IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SEAN M. GLOVER,

ORDER

Plaintiff,

02-C-0097-C

v.

PREMIER BANK,

Defendant.

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This is a civil action in which plaintiff Sean M. Glover alleges that defendant Premier Bank mishandled the proceeds of his great-grandfather's estate, which was probated in 1949. In an order entered on June 24, 2002, I granted defendant's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) because plaintiff had failed to establish that more than $75,000 was in dispute in this case, as is required to invoke the court's diversity jurisdiction. In an unpublished order dated February 25, 2003, the Court of Appeals for the Seventh Circuit affirmed the dismissal. See Glover v. Premierbank, No. 02-2853 (7th Cir. Feb. 25, 2003). Presently before the court is plaintiff's "Motion for Relief From Order and Judgment" pursuant to Fed. R. Civ. P. 60(b), which he filed on February 26, 2003. Although plaintiff's motion was filed before the court

of appeals issued its mandate (as opposed to its order), this court has jurisdiction to consider the motion. See Brown v. United States, 976 F.2d 1104, 1110-11 (7th Cir. 1992) ("Parties may file motions under Rule 60(b) in the district court while an appeal is pending. In such circumstances we have directed district courts to review such motions promptly, and either deny them or, if the court is inclined to grant relief, to so indicate so that we may order a speedy remand.").

Plaintiff purports to have discovered new evidence showing that the amount in controversy in this case exceeds $75,000. Rule 60(b)(2) may be invoked when "newly discovered evidence that could not have been obtained at the time of the original litigation may show that the judgment was erroneous." Bell v. Eastman Kodak Co., 214 F.3d 798, 801 (7th Cir. 2000). The rule requires a showing that the new evidence could not have been discovered earlier through the exercise of due diligence. "Diligence looks not to what the litigant actually discovered, but what he or she *could* have discovered" and therefore the moving party may not simply rely on a conclusory allegation of diligence, but must present facts showing why the evidence could not have been discovered earlier. 12 Moore's Federal Practice § 60.42[5] (Matthew Bender 3d ed.). Plaintiff does not allege that his "new" evidence could not have been presented to this court in a timely fashion in response to defendant's motion to dismiss or following the entry of judgment in this case last June. Accordingly, plaintiff's motion to set aside the judgment in this case pursuant to Fed. R. Civ.

P. 60(b)(2) is DENIED.

Entered this 5th day of March, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge