UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ELIOT I. BERNSTEIN, et al.,

07 Cv. 11196 (SAS)

Plaintiffs,

-against-

APPELLATE DIVISION FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, et al.,

Defendants.

----------x

STATE DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF ELIOT I. BERNSTEINS' "EMERGENCY MOTION".

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Preliminary Statement

Movant plaintiff pro se Eliot Bernstein ("Plaintiff") brought this action in 2007, ultimately suing hundreds of defendants, including, inter alia, the Hon. Judith S. Kaye, Chief Judge of the New York State Court of Appeals; various judges of the Supreme Court of the State of New York, Appellate Divisions, First and Second Departments; the attorney discipline committees of the First and Second Departments (hereafter referred to as the "Disciplinary Committees"), as well as certain members and current and former counsel of the Disciplinary Committees, and various other state actors and entities (collectively the "State Defendants").

By August 8, 2008 Order, the State Defendants' motion to dismiss the complaint was granted on the grounds that the plaintiffs lacked standing to pursue their claims against the State Defendants; plaintiffs' claims were barred by absolute judicial and quasi judicial immunity, sovereign immunity and qualified immunity; most of plaintiffs' claims, including the Civil RICO

claims, were time-barred; plaintiffs failed to state a claim; the complaint violated Fed. R. Civ. P. 8(a); and certain of the claims, if not dismissed on other bases, would be barred by the Rooker-Feldman doctrine. See Bernstein v. New York, 591 F.Supp.2d 448, 460 (S.D.N.Y. 2008). Plaintiff appealed the order to the United States Court of Appeals for the Second Circuit and that appeal was dismissed as frivolous and without a basis in law by a February 5, 2010 order. See Docket No. 115.

Since the dismissal of this action, Plaintiff, and his former co-plaintiff P. Stephen Lamont have continued to attempt to re-litigate the identical claims. See, e.g. Bernstein v. Appellate Div. First Dept. Disciplinary Committee, 2010 WL 5129069, * 2 (S.D.N.Y. December 15, 2010) (Denying Lamont's motion to re-open judgment); Lamont v. Proskauer Rose, United States District Court, District of Columbia (11 cv 00949) (Action brought in the District of Columbia against New York State defendants for same grounds asserted in this action); Bernstein v. Appellate Div. First Dept. Disciplinary Committee, August 19, 2008 Order (Docket No. 108) (Order denying application for reconsideration).

Plaintiff's instant application is almost incomprehensible. However, to the extent it can be understood, it appears to be a motion to permit him to re-open this case and to amend his complaint. For the reasons set forth herein, whether deemed a motion to re-open pursuant to Rule 60 of the Federal Rules of Civil Procedure or a motion to amend the complaint, Plaintiff's prolix application to re-litigate this case, and to add literally thousands of defendants to this action, should be denied without further proceedings.

ARGUMENT

This case has been closed since the Court dismissed the action on August 8, 2008. Plaintiff has now moves for "emergency" relief in this case. In his motion, Plaintiff alleges that

an "amended Rico and Antitrust Lawsuit" against 3787 defendants, including federal and state judges, has been approved by this Court. See Emergency Motion at p. 2. Plaintiff seems to assert that he seeks leave, pursuant to Fed. R. Civ. P. 60, to reopen the case to have further proceedings herein, including a trial, and also seeks the appointment of a federal monitor. See Emergency Motion at p. 55. He also seeks leave to amend his complaint. See Emergency Motion at p. 59. Plaintiff's basis for reopening the case seems to be a Rule 60 motion made by a plaintiff in a "related" action, Andersen v. Cahill, S.D.N.Y. 07 cv 9599, and his allegations that "tyrants" and "coupsters" with conflicts of interests are controlling world markets and engaging in a RICO enterprise. See Emergency Motion at pp. 58-59. As set forth below, these allegations do not establish the extraordinary circumstances that would be required to vacate the judgment here or to re-open this closed case.

A. To Obtain Relief from a Final Judgment, Plaintiff Must Show Exceptional Circumstances Using Highly Convincing Evidence.

Plaintiff asks this Court to "re-open" his case pursuant to Rule 60(b) and (d) of the Federal Rules of Civil Procedure. Rule 60 sets forth the means by which a party may move for relief from a final judgment or order. Specifically, plaintiff moves pursuant to Rule 60(b)(6) which permits the Court to relieve a party from a final judgment or order for "any…reason which justifies relief". Relief under this rule is "extraordinary" and will only be granted upon a showing of "exceptional circumstances". See Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986). See also Ruotolo v. City of New York, 514 F.3d 184, 191 (2d Cir. 2008).

Rule 60(d) permits a final judgment to be reopened where there has been a fraud on the court. Rule 60(d) grants courts the power to "entertain an independent action to relieve a party

from a judgment" or "set aside a judgment for fraud on the court." "If, however, a movant could have pursued a timely Rule 60(b)(3) motion but inexcusably failed to do so, the movant is precluded from relying on Rule 60(d) to bring his claims outside of Rule 60(b)(3)'s one-year statute of limitations period." Rivera v. U.S., 2012 WL 1887133, * 1 (S.D.N.Y. May 21, 2012), citing In re Lawrence, 293 F.3d 615, 622 n. 5 (2d Cir.2002). Furthermore, the requirements of Rule 60(d) are stringent and narrow and the alleged fraud must be established by clear and convincing evidence. King v. First American Investigations, Inc., 287 F.3d 91, 95 (2d Cir. 2002), cert. den'd, 537 U.S. 960 (2002).

Rule 60 motions are disfavored. The party seeking relief bears the burden of establishing such exceptional circumstances by supporting its motion with "highly convincing evidence." See Canale v. Manco Power Sports, LLC, 2010 WL 2771871, * 2 (S.D.N.Y. 2010) (Citations and internal quotations omitted). See also Kotlicky v. U.S. Fidelity & Guaranty Co., 817 F.2d 6, 9 (2d Cir. 1987).

B. Plaintiff Is Not Entitled to Relief from the Final Judgment in This Case.

The circumstances proffered by Plaintiff here fail to establish the extraordinary circumstances necessary to re-open this Court's dismissal of his case, which was affirmed by the Second Circuit.

Plaintiff seems to allege that events in the case Andersen v. Cahill, S.D.N.Y. 07 cv 9599 (Docket No. 138) justify re-opening this case. In that motion, plaintiff Christine Andersen, a former employee of the Disciplinary Committee of the New York State Supreme Court, Appellate Division, First Department, seeks to re-open her employment-related lawsuit, alleging that a witness who gave testimony in that lawsuit was subject to intimidation and retaliation and has brought her own lawsuit. See Plaintiff's Amended Motion to re-Open Andersen v. Cahill,

Docket No. 138, at ¶¶ 21-23. But even in her opposition motion, plaintiff Christine Andersen alleges that the alleged intimidation was known to her and brought to Court's attention by way of an October 24, 2008 letter from her counsel. See Plaintiff's Amended Motion to re-Open Andersen v. Cahill, Docket No. 138, at ¶ 23. Thus, even putting aside the merit of these allegations, the alleged fraud has been known for almost four years and cannot serve as a basis for a motion under Rule 60(d).

Furthermore, again putting aside the merits of the allegation of fraud, whatever is happening in the Andersen case is not an "exceptional circumstance" that would justify re-opening the case here because such events cannot revive Plaintiff's claims against the State Defendants. Plaintiffs' complaints against the State Defendants were based upon his allegations that they failed to properly handle attorney grievances. But as this Court has specifically held in dismissing his previous claims of alleged mishandling of attorney grievances, "there is no clearly established right to have complaints investigated or pursued" and "no cognizable interest in attorney disciplinary procedures or in having certain claims investigated." Bernstein v. New York, 591 F.Supp.2d at 466-68. As this Court correctly determined, Plaintiff had no standing to challenge the state court system's actions in regard to attorney discipline. See, e.g., Morrow v. Cahill, 278 A.D.2d 123 (1st Dep't 2000), app. denied, 96 N.Y.2d 895 (2001) (Holding that a complainant lacked standing to compel a disciplinary committee's investigation of his former counsel as he suffered "no direct and harmful effect" from the committee's decision); Sassower v. Comm'n on Judicial Conduct of N.Y., 289 A.D.2d 119 (1st Dep't 2001); Mantell v. New York State Comm'n on Judicial Conduct, 277 A.D.2d 96 (1st Dep't 2000), app. denied, 97 N.Y.2d 706 (2001). Plaintiff therefore cannot state a claim against the State Defendants on this basis. In addition, his claims are again barred by absolute judicial, quasi-judicial and qualified immunity

and numerous other defenses. See Oliva v. Heller, 839 F.2d 37, 39 (2d Cir. 1988); Rodriguez v. Weprin, 116 F.3d 62, 66 (2d Cir. 1997).[1]

C. Plaintiff's Motion To Amend Must Be Denied.

It is respectfully submitted that in light of the fact that this case is closed, Plaintiff's motion, to the extent that it is a motion to amend, is a nullity. Amaker v. Supreme Court New York Appellate Divisions: Second Judicial Dept, 2011 WL 4372960, * 2 (E.D.N.Y. September 19, 2011) (Denying motion to amend complaint in a closed case). Nevertheless, even were the Court to entertain such a motion, because Plaintiff has not and cannot remedy the fundamental defects in his claims, such amendment would be futile and his application should thus be denied. Jones v. Commerce Bank, N.A., 2006 WL 2642153, * 3 (S.D.N.Y. September 15, 2006).

CONCLUSION

For the foregoing reasons, State Defendants ask that the Court issue an order denying Plaintiff's "emergency" motion pursuant to Rule 60 and granting such other and further relief as the Court deems just, proper and appropriate.

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1 To the extent that plaintiff asserts that this Office should be disqualified from representing the State Defendants in this case, his argument must be rejected. Plaintiff has set forth no basis for disqualification here where his claims are again clearly without any legal basis. Furthermore, in a March 10, 2008 Order, this Court previously ruled on plaintiff's claims of a conflict and rejected the same, holding:

> Plaintiffs suggest that the Attorney General is conflicted because they requested that he investigate the allegations underlying this action and because they believe he will be called upon to investigate related allegations as they are exposed. I have considered plaintiffs' request and have determined that the Attorney General does not face an improper conflict of interest in representing the State Defendants. If, however, the Attorney General concludes that an investigation of defendants is warranted, then independent counsel would be required.

See March 10, 2008 Order, p. 1.

Dated: New York, New York
August 14, 2012

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