IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JEFFREY and CHERYL STEVENS,

Plaintiffs,

ORDER

v.

04-C-985-X

DALE SMITH, NATIONAL FIDELITY
and IRVING STEINER,

Defendants.

Before the court is plaintiffs' motion for relief from judgment filed on January 12, 2007 pursuant to Fed. R. Civ. P. 60(b)(6). Plaintiffs reached a settlement agreement with defendants Irving Steiner (a.k.a. Howard Olson) and National Fidelity in late 2005. On January 10, 2006, this court entered a stipulation and order, drafted by the parties, dismissing the case with prejudice, "excepting only that jurisdiction is retained by this Court for the purpose of ensuring compliance with the settlement agreement between the parties." *See* dkt. 38; dkt. 40, Exh. A (copy of the settlement agreement). Alleging that Olson breached the settlement agreement by stopping monthly payments as of August 2006, plaintiffs now request that the court reopen the above matter and enter judgment against defendants. Olson, who is now proceeding *pro se*, opposes plaintiffs' motion on the ground that it is untimely. However, he requests that the court re-open the entire case, claiming that service was improper, he was coerced into settling by plaintiff's attorney and by his *own* attorney, he paid his first installment (contrary to plaintiffs' allegations) and plaintiffs' attorney violated the FDCPA.

Recognizing an apparent conflict between Seventh Circuit law and Supreme Court precedent, this court entered an order on May 1, 2007, requesting that the parties brief a number of issues related to whether it has jurisdiction to enforce the settlement agreement under the dismissal order or authority to re-open the case to hear the parties' claims. Dkt. 46. Having reviewed the parties' submissions and the relevant law, I find that the dismissal order is insufficient to retain enforcement jurisdiction and that reopening the lawsuit is not warranted.

In *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 378 (1994), the Supreme Court held that enforcement of a settlement agreement is not a continuation or renewal of a dismissed suit and requires its own basis for jurisdiction. In that case, the Court found no jurisdiction because the district court had dismissed the case with prejudice and did not reference the settlement agreement or specifically retain jurisdiction in the dismissal order. In dicta, the Court explained that the dismissal order could have retained enforcement jurisdiction by embodying the settlement contract or expressly stating that the court was retaining jurisdiction over the settlement. *Id.* at 381-82; *see also* Fed. R. Civ. P. 41(a)(1)(ii) (voluntary dismissal of lawsuit by filing of stipulation of dismissal by all parties).

In recent cases, however, the Seventh Circuit has interpreted *Kokkonen* restrictively, holding that a district judge cannot dismiss a suit with prejudice, thus terminating federal jurisdiction, and at the same time retain jurisdiction to enforce the parties' settlement. *Shapo v. Engle*, 463 F.3d 641, 645 (7th Cir. 2006); *Lynch v. SamataMason, Inc.*, 279 F.3d 487, 489 (7th Cir. 2002); *see also Blue Cross Blue Shield Ass'n v. American Express Co.*, 467 F.3d 634, 636 (7th Cir. 2006). In two earlier cases, the court of appeals agreed with the holding in *Kokkonen,* but neither

case involved a dismissal order that both retained jurisdiction over the settlement agreement and dismissed the case with prejudice. *Hill v. Baxter Healthcare Corp.*, 405 F.3d 572, 576 (7th Cir. 2005); *Goulding v. Global Medical Products Holdings, Inc.,* 394 F.3d 466, 468 (7th Cir. 2005). The Court in *Kokkonen* did not distinguish between a dismissal with prejudice and a dismissal without prejudice, but Rule 41(a)(1)(ii) does provide that "[u]nless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice."

Given the Seventh Circuit has reached this question directly in more recent decisions, I find the dismissal order to be insufficient to permit enforcement of the settlement agreement. Unfortunately, in drafting the dismissal order, the parties (and ultimately the court) erred by dismissing the case with prejudice. As evidenced in their brief, plaintiffs appear to have reached the same conclusion, stating that they are not asking the court to enforce the settlement agreement pursuant to the dismissal order. Dkt. 47 at 3-5. Instead, plaintiffs seek to re-open the judgment under Fed. R. Civ. P. 60(b)(6), which permits a court to vacate a final order for any reason "justifying relief from the operation of the judgment" upon a motion made within a reasonable time. Rule 60(b)(6) applies only in situations in which extraordinary relief is sought and requires a showing of exceptional circumstances. *Karraker v. Rent-A- Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005); *Neuberg v. Michael Reese Hosp. Foundation*, 123 F.3d 951, 955 (7th Cir. 1997) (citing *Provident Sav. Bank v. Popovich*, 71 F.3d 696, 700 (7th Cir. 1995)).

Olson objects to plaintiffs' request on the ground that is untimely, but I find little merit in his argument. Although other subsections of Rule 60(b) require that motions be made within one year of the judgment, Rule 60(b)(6) empowers the court to reopen a judgment even after a year has passed. *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 393

(1993). Plaintiffs filed their motion a year and a day after the entry of the dismissal order and only five months after Olson allegedly breached the settlement agreement. Moreover, plaintiffs spent those five months trying to contact Olson about his failure to pay and received no response. Although Olson claims that he has always been available, plaintiffs clearly have had a hard time locating him throughout the course of this lawsuit.

Notwithstanding the timeliness of plaintiffs' motion, Olson's alleged breach of the settlement agreement is not an exceptional circumstance sufficient to vacate the dismissal order under Rule 60(b)(6). Unless a court properly retains jurisdiction over the settlement agreement, which failed to happen in this case, a breach of contract dispute typically must be resolved in a new lawsuit. *See Kokkonen*, 511 U.S. at 381; *Neuberg*, 123 F.3d at 955-56; *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002); *McCall-Bey v. Franzen*, 777 F.2d 1178, 1186 (7th Cir. 1985). As plaintiffs note, the court of appeals has suggested in dicta that in some circumstances, complete repudiation of a settlement agreement can justify vacating a court's prior dismissal order. *See Neuberg*, 123 F.3d at 954 (citations omitted). However, in *Neuberg*, the court affirmed the district court's refusal to enforce a settlement agreement pursuant to Rule 60(b) because the moving parties were not really trying to reopen the dismissed lawsuit, which would be the effect of a Rule 60(b)(6) motion, but were instead trying to get enforcement of a collateral agreement. *Id.* at 955. Plaintiffs admit that they are not asking the court to vacate the settlement agreement and litigate the underlying case; they want to enforce the terms of the agreement. Dkt. 47 at 3 and 9. Rule 60(b) cannot be used to fill the jurisdictional vacuum that exists in this case. *See McCall-Bey*, 777 F.2d at 1186.

I sympathize with plaintiffs' situation, but vacating my previous order would not give them the result they seek or may deserve. Olson has paid only $2700 of the agreed amount and it is clear that he cannot, or will not, pay any more. However, if plaintiffs wish, they may proceed in a separate legal action to enforce the settlement agreement in state court. Accordingly, plaintiffs' motion is denied.

Similarly, Olson's request to re-open the entire case is meritless. Olson does not specify the grounds on which he seeks relief from the order, but he has not alleged mistake, inadvertence, surprise or excusable neglect (Rule 60(b)(1)); newly discovered evidence since the entry of judgment (Rule 60(b)(2)); or that the judgment has been satisfied (Rule 60(b)(5)). He first refers to the amended affidavit of Sandra Brown, which he claims was never considered and shows service was improper in the underlying lawsuit. *See* dkt. 44. The affidavit was filed on October 11, 2005, after this court denied Olson's motion alleging insufficiency of service of process. Dkt. 35 and 37. However, Olson chose to enter into a settlement agreement and stipulate to dismissal after the affidavit was obtained. The submission of the affidavit in and of itself does not justify re-opening the case.

Olson claims that he was coerced into settling, suggesting that he may be seeking relief from judgment because of fraud (Rule 60(b)(3)) or because the judgment is void (Rule 60(b)(4)). However, motions pursuant to Rule 60(b)(3) must be brought within one year of judgment and those under Rule 60(b)(4) must be made within a reasonable time. Although he admits that he knew at the time of settlement that he was being coerced, *see* dkt. 48 at 3, Olson made no attempt to raise this claim until plaintiffs sought to re-open the case due to his failure to pay the agreed installments.

Olson's remaining claims (regarding the first installment and the violation of the FDCPA by plaintiffs' attorney) are related to the enforcement of the settlement agreement or constitute new causes of action. For the reasons outlined above, this court does not have jurisdiction over such claims or sufficient justification to reopen under Rule 60(b). Olson may choose to pursue his claims in another forum, but his request to re-open is denied.

Entered this 13th day of July, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge