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Sent: Tuesday, June 20, 2017 9:51 PM
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Subject: krh: 2nd Circuit - US Supreme Court case on Fraud on the Court patent Case opened 12 years later 6.19.17

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In *Hazel-Atlas,* the Supreme Court set aside a twelve-year old judgment on account of new evidence of a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but [a] Circuit Court of Appeals" in order to obtain a patent. 322 U.S. at 245-46, 64 S.Ct. at 1001.

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The *Hazel-Atlas* Court explained that fraud on the court involves "far more than an injury to a single litigant" because it threatens the very integrity of the judiciary and the proper administration of justice. *Id.* at 246, 64 S.Ct. at 1001. Proof of a scheme to defraud together with the complicity of the offending party's lawyers in *Hazel-Atlas* was, in the Court's judgment, conclusive evidence of fraud on the court. However, the Supreme Court was careful to distinguish between the facts of the case before it and "a case of a judgment obtained [simply] with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." *Id.* at 245, 64 S.Ct. at 1001. The latter scenario, according to the Court, would be subject to the rule of finality, *i.e.,* that judgments generally should not be disturbed once the one-year term following their entry has expired. *See id.* at 248, 64 S.Ct. at 1002.

On this appeal, appellant relies heavily upon this court's prior decision in *Leber-Krebs, Inc. v. Capital Records,* 779 F.2d 895 (2d Cir. 1985), in which we emphasized that the fraud-on-the-court rule enunciated in *Hazel-Atlas* "should be characterized by flexibility and an ability to meet new situations demanding equitable intervention." *Id.*at 900; *see Hazel-Atlas,* 322 U.S. at 248, 64 S.Ct. at 1002. Gleason points to the equitable and flexible nature of the rule in support of his contention that the saving clause of Fed.R.Civ.P. 60(b) provides a sweeping avenue of relief against fraudulently obtained judgments.

We think appellant reads the saving clause of Rule 60(b) too broadly. As the district court recognized, the instant case is distinguishable from *Leber-Krebs* because the aggrieved party in that case did not even have the opportunity to litigate the issue of fraud. *Leber-Krebs* involved a creditor who moved to confirm an *ex parte* attachment order within the statutorily prescribed five-day period. The district court denied the motion, relying on the garnishee's false representation that it held none of the debtor's assets. Consequently, the creditor lost the opportunity to enforce his judgment against the debtor. We held that the

creditor could maintain an independent action against the garnishee under Fed.R.Civ.P. 60(b) for fraud on the court since the fraud prevented the creditor from proceeding against the garnishee who held the debtor's assets.

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Here, by contrast, plaintiff had the opportunity in the prior proceeding to challenge the police officers' account of his arrest. The issues of lack of probable cause and bad faith were before the court from the outset. Gleason cannot be heard now to complain that he was denied the opportunity to uncover the alleged fraud. While the officers may have lied at their depositions, nothing prevented plaintiff during the pendency of the prior proceeding from deposing the two eyewitnesses to the bank robbery in order to impeach the officers' testimony. Instead, however, Gleason voluntarily chose to settle the action.

As we previously have made clear, the credibility and veracity of a witness at issue in an original proceeding cannot be later challenged by way of an independent action. *See Serzysko,* 461 F.2d at 702 n. 2; *see also Travelers Indemnity Co. v. Gore,* 761 F.2d 1549, 1552 (11th Cir. 1985). After-discovered evidence of alleged perjury by a witness is simply not sufficient for a finding of "fraud upon the court." *Hazel-Atlas,* 322 U.S. at 245, 64 S.Ct. at 1001; *Serzysko,* 461 F.2d at 702.

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Similarly, allegations of nondisclosure during pretrial discovery do not constitute grounds for an independent action under Fed.R.Civ.P. 60(b). *See H.K. Porter Co. v. Goodyear Tire Rubber Co.,* 536 F.2d 1115, 1118 (6th Cir. 1976).

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Absent the type of fraud which "subvert[s] the integrity of the court itself, or is . . . perpetrated by officers of the court," 7 Moore ¶ 60.33, at 360; *see Serzysko,* 461 F.2d at 702, the requisite interference with the judicial machinery cannot be established and an independent action for fraud on the court therefore will not lie.

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In short, neither perjury nor nondisclosure, by itself, amounts to anything more than fraud involving injury to a single litigant.

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Cf. Hazel-Atlas, 322 U.S. at 246,64 S.Ct. at 1001; *Great Coastal Express, Inc. v. International Brotherhood of Teamsters,*675 F.2d 1349, 1357 (4th Cir. 1982) ("[p]erjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as early as possible"), *cert. denied,* 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 978 (1983).

Notwithstanding Judge Leval's determination that plaintiff alleged only perjury and nondisclosure as the basis for his independent action for relief, Gleason nevertheless contends that the new evidence before the district court was indicative of a broad conspiracy and cover-up which transcended mere perjury and nondisclosure. Thus, plaintiff claims that the district court erred in finding the alleged fraud to be intrinsic to the prior proceeding. Although we agree with plaintiff that relief from a judgment by way of an independent action need not be premised on a showing of extrinsic as opposed to intrinsic fraud, *see Averbach v. Rival Mfg. Co.,* 809 F.2d 1016, 1022 (3d Cir.) ("`extrinsic' — `intrinsic' distinction which is based on a statement in *United States v. Throckmorton,* 98 U.S. (8 Otto) 61 [23 L.Ed. 93] (1878), was overruled, if it was ever the law, by *Marshall v. Holmes,* 141 U.S. 589 [12 S.Ct. 62, 35 L.Ed. 870] (1891)"), *cert. denied,*___ U.S. ___, 107 S.Ct. 3187, 96 L.Ed.2d 675 (1987); *see also Serzysko,* 461 F.2d at 702 n. 2; 11 C. Wright A.

Miller, *Federal Practice and Procedure* § 2868, at 240-41 (1973) (distinction between extrinsic and intrinsic fraud is "most unfortunate, if true.

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[It] rests on clouded and confused authorities, its soundness as a matter of policy is very doubtful, and it is extremely difficult to apply. It ought not to persist as a limit on independent actions" under Fed.R.Civ.P.

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60(b).), an aggrieved party seeking relief under the saving clause of Rule 60(b) still must be able to show that there was no "opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action." *Serzysko,* 461 F.2d at 702 n. 2; *see Marshall,* 141 U.S. at 596, 12 S.Ct. at 64; *M. W. Zack Metal Co. v. International Navigation Corp.,* 675 F.2d 525, 530 (2d Cir.), *cert. denied,* 459 U.S. 1037, 103 S.Ct. 449, 74 L.Ed.2d 604 (1982); 11 Wright Miller § 2868, at 239.

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The district court explicitly found that plaintiff had ample opportunity in the prior proceeding to uncover the alleged fraud, and the record supports the court's determination. Accordingly, plaintiff's contention in this regard is without merit.

CONCLUSION

For all of the foregoing reasons, the district court's order granting defendant's motion to dismiss for failure to state a claim upon which relief can be granted is affirmed.

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