UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
CASE NO. 8:20-cv-325-MSS-MRM

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BRIAN DAVISON et al.,

Defendants.

_____/

PLAINTIFF'S OPPOSITION TO DAVISON'S RENEWED MOTION TO ALTER OR AMEND THE FINAL JUDGMENT PURSUANT TO FED.R.CIV.P. 60(b)(1) AND 60(b)(5)

Plaintiff Securities and Exchange Commission ("Commission") hereby opposes Davison's Renewed Motion to Alter or Amend the Final Judgment ("Davison's Motion") (D.E. 768) as there was no mistake, surprise, or excusable neglect warranting any change. Nor has the Final Judgment been satisfied. Rather, Davison is trying to rewrite the terms of the agreed upon settlement to terms more favorable for himself, based on his own alleged error. Such a revision should not be condoned. Davison's Motion should be denied and he should be ordered to turn over the coins as agreed or their monetary equivalent.

I. The Settlement

After eighteen months of litigation and several weeks of negotiation between the Commission, Davison and the Receiver, the parties agreed to settle the case. To that end, the parties agreed to the entry of a Final Judgment that specifically sets forth with precision the property and personal items Davison was to retain and the items he was to turn over to the Receiver to satisfy the disgorgement, interest and civil penalties agreed upon. Because Davison did not have enough cash on hand to satisfy the monetary relief sought, and because many of the items were of indeterminate or fluctuating value, instead of performing costly and time-consuming valuations for each of Davison's possessions, the parties agreed to set forth with specificity the items to be turned over to the Receiver that would be deemed to satisfy the monetary relief.

In crafting this settlement, the items selected were not chosen based on agreed upon values. Instead, the parties negotiated which items to turn over based on multiple factors and agreed the judgment would be satisfied whether the chosen items ultimately sold for an amount over or under the amount of judgment. If the items sold for less than the monetary relief sought, the SEC could not try to collect additional items or monies from Davison. In turn, if the items sold for more than the judgment's monetary relief, the Receiver would keep any overages to return to investors and Davison would not get a refund. All parties agreed to these terms as

set forth in the Final Judgment in order to provide finality to the parties and for reasons of efficiency and judicial economy. To that end, the agreed upon Final Judgment was filed and ultimately entered by this Court on August 5, 2021 (D.E. 355-1).

II. The Final Judgment Has Not Been Satisfied

To date, Davison has not turned over the 480 Platinum American Eagle Coins and 3 of the Gold American Eagles that were set forth in the Final Judgment to be turned over. Davison claims these items were listed in error (admittedly by him) and wants the Court to rewrite the settlement and the Final Judgment to deem the judgment satisfied anyway, without him having to make up for the difference in value for coins he has not turned over (some $450,000).

Davison's sole reason behind his request is that the items already turned over to the Receiver total more than the monetary relief set forth in the Final Judgment. That the items Davison turned over could equal more than the monetary relief agreed upon was a consequence anticipated during settlement and specifically accounted for in the Final Judgment. Indeed, the Final Judgment states, "Davison agrees that once he turns over the aforementioned property and assets, he relinquishes all legal and equitable right, title and interest in the property and assets ("Funds"), *and no part of the Funds shall be returned to him."* Final Judgment at p. 9 (emphasis added) (DE 355-1).

Davison should not be allowed to wait and see whether the sales of the items turned over is profitable then in hindsight claim he should not have to comply with the clear terms of the agreed upon Final Judgment. Davison's wish to rewrite a judgment that was bargained for and agreed to by all parties because he made an error should not be condoned. Davison has the financial means to make up the difference in price of the coins he promised, and should be made to do so[1].

III. Davison is Not Entitled to Relief Under Federal Rule of Civil Procedure 60(b)(1) and 60(b)(5)

Rule 60(b) allows a court to relieve a party from Final Judgment for "(1) mistake, inadvertence or excusable neglect," [or when] . . . (5) "the judgment has been satisfied." Fed.R.Civ.P. 60(b). Relief under Rule 60(b) is to be granted only in exceptional circumstances. *See U.S. v. Eyler*, 778 F. Supp. 1553, 1556 (M.D. Fla. 1991) (citing *Tessmer v. Walker*, 833 F.2d 925 (11th Cir. 1987)). Indeed, the party seeking to modify the order must show "that new and unforeseen conditions have produced such extreme and unexpected hardship that the decree is oppressive." *Id.* Davison has failed to meet this standard.

Moreover, "Rule 60(b)(5) is not a basis to seek relief from a judgment for money damages." *Wakefield v. Cordis Corp.*, No. 07-20570-CIV-ALTONAGA,

[1] Pursuant to the Final Judgment, Davison was allowed to keep $500,000 in investment accounts as well as other items of value that could be used to purchase the coins or to pay the monetary value of the coins.

2009 WL 10701260, at *6 (S.D. Fla. Sept. 16, 2009) (citation omitted); *Eyler*, 778 F. Supp. at 1557 ("The *Gibbs* court established that, within the Eleventh Circuit, the relief contemplated by a Rule 60(b)(5) motion is relief from orders with prospective application, and that judgments awarding current monetary damages for past wrongdoings are properly considered retroactive, not prospective in nature."). As discussed below, Davison's Motion offers no real argument for relief of any kind, because he has not satisfied the judgment and there was no mistake in the judgment that would qualify for relief under Rule 60(b).

A. The Final Judgment Has Not Been Satisfied

As explained above, the monetary relief provided for in the Final Judgment was to be satisfied by turning over the specific items listed. The Final Judgment was not written (nor was it agreed upon) to provide that Davison could stop turning over items once the items were sold for a value over the amount of monetary relief sought. Indeed, the Final Judgment specifically provided Davison would not a get a refund if such an overage were to occur. Nor was the Final Judgment written to give Davison a choice of paying the monetary relief or turning over the items listed. Instead, the Final Judgment is crystal clear as to the terms under which the judgment would be deemed satisfied. Davison cannot only rely on the monetary relief section of the Final Judgment and ignore the remaining sections of the Final Judgment

setting forth the terms under which that monetary relief would be deemed satisfied. Rather, the Final Judgment must be read as a whole and enforced as written.

Clearly, the Final Judgment has not been satisfied and Rule 60 does not afford relief here.

B. There is No Mistake under Rule 60(b)(1)

"Rule 60(b)(1) motions premised upon mistake are intended to provide relief to a party in only two instances: (1) when the party has made an excusable litigation mistake . . . or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order." *Yapp v. Excel Corp*., 186 F.3d 1222, 1231 (10th Cir. 1999).

Here, neither instance applies. Even assuming *arguendo* that Davison made an honest mistake as to what kind of coins he possessed and agreed to turn over, that is not a "litigation mistake" or a judicial error under which Rule 60(b)(1) provides for an alteration of a judgment. Nor is it a mistake that cannot be remedied by Davison without Court intervention--he can simply purchase the coins he stated he would turn over or pay their equivalent monetary value to satisfy the Final Judgment. Thus, Davison has failed to state a reason to alter the Final Judgement under Rule 60(b)(1).

WHEREFORE, for the foregoing reasons, the Commission respectfully requests that this Court deny Davison's Motion.

Respectfully submitted,

Dated: January 31, 2023 By: s/Alise Johnson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 31 2022, I electronically filed the foregoing document via the Court's CM/ECF electronic filing system, which provides notice to all counsel of record.

By: s/ Alise Johnson
Alise Johnson