

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

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

Civil Action 97-2257

JOHN GARDNER BLACK, DEVON CAPITOL
MANAGEMENT, and FINANCIAL
MANAGEMENT SCIENCES,

Defendants.

OPINION AND ORDER

Pending is a Motion to Grant Relief (Doc. 33) filed by Defendant, John Gardner Black. The motion is filed pursuant to F.R.Civ.P. 60(b) which allows a court to relieve a party from a final judgment, order or proceeding for one of the following reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence;
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; or
- (6) any other reason justifying relief from the operation of the judgment.

Although Defendant, John Gardner Black, does not specify any particular section of Rule 60(b), he alleges, as grounds for relief, the court's lack of jurisdiction; the entry of the judgments and orders without complete factual knowledge; Plaintiff's fraudulent concealment of exculpatory information relating to alleged

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violations of the Investment Advisors Act of 1940, Defendant Financial Management Sciences ("FMS") exemption from Plaintiff's jurisdiction; the Collateralized Investment Agreements (CIAs) which Defendant John Gardner Black refers to as "individually negotiated contracts," were not securities; and that Defendants John Gardner Black and Devon Capital Management were not investment advisors.

Initially, it is important to set forth the relevant procedural history of this case. This action was filed by Plaintiff on September 26, 1997, alleging violations of Section 17(a) of the Securities Act (15 U.S.C. 77c(a)), Section 10(b) of the Exchange Act (15 U.S.C. 78j(b)) and Rule 10b-5 (17 C.F.R. 240.10b-5), Sections 206(1), 206(2) and 206(4) of the Advisors Act (15 U.S.C. 80b-6(1), 80b-6(2) and 80b-6(4) and Rule 206(4)-2 (17 C.F.R. 275.206(4)-2).

On the same day this action was filed, Judge Standish of this court entered a Temporary Restraining Order against Defendants, including an asset freeze, for the appointment of an equitable receiver and scheduling a preliminary injunction hearing.

On October 27, 1997, the date of the preliminary injunction hearing, with Defendants' consent, Judge Smith of this court entered an order continuing the preliminary injunction, consolidating the hearing on the preliminary injunction with the request for permanent injunctive relief and setting a trial date for February, 1998.

On December 16, 1997, after receiving written consents from each Defendant, I entered an order of permanent injunction against all Defendants and continuing the asset freeze pending resolution of disgorgement and civil penalties, which issues were reserved for future disposition. With the consent of Defendant John Gardner

Black an Order of Disgorgement and Civil Penalties was entered as to Defendant John Gardner Black on April 29, 1998. Thereafter, on September 23, 1998, the Court ordered that Defendant John Gardner Black pay \$1500 per month, beginning November 1, 1998, until the disgorgement and civil penalties were paid in full.

In Ackermann v. United States, 340 U.S. 193(1950), the United States Supreme Court stated that relief granted under Rule 60(b) is extraordinary and can be granted only when the moving party demonstrates exceptional circumstances. Furthermore, under Rule 60(b) any motion under sections (1), (2), or (3), set forth above, must be made not more than one year after the judgment or order was entered.

Although the Defendant, John Gardner Black, does not so specify, a fair reading of his motion indicates that he is proceeding under Rule 60(b)(3), Rule 60(b)(6) or Rule 60(b)(4).

As to Rule 60(b)(3), Defendant John Gardner Black cannot prevail as his motion has been brought far in excess of one year after the order at issue was entered. As to Rule 60(b)(6), Defendant John Gardner Black cannot prevail because he has not alleged or established exceptional or extraordinary circumstances. As to Rule 60(b)(4), Defendant John Gardner Black cannot prevail because this court did have jurisdiction by virtue of the allegations made by Plaintiff in the complaint and Defendant's consents to the orders of this court granting preliminary and permanent injunctive relief.

Moreover, I find no merit to Defendant John Gardner Black's argument that the Collateralized Investment Agreements ("CIAs") at issue here are not securities. Unarguably, investments of money were made under the CIAs; the investments so made were in a common enterprise (clients' funds were pooled in two accounts); and

the CIAs provided clients with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. See SEC v. Infinity Group et. al., 212 F.3d 180, 187 (3d Cir. 2000), cert denied, 536 U.S. 1000 (2001) from Springer v. SEC, 2001 U.S. LEXIS 2012 (U.S. 2001).

I also reject Defendant John Gardner Black's assertion that Defendant Devon Capital Management, Inc. ("Devon"), is not an investment adviser under the Advisers Act, supra. Devon directed the investment of client funds and received a monthly fee. See 15 U.S.C. § 80b-2(a)(11).

Defendant John Gardner Black also argues that relief should be granted because Defendant Financial Management Sciences, Inc., ("FMS") is not an investment company. Since Plaintiff never alleged that FMS was an investment company or that there were any violations of the Investment Company Act, this argument has no merit.

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DATE: May 9, 2001

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