue the matter further, and defendants' motion to vacate the judgment, filed six years after the jury returned its verdict, is now time barred.[2] See Fed. R. Civ. P. 60(b)(3).

C. Defendants Had a Full and Fair Opportunity to Present Their Case

In any event, should the Court conclude that defendants' motion constitutes a timely challenge to the judgment issued in 2007 after the punitive damages trial, defendants have not met their burden of demonstrating that the alleged misrepresentation prevented them from "fully and fairly presenting [their] case." See State Street Bank and Trust Co., 374 F.3d at 176. As an initial matter, defendants could have argued to the jury that in light of Mr. Toto's testimony,

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[2] Even if defendants claim to challenge the judgment entered on November 24, 2004 denying defendants' post-trial motions and granting the Government's motion for injunctive relief, the current motion would still be time barred since more than four years have passed since the entry of that judgment.

jurors could infer that Mr. Toto was in fact a tester. Alternatively, defendants could have sought discovery regarding Mr. Toto's status as a "tester" when the issue first came to light. Defendants, for example, could have sought a brief recess in the 2002 trial to depose someone from the Fair Housing Council with knowledge of that organization's personnel. Certainly, to the extent defendants claim that the alleged misrepresentation somehow prevented them from fully and fairly presenting their case during the punitive damages trial in 2007, defendants could have investigated this issue further during the five-year interval in between the two trials. Defendants offer no explanation for failing to conduct any inquiry, or to seek any discovery regarding this issue, at any point between 2002 and 2007. Finally, defendants had an opportunity to raise this issue at the trial in 2007, and opted not to do so. Mr. Toto testified at the 2007 trial regarding his call to Space Hunters prompted by an ad in a newspaper. Declaration of Neil M. Corwin, dated January 30, 2009 ("Corwin Decl."), Ex. C at 116. Despite having a full and fair opportunity to cross examine Mr. Toto regarding his reasons for calling Space Hunters, defendants did not ask Mr. Toto whether he was working as a tester when he called Space Hunters. See id. at 116-19.

In sum, although defendants have had notice since 2002 of Mr. Toto's confusion over the word "tester," defendants chose to wait until now to conduct any inquiry into this matter. Defendants' delay is of their own choosing and is not a basis for claiming that they were somehow denied a full and fair opportunity to present their case.

D. Defendants Have Failed Produce Clear and Convincing Evidence of a Misrepresentation

1. The Affidavits Submitted by Defendants Fail to Establish a Misrepresentation by the Government

Perhaps most important, defendants' motion is also deficient under the stringent standards set forth in Fed. R. Civ. P. 60(b)(3) because defendants have simply failed to produce clear and convincing evidence of any misrepresentation by the Government. See Fleming, 865 F.2d at 484. Defendants' "evidence" consists of a self-serving affidavit from defendant John McDermott in which he claims that he was informed by an individual named Kirkland Graham that Mr. Graham had previously met Mr. Toto at a training seminar for testers conducted by the Fair Housing Council in 1998. Affidavit of John Mc Dermott, dated December 17, 2008 ("McDermott Aff."), ¶ 8. He then falsely claims that "Mr Graham then confirmed this fact with the [Fair Housing Council's] personnel director." Id. As discussed below, no one from the Fair Housing Council has ever confirmed that Mr. Toto attended a training seminar for testers in 1998. Defendants also submit an affidavit from Mr. Graham stating that he was introduced to Mr. Toto by his sister-in-law, "Chrel [sic] Eason" at a training session conducted by the Fair Housing Council in 1998. Affidavit of Kirkland Graham, dated December 12, 2008 ("Graham Aff."), ¶ 2. Attached to Mr. Graham's affidavit is a purported transcript of a telephone conversation on November 7, 2008 between Mr. Graham and David Whritenour, an employee of the Fair Housing Council, in which Mr. Whritenour at one point says that he believes Mr. Toto did some testing in the Space Hunters case. Kirkland Aff., Ex.1, at 5.

Defendants' "evidence" of fraud on the part of the Government is not only far from clear and convincing, it also lacks credibility. Mr. McDermott's affidavit does not contain any facts

derived from personal knowledge related to Mr. Toto's employment status when he first contacted Space Hunters regarding an apartment. See McDermott Aff. ¶¶ 1-10. In fact, Mr. McDermott's affidavit does not contain any valid – much less clear and convincing – evidence of a misrepresentation by the Government.

Mr. Graham's affidavit similarly fails to provide any convincing evidence that Mr. Toto worked as a tester for the Fair Housing Council. Mr. Graham's affidavit noticeably lacks any detail or specificity regarding his alleged meeting of Mr. Toto ten years ago. See Graham Aff. ¶¶ 2-6. Nor does Mr. Graham provide any reason to explain why he came forward with this information in 2008. Id. Mr. Graham also gives no indication of having seen Mr. Toto again since 1998, and offers no explanation as to how he remembers a seemingly random meeting ten years ago. Id.

The recorded conversation between Mr. Graham and Mr. Whritenour, an employee of the Fair Housing Council who commenced his employment with the Fair Housing Council afer the Space Hunters investigation was completed, does not offer any further evidence of a misrepresentation. Id. ¶ 7. Although defendants insist that the recorded conversation constitutes an "admission . . . that Mr. Toto was a tester assigned to Space Hunters," see Defs' Mem. at 21-22, an examination of the transcript of the call belies that claim. While early in the conversation Mr. Whritenour expresses a belief that Mr. Toto was a tester in the Space Hunters case, see Corwin Decl., Ex. D at p. 5, lines 5-8, later on during the call, Mr. Whritenour explicitly states that he was not really familiar with the specific circumstances surrounding Mr. Toto's involvement with Space Hunters because the Space Hunters investigation and trial occurred before Mr. Whritenour commenced his employment with the Fair Housing Council, see id. at p.

8, lines 18-22.[3] Contrary to Mr. McDermott's affidavit, Mr. Whritenour never "confirmed" that Mr. Toto attended a training session for testers in 1998. Kirkland Aff., Ex. 1, at 2-10. Moreover, it is clear from the transcript of the telephone conversation that Mr. Whritenour had no personal knowledge of Keith Toto's involvement in the Space Hunters case. In sum, the affidavits of defendant McDermott and Mr. Graham fall far short of meeting the standard of clear and convincing evidence of a misrepresentation on the part of the Government.

2. The Evidence Submitted by the Government Conclusively Establishes that Keith Toto Has Never Worked for the Fair Housing Council or HUD as a Tester

Notwithstanding defendants' failure to come forward with clear and convincing evidence, because of the serious allegations of Government misconduct lodged by defendants, the Government has provided the Court with four declarations and a letter dated October 4, 2002, affirmatively demonstrating that Keith Toto was – as has been consistently represented by the Government – an individual seeking housing services, not a tester.

The first document submitted by Government is a letter dated October 4, 2002, directed to Judge Casey from the United States Attorney's Office (the "Government's letter"). See Corwin Decl., Ex. A. The Government's letter, a copy of which was received by Mr. Murray's office on October 5, 2002, states that the United States Attorney's Office has confirmed with HUD and the Fair Housing Council that Mr. Toto was not a tester for either organization. Id. The Government's letter also enclosed a letter from the Testing Coordinator at the Fair Housing

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[3] The first copy of the transcript submitted by defendants incorrectly attributed that portion of the conversation (p. 8, lines 18-22) to Mr. Graham. After the Government brought this error to defendants' attention, see Corwin Decl. ¶ 7, defendants provided the Government with a corrected transcript id., Ex. D.

Council, Robert A. May, unequivocally stating that Mr. Toto has never worked for the Fair Housing Council "in any capacity." Id. Although defendants have been aware of this letter since 2002, they have failed to bring this letter to the Court's attention. See Corwin Decl. ¶¶ 2-3.

The Government has also provided to the Court a current declaration from Mr. Toto, who confirms that he has never worked as a tester for either the Fair Housing Council or HUD. Declaration of Keith Toto, dated January 10, 2009 ("Toto Decl.") ¶¶ 4-6. Mr. Toto explains that during the first trial in October 2002, when Judge Casey asked him whether he was a tester and he replied "yes," Mr. Toto was confused and did not understand the meaning of the word "tester." Id. ¶ 2. He clarifies that he now understands the meaning of the word "tester" and that he has never worked as a tester. Id. ¶¶ 3-6.

Moreover, Mr. Graham's dubious assertion that he remembers being introduced to Keith Toto by his sister-in-law approximately ten years ago is completely undercut by the declaration of his sister-in-law, Chyrel Eason, stating that she does not recall ever meeting an individual named Keith Toto, and that she has never introduced anyone by that name to Mr. Graham. Declaration of Chyrel Eason, dated January 27, 2009, ¶¶ 2-3.

David Whritenour's declaration explains that at the time of his telephone conversation on November 7, 2008, with Mr. Graham, the only thing he knew about Mr. Toto is that he had somehow been involved in the Space Hunters case, and Mr. Whritenour had assumed he was a tester. Declaration of David Whritenour, dated January 27, 2009, ("Whritenour Decl.") ¶¶ 4-5. Mr. Whritenour further notes that the Space Hunters case preceded his employment with the Fair Housing Counsel and that he did not possess any personal knowledge regarding the facts and circumstances of that case. Id. Since speaking to Mr. Graham, Mr. Whritenour has had the

opportunity to review the Fair Housing Council's files regarding the Space Hunters case and to confirm that Mr. Toto did not work as a tester in that case. Id. ¶ 7.

Mr. Whritenour also describes an incident curiously omitted from defendants' papers. Specifically, a couple of days after the call with Mr. Graham, Mr. Whritenour received a visit at his home from Mr. Graham and an individual whose description matches that of Mr. McDermott but who gave the name "Pierce Ripley." Id. ¶ 6. Mr. Graham and "Mr. Ripley," who described himself as a former investigator for Bear Stearns and the Department of Justice, questioned Mr. Whritenour about his knowledge of Keith Toto. Id. During that visit, Mr. Whritenour informed Mr. Graham and "Mr. Ripley" that he did not know anything about the specifics of Mr. Toto's involvement in the Space Hunters case. Id.

The last submission by the Government is a declaration from Lee Porter, the Executive Director of the Fair Housing Council. Ms. Porter also confirms, based on her staff's review of Fair Housing Council tester applications, payroll forms related to testers, and the records related to the Space Hunters case, that Keith Toto has never worked for the Fair Housing Council as a tester. Declaration of Lee Porter, dated January 28, 2009, ¶¶ 3-5.

Based on all of the evidence described above, there is simply no question that Mr. Toto's only association with this case is as a victim of discrimination and not as an employee of the Fair Housing Council. Not only do defendants fail to demonstrate by clear and convincing evidence a misrepresentation on the part of the Government regarding Mr. Toto's status, but the declarations submitted by the Government completely debunk the "evidence" submitted by defendants.

CONCLUSION

For the foregoing reasons, the Court should deny defendants' motion to vacate judgment in its entirety.

Dated: New York, New York
January 30, 2009

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