UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHRISTINE ANDERSON,

Plaintiff, 07-Civ- 9599 (SAS)

- against -

THOMAS CAHILL, Et Al.,

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO REOPEN THIS MATTER

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Preliminary Statement

This memorandum of law and the Declaration of John Knudsen are submitted on behalf of defendants Thomas Cahill, Sherry Cohen and David Spokony in opposition to plaintiff's pro se motion to reopen this case. As the Court will recall, after a five day jury trial in this matter in October 2009, during which plaintiff was represented by counsel, the jury found for the defendants. The jury decision was affirmed by the Second Circuit. Now, plaintiff's pro se motion appears to seek a new trial pursuant to Rule 60 because of "newly discovered evidence" indicating that a potential witness did not testify at the trial because she was "threatened and chilled" by a fellow employee of the defendants. The motion should be denied.

Initially, this motion is untimely as Rule 60 motions based upon newly discovered evidence or fraud, which are the grounds expressly raised here by plaintiff, must be made within one year of the entry of judgment. Here, judgment was entered on October 30, 2009, nearly three years ago. Factually, plaintiff's claim that a potential witness, Nicole Corrado, did not testify at trial because she was intimidated is not supported by any evidence. Plaintiff attaches a federal complaint by Ms. Corrado, but that complaint contains no allegation that Ms. Corrado

was threatened into not testifying at plaintiff's trial. In fact, Ms. Corrado's complaint makes no reference to the trial in this matter at all.

The Corrado complaint does allege that Ms. Corrado was "warned" prior to giving a deposition in this matter. That allegation, however, was raised with the Court by Ms. Anderson's attorney in October 2008, and was discussed with the Court in an October 30, 2008 conference, one year prior to the trial in this case. Thus, that allegation, which is the only one pertaining to this case raised in the Corrado complaint, does not claim that Ms. Corrado did not testify at trial because she was threatened, and in any event, the specifics of this claim were already addressed by this Court and are thus not "newly discovered." Accordingly, this motion should be denied.

Factual Background

During discovery in this case, Nicole Corrado was deposed by plaintiff's attorney John Beranbaum on August 21, 2008. In that deposition, Ms. Corrado described her superiors as "arrogant" (pg. 17, 19), "ill motivated" (pg. 22), said they had an "agenda" (pg 22), they were "dictatorial" (pg. 25), they were "difficult" and "micromanaged" (pg 27), they were "very combative" and "very confrontational" due to "insecurities" (pg 30), had "poor management skills" (pg. 32), were "hostile" (pg 39), they engaged in religious discrimination (pg. 49-50, 57), were "racially insensitive" (pg 61) and "racist" (pg 71), and were "sexist" (pg 74). See Corrado Deposition, attached to Knudsen Decl. as Exhibit A. Specifically with regard to plaintiff Christine Anderson, Ms. Corrado testified that her superiors were racially motivated against Ms. Anderson (pg 73), that she "never felt this level of injustice" before the problems with Ms. Anderson (pg 86), that Ms. Anderson looked "unhealthy" because of her treatment at the hands

of superiors (pg 89), that Ms. Anderson was "tormented" by her superiors (pg 90), and that the treatment of Ms. Anderson was because of her race (pg 95). Id.

On October 24, 2008, plaintiff's attorney John Beranbaum sent a letter to the Court in which he stated that Ms. Corrado notified Ms. Anderson that she (Ms. Corrado) had been "warned" by her supervisor prior to her deposition. See Knudsen Decl, Exh. B. Mr. Beranbaum stated in the letter that there was no basis to conclude that Ms. Corrado's testimony was influenced by this "warning," id., a palpably credible conclusion given the sympathy to Ms. Anderson and the hostility to her supervisors that characterized the deposition testimony. Defendants' attorney Lee Adlerstein responded to Mr. Beranbaum's letter by letter dated October 27, 2008. See Knudsen Decl., Exh. C.

During the October 30, 2008 court conference, there was a discussion of the letters exchanged by counsel pertaining to Ms. Corrado's claim. See Transcript of the October 30, 2008 conference, attached to Knudsen Decl. as Exh D, at pgs 2, 26-27. When asked by Mr. Beranbaum to address his letter on that topic, the Court responded that "I don't think there is much to address," and asked whether plaintiff's counsel was requesting that the Court to do anything in response to the letter. Id., pgs 26-27. Mr. Beranbaum noted that he was just "appris[ing] the Court" of the claim for the Court to take action if it believed appropriate, to which the Court responded "I don't." Id., pg 27.

A trial was conducted in this matter on October 20, 2009 through October 29, 2009. See Docket Minute Entries for those dates. Nicole Corrado was not called as a witness to testify, nor was there any discussion about her testifying during the trial. She was listed as a witness for plaintiff on the joint pretrial order. Docket No. 104. The jury returned a verdict for the defendants, and judgment was entered on October 30, 2009. Docket No. 120.

Subsequently, plaintiff filed a pro se Rule 59 motion on November 16, 2009 seeking a new trial. The Court denied that motion, noting that plaintiff was represented by counsel in the matter and thus would not accept the pro se motion as a party cannot have an attorney and represent themselves at the same time, citing O'Reilly v. New York Times Co., 692 F.2d 863, 868 (2d Cir. 1982). Docket No. 123. Plaintiff then appealed the judgment on November 25, 2009, and the Second Circuit affirmed the verdict on April 4, 2011. Docket No. 128.

Nicole Corrado filed a federal hostile work environment complaint in April 2012, relating to her employment at the Departmental Disciplinary Committee ("DDC") where she and Ms. Anderson were co-workers. See Corrado Complaint, attached to Plaintiff's Affirmation as Exhibit A, and Knudsen Decl. as Exh. E. In that complaint, Ms. Corrado alleges that her supervisor at the DDC spoke to her about two days prior to her deposition in the Anderson case, stating that he had admitted himself to a psychiatric hospital in 2007 for "suicidal tendencies" because of Ms. Corrado, and was "warning her accordingly." Corrado Comp., ¶ 27. The complaint does not allege that this interaction had anything to do with Ms. Corrado's upcoming deposition testimony in this case, nor that it influenced Ms. Corrado's testimony in any way. If anything, as noted above, Ms. Corrado's deposition testimony was hostile to her supervisors at the DDC and sympathetic to Ms. Anderson. Finally, Ms. Corrado's complaint does not include any allegations that Ms. Corrado was intimidated into not giving testimony at the trial in this case, and makes no reference to the trial in this case at all.

ARGUMENT

PLAINTIFF'S RULE 60 MOTION IS UNTIMELY AND UNSUPPORTED BY EVIDENCE

Nearly three years after judgment was entered against plaintiff, plaintiff now seeks to reopen this case pursuant to Rule 60, specifically under "Rule 60(b) and (d)(3)." See Plaintiff's Affirmation in Support of Motion to Reopen, preamble. While not specifying the particular provision of Rule 60(b) in her papers, plaintiff characterizes her claims pertaining to Ms. Corrado as "newly discovered," which falls under the purview of Rule 60(b)(2). Plaintiff's Affirmation, ¶¶ 4,8. Rule 60(c)(1) specifies that motions made under section (b)(2) must be made within one year of the entry of judgment. Thus, any claim for relief based upon "newly discovered evidence" is untimely.

Plaintiff also seeks relief under 60(d)(3), which is relief based upon "fraud on the court." While there is no limitation period specifically for this subsection, it must be made within one year of entry of judgment, if it could have been done so. See Rivera v. U.S., 2012 WL 1887133, *1 (S.D.N.Y. May 21, 2012) ("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."), citing In re Lawrence, 293 F.3d 615, 622 n. 5 (2d Cir. 2002). Here, since the only claims raised by plaintiff in this motion were known to her (and raised with the Court) in 2008, see Knudsen Decl, Exhs B-D, and at pg 8 in this memo, and prior to the trial in this matter, they would fall within this time constraint. Accordingly, any claim for relief based upon "fraud on the court" is also untimely. [1]

[1]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,

Even if this motion were timely, plaintiff offers no evidence to support her claim that Ms. Corrado was intimidated into not testifying at the trial in this matter. In general, relief under Rule 60 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). The party seeking relief bears the burden of establishing such exceptional circumstances by supporting its motion with "highly convincing evidence." Canale v. Manco Power Sports, LLC, 2010 WL 2771871, *2 (S.D.N.Y. 2010). See also Kotlicky v. U.S. Fidelity & Guaranty Co., 817 F.2d 6, 9 (2d Cir. 1987). Plaintiff offers no evidence to support her claim about Ms. Corrado.

In her Affirmation, plaintiff argues that she is entitled to Rule 60 relief based upon the "newly discovered ... fact" that Nicole Corrado's federal complaint "corroborat[es] ... that she was so chilled by the deliberate witness tampering that she did not testify in plaintiff's district court trial." Affirmation, ¶ 4. Plaintiff's evidence for this claim is paragraphs 27-31 of the Corrado federal complaint. Id. Paragraphs 27-31 of the Corrado complaint, however, do not refer to any tampering or intimidation of Ms. Corrado pertaining to testimony at the federal trial in this case. In fact, the Corrado complaint does not include any allegation about the trial in this matter, much less that Ms. Corrado was threatened or otherwise intimidated into not testifying at that trial.

Instead, paragraphs 27-31 refer to a period of time around when Ms. Corrado was deposed by plaintiff's attorney in this matter, which occurred about 14 months before the trial. Specifically pertaining to plaintiff's characterization of witness "tampering," paragraph 29 of the

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Inc., 287 F.3d 91, 95 (2d Cir. 2002). Plaintiff offers no evidence that Ms. Corrado did not testify at trial due to intimidation, much less the stringent "clear and convincing evidence" needed for Rule 60(d) relief.

Corrado complaint states that "[i]n or around August 2008, approximately two days" prior to her deposition in this matter, Corrado's supervisor told Corrado that "as a result of [Corrado] rejecting him, he admitted himself into a psychiatric ward … for 'severe depression and suicidal tendencies' and that he was warning her accordingly. When plaintiff asked ... what he meant, [the supervisor] stated in response, 'I am just warning you' while staring intensely at the plaintiff."[2]

This is the only claim in the Corrado complaint that discusses any sort of "warning," ostensibly supporting Ms. Anderson's claim of "tampering" or "intimidation" of Corrado prior to Corrado's giving testimony. There is nothing explicit suggesting that Corrado's supervisor was referring to plaintiff's upcoming deposition testimony for this case. Importantly, Ms. Corrado's deposition testimony demonstrated repeated hostility towards the DDC supervisors, rather than the alleged intimidation by them.

There is no allegation or showing that Corrado did not testify in the trial in this matter because of any tampering or intimidation. In fact, the complaint indicates that Corrado was not working for the defendants' agency at the time of the Anderson trial. Corrado Comp, ¶ 56. Thus, as there is no evidence to support plaintiff's claim that Corrado did not testify in the trial because of witness tampering, this motion should be denied.

Additionally, the implicit argument in plaintiff's motion, that Corrado's testimony was restricted because of this "warning," is not borne out by the evidence. The Corrado complaint does not allege any impact on Corrado's testimony resulting from this alleged "warning" by her supervisor. A review of the transcript of Corrado's deposition in this matter reflects that Corrado

[2] The Corrado complaint does not identify for what case Corrado was giving a deposition, but based upon the date range identified and the facts already known about her claim, we assume she refers to this Anderson matter.

did not temper her testimony because of this warning, as she referred to her supervisors as "arrogant" (pg. 17, 19), "ill motivated" (pg. 22), "dictatorial" (pg. 25), "hostile" (pg 39), "racially insensitive" (pg 61), "racist" (pg 71), and "sexist" (pg 74), among other derogatory terms.[3] Moreover, plaintiff's own attorney, John Beranbaum, noted in his October 24, 2008 letter to the Court that there was no basis to conclude that this warning had any effect of Corrado's deposition testimony. See Knudsen Decl at Exh. B. Thus, plaintiff's argument that Corrado's testimony was somehow restricted by this "warning" is not supported by any evidence, and is in fact contradicted by the record.

Finally, everything alleged by plaintiff in this motion was known to plaintiff and raised with the Court four years ago. The Corrado complaint states that Corrado notified another supervisor of this "warning" in September 2008. Corrado Comp., ¶ 31. Plaintiff's attorney John Beranbaum sent a letter notifying the Court of this "warning" on October 24, 2008. Knudsen Decl., Exh. B. When the Court addressed this "warning" at the October 30, 2008 conference, plaintiff's attorney said he was just "appris[ing] the Court" of the claim, but not asking the Court to take any action. Knudsen Decl, Exh. D, pgs 26-27. Despite knowing of this claim, plaintiff did not ask the Court to take any action nor did she raise this matter again during the pendency of this case.

In sum, plaintiff now resurrects an allegation, purportedly "newly discovered" although raised four years ago with the Court, in order to continue her pro se effort to re-litigate this long-closed matter. Plaintiff (who, while pro se here, is an attorney) blatantly mischaracterizes the allegation in the Corrado complaint as referring to giving testimony at plaintiff's trial despite the

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[3] See Corrado Dep transcript at identified pages. Corrado also noted that they had an "agenda" (pg 22), were "difficult" and "micromanaged" (pg 27), were "very combative" and "very confrontational" due to "insecurities" (pg 30), had "poor management skills" (pg. 32), and they engaged in religious discrimination (pg. 49-50, 57).

obvious fact that is not what Corrado claims. In fact, the Corrado complaint states "[o]n or around August 21, 2008, plaintiff gave testimony against defendant in the discrimination lawsuit", ¶ 30, which directly contradicts plaintiff's argument that Corrado was intimidated into not giving such testimony.

As demonstrated above, there is no evidence to support plaintiff's allegation that Corrado did not testify at the Anderson trial because of witness intimidation. Accordingly, plaintiff's motion for Rule 60 relief should be denied.

CONCLUSION

For the reasons set forth in this Memorandum of Law, plaintiff's motion for Rule 60 relief and a new trial should be denied, and defendant should be entitled to costs and fees associated with this application and with other relief as the Court deems appropriate.

Dated: New York, New York
August 17, 2012

Respectfully submitted,

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