UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ELIYAHU MIRLIS,	:	CASE NO. 3:16-CV-00678 (MPS)
Plaintiff,	:	
v.	:	
	:	
RABBI DANIEL GREER and YESHIVA OF NEW HAVEN, INC.,	:	
Defendants.	:	JUNE 8, 2021

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR RELIEF FROM FINAL JUDGMENT

Defendants Daniel Greer ("Greer") and Yeshiva of New Haven, Inc. ("Yeshiva") (collectively "Defendants") respectfully submit this memorandum of law in support of their motion, pursuant to Federal Rule of Civil Procedure 60(b)(6), for an order granting relief from the judgment entered in this matter against the Defendants on June 6, 2017. (Doc. # 163, Judgment). As we discuss below, recent information relating to a critical witness in the case, Aviad Hack, has been revealed that warrants an evidentiary hearing to permit defendants to further explore the circumstances of his appearance as a witness in this case, and whether extraordinary post-judgment relief under Rule 60(b)(6) is warranted. This information, which concerns a "cooperation" agreement reached between Hack and the plaintiff, pursuant to which Hack was dropped as a defendant in the case in exchange for his testimony, was the subject of speculation by the court and defense prior to trial, but was not previously known or revealed. The existence of this agreement, if presented to the jury, coupled with the fact that Hack testified only at deposition and could not be cross-examined at trial due to his absence, would have significantly undermined a key pillar of the plaintiff's case; the fact that Hack testified only at deposition, and could not be cross-examined at trial due to his absence, further dealt a crippling blow to the defendants. Defendants should be granted an evidentiary hearing so that the details

of this undisclosed cooperation agreement, and Hack's non-appearance at trial, may be fully explored with testimony under oath.

I. BACKGROUND

1. The Initial Trial and Related Proceedings

The Court did not preside over the trial of this matter, so we review the relevant procedural and factual background in some detail. The case centered generally on plaintiff's claims that he was sexually abused by defendant Daniel Greer while a student at Yeshiva of New Haven ("Yeshiva") between 2001 and 2005. He claimed that the abuse began in his sophomore year, in the fall of 2002, and continued at varying intervals until his graduation in 2005. During this time, defendant Greer held various leadership roles with the Yeshiva, an Orthodox Jewish religious school he had founded in the late 1970s. Plaintiff asserted assault claims against defendant Greer individually, and negligence claims against the school for failing to discover the claimed abuse.

The case was tried over approximately a week in May 2017. The jury returned a verdict in plaintiff's favor, and awarded $15 million in compensatory non-economic damages. Final judgment in the amount of $21,749,041.10 – which included punitive damages and offer-of-judgment interest - entered on June 6, 2017. Thereafter, on June 28, 2017, defendants filed a motion for a new trial under Fed. R. Civ. P. 59(a), seeking either an order granting a new trial, or a remittitur of the judgment, on the basis that the evidence could not fairly support the jury's award of non-economic damages. On October 27, 2017, a motion for relief from judgment under Fed. R. Civ. P. 60(b)(2) was filed, based on newly-discovered evidence. Those motions were denied by the Court (Shea, J.) on December 8, 2017. On March 3, 2020, the Second Circuit

affirmed the judgment. Thereafter, on January 25, 2021, the United States Supreme Court denied defendants' petition for certiorari.

This motion focuses on the testimony of one of the key witnesses for the plaintiff, Aviad Hack. Hack had attended the Yeshiva as a student, and ran the high school during plaintiff's years there. Hack did not appear in person as a trial witness. The trial court found him to be "unavailable", and instead portions of his videotaped deposition sessions from the summer of 2016 were played for the jury. See generally ECF 293-1 (redacted transcript of Hack deposition tracking portions allowed into evidence by Court and played for jury).

Judge Shea noted the importance and impact of this testimony in a post-trial ruling on a third-party motion for access to the deposition excerpts played at trial:

> Hack's testimony directly supported Mirlis' account with respect to Greer's liability—he stated that he knew that Greer was abusing Mirlis at the time that it was taking place. (*See* ECF No. 111-6 at 11). He noted that Greer had told him as much. (*Id.* at 11-12). Hack was one of only two witnesses who directly corroborated Mirlis' allegations as to liability—the other was Mirlis' wife, Shira Mirlis, who testified that Mirlis told her about Greer's abuse after he had left the Yeshiva. (*See* ECF No. 230 at 142). Hack also stated that Greer had abused him in a similar manner as alleged by Mirlis. (*See* ECF No. 111-6 at 8-9). In addition, I granted the jurors' request to view a portion of Hack's video testimony again during their deliberations. (*See* ECF No. 234 at 535). As such, the jurors likely relied upon Hack's deposition testimony in rendering their verdict.

See ECF No. 277 (Ruling on Request for Access to Post-Judgment Financial Documents and Video Deposition Played at Trial), at 11, rev'd on other grounds, 952 F.3d 36 (2d Cir. 2020). Hack further testified that he was in a sexual "relationship" with defendant Greer between approximately 1992 and 2004; Hack was over 18 years of age during the vast majority of that time period.

The jury, as noted, requested to re-hear Hack deposition testimony toward the end of the first day of deliberations; the video was re-played the following morning. Later that day, the jury returned a note indicating that it was deadlocked on all issues, including the liability of both

defendants. The trial court delivered an Allen charge, with the consent of the parties. The $15 million verdict was returned less than 3 hours later. 5/17/17 Tr. 526-32; 5/18/17 Tr. 535-47.

The circumstances of Hack's appearances as a trial witness and the scope of permissible cross-examination (had he appeared in person at trial) were discussed at some length during final pretrial conferences with the Court. Defendants had submitted as a proposed exhibit a prior state court complaint that included Hack as a named defendant; the complaint was served on Greer and the Yeshiva, but never returned to court. See ECF No. 111, Exhibit D (proposed Defense Exhibit 505). The complaint in this case never included Hack as a defendant; instead, as noted, he was one of plaintiff's critical witnesses. The potential significance of Hack's "transition" from potential defendant to key witness was discussed with the court:

> THE COURT: I didn't know that. So the theory would be that Mr. Hack had started out as a defendant, that he switched sides or agreed to testify for the plaintiff because he was concerned that what?
>
> MR. WARD: Concerned about his own civil liability and criminal liability.
>
> THE COURT: But how would -- but unless you can establish that there was some kind of quid pro quo, do you have evidence as to why he was no longer a defendant?
>
> MR. WARD: Why he was originally a defendant?
>
> THE COURT: No, why he was dropped as a defendant.
>
> MR. WARD: Other than the fact that he was dropped as a defendant and then became the star witness for the plaintiff. I think it goes –
>
> THE COURT: When you say the star witness though –
>
> MR. WARD: The only witness.
>
> THE COURT: No, no, wait. What I'm getting at, let's assume Mr. Ponvert is successful in serving him with a

> subpoena. I imagine Mr. Ponvert will ask him, now, sir, are you here under subpoena? You're here because there's a Court order. So what's the theory then as to motive at that point? I guess I'm not -- if he would admit on the stand, yeah, I made a deal with the plaintiff that he's going to drop me from the case in exchange for my testimony, well, then, I think yeah.
>
> MR. WARD: That would be exceptionally relevant.

See Exhibit A (Transcript of 5/2/17 pretrial conference, at pp. 39-40).

Plaintiff's counsel noted that Hack had never been named as a defendant in this federal filing. He also stated that Hack's inclusion as a defendant in the draft complaint/proposed defense exhibit 505 was principally due to potential insurance coverage issues, and followed discussion with defense counsel about that subject. There was no mention of any "quid pro quo", or other any other "deal" similar to the hypothetical posited by Judge Shea, involving being dropped as a defendant in exchange for testifying.

The trial court returned to the subject of Hack's credibility, and possible impeachment, at the final pretrial conference on May 9, 2017, the day before trial began. Judge Shea stated as follows:

> THE COURT:
> * * *
> And with regard to the draft complaint that the defendants have included as an exhibit, I've given that some thought and I was going to say something about the other issue which you've now said is moot. It seems to me that based on our conversation last time, if that is relevant at all, it's relevant to the issue you identified last time. Namely, it would go by showing that Mr. Hack was initially named and then was dropped. If you could prove that Mr. Hack was aware of that and that there had been a discussion or agreement or understanding between either Mr. Hack and Mr. Mirlis or Mr. Hack and Mr. Ponvert or something like that that, hey, we'll drop you in exchange for your testimony, then I think it would go to interest or bias. But I'm not sure how you're going to do that now if he's not going to be

here.

See Exhibit B (Transcript of 5/9/17 pretrial conference, at 13-14). At that point, it appeared that Hack would not be appearing in person at trial as a witness, as neither party had been able to serve him with a trial subpoena. See generally id. at 4-9. Judge Shea inquired about how the earlier complaint naming Hack, Defense Exhibit 505, might be admitted in his absence:

> THE COURT: How do you ask the foundational questions that would make that complaint relevant to his bias or interest? He's not here. I take it you did not ask him that at the deposition.
>
> MR. WARD: I did not.
>
> THE COURT: So how do you make that document so that it has a foundation and therefore would be relevant?
>
> MR. WARD: Possibly through the attorney that he retained.

Id. at 15. Again, there was no mention by counsel of any potential "agreement" or "understanding" of the type referenced by the Court, between Hack and Mirlis and/or his counsel, regarding removal as a defendant in the case in exchange for testimony.

2. Recent Information Relating to Aviad Hack

Information bearing directly on this question was recently disclosed to defendant Greer – by Aviad Hack – in the context of an ongoing arbitration matter before a religious tribunal. The attached affirmation of Rabbi Avrohom Notis sets forth details regarding this recent disclosure. See Exhibit C. As Rabbi Notis indicates, he is currently serving as one of the arbitrators in the ongoing private religious arbitration; Aviad Hack is the respondent in that proceeding. At an arbitration session in January 2021, Hack submitted to the panel an affidavit[1] from his counsel,

[1] The affidavit was dated September 1, 2020, but was not submitted to defendant Greer until lat January of 2021. See Exhibit D.

Steven J. Errante, Esq., addressing Hack's role as a witness in this case, along with a complaint dated September 30, 2015. The complaint listed Eliyahu Mirlis as the plaintiff, and named Daniel Greer, Yeshiva of New Haven, Inc., Aviad Hack and Eliezer Greer as defendants. See Exhibit D. The Errante affidavit referenced the complaint – which was the exact document defendants had submitted pre-trial as a proposed defense exhibit - as a draft, and noted it named Aviad Hack as a defendant. Attorney Errante further stated that he had represented Aviad Hack in connection with that lawsuit, and that a "significant part" of his representation was to prevent him from being sued by Mr. Mirlis. Attorney Errante stated that he accomplished that goal by assuring counsel for Mr. Mirlis, Antonio Ponvert, Esq., that he would testify "truthfully and completely" about everything he knew regarding Mr. Mirlis, Daniel Greer, and their relationship. He further indicated that, as a result of this agreement, Aviad Hack was not sued by Mr. Mirlis. See Exhibit D.

Rabbi Notis further states that on May 30, 2021 Attorney Errante appeared before the arbitration panel by remote Zoom platform, and answered follow-up questions about the agreement referenced in his affidavit, as well as Hack's non-appearance at trial after he gave deposition testimony. Rabbi Notis indicates that no stenographic transcription of this recent session is available, and sets forth his best recollection about statements made during that session. He indicates, among other things, that the agreement to remove Hack as a defendant in the case came about as a result of discussions between Attorney Errante and plaintiff's counsel. He further states that, when asked why Mr. Hack did not appear as a witness at trial, Attorney Errante indicated that it was "not in the original deal"; Rabbi Notis understood this to mean that the agreement between counsel only contemplated deposition testimony, and that it was assumed Hack would not appear at trial. See Exhibit C, ¶ 8.

II. RELEVANT LEGAL STANDARDS

Rule 60(b) permits a party to seek relief from a final judgment in several defined sets of circumstances. *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). The rule includes five enumerated circumstances, including fraud, mistake, and newly discovered evidence, and one catch-all provision. Rule 60(b); *see also Matter of Emergency Beacon Corp.*, 666 F.2d 754, 758 (2d Cir. 1981). The catch-all provision, found in subsection 6, allows a court to grant relief for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6); *see also Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) ("Rule 60(b)(6) ... permits reopening when the movant shows any reason justifying relief from the operation of the judgment other than the more specific circumstances set out in Rules 60(b)(1)–(5)."); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 n.11 (1988). Rule 60(b)(6) acts as a "grand reservoir of equitable power to do justice in a particular case." *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012), quoting *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir.1986).

Although a Court has wide discretion to grant relief under Rule 60(b)(6), it is not limitless; generally, relief under Rule 60(b)(6) is available only in 'extraordinary circumstances" *Buck v. Davis*, 137 S. Ct. 759, 777–78 (2017) (quoting *Gonzalez*, 545 U.S. at 535), or "where the judgment may work an extreme and undue hardship". *Matter of Emergency Beacon Corp.*, 666 F.2d 754, 759 (2d Cir. 1981). To determine whether such circumstances exist, the court may consider a wide range of factors, including "the risk of injustice to the parties and the risk of undermining the public's confidence in the judicial process." *Buck*, 137 S. Ct. at 777–78 (quoting *Liljeberg*, 486 U.S. at 863–64).

The only temporal constraint on motions for relief under Rule 60(b)(6) is that they must be brought within a "reasonable time". Rule 60(c)(1). What qualifies as "reasonable" depends

largely on the facts of a given case, including the length and circumstances of the delay and the possibility of prejudice to the opposing party. *Matter of Emergency Beacon Corp.*, 666 F.2d 754, 760 (2d Cir. 1981). Courts must use their discretion to "balance the interest in finality with the reasons for delay." *Grace v. Bank Leumi Tr. Co. of NY*, 443 F.3d 180, 190 (2d Cir. 2006), quoting *United States Fidelity & Guar. Co.*, 817 F.2d 6, 9 (2d Cir.1987). Courts have allowed Rule 60(b)(6) motions for relief filed several years after entry of the judgment complained-of. *See, e.g., Buck v. Davis*, 137 S. Ct. 759, 767 (2017) (holding movant was entitled to Rule 60(b)(6) relief to reopen eight-year-old judgment against him); *Matter of Emergency Beacon Corp.*, 666 F.2d 754, 760 (2d Cir. 1981) (determining that bankruptcy court did not abuse its discretion in allowing Rule 60(b)(6) motion 26 months after entry of judgment complained of where bankruptcy trustee uncovered false statements made to the bankruptcy court); *Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1051 (2d Cir. 1982) (two year delay considered "reasonable" for purposes of Rule 60(b)(6)); *United States v. Karahalias*, 205 F.2d 331, 333 (2d Cir. 1953) (17 year delay); *see also Klapprott v. United States*, 335 U.S. 601 (1949) (petitioner's motion was proper under Rule 60(b)(6) where it was filed more than 4 years post judgment and justified by the existence of extraordinary circumstances, including his imprisonment, illness and inability to afford legal counsel); United States v. Cirami, 563 F.2d 26, 35 (2d Cir. 1977)("[w]here one timely seeking Rule 60(b)(6) relief from a default judgment can make out a strong case that he had a meritorious defense which could have been asserted but for a truly extraordinary turn of events not covered by the first five clauses of the rule and which brought about his default and resulted in substantial injustice to him, it is appropriate to vacate the judgment so that the merits of his case can be considered.")

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The Supreme Court recently reversed a lower court ruling denying relief under Rule 60(b)(6), and remanded the matter to the trial court for further proceedings. In *Tharpe v. Sellers*, 138 S. Ct. 545 (2018), the Supreme Court reviewed an Eleventh Circuit ruling affirming a lower court's denial of convicted murderer Tharpe's Rule 60(b)(6) motion seeking to challenge the death penalty sentence imposed by a jury; defendant believed the jury included a juror biased against him on account of racist beliefs. The Eleventh Circuit's decision was based on its conclusion, rooted in the state court's factfinding, that Tharpe had failed to show prejudice in connection with his procedurally defaulted claim, i.e., that Tharpe had "failed to demonstrate that [the juror's] behavior 'had substantial and injurious effect or influence in determining the jury's verdict.' *Tharpe*, 138 S. Ct. at 546. However, Tharpe was able to produce a sworn affidavit from that juror, indicating his stunningly racist views, including:

> "there are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls."

Id. The Supreme Court held that this affidavit presented a strong factual basis for the argument that Tharpe's race, which was African-American, affected that juror's vote for a death verdict. *Id.* Accordingly, the Supreme Court overturned the Eleventh Circuit and remanded the case for further consideration. The Court mused in dicta that Tharpe might not ultimately be entitled to the relief he seeks, but held that he was entitled to a review of his claims based on a proper application of the law. *Id*.

III. ARGUMENT

Defendants respectfully submit that the recently-disclosed information raises sufficient questions about the underlying trial and judgment in this matter that a hearing is warranted. First, as a matter of procedure and timing, this motion meets the "reasonableness" standard under

the authorities cited above. The affidavit of Attorney Errante regarding the cooperation agreement with the plaintiff for Hack's testimony was provided to defendant Greer in January of this year; defendants, however, did not believe that affidavit, standing alone, provided a sufficient basis on which to seek relief under Rule 60(b)(6). The additional information set forth in Rabbi Notis's affirmation, Exhibit C, sheds further light on the cooperation agreement, and also raises important questions as to Hack's absence as a witness at trial. As noted in the Notis affirmation, this additional information was presented a little over a week ago, on May 30th. Defendants have moved promptly since learning of these additional facts.

With respect to the merits, defendants recognize that Rule 60(b)(6) sets a very high standard for relief. We respectfully submit, however, that the preliminary showing in our supporting papers provides a basis for the Court to permit further inquiry into the circumstances of Hack's "cooperation agreement", and his non-appearance as a witness at trial. The trial court noted the importance of Hack's deposition testimony in this case, and that the jurors likely relied on it in reaching their verdict. ECF 277.00, at 11. The admission of the Hack deposition, coupled with the inability to cross-examine Hack at trial, dealt a crippling blow to the defense; Hack voluntarily appeared for two deposition sessions in July-August of 2016, and defense counsel had no reason to suspect he might not appear at, or be available for, trial. More importantly, at the time of the deposition the defense was unaware of the Hack-Mirlis cooperation agreement that had been negotiated by their counsel, and therefore could not have examined Hack about it.

The recent disclosure that Hack was removed (or not included) as a defendant in this case based on his agreement to provide testimony for the plaintiff raises troubling questions about his role as a key witness in the case. Both the defense and the trial court raised the possibility of

such an agreement prior to trial, yet it was unknown to the court and defense at the time of trial, and the jury that returned a multi-million dollar verdict in plaintiff's favor never learned of it. Equally troubling is the possibility set forth in the Notis affidavit – that Hack understood that he would not have to appear at trial, and that appearance for deposition would be sufficient to satisfy any obligations he had under his "cooperation agreement".

Simply put, the existence of an undisclosed cooperation agreement with a vital witness, coupled with the possibility that the defense may have been deprived of a meaningful opportunity to cross examine that witness, is sufficient to erode confidence about the judgment in this case. Defendants should be permitted the opportunity to delve further into these questions and circumstances – including the opportunity to question Hack at a hearing before the Court.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court schedule an evidentiary hearing at which the facts underlying the issues raised in this motion may be further explored, in order to determine whether relief under Rule 60(b)(6) is warranted.

THE DEFENDANTS,

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Memorandum of Law in Support of Motion for Relief from Final Judgment was filed electronically on June 8, 2021. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ David T. Grudberg
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