UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES KING,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.
_____/

Case No. 1:16-cv-343

HON. JANE M. BECKERING

OPINION AND ORDER

Now pending before the Court in this closed case is Plaintiff's November 29, 2023 Motion for Relief from Judgment (ECF No. 125), seeking to have this Court vacate its 2017 Judgment. Defendants filed a response in opposition to Plaintiff's motion (ECF No. 131), and Plaintiff filed a reply to their response (ECF No. 133). For the following reasons, the Court denies the motion.

I. BACKGROUND

Plaintiff initiated this case in 2016, alleging (1) constitutional claims against three individual officers under *Bivens*[1], and (2) state-law tort claims against the United States under 28 U.S.C. § 1346(b)(1) (Federal Tort Claims Act) (FTCA). The case has proceeded through all three levels of the judicial branch. Important to understanding its path is that the FTCA, which allows a plaintiff to bring certain state-law tort claims against the United States, also includes a provision known as the "judgment bar." If a court enters a "judgment in an action under section 1346(b),"

[1] In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001).

which is the section under which Plaintiff proceeded, then the judgment bar operates to preclude "any action by the [plaintiff], by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. The Supreme Court has instructed that "once a plaintiff receives a judgment (favorable or not) in an FTCA suit," this "complete bar" is triggered, and "he generally cannot proceed with a suit against an individual employee based on the same underlying facts." *Simmons v. Himmelreich*, 578 U.S. 621, 625 (2016). As the Supreme Court observed, the FTCA "opened a new path to relief (suits against the United States) while narrowing the earlier one (suits against employees)." *Brownback v. King*, 529 U.S. 209, 212–13 (2021).

1. Judgment Entered in District Court

Plaintiff brought his claims in this case against the United States; Douglas Brownback, an agent with the Federal Bureau of Investigation (FBI); Todd Allen, a detective with the Grand Rapids Police Department (GRPD); and Connie Morris, a GRPD officer. Agent Brownback and Detective Allen were members of a joint federal-state fugitive task force investigating a felony home invasion in West Michigan. They had a Michigan warrant for the arrest of a fugitive. Plaintiff's claims arose from his violent encounter with Defendants Brownback and Allen more than a decade ago in July 2014 when he was misidentified as the wanted fugitive. Plaintiff filed his original Complaint in April 2016 and filed an Amended Complaint in August 2016. In lieu of filing an answer to Plaintiff's Amended Complaint, Defendants filed a "Motion to Dismiss, or, Alternatively, for Summary Judgment."

This Court granted Defendants' motion. Regarding the *Bivens* claims, this Court rejected each alleged constitutional violation, determining that, judged from the perspective of a reasonable officer, the officers did not violate Plaintiff's "right to be free from an unreasonable search and

seizure," (Op. & Order, ECF No. 91 at PageID.1016–1018), and their use of force was reasonable under the circumstances, particularly in light of Plaintiff's admitted active resistance (*id.* at PageID.1018–1020). The Court rejected Plaintiff's malicious-prosecution claim because his allegations were "so non-specific as to make it impossible to discern the basis for [his] claim" (*id.* at PageID.1021).

Regarding Plaintiff's FTCA claims, this Court determined that the parties' undisputed facts supported the finding that the United States was entitled to governmental immunity under state law (*id.* at PageID.1028–1030). Next, the Court determined that Plaintiff failed to plausibly establish any of the alleged state-law torts (*id.* at PageID.1030). Specifically, the Court held that Plaintiff's claims for assault and battery should be dismissed because the officers had "used reasonable force in subduing [him]"; Plaintiff's false-imprisonment, false-arrest, and malicious-prosecution claims should be dismissed because "probable cause existed" to arrest and charge him; and his intentional-infliction-of-emotional-distress claim should be dismissed because the officers had "acted within their authority" (*id.*). Hence, the Court concluded that Michigan law barred Plaintiff's FTCA claims, either on governmental immunity grounds or for failure to state a claim (*id.*). Having resolved all pending claims, this Court entered a Judgment on the merits "in favor of Defendants and against Plaintiff," dismissing his case on August 24, 2017 (ECF No. 92).

2. The Sixth Circuit Declines to Apply the Judgment Bar

Plaintiff appealed the case to the Court of Appeals for the Sixth Circuit. The parties stipulated to dismiss Officer Morris (COA No. 17-2101, Order, Doc. 34-1). Plaintiff did not challenge the dismissal of his malicious-prosecution claim, and he expressly stated that he had "decided not to pursue his [FTCA] claim against the United States on appeal" (COA No. 17-2101, Appellant's Br., Doc. 36 at p. 32 n.5). Therefore, Plaintiff's issues on appeal were limited to his

individual-capacity claims against Agent Brownback and Detective Allen for unlawful search and seizure and the use of excessive force. Defendants argued that these individual-capacity claims should be dismissed under the FTCA's judgment bar, 28 U.S.C. § 2676, because the facts underlying his claims against the officers were the same facts underlying his FTCA claims against the United States, and this Court had entered a Judgment for the United States on the merits (COA No. 17-2101, Appellees' Br., Doc. 41 at pp. 19–20).

The Sixth Circuit disagreed with Defendants. According to the majority in the February 25, 2019 decision, this Court's dismissal of Plaintiff's FTCA claims did not trigger the judgment bar to preclude Plaintiff's *Bivens* claims because the dismissal of the FTCA claims was not on "the merits" but "for lack of subject-matter jurisdiction." *King* v. *United States*, 917 F.3d 409, 419 (2019). The appellate panel proceeded to address the *Bivens* claims and reversed this Court's decision that Agent Brownback and Detective Allen were entitled to qualified immunity. *Id.* at 421–32.

Judge Rogers dissented. Judge Rogers opined that this Court's decision in favor of the United States on Plaintiff's FTCA claims triggered the judgment bar and required the dismissal of his additional claims against Agent Brownback and Detective Allen. *Id.* at 434. Judge Rogers pointed out that under Sixth Circuit precedent, a judgment for or against the United States on an FTCA claim bars claims based on the same subject matter, "even when the claims [a]re tried together in the same suit and [ ] the judgments [ ] entered simultaneously." *Id.* (quoting *Harris v. United States*, 422 F.3d 322, 334 (6th Cir. 2005) (quoting *Serra v. Pichardo*, 786 F.2d 237, 239, 242 (6th Cir. 1986)).

Defendants sought rehearing en banc, which the Sixth Circuit denied on May 29, 2019. However, Defendants also filed a petition for certiorari in the United States Supreme Court, which was granted.

3. The Supreme Court Holds that the Judgment Bar Applies

The Supreme Court unanimously reversed the Sixth Circuit. In a concise decision issued on February 25, 2021, the Supreme Court held that this Court's "order was a judgment on the merits of the FTCA claims that can trigger the judgment bar." *Brownback*, 592 U.S. at 219. Indeed, the Supreme Court held that this Court's decision had hinged on a "quintessential merits decision: whether the undisputed facts established all the elements of [Plaintiff's] FTCA claims." *Id.* at 216. The Supreme Court indicated that this Court had determined both (1) that Plaintiff had not established that the Government employees would be liable under state law, an element of his FTCA claims, by application of Michigan immunity law; and (2) that Plaintiff's FTCA claims failed under Federal Rule of Civil Procedure 12(b)(6) for reasons of "substantive law." *Id.* at 216–17. The Supreme Court opined that "[b]ecause a federal court always has jurisdiction to determine its own jurisdiction, a federal court can decide an element of an FTCA claim on the merits if that element is also jurisdictional, [and] the District Court did just that with its Rule 12(b)(6) decision." *Id.* at 218–19 (internal quotation marks and citation omitted). The Supreme Court rejected the Sixth Circuit's reasoning, pointing out that "in the unique context of the FTCA, all elements of a meritorious claim are also jurisdictional." *Id.* at 217.

In a footnote, the Supreme Court acknowledged that Plaintiff argued for the first time that the judgment bar does not apply to *Bivens* claims brought in the same lawsuit as FTCA claims but is limited to *Bivens* claims brought in a separate lawsuit. *Id.* at 747 n.4. The Supreme Court declined to address that question, instead "leav[ing] it to the Sixth Circuit to address [Plaintiff's]

alternative arguments on remand." *Id.* Justice Sotomayor wrote a separate concurrence opinion to emphasize that Plaintiff's alternative argument (and the counterarguments) merited "closer consideration." *Id.* at 219–23.

4. The Sixth Circuit Applies the Judgment Bar on Remand

On remand, the Sixth Circuit held that the judgment bar applied to *Bivens* claims brought in the same suit as FTCA claims. In its decision issued on September 21, 2022, the Sixth Circuit pointed out that in *Harris, supra*, the case previously cited by Judge Rogers in 2019, the Sixth Circuit had "squarely" held that "the FTCA judgment bar applies to other claims brought in the same action, including claims brought under *Bivens.*" *King v. United States*, 49 F.4th 991, 992–93 (6th Cir. 2022). The Sixth Circuit held that "*Harris* has not been overruled by later precedent and, as a binding decision of this court, requires that we affirm the district court's dismissal of the plaintiff's remaining claims." *Id.* at 992. On December 19, 2022, the Sixth Circuit denied Plaintiff's petition for rehearing en banc. Plaintiff petitioned the Supreme Court for certiorari, which was denied on October 30, 2023.

On November 29, 2023, Plaintiff filed the motion at bar in this Court, which has been fully briefed. The case was subsequently reassigned to the undersigned by Administrative Order No. 24-CA-036 (ECF No. 134).

II. ANALYSIS

A. Motion Standard

Plaintiff's motion is brought under Federal Rule of Civil Procedure 60(b). Rule 60(b) provides that a "court may relieve a party or its legal representative from a final judgment" for one of the following five reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable 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 by an opposing party; (4) the judgment is void; or (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable. FED. R. CIV. P. 60(b)(1)–(5).

When a motion does not fall within one of these first five enumerated reasons, Rule 60(b)(6) provides a "catchall" category for "any *other* reason that justifies relief." FED. R. CIV. P. 60(b)(6) (emphasis added). The Sixth Circuit has explained that Rule 60(b)(6) "applies only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule. This is because almost every conceivable ground for relief is covered under the other subsections of Rule 60(b)." *McCurry ex rel. Turner v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 592 (6th Cir. 2002) (citation omitted). *See also Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465, 468 (6th Cir. 2007) (instructing that subsection (6) applies "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule"). The party seeking to invoke Rule 60 bears the burden of establishing that its prerequisites are satisfied. *McCurry, supra.*

"Though courts have considerable discretion in granting relief from judgment pursuant to Rule 60(b), the court's power is limited by public policy favoring the finality of judgments." *Coleman-Bey v. Bouchard*, 287 F. App'x 420, 421 (6th Cir. 2008) (citing *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund,* 249 F.3d 519, 524 (6th Cir. 2001)). "This is 'especially true in an application of subsection (6) of Rule 60(b), which applies only in exceptional or extraordinary circumstances[.]'" *Id.* (quotations & citation omitted). Accordingly, "courts must apply Rule 60(b)(6) relief only in unusual and extreme situations where principles of equity

mandate relief." *Id.* (quotations and citation omitted) (emphasis in original). *See also McCurry, supra* (reciting the same proposition); *Ford*, 487 F.3d at 468 (indicating that the "something more" needed for application of subsection (6) "must include unusual and extreme situations where principles of equity *mandate* relief") (citation omitted) (emphasis in original).

B. Discussion

Plaintiff argues that this Court should exercise its broad equitable power under Rule 60(b)(6) to vacate its 2017 Judgment dismissing his case and permit him to amend his August 2016 Amended Complaint to "excise" his FTCA claims (ECF No. 126 at PageID.1334). Plaintiff asserts that he relied on established case law in determining his litigation strategy, caselaw that changed while his appeal was pending and that resulted in a procedural bar but not any substantive changes to the merits of his *Bivens* claims (*id.* at PageID.1346–1348).

In response, Defendants opine that Plaintiff is seeking to do precisely what the Supreme Court and the Sixth Circuit indicated he cannot: "undo his strategic choices to bring his FTCA and *Bivens* claims together and litigate those claims to judgment, and then to forgo his appeal of the FTCA judgment [and] amend his 2016 complaint to assert only *Bivens* claims" (ECF No. 131 at PageID.1363–1364). Defendants argue that this Court should deny Plaintiff's motion because the motion is untimely filed as Plaintiff has known about the basis of his motion for years, and Rule 60(b) does not afford relief for a plaintiff's misplaced legal strategy (*id.* at PageID.1370–1382).[2]

[2] In their response brief, Defendants also argue that a second amended complaint alleging only *Bivens* claims would fail because Supreme Court precedent precludes expanding *Bivens* to encompass Plaintiff's claims (ECF No. 131 at PageID.1382–1394), an argument that Plaintiff rejects in his Reply brief (ECF No. 133 at PageID.1416–1422). Given this Court's resolution of Plaintiff's Rule 60(b) motion, the Court declines to address the merits of Plaintiff's proposed amendment.

Plaintiff's motion is properly denied.

1. Plaintiff's Motion is Untimely Filed

The first step in the analysis is discerning the reason for Plaintiff's motion, because the applicable subsection dictates whether he timely filed his motion. Subsection (c) of Federal Rule of Civil Procedure 60 instructs that "[a] motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." FED. R. CIV. P. 60(c)(1). *See In re Vista-Pro Auto., LLC*, 109 F.4th 438, 442 (6th Cir. 2024) (indicating that Rule 60(c)(1) "speaks in plain terms") (citing *Kemp v. United States*, 596 U.S. 528, 533 (2022)).

While Defendants argue that Plaintiff's assessment of the import of the FTCA's judgment bar was a "mistake" that falls within Rule 60(b)(1), Plaintiff contends that he did not make a "mistake" but a strategic decision based on his assessment of the relevant caselaw. Plaintiff asserts that his motion falls within subsection (6), a location that permits him to argue that the motion was filed "reasonably" on time.

Under Sixth Circuit caselaw, Plaintiff's motion falls within Rule 60(b)(1). In *Cummings v. Greater Cleveland Regional Transit Authority*, 865 F.3d 844, 847 (6th Cir. 2017), where the plaintiff's lawyer was mistaken about the interpretation of the state's retirement law and/or "failed to apprehend the consequences of existing law at the time of the settlement," the Sixth Circuit found that the plaintiff described "a Rule 60(b)(1) problem" and that the motion most "naturally fit" under Rule 60(b)(1). *Id.* The Sixth Circuit therefore concluded that the district court properly dismissed her motion as late because it was filed more than one year after the court had entered a judgment. Importantly, the Sixth Circuit opined that "[t]he one-year limitation period for Rule 60(b)(1) and (3) motions would mean little if advocates could sidestep it whenever they wished by

attaching a Rule 60(b)(5) or (6) label to the motion." *Id.* *See also McCurry*, 298 F.3d at 592–93 (holding that the district court erred in awarding relief under Rule 60(b)(6) without first considering the applicability of subsection (b)(1) of the Rule). Plaintiff's November 29, 2023 motion is clearly untimely under the plain language of Rule 60(b)(1) as it was filed years past the one-year anniversary of this Court's August 24, 2017 Judgment.

Even if Plaintiff's November 29, 2023 motion is properly construed as falling within Rule 60(b)(6), the Court is not convinced that the motion was filed within a "reasonable" time under that subsection. Plaintiff himself concedes that as early as January 2018, when he filed his Appellant's Brief in the Sixth Circuit, he was aware of the judgment bar. *See* ECF No. 126 at PageID.1340 (indicating that, as part of his "litigation strategy," he did not appeal his FTCA claims based on his understanding of the judgment bar). Defendants raised the judgment bar in the Sixth Circuit in April 2018, and the Supreme Court held in February 2021 that the judgment bar applied to this case. The Sixth Circuit affirmed this Court's dismissal of Plaintiff's claims in September 2022. Nothing in these post-Judgment proceedings precluded Plaintiff from concurrently seeking relief under Rule 60(b) in this Court. Rather, it was Plaintiff's strategy to pursue both *Bivens* and FTCA claims in his complaints, to not seek leave to amend before this Court dismissed his claims, and to doggedly pursue appeal of this Court's Judgment rather than seek timely relief under Rule 60(b). Waiting until November 2023 to request relief in this Court from a 2017 Judgment was another strategic decision along the long path of this litigation. The lengthy delay in filing the present motion cannot plausibly be deemed a "reasonable" amount of time. Therefore, whether Plaintiff's November 29, 2023 motion is properly construed as filed under either Rule 60(b)(1) or (b)(6), the Court concludes that Plaintiff did not timely pursue post-Judgment relief in this Court.

2. Plaintiff's Motion Lacks Merit

Assuming arguendo that Plaintiff filed within a "reasonable" time under 60(b)(6), Plaintiff has not established grounds for relief under that subsection. In *McCurry*, 298 F.3d at 594, there was some question about whether the plaintiffs' attorney made "purely strategic" and "wholly deliberate" decisions in the wrongful death litigation or whether counsel had merely "overlooked" governing statutes. There was also some question about whether the attorney had "fully informed" his clients about the controlling law and the potential consequences of any strategies they might have employed. *Id.* The Sixth Circuit determined that if the attorney was mistaken as to the governing law and his clients relied upon this mistaken advice, its precedent precluded the use of Rule 60(b)(1) to relieve the plaintiffs of the consequences of this error. *Id.* (citing *FHC Equities, L.L.C. v. MBL Life Assurance Corp.,* 188 F.3d 678, 683–87 (6th Cir. 1999) (concluding that the attorney's misapplication of the rules did not justify setting aside the judgment under Rule 60(b) to permit "a second bite at the appeal apple").

If, on the other hand, the attorney was fully apprised of the governing statutes and "deliberately chose a strategy that he deemed advantageous to his clients," the Sixth Circuit determined that his Rule 60(b) motion likewise could not be used "as a technique to avoid the consequences of decisions deliberately made yet later revealed to be unwise." *Id.* (quoting *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989), and citing *FHC Equities,* 188 F.3d at 687 ("Where counsel makes a deliberate choice to rely on one legal theory, the party cannot thereafter attempt to be relieved of the consequences of that conscious decision should the theory prove to be unsuccessful.") (internal quotations and citations omitted)).

The Sixth Circuit concluded that "the uniform decisions of this and other circuits establish that this provision does not permit litigants and their counsel to evade the consequences of their

legal positions and litigation strategies, even though these might prove unsuccessful, ill-advised, or even flatly erroneous." *Id.* at 595 (citing, e.g., *Pryor v. U.S. Postal Serv.,* 769 F.2d 281, 288–89 (5th Cir. 1985) ("Were this Court to make an exception to finality of judgment each time a hardship was visited upon the unfortunate client of a negligent or inadvertent attorney, even though the result be disproportionate to the deficiency, courts would be unable to ever adequately redraw that line again, and meaningful finality of judgment would largely disappear.")).

The Sixth Circuit expressly rejected application of subsection (b)(6) of Rule 60, opining that where the grounds advanced for relief—"strategic misjudgments and flawed legal analysis"—"fit quite comfortably within the range of circumstances addressed in Rule 60(b)(1)," subsection (b)(6) is inapplicable. *Id.* at 595–96. The Sixth Circuit opined that "it clearly would be inappropriate to invoke subsection (b)(6) to grant relief that is foreclosed under subsection (b)(1)" because the "two clauses are mutually exclusive, with relief available under subsection (b)(6) only in the event that none of the grounds set forth in clauses (b)(1) through (b)(5) are applicable." *Id.* at 596. The Sixth Circuit pointed out that "[w]ere it otherwise, our decisions involving the first five clauses of Rule 60(b)—*FHC Equities,* for example—would lose much of their force, as a party who failed to meet the prerequisites for relief under one of these provisions could simply appeal to the 'catchall' of subsection (b)(6)." *Id. Cf. Hill v. Rios*, 722 F.3d 937, 938–39 (7th Cir. 2013) (opining that "a litigant who bypasses arguments on appeal cannot depict his own omission as an 'extraordinary' event that justifies post-judgment relief").

Here, too, while Plaintiff espouses at length about the unjust result in his case in an effort to invoke Rule 60(b)(6), the reason for his motion under Rule 60(b) is nonetheless a straightforward claim of either attorney error or strategic miscalculation, to wit: Plaintiff decided not to appeal his FTCA claims based on his belief, mistaken or strategic, that the judgment bar

would not preclude his *Bivens* claims after the judgment on his FTCA claims became final. Attorney error and strategic miscalculation simply do not provide proper bases for post-Judgment relief.

Plaintiff also asserts that relief from Judgment is justified because the Supreme Court's decision in this case created "a new jurisdictional rule" and overturned "well-established Supreme Court and circuit precedent [that previously] allowed [his] constitutional claims to proceed, notwithstanding this Court's jurisdictional dismissal of his parallel claims" (ECF No. 126 at PageID.1333). As Defendants point out, "[n]othing in the Supreme Court's opinion supports his assertion" (ECF No. 131 at PageID.1372). Rather, as the Supreme Court unanimously recognized in its concise decision, this Court's decision on Defendants' motion concerned a "quintessential merits decision." *Brownback*, 592 U.S. at 216.

In any event, even "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)." *FCA US, LLC v. Spitzer Autoworld Akron, LLC*, 887 F.3d 278, 287 (6th Cir. 2018) (quoting *Agostini v. Felton*, 521 U.S. 203, 239 (1997)). For example, in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the petitioner based his Rule 60 motion on a change in law, claiming that the law on which the district court based its decision had changed due to a Supreme Court ruling. *Id.* at 536. The Supreme Court noted that relief under Rule 60(b)(6) requires the movant to show "extraordinary circumstances" and held that it was "hardly extraordinary" for the Court to arrive at a different interpretation of the law than governed during the start of petitioner's case. *Id.* at 537.

As Plaintiff recognizes, the decision to grant Rule 60(b) relief requires a "case-by-case inquiry," balancing numerous factors, including the competing policies of the finality of judgments and the command that justice be done in light of all the facts. *Henson v. Fid. Nat'l Fin., Inc.*, 943

F.3d 434, 444–45 (9th Cir. 2019) (quoting *Stokes v. Williams*, 475 F.3d 732, 736 (6th Cir. 2007) (quoting *Blue Diamond Coal*, 249 F.3d at 529)). Having balanced the relevant factors, the Court concludes that Plaintiff has not, on the facts in this case, identified proper grounds for relief from this Court's Judgment.

Therefore, either on grounds of untimeliness or lack of merit, the Court, in its discretion, denies Plaintiff's motion for relief from its Judgment. As the Supreme Court put it, "[t]here must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackermann v. United States*, 340 U.S. 193, 198 (1950).

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Plaintiff's Motion for Relief from Judgment (ECF No. 125) is DENIED.

This case remains closed.

Dated: September 16, 2024

/s/ Jane M. Beckering
JANE M. BECKERING
United States District Judge