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United States District Court,
S.D. New York.
PTAK BROS. JEWELRY, INC., Plaintiff,
v.
Gary PTAK and G. Ptak, LLC, Defendants.

No. 06 Civ. 13732(CM).
Jan. 25, 2011.

DECISION AND ORDER DENYING THE MOTION FOR RELIEF FROM JUDGMENT
McMAHON, District Judge.

INTRODUCTION

***1** Before the Court is the motion of Defendants **Gary Ptak** ("G.Ptak") and G. Ptak LLC ("GPL," collectively "Defendants") for relief from a judgment entered against them on default by The Hon. Denny Chin on June 1, 2009 (the "Judgment"). The judgment awarded injunctive relief and monetary damages to Plaintiff Ptak Bros. Jewelry, Inc. ("PBJ" or "Plaintiff"). Defendants seek to vacate the order and default judgment pursuant to Federal Rule of Civil Procedure 60(b)(3), (b)(5) and (b)(6), arguing that plaintiffs' trademark registration was procured by fraud or misrepresentation on the part of plaintiffs and that enforcement of the judgment would be inequitable in view of the pendency of a proceeding to cancel that registration.

Defendants have shown no basis for relieving them from the effects of a judgment that was entered because of their repeated failure to comply with orders of this court. The pendency of the cancellation proceeding is of no relevance. Furthermore, the conclusion is inescapable that Defendants have resorted to this motion-at the last possible moment-because they failed or neglected to take a timely appeal from the judgment. Defendants may even have waited until Judge Chin was elevated to the Court of Appeals in the hope of shopping this case to a more sympathetic jurist. They will get no comfort from this court.

The motion to vacate the default judgment is denied.

BACKGROUND

I. The Facts

The underlying facts are set forth in *Ptak Bros. Jewelry, Inc. v. Ptak*, No. 06 Civ. 13732(DC), 2007 WL 1536934 (S.D.N.Y May 29, 2007), familiarity with which is assumed.

Ptak Bros., Inc., the predecessor to PBJ, was once owned equally by siblings Gary, Saree, and Alan Ptak. The trademarks "PTAK" and "PTAK BROS." were recognized nationally since 1997 for its jewelry goods and services.

Pursuant to a settlement agreement (the "Agreement") among the siblings, the assets of the company, including the names "Ptak Brothers," "Ptak Bros.," and "Ptak", were sold and the proceeds were distributed equally. The siblings brought suit against G. Ptak asserting that he was not complying with the Agreement. The court granted their motion and ordered liquidation of the company. *Ptak Bros. Jewelry*, 2007 WL 1536934.

At auction, bidders were advised that G. Ptak operated his own jewelry business under the name "Custom Jewelry by G. Ptak," but only the winning bidder would be able to use the name " Ptak Bros., Inc." *Ptak Bros. Jewelry*, 2007 WL 1536934.

Plaintiff was the highest bidder. The Bill of Sale assigned to Plaintiff the name "Ptak Bros., Inc." and any and all derivatives thereof, the URL http:// www.ptakbros.com, and the company's telephone numbers. G. Ptak and Plaintiff also entered into a restrictive covenant providing that G. Ptak could use his own name for person or business purposes, including in connection with the jewelry business, but did not have the right to use the name " Ptak Bros., Inc." *Ptak Bros. Jewelry*, 2007 WL

1536934.

***2** Thereafter, G. Ptak continued to use the name "Ptak Bros." in his jewelry business and ordered Verizon to redirect any faxes sent to the PBJ fax to GPL. This led to this action. *Ptak Bros. Jewelry*, 2007 WL 1536934.

II. Procedural History

In December 2006, Plaintiff filed a complaint against defendants alleging trademark infringement, unfair competition, and breach of contract. Judge Chin granted Plaintiff's motion for preliminary injunction, *Ptak Bros. Jewelry*, 2007 WL 1536934, and discovery commenced in early 2007.

In November 2007, G. Ptak filed a Petition for Cancellation with the TTAB to cancel the mark "PTAK." *In re G. Ptak, LL*, T.T.A.B. No. 92048502 (Petition for Cancellation), *available at* http://ttabvue.uspto.gov.

After nearly two years, little progress had been made in the lawsuit due to Defendants' delaying tactics and failure to comply with discovery demands. *Ptak Bros. Jewelry, Inc. v. Ptak*, No. 06 Civ. 13732(DC), 2009 WL 807725 (S.D.N.Y March 30, 2009). In early 2009, Plaintiff filed a motion for sanctions, which Judge Chin granted by entering a default judgment against Defendants on June 1, 2009. *Ptak Bros. Jewelry, Inc. v. Ptak*, No. 06 Civ. 13732(DC), 2009 WL 1514469 (S.D.N.Y June 1, 2009). Judge Chin concluded that sanctions were warranted because defendants had a demonstrated history of failing to comply with his orders, including refusing to comply with discovery requests and failing to appear for depositions, which had resulted in delayed proceedings and prejudice to plaintiff. Judge Chin further concluded that Defendant **Gary Ptak** had made misrepresentations to the court. He specifically found that Mr. Ptak had acted willfully and in bad faith, and had conducted himself in a way that gave him no reason to believe a lesser sanction would be effective. Judge Chin also noted that defendants had been given several warnings before being subjected to the ultimate sanction of default. *Ptak Bros. Jewelry*, 2009 WL 807725. Accordingly, judgment was entered permanently enjoining Defendants from using names, trademarks, and Internet domains confusingly similar to Plaintiff's trademarks, including "Ptak," "Ptak Bros.," "Ptak Brothers," "Ptak.com," or "Ptak." Defendants were also enjoined from employing deceptive business practices, stating or implying that Ptak Bros.'s business had been shut down, using the term "Ptakage(s)," using or displaying jewelry from PBI in marketing materials, and identifying themselves as formerly associated with PTI or any Ptak-named entity, except in connection with a family narrative. *Ptak Bros. Jewelry*, 2009 WL 1514469.

Defendants did not take an appeal from the default judgment, which (according to the docket) was served on them June 1, 2009. (Docket No. 72.)

On June 1, 2010-a year to the day from entry of the default judgment-Defendants sent a letter to Chief Judge Preska requesting that the action be opened for the purpose of entertaining a motion pursuant to Rule 60(b) and to assign a judge to the matter, given Judge Chin's ascension. (Docket No. 76.) Chief Judge Preska reopened the case and it was reassigned to me. On June 3, 2010, Defendants filed this motion to vacate the default judgment that had been entered on June 1, 2009. (Docket No. 79.)

***3** Defendants contend that the Judgment should be vacated, because a) applying the judgment prospectively would no longer be equitable and b) the judgment was obtained by fraud, misrepresentation or misconduct by an opposing party. Specifically, defendants argue that Plaintiff acted with unclean hands by making false statements with the intent to deceive the Patent and Trademark Office ("PTO") when registering the Ptak trademark. This, of course, is the issue currently pending before the TTAB; it is not the basis on which Judge Chin entered the default judgment. Defendants also argue that enforcement of the Judgment would not be equitable should the TTAB rule in G Ptak's favor in the cancellation proceeding.

DISCUSSION

I. There Is No Basis to Vacate the Judgment Pursuant to Rule 60(b)(3) on Grounds of Fraud or Misconduct

Defendants have not shown any fraud or misconduct in the procurement of the default judgment. Indeed, if there has been any fraud or misconduct here, it is Mr. Ptak's failure to apprise the court that it was his own misconduct that led to the entry of the default judgment-rather than anything said or done by plaintiffs.

Rule 60 of the Federal Rules of Civil Procedures proscribes a mechanism by which a party may seek relief from a final judgment. *Paddington Partners v. Bouchard,* 34 F.3d 1132, 1144 (2d Cir.1994) , *House v. Secretary of Health & Human Serv.,* 668 F.2d 7, 9 (2d Cir.1982). This rule seeks to balance "serving the ends of justice and preserving the finality of judgments." *Paddington,* 34 F.3d at 1144; *Nemaizer v. Baker,* 793 F.2d 58, 61 (2d Cir.1986). However, a party may not use a Rule 60 motion as a means to relitigate a case. *Mastini v. American Tel. & Tel. Co.,* 369 F.2d 378 (2d Cir.1966), *cert. denied,* 378 U.S. 933 (1967).

Pursuant to a Rule 60(b)(3) motion, the Court may relieve a party from final judgment where an adverse party used fraud, misrepresentation, or misconduct to obtain the judgment. Fed.R.Civ.P. 60(b)(3); *see Simons v. United States,* 452 F.2d 1110 (2d Cir.1971), *Fleming v. New York Univ.,* 865 F.2d 478, 484 (2d Cir.1989). The movant must demonstrate by clear and convincing evidence that the "conduct complained of prevented the moving party from fully presenting his case." *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada,* 374 F.3d 158, 176 (2d Cir.2004).

A Rule 60(b)(3) motion for relief from a judgment on grounds of fraud or misconduct must be made no more than a year after the entry of the judgment. Fed.R.Civ.P. 60(c)(1); *see United States v. Beggerly,* 524 U.S. 38, 46 (1998), *Freasier v. Mulderig,* No. 87 Civ. 6327(RJS), 2008 WL 5250370 (S.D.N.Y. Dec. 15, 2008).

Defendants' motion was filed June 3, 2010, more than one year after the Judgment was entered. Plaintiff argues that this bars any consideration of the merits of the motion. However, I believe that the year must be calculated from the date when Mr. Ptak sought to reopen the judgment, which date was June 1, 2010-exactly a year after entry of the judgment in question. I will, therefore, proceed to consider the merits.

***4** The "merits" are easily dispensed with. Defendants have not provided clear and convincing evidence of fraud, misrepresentation, or misconduct on the part of the Plaintiffs. In fact, they have not provided ANY evidence that plaintiffs engaged in fraud, misrepresentation or misconduct in the procurement of the default judgment. It is plain enough, from reading Judge Chin's thorough and measured opinion, that the only misrepresentations and misconduct used to procure the default judgment were Mr. Ptak's misrepresentations and misconduct. His failure to obtain counsel to represent the corporation G. Ptak LLC (without which representation the corporate defendant was in actual default), false statement that an attorney was representing Defendants when the representation was a sham and failure to cooperate with discovery-all this misconduct led Judge Chin to conclude that he should be precluded from mounting a defense. In their moving papers, defendants have not pointed to a single item in the litany of **Gary Ptak's** litigation misconduct as recited by Judge Chin that is not true.

The basis for Defendants' contention that the default judgment was obtained by fraud, misrepresentation or misconduct is their claim that Plaintiff acted with "unclean hands" in registering the Ptak trademark. But Judge Chin did not impose the default judgment on the merits-he imposed the default judgment on the ground of defendants' repeated flouting of his orders. So the underlying merits of the trademark registration has no bearing on the outcome of this motion. Indeed, it is clear that Judge Chin was aware of the pendency of the can-

cellation proceeding and knew that Defendants had alleged that Plaintiff acted with unclean hands in registering the trademark, because Judge Chin specifically rejected Plaintiff's request that defendants be ordered to withdraw the cancellation proceeding pending before the TTAB as a sanction. *Ptak Bros. Jewelry, Inc. v. Ptak*, No. 06 Civ. 13732(DC), 2009 WL 1514469 (S.D.N.Y June 1, 2009). Because Judge Chin knew about the cancellation proceeding and the basis on which Ptak had filed it, no fraud was perpetrated on the Court in connection with the default judgment.

Therefore, the motion to set aside the judgment pursuant to Rule 60(b)(3) is denied.

II. There Is No Basis to Vacate the Judgment Pursuant to Rule 60(b)(5) on Grounds that Applying the Judgment Prospectively Would No Longer be Equitable

Under Rule 60(b)(5), a party may to move for relief from judgment on grounds that applying the judgment prospectively would no longer be equitable, "not when it is no longer convenient to live with the terms of a consent decree," *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992), or as a substitute for a timely appeal. *Nemaizer*, 793 F.2d at 61, *Cruickshank & Co., Ltd. v. Dutchess Shipping Co., Ltd.*, 805 F.2d 465, 468 (2d Cir.1986) . Further, such a motion must be made within a reasonable time following entry of the Judgment. Fed.R.Civ.P. 60(c)(1): *see United States v. Morgan*, 346 U.S. 502, 517 (1954).

***5** This rule is rooted in the "traditional power of a court of equity to modify its decree in light of changed circumstances." *Frew v. Hawkins*, 540 U.S. 431, 441 (2004). Since Rule 60(b) provides for "extraordinary judicial relief," the rule should only be available in "exceptional circumstances." *Nemaizer*, 793 F.2d at 61. In *Rufo*, the Supreme Court held it was appropriate to grant a Rule 60(b)(5) motion where the has been "a significant change either in factual conditions or in law." *Rufo*, 502 U.S. at 384; *see also Home v. Flores*, 129 S.Ct. 2579, 2595 (2009).

As should be obvious from the foregoing, Defendants have not demonstrated that they are entitled to the relief requested. Plainly defendants committed the infractions that led Judge Chin to sanction them; plainly Mr. Ptak ignored the patient Judge Chin's repeated warnings that he was not in compliance with the orders of the court; plainly he and his corporation (which was already in default for failing to appear by counsel) received their just desserts in the end. If they had a complaint about Judge Chin's decision, they could and should have taken a timely appeal from the judgment. Rule 60 is not to be used to circumvent a party's failure to appeal. *Nemaizer*, 793 F.2d at 61. *Cruickshank & Co*, 805 F.2d at 468.

Therefore, the motion pursuant to Rule 60(b)(5) is denied on the merits.

Additionally, Defendants have not shown by clear and convincing evidence that their motion was filed within a "reasonable time." Although motions under Rule 60(b)(5) can be made more than a year after entry of the judgment from which relief is sought, in every instance a moving party must demonstrate that the motion was made within a "reasonable time" after some change in the factual or legal circumstances that render enforcement of the judgment inequitable. Here, nothing has changed, factually or legally, since the judgment was entered-as defendants' invocation of the same tired arguments attests-except, of course, that the judge who entered it, and whose familiarity with this matter exceeds that of anyone else, is no longer sitting on the District Court. It should come as no surprise that this court believes that defendants may have purposefully delayed filing their challenge to the judgment until Judge Chin was no longer on the bench.

The motion is, therefore, denied as well on the purely procedural basis that it was not filed within a "reasonable time" after grounds therefor were discovered.

III. There Is No Basis to Vacate the Judgment

Pursuant to Rule 60(b)(5) on Grounds that Extraordinary Circumstances Justify Relief

A motion to vacate a judgment may be granted "for any other reason justifying relief," Fed.R.Civ.P. 60(b)(6), but this "catch-all" should only be invoked when there are extraordinary circumstances that work an "extreme and undue hardship." *Nemaizer v. Baker*, 793 F.2d 58. 63 (2d Cir.1986). Where the movant can demonstrate that the "linchpin" of the judgment was false, courts may grant relief. *Estate of Hogarth v. Edgar Rice Burrows, Inc.*, No. 00 Civ. 9569(DLC), 2005 WL 1581271 (July 7, 2005). For example, in *Marshall v. Holmes*, the Supreme Court granted a Plaintiff relief where the judgment had resulted from a forged document. 141 U.S. 589 (1891).

***6** Defendants contend that the basis of the Judgment will be called into question if TTAB finds the Plaintiff fraudulently obtained the trademark. But that, as has been repeatedly pointed out, is simply not true. The defaults judgment was entered as a sanction for defendants' litigation misconduct. Nothing the TTAB can or will do in the future could possibly call into question Judge Chin's conclusion that Mr. Ptak repeatedly flouted orders of this court, refused to cooperate with legitimate discovery demands, and made misrepresentations to the court. This case is thus completely distinguishable from *Estate of Hogarth*, where the sanctioned party was granted relief upon presenting substantial factual information that undermined the principal reason for the sanction.

The motion to vacate pursuant to Fed.R.Civ.P. 60(b)(6) motion is denied.

CONCLUSION

For the above reasons, the motion is denied. The Clerk of the Court is directed to re-close the file in this case, and to remove the instant motion from the court's list of pending motions.

S.D.N.Y.,2011.
Ptak Bros. Jewelry, Inc. v. Ptak

Slip Copy, 2011 WL 253424 (S.D.N.Y.)

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