Appeal No. 19-2753

In the

United States Court of Appeals

For the

Third Circuit

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION,
MDL No. 2323

Amon C. Gordon,

Plaintiff-Appellant

This Document Relates To:

BAGGS et al. v. NATIONAL FOOTBALL LEAGUE, et al.,
Civil Action No. 2:13-cv-05309-AB

MOTION TO STAY THE APPEAL AND FOR LIMITED REMAND TO PERMIT THE DISTRICT COURT TO CONSIDER RULE 60(B) MOTION BEING FILED SIMULTANEOUSLY WITH THE EASTERN DISTRICT OF PENNSYLVANIA

Plaintiff Amon C. Gordon respectfully seeks this Court to grant a limited remand of this matter back to the Eastern District of Pennsylvania (Brody, J.) in order for the district court to consider a Motion under Rule 60(b)(1) (2) and (6); and, to stay the appeal in the interest of judicial economy and to avoid duplicative proceedings. Plaintiff seeks an opportunity to bring this matter back before the district court to address a mistake that was outcome determinative and grossly unfair. This Court has asked the parties to address whether this Court has the authority to consider the appeal. Plaintiff has responded that, indeed, this Court does have that authority. However, the most efficient manner in which to resolve the question of mistake may be to go back to the district court and ask the court there to correct its mistake under Rule 60[1].

The motion must be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was

[1] Rule 60(b) of the Federal Rules of Civil Procedure provides that:

> On motion and upon such terms as are just, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

entered or taken. *Gonzalez v. Crosby*, 545 U.S. 524, 528 n. 2, 125 S. Ct. 2641, 2645 n. 2, 162 L.Ed.2d 480 (2005); FED. R.CIV.P. 60(c)(1). This motion is indeed timely as it was made within forty-four (44) days following the entry of the Settlement Implementation Order dated July 2, 2019.

Here, the district court would be empowered to grant relief under several parts of Rule 60(b), including Rule 60(b)(1), mistake and surprise; Rule 60(b)(2), newly discovered evidence; and Rule 60(b)(6), any other reason justifying relief from the operation of the judgment. *See Satterfield v. D.A. Philadelphia*, 872 F.3d 152 (3rd Cir. 2017). Here, the hardship to Mr. Gordon is extreme. Having to wait to go through another years-long process to make a claim under the Settlement Agreement will undoubtedly delay his award and even potentially reduce his award drastically as the awards are reduced based on age of the claimant. Mr. Gordon will be under extreme hardship if he fails to reinstate the claims he was duly awarded more than two years ago.

In addition, apparently, there is some unknown action that took place that led to the district court being provided incorrect information. (*See* July 2 Order, "The Court is troubled by the events leading to this objection and has looked into the matter. The Special Master and the Claims Administrator have assured the Court that the events leading to this objection will not be repeated."). There is simply no further explanation in the Order to put Mr. Gordon or his counsel on

notice of what misleading information may have worked its way into the process that resulted in Mr. Gordon's claim being strangely rejected contrary to the clear language of the Settlement Agreement. It can only mean the Settlement Agreement and the Court's definition of the Settlement terms were not followed because deeply flawed information was provided to the district court.

Under well-established principles, Rule 60(b) is not a substitute for an appeal. *See Martinez-McBean v. Government of the Virgin Islands*, 562 F.2d 908, 911 (3d Cir.1977). However, some courts have held that legal error may be characterized as a "mistake" within the meaning of Rule 60(b)(1), but only where the motion is made, as here, within the time allowed for appeal. *See, e.g., Jaye v. Oak Knoll Village Condo. Ass'n*, __ Fed.Appx. __, 2019 WL 3492464 (3d Cir. August 1, 2019) (Rule 60 motion properly denied because it was not brought within a reasonable time); *See, e.g., Barrier v. Beaver*, 712 F.2d 231 (6th Cir. 1983) (Rule 60 motion considered because it was brought within a time period to appeal); *International Controls Corp. v. Vesco*, 556 F.2d 665 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 758 (1978). *See generally*, Note, Relief from Final Judgment Under Rule 60(b)(1) Due to *Judicial Errors of Law*, 83 Mich. L. Rev. 1571 (1985). However a mistake of law or application of law may be considered as well. There is authority for the view that the word "mistake" as used in Rule 60(b)(1) encompasses any type of mistake or error on the part of the

court, including judicial mistake as to applicable law. See *Oliver v. Home Indem. Co.*, 470 F.2d 329 (5th Cir. 1972); *Stewart Security Corp. v. Guaranty Trust*, 71 F.R.D. 32 (W.D. Okla. 1976); *Crane v. Kerr*, 53 F.R.D. 311 (N.D.Ga. 1971). *See also D.C. Federation of Civic Associations v. Volpe*, 520 F.2d 451 (D.C. Cir. 1975); *Meadows v. Cohen*, 409 F.2d 750 (5th Cir. 1969); and *Schildhaus v. Moe*, 335 F.2d 529 (2d Cir. 1964) (failure to apply intervening appellate decisions contrary to district court interpretation of the law is a "mistake"). *Contra*, *Silk v. Sandoval*, 435 F.2d 1266, 1267–68 (1st Cir. 1971), *cert. denied*, 402 U.S. 1012, 91 S.Ct. 2189, 29 L.Ed.2d 435 (1971); *Morgan Guaranty Trust Co. v. Third National Bank*, 545 F.2d 758 (1st Cir. 1976); *Scola v. Boat Frances R. Inc.*, 618 F.2d 147 (1st Cir. 1980). *See also Swam v. United States*, 327 F.2d 431 (7th Cir. 1964) *cert. denied*, 379 U.S. 852, 85 S.Ct. 98, 13 L.Ed.2d 55 (1964).

It is respectfully submitted the better view is to allow reconsideration of a point of law or the application of the law under Rule 60(b)(1) when relief from judgment is sought within the normal time for taking an appeal. *International Controls v. Vesco*, 556 F.2d 665 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014, 98 S. Ct. 730, 54 L.Ed.2d 758 (1978). This view serves the best interest of the judicial system by avoiding unnecessary appeals and allowing correction of legal error if and when made and if the district court is satisfied that an error was committed.

Wherefore, Plaintiff Appellant respectfully moves for a stay of the Appeal and a limited remand so that the district court may consider Plaintiff Appellant's Rule 60 motion in order to best serve the efficiencies of the proceedings.

Respectfully submitted,

Dated: August 20, 2019

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CERTIFICATE OF FILING AND SERVICE

I, Noel Reyes, hereby certify pursuant to Fed. R. App. P. 25(d) that, on August 20, 2019 the foregoing Document was filed through the CM/ECF system and served electronically on parties in the case.

/S/Noel Reyes