

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS
COMMISSION, et al.

Defendants.

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Civ. A. No. SA:12-cv-1002-FB-HJB

MOTION TO VACATE JUDGMENT AND RESUME DISCOVERY

Plaintiff John Eakin, *pro se*, respectfully moves to vacate the judgment (ECF No. 121) entered March 25, 2015, pursuant to FRCP 60b(6) on grounds that Defendants have failed to perform under the implied terms of their status report to the Court. (ECF No. 98)

Since confirming their possession of the remains of Plaintiff’s First Cousin once removed, Private Arthur H. “Bud” Kelder, Defendants have returned only token portions of remains for burial by his family. Further, Defendants have wrongfully concealed portions of the subject remains.

Plaintiff now asks for an order compelling full and complete identification of all of the remains of Private Arthur H. “Bud” Kelder. Alternatively, should the Court find that Defendants are unable to timely return the remains for burial; Plaintiff asks that discovery be resumed to allow trial on the merits of the case.

I. History of This and Related Litigation

a. History of this litigation.

Plaintiff's original complaint (ECF No. 1) was filed October 18, 2012 upon his learning that a member of his family had been unreasonably buried as an Unknown. Plaintiff's knowledge that the remains of his family member had failed to be identified through Defendant's negligence was gained through a FOIA suit (SA-10-cv-00784-FB-NSN) filed in this district on September 28, 2010.

Plaintiff presented in his complaint government documents indicating that Private Kelder was one of fourteen servicemembers buried in common grave #717 of the Cabanatuan POW camp. Plaintiff presented further dental evidence conclusively identifying unidentified remains X-816 as those of Private Kelder that Defendants had negligently failed to obtain. Defendants objected to Plaintiff's petition for a Writ of Mandamus on the basis that only they had the authority to identify the remains and therefore Plaintiff lacked standing.

Defendants concede their obligation to return the identified remains of deceased servicemembers to their families for burial, but contend they have no obligation to officially identify the remains. (Mot. Dismiss ECF No. 47 at 7)

On April 10, 2014 in a hearing on Plaintiff's Motion for Discovery (ECF No. 51) Magistrate Judge Bemporad stated that document discovery would be granted. The Court further stated from the bench that should Plaintiff request production of the subject remains the court would be inclined to grant such production request.

On July 30, 2014, Defendants filed notice (ECF No. 79) that the subject unidentified remains would be disinterred on August 12, 2014.

Being aware of Defendant's reputation for unnecessarily delaying identification of remains by misstatements and concealment, Plaintiff so advised this court (ECF No. 94, filed January 8, 2015) and requested that this case be returned to the court's active docket.

Defendants have failed to use every available resource to complete the disinterment and DNA testing as quickly and efficiently as possible as ordered by this Court. Defendant's apparent inability to identify the subject remains, meet their own projected timeframes for identification or even provide complete and truthful status reports provide reason to return this case to the Court's active docket. (ECF No. 94, at 1)

On January 22, 2015, soon after additional families of missing servicemembers had moved to intervene, Defendants notified the court (ECF No. 98) that the remains of Private Kelder had been identified.

On February 2, 2015, this court entered Report and Recommendation of United States Magistrate Judge (ECF No. 103). Plaintiff subsequently filed his objection to the report and recommendation (ECF No. 110). Plaintiff's objection disputed Defendants contention that they had identified the remains of Private Kelder and that he therefore had no standing to bring any of his broader contentions that the identification of Private Kelder's remains was inadequate. Plaintiff contended that the "identification" was based on incomplete, misleading and legally insufficient information provided by Defendants and was counter to the intent of the Court's order recognizing that "all ten sets of remains" must all be identified to conclude this litigation.

To allow identification (or non-identification) of less than all associated remains, as Defendants propose, is a violation of Defendants' published regulations and customary scientific procedures. Further, Defendants have identified only a small portion of the remains of Private Kelder and suggest they will deliver additional portions at some unspecified time in the future. To allow the delivery of suspect remains in installments simply for the purpose of litigation posturing by Defendants is grossly unjust, disrespectful and shocks the conscience. (ECF No 103 at 2)

Defendant's bogus and premature partial identification of Private Kelder's remains not only mislead this Court into hastily finding Plaintiff's petition moot, but also prematurely terminated Plaintiff's standing under the terms of Douglas Kelder's Power of Attorney in favor of Plaintiff Eakin. (ECF exhibit 26 to First Amended Complaint)

Plaintiff reiterates his objections to Defendant's purported identification of remains and includes them as set out in full in this motion.

b. Other Related litigation

(1) Patterson, et al v. Defense POW/MIA Accounting Agency – case #: 5:17-cv-00467-XR , A petition for Writ of Mandamus to obtain the remains of : PFC Lloyd Bruntmyer, PFC David Hansen, Brigadier General Guy O. Fort, Private Arthur H. “Bud” Kelder, Private Robert R. Morgan, 1LT Alexander R. “Sandy” Nininger, Colonel Loren P. Stewart. Closed July 29, 2019.

(2) Eakin v. United States Department of Defense, case #: SA-16-cv-00972-RCL. Freedom of Information Suit to obtain records of unidentified remains and deceased personnel files. Closed August 26, 2024.

II. Plaintiff's Standing

This Court previously addressed Defendants' objection to Plaintiff's standing. (*Mag R&R* ECF No. 30 at 10, *Order* ECF No. 34 at 10)

Douglas Kelder's power of attorney in favor of John Eakin, upon which the Court relied, was prematurely terminated by Defendant's hasty assertion that the remains of Private Kelder had been identified. Out of an abundance of caution, a new power of attorney in favor of Plaintiff Eakin is attached. (Exh 1)

III. Defendants Have Failed to Return All Remains

Defendants have conceded their obligation to return the identified remains of deceased servicemembers to their families for burial, but have contended that they have no obligation to officially identify the remains. (*Mot. Dismiss* ECF No. 47 at 7) However, with the government's official recognition that Private Kelder's remains are among those disinterred from Cabanatuan Common Grave # 717, the situation changes from one of identification of remains to proper reassociation and care of the complete remains of a deceased servicemember. (*10 U.S. Code § 1481 inter alia*)

Defendants can no longer argue that they have no ministerial duty to return the remains of Private Kelder to his family for burial. (*Id.*)

“Defendants were instructed “to use every available resource to complete the disinterment and DNA testing as quickly and efficiently as possible.” [(Docket Entry 84, at 2)] (*Mag R&R* ECF No. 103 at 4) Now, over nine years since Defendants reported that they had identified the remains of Private Kelder (*Status Report* ECF No. 98), they have returned only a few token portions of his remains, despite having nearly all such remains in their possession and more than sufficient time to do so. (*Exh 2. ID package extract showing returned remains* and *Exh 3, photograph of the remains recovered from the ten graves disinterred from the Manila American Cemetery*) To induce Private Kelder's family to initially accept delivery of less than his complete remains, Defendants promised to timely deliver additional portions of remains as directed by this Court and, in fact, did make two additional deliveries of one bone each time, the last delivery in 2019.

Based upon Defendant's statements concerning their identification of the remains, the understanding by Plaintiff and apparently also by this Court was that Private Kelders' remains

had been recovered in total as a set as there was no mention of only partial remains having been identified.

"It is undisputed that Defendants have identified one set of remains in Cabanatuan Common Grave 717 as Private Kelder. (See Docket Entry 98, Docket Entry 101)" (Magistrates R&R ECF No.103 at 7) [emphasis added]

Attached as Exhibit 3 is a photograph of the remains recovered from the ten graves disinterred from the Manila American Cemetery. Each of these sets of remains is virtually anatomically complete with the possible exception of small or soft bones. Any commingling among the remains recovered from Grave #717 was not caused by the enemy, but due to negligent handling by untrained civilian embalmers employed by the U.S. Army where it was their practice to commingle remains (*see below referencing Exh 4*).

To date, Defendants have produced less than ten percent of any one of the remains recovered from each of the graves of the ten Unknowns disinterred from the Manila American Cemetery. (Exh 3) The balance of Private Kelder's remains are believed to be stored in Defendant DPAA's identification laboratory or concealed as CIL portions.

Examination of documents published by Defendants show that their identification laboratory has neither the capability nor capacity to properly segregate more than a few token portions of Private Kelder's remains from those other remains recovered from Cabanatuan Common Grave # 717. The obvious conclusion is that in Defendant's haste to moot this litigation, they mislead this Court and Plaintiff's family as to their ability to timely return the remains that are the subject of this litigation.

Further, review of documents obtained from Defendants in related litigation (Exh 4, *anthropologists' memo extracted from file Nuuanu_US_X-048B-1*) show that it was Defendants' practice to intentionally commingle the remains to present a complete set of remains of

Unknowns. Any remains not associated with a skull were designated as “CIL portions” (*Central ID Lab*).

Defendants then concealed their misdeed by filling multiple caskets to capacity with these CIL portions, each casket containing portions of remains from hundreds of missing servicemembers, then interring each of those caskets as a single Unknown. Such burials of caskets filled to capacity with unidentified remains do not comply with Defendant’s own requirements for group burials nor even as an honorable burial. By doing so, Defendants thereby avoided the spectacle of thousands of additional graves of Unknowns or exposing their inability to properly segregate and identify remains. The burial of these “assembled” remains as Unknowns was for show rather than to provide an honorable burial and memorialization of servicemembers who had given their lives for their country. It is likely that portions of remains recovered from Cabanatuan Common Grave #717 were classified as CIL portions and concealed in these CIL caskets.

Defendants have intentionally and unlawfully denied Private Kelder and thousands of his brothers a dignified and honorable burial. In doing so, Defendants have intentionally misled this Court and Plaintiff’s family.

IV. Standards of Review

a. Legal basis to vacate judgment – FRCP Rule 60(b)(6)

Rule 60(b) provides that upon motion, a court may relieve a party from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered earlier; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or it is based on an earlier

judgment that has been reversed or vacated, or that applying the judgment prospectively is no longer equitable; or (6) any other reason that justifies relief. Fed. R. Civ. Proc. 60(b)(1)-(6).

Additionally, Rule 60(d)(3) specifies that this rule does not limit a court's power to set aside a judgment for fraud on the court should it find that such has occurred.

Here, Plaintiff's motion does not allege mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; fraud, misrepresentation, or misconduct by an opposing party; a void judgment; the judgment has been satisfied, released, or discharged, or it is based on an earlier judgment that has been reversed or vacated, or that applying the judgment prospectively is no longer equitable. Rather, Plaintiff alleges that Defendants have not performed as it lead the Court and family to reasonably believe it would and has not fully identified the subject remains. It may therefore be construed as arising under the "catch-all" clause of Rule 60(b)(6). *See Hess v. Cockrell*, 281 F.3d 212, 215-16 (5th Cir. 2002).

Additionally, other federal courts have noted that Rule 60(b)(6) is a proper basis for seeking relief of a settlement agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994) (noting that some courts of appeals have held that the reopening of a dismissed suit by reason of a breached agreement, which was the basis for a dismissal, can be obtained under Federal Rule of Civil Procedure 60(b)(6)) (citing cases); *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 605 (5th Cir. 1986) (noting that when a settlement agreement is breached, the plaintiff has two remedies available: he can bring an action to collect the amount due under the settlement or he can make a Rule 60(b)(6) motion to vacate the prior dismissal and reinstate the case); *Reed v. Gallegos*, No. C-07-190, 2009 WL 5216871, at *2 (S.D. Tex. Dec. 29, 2009) ("Some appellate courts have held that Rule 60(b)(6) is a basis for seeking relief of the breach of a settlement agreement.").

Rule 60(b)(6) is “a residual clause used to cover unforeseen contingencies; that is, it is a means for accomplishing justice in exceptional circumstances.” *Steverson v. GlobalSantaFe Corp.*, 508 F.3d 300, 303 (5th Cir. 2007) (quoting *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F. 2d 599, 604-05 (5th Cir. 1986)). Motions under this clause “will be granted only if extraordinary circumstances are present.” *Hess*, 281 F.3d at 216. In *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981), the Fifth Circuit set forth the following factors to consider when evaluating a motion under Rule 60(b)(6): (1) that final judgments should not lightly be disturbed; (2) that a Rule 60(b) motion should not be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether, if the case was not decided on its merits due to a default or dismissal, the interest in deciding the case on its merits outweighs the interest in the finality of the judgment and there is merit in the claim or defense; (5) whether, if the judgment was rendered on the merits, the movant had a fair opportunity to present his claims; (6) whether there are intervening equities that would make it inequitable to grant relief; and (7) any other factors relevant to the justice of the judgment under attack. *Id.* at 402.

Here, the order closing Plaintiff’s case was expressly based on the Status Report filed by Defendants claiming to have identified the remains of Private Kelder. (ECF No. 98) Plaintiff was diligent in prosecuting his case, and the merits of his case were never reached before the case was closed. Plaintiff repeatedly objected to closing the case. (*Plf objection to Mag R&R* ECF No. 110)

“Premature dismissal by acceptance of Defendants’ suggestion that complaint is mooted upon exhumation would deny Plaintiff any recourse to challenge the adequacy or integrity of the exhumation and examination process. Defendants’ proposed identification process will not withstand challenge concerning the integrity or timeliness of the examination and is deliberately vague.” (Plf Response to Def Suggestion of Mootness ECF 73)

Accordingly, even though a final judgment should not be lightly disturbed, granting Plaintiff's motion would be consistent with the factors established in *Seven Elves* and appropriate under Rule 60(b)(6).

b. “Quasi-Property” Right in a Dead Body

The Fifth Circuit has recognized the existence of a "quasi-property" right ... [in a dead body] by virtue of state law. (*Arnaud v. Odom*, 870 F. 2d 304 - Court of Appeals, 5th Circuit 1989)

“The right to bury a corpse and preserve its remains is a legal right which is well recognized, and it is held that the courts will protect such right and the right to dispose of a corpse by a decent burial which includes the right to possession of the body in the same condition in which death leaves it. 17 Tex.Jur. 2d 485; *Burnett v. Surratt*, Tex.Civ.App., 67 S.W.2d 1041. . . . Any interference with such right of possession of the body of a deceased by mutilation or otherwise disturbing the body without the consent of the next of kin is an actionable wrong for which a claim for damages may be maintained. *Love v. Aetna Casualty & Surety Company*, Tex.Civ.App., 99 S.W. 2d 646, affirmed 132 Tex. 280, 121 S.W.2d 986.” (cited *Terrill v. Harbin*, 376 SW 2d 945 – 1964)

V. Requested Relief

Having now confirmed that they have the remains of Private Kelder in their possession, some stored in their laboratory and some concealed as CIL portions in caskets filled to capacity and buried as individual Unknowns, Defendants have a ministerial duty to properly segregate and return all of Private Kelder's remains to his family for an honorable burial as they might direct. Plaintiff now respectfully requests this Court to order the immediate return of Private Kelder's complete remains.

Alternatively, if upon inquiry this Court determines that Defendants are unable or unwilling to timely return Private Kelder's remains, Plaintiff respectfully requests this Court to resume the discovery process interrupted by Defendant's premature claim to have identified the subject remains, and order the production of all relevant remains and documents for expert examination with such expenses as may be incurred reimbursed as provided for under 10 U.S. Code § 1482 *inter alia*.

Respectfully submitted,

/s/ John Eakin

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties of record. And I caused a copy to be sent, by certified U.S. Mail, to:

Ms. Stephanie Rico, Civil Process Clerk
Office of the United States Attorney
For the Western District of Texas
601 NW Loop 410, Ste 600
San Antonio, TX 78216-5597

/s/ John Eakin

John Eakin, Plaintiff *pro se*

ATTACHMENTS:

Exh1 Power of Attorney
Exh2 Extract Page From ID package
Exh3 Photo Of Ten Unknowns
Exh4 Pages From Nuuanu_US_X-048B-1
Proposed Order