No. 23-305-cv

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DANIEL HAMPTON

Mr. Hampton-Appellant,

v.

DENIS MCDONOUGH,

in his Official Capacity

as Secretary of the United States Department of Veterans Affairs

Defendant-Appellee.

On Appeal from an Order of the

United States District Court for the Eastern District of New York

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BRIEF OF APPELLANT

Dr. Kissinger N. Sibanda, Esq.

LAW OFFICES OF KISSINGER N. SIBANDA

P.O. Box 714, Livingston, NJ 07039

Tel: 862-250-9684

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PRELIMANARY STATEMENT

Mr. Hampton seeks a reversal of the "ORDER" dated April 28th, 2023, in Case 17-CV-5711 (JMW), in the Eastern District of New York and a new trial. In the alternative, Mr. Hampton seeks a remand for an evidential hearing by the Lower Court.

DEEP ISSUES

Appellant (Mr. Hampton) seeks reversal of Order and Opinion dated April 28th, 2023, A[1](4-6), from the lower court, the Eastern District of New York based on misapplication of the law determining operative fraud under Federal Rule of Civil Procedure 60 (b) 3 and under Federal Rule of Civil Procedure Rule 59 (a) 1 (A); misapplication of the law for a new trial.

JURISDICTIONAL STATEMENT

This is an appeal from final order of the district court dismissing through motion an action on whether Mr. Hampton should have a new trial by final judgment.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the April 28th, 2023, decision is a final order or judgment that disposes of all parties' claims in Case No. 17-CV-5711 (JMW). *Herein after*, the "Order."

[1] (A -) refers to the Appellant's Appendix. Appellant counsel reached out to Appellee counsel, Megan Friesmuth several times, for Appellee's designation of record to be included in this Appendix but she did not provide such designation for the record.

The district court had federal question jurisdiction over those claims pursuant to Federal Question jurisdiction 28 U.S.C. § 1331(a)(2) because Mr. Hampton sued under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"),

On February 1st, 2023, Mr. Hampton filed a Notice of Appeal of the district court's decision, which granted defendant's motion for summary judgment. The appeal is timely because pursuant to Rule 4(a)(4)(A)(iv) of the Federal Rules of Appellate Procedure, the time to appeal the district court's Order had not expired when Mr. Hampton filed a notice of Appeal on March 7th, 2023. The clerk of the second circuit then stayed the appeal pending the lower court's decisions on the Rule 60 (b) and Rule 59 motions.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the district court's April 28th, 2023, Order and Opinion constitutes a final order or judgment that dispose of all party claims in Case No. 17-CV-5711 (JMW).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

QUESTIONS:

A. Whether the court failed to interpret and apply the correct standard, and caselaw, for operative fraud by ignoring the constitutional implications of an unconsented stipulation and omissions in Mr. Hampton's Rule 60 (b) 3 motion?

B. Whether the lower court failed to interpret and apply the correct legal standard, and caselaw, as well as safety net in denying Mr. Hampton a new trial?

DEEP ISSUE

Should this court condone fraud (unconsented stipulation) and omissions under Rule 60 (b) 3 and Rule 59 (a) 1 (A) as legal?

STATEMENT OF THE CASE

A. The Nature of the Case

Mr. Hampton commenced this case against Defendant "Denis McDonough," in his official capacity as the Secretary of the United States Department of Veterans Affairs, alleging *quid pro quo* sexual harassment, hostile work environment, atmosphere of adverse actions, and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 ("Title VII"). A-(43).

B. The Course of Proceedings and Disposition Below

Following summary judgment motion practice, only Mr. Hampton's retaliation claim remained in the case to be tried. (ECF: 51.) As relevant to that claim, Mr. Hampton alleged that the VAMC retaliated against him for filing an Equal Employment Opportunity ("EEO") complaint against his supervisor on November 16, 2015, by terminating his employment on April 16, 2016.

After a three-day jury trial addressing the sole remaining claim, namely, retaliation, from January 31, 2023, to February 1, 2023, the jury returned for the defendant. Appellant then filed a join motion; construed by the Lower Court as a joint Rule 60 (b) 3 and Rule 59 (a) 1 (A) motion. He appeals the Lower Court's Order, denying the requests. A - (18).

STATEMENT OF FACTS

In 2017, appellant, Mr. Hampton filed a complaint which averred as follows, A (98):

On December 6, 2009, Mr. Hampton accepted a temporary appointment, not to exceed three years, as a Medical Supply Technician with the Sterile Processing Service ("SPS"), at the VA Medical Center in Northport, NY, earning $19 dollars per hour.

Mr. Hampton's job duties consisted of sterilizing and assembling surgical instruments for use in surgery. The Chief of SPS, Joan Maggiore ("JM"), was Mr. Hampton's immediate supervisor. On or about June 28, 2010, Mr. Hampton's co-workers learned from the social media website, Facebook that Mr. Hampton placed a new tattoo on his back.

The tattoo was not visible, so JM asked Mr. Hampton to remove his shirt to show his tattoo to her, which he refused to do, since the tattoo had nothing to do with work and he did not want to expose the bare skin on his back. Approximately 15 minutes later, JM called Mr. Hampton into her office and closed the door behind him, thus, Mr. Hampton was separated from the view of other employees.

JM positioned herself between the door and Mr. Hampton, suggesting that he was not free to leave the office. JM told Mr. Hampton to take his shirt off and to show her his back tattoo. Mr. Hampton attempted to leave JM's office, but she blocked his exit and insisted that he comply with her directive. In fear for his job, Mr. Hampton reluctantly took his shirt off to reveal his tattoo. JM looked Mr. Hampton up and down and stated that he did not have a "V shape."

Mr. Hampton said he felt uncomfortable and the comments about his body were unwelcomed and inappropriate. Also, around this time, JM often commented to Mr. Hampton on how she checked on what was going on in his personal life through his postings on Facebook, which Mr. Hampton understood to mean that JM was romantically interested in him.

During the June 28, 2010, meeting, Mr. Hampton told JM to stop viewing his Facebook page and blocked her from doing so. JM became visibly upset after

Mr. Hampton told JM to stop looking at his page. After Mr. Hampton told JM to stop looking at his page, JM began to scrutinize Mr. Hampton's work more than other Medical Supply Techs. For example, JM ordered lead technician, Elizabeth Thomas-Cutty to review his trays (a tray are all the tools needed for a particular surgery) for cleanliness, whereas other Medical Supply Technician's did to receive such scrutiny. On February 16, 2012, Mr. Hampton was sick so he did not report to work and he used a sick day, following proper procedure. On February 23, 2012, JM asked Mr. Hampton if he wanted to "fuck" her and Valience, a Medical Support Assistant, at the same time. Mr. Hampton rebuffed JM's request and told her "no".

On February 24, 2012, JM told Mr. Hampton that he need to submit a sick day slip for February 16, but told Mr. Hampton that if he came to her office to "earn [his] time back", she wouldn't require him to use a sick day. Mr. Hampton understood this to mean that if he had sex with JM, he would not have to utilize a sick day for his absence on February 16. He refused. JM physically touched Mr. Hampton by rubbing his arm on both February 28 and 29, 2012.

Mr. Hampton asked JM several times to stop touching him, but she did not stop. When Mr. Hampton refused to allow JM to touch him, she threatened to discipline Mr. Hampton for processing dirty scopes, an infraction he did not

commit and one for which, even if he did commit, does not typically result in discipline. In or around April 2013, Mr. Hampton sent an anonymous letter to Rosie Chapman, Chief Nurse Executive concerning JM's harassment of Mr. Hampton as described above. A few weeks after Mr. Hampton sent the letter to Ms. Chapman, and not having heard anything about his complaint, Mr. Hampton told Chapman verbally he was being harassed by JM. Neither Chapman nor any other agent of Defendant took any action to investigate or correct the harassment and it continued. For example, in or around May 2013, JM and her secretary Ruth were discussing and commenting about anal sex openly in common/break area. JM stated "you gotta do what you gotta do to please the man." Both Mr. Hampton and co-worker, Carrie Johnson who were having lunch together at an adjacent table got up and left the break area because of JM's comments about anal sex and pleasing "the man".

In July 2013, Mr. Hampton was injured at work and missed approximately six weeks. During his time away from work, JM often texted or called Mr. Hampton about non-work-related matters, including who he was with and what he was doing, at times, asking him inappropriate questions about his body such as why Mr. Hampton cannot have children, why Mr. Hampton is not married and why Mr. Hampton has foster children. In October 2013, JM questioned Mr. Hampton's

ability to bear children, asking him if it was him who could not have children or his girlfriend who could not have children. In July 2014, JM stated that a co-worker had a nice chest and that she was attracted to him. In September 2014, JM asked Mr. Hampton why he lived with a foster child and why his girlfriend and he cannot bear children. JM's comment upset Mr. Hampton because the difficulties Mr. Hampton and his girlfriend may have been personal and sensitive to both of them and an issue he was not comfortable discussing at work, and advised JM of this.

On January 26, 2015, in front of Ruth Schuler, JM touched Mr. Hampton in the lower abdominal area and asked if he was losing weight. Shocked, Mr. Hampton exclaimed "what the F#*k is wrong with you?" Then JM went into her office closed the door. Mr. Hampton had previously requested weekly leave without pay ("LWOP") so that he can take his foster son to doctor appointments or to visits with his biological mother. The requests were submitted to JM who approved the request. On January 28, 2015, Mr. Hampton submitted the leave request to JM, per procedure. Although such requests are routinely approved by supervisors, JM denied Mr. Hampton's request for no stated reason nor was there any possible legitimate reason to deny the request. At or about this time, JM told Mr. Hampton that his facial hair was thick and nasty and that she likes him better when he is clean shaven. In early February 2015, Mr. Hampton complained to his union

representative, Steve Tucci about JM's physical and verbal harassment and abuse. Mr. Hampton also made similar complaints to William Burton, Facility Equal Employment Opportunity Specialist but Burton did not investigate or take corrective action, even though Burton is the individual specifically charged with handling complaints of this nature.

On or about April 12, 2015, Mr. Hampton asked JM for permission to take off April 13, 2015. JM approved the request and Mr. Hampton took the day off, but on April 14, 2015, JM nonetheless marked Mr. Hampton AWOL, which remained part of his personnel and employee record. On May 5, 2015, Mr. Hampton requested a few days of leave to care for his sick foster child, but JM denied Mr. Hampton request for leave, again without a reasonable or legitimate reason being present and with such requests being routinely granted to other employees in the unit.

Mr. Hampton again complained to his union that JM had discriminatorily denied him leave after which, the leave was again granted, suggesting there indeed was no legitimate reason for the denial.

On May 12, 2015, Mr. Hampton complained to Philip Moschitta, Facility Director, concerning JM's inappropriate touching, inappropriate comments and the denial to utilize his time and leave after his previous complaint. Moschitta did not

respond to Mr. Hampton or take action to protect him from further harassment or retaliation nor did he refer him to EEO. On May 13, 2015, JM came to Mr. Hampton's work area, and in front of him, scratched her inner thigh. JM stated I "was scratching my leg ... I don't want you think I was scratching my crotch," thus showing her knowledge of Mr. Hampton's complaints about her. On June 3, 2015, JM required that Mr. Hampton report to her when he first comes to work so she "knows [he's] here". Prior to his complaints, Mr. Hampton was not required to report to JM upon getting to work.

On or about June 18, 2015, JM falsely accused Mr. Hampton of improperly handling eyeglass lenses and said that she should terminate him. JM asked Mr. Hampton to sign a Report of Contact, which is a report submitted by the employee to a supervisor about something they did wrong. Mr. Hampton refused because he did not improperly handle eyeglass lenses as JM alleged. On June 25, 2015, JM again threatened to terminate Mr. Hampton's employment despite his above satisfactory performance. On July 20, 2015, JM provided Mr. Hampton with improper instructions on how to clean one of the medical devices.

On or about August 18, 2015, Mr. Hampton filed an "informal" complaint with ORM through EEO Counselor, Nicolas Maxin. Although termed an informal complaint, this is the first statutorily required step for federal employees to begin

an EEO investigation. In September 2015, JM required Mr. Hampton to wear a face cover, but other similarly situated employees having facial hair were not required to do so.

On or about, October 29, 2015, mediation was conducted, no resolution was reached, and Mr. Hampton was notified of his right to file a formal EEO complaint. On November 6, 2015, a "formal complaint" was filed with the VA, Office of Resolution Management. On November 16, 2015, Mr. Hampton was informed that he must contact JM directly when calling out sick. Prior to Mr. Hampton's complaints he was not required to contact JM directly.

Beginning in December 2015, JM refused to process Mr. Hampton's time and leave requests in a timely fashion, and she only responded to the requests when Mr. Hampton asked about them. On January 11, 2016, the Assistant Chief, Mary Catherin Sinkus, stated to Mr. Hampton that her ass was getting "fat and not in a good way".

On January 28, 2016, JM made Mr. Hampton feel uncomfortable when she entered his work area and blocked his exit with her body. On February 22, 2016, Sinkus stated to Mr. Hampton that "You should watch your mouth Daniel..." Mr. Hampton understood this to mean that he should watch who he complains to and who he complains about. On March 4, 2016, JM accused Mr. Hampton of making

an offensive remark to her. On March 14, 2016, JM removed Mr. Hampton from his normal job responsibilities and was placed in "prep". Prior to being placed in "prep", Mr. Hampton's was assigned to Deacon and was required to clean all of the "dirty" trays that came in from the operating room after a surgery. However, Mr. Hampton's job responsibilities changes after being assigned to "Prep". Now his job responsibilities were to assemble sterile trays to place on carts that are brought into the operating room. In other words, Mr. Hampton was performing the opposite job duties.

Thus, by being placed in "prep", Mr. Hampton lost the job duties he preferred and performed for many years. On or about April 1, 2016, Mr. Hampton was notified that effective April 16, 2016, his employment as a Medical Supply Technician would terminate stating to Mr. Hampton that they no longer needed his services but went on to hire a replacement with no experience.

On April 16, 2016, Mr. Hampton's employment with the VA was terminated. In the Final Agency Decision dated February 10, 2017, Maxanne R. Witkin, Director, Office of Employment Discrimination Complaint Adjudication, waived the 45-day statute of limitations period for all of Mr. Hampton's claims stating, "As all of [Mr. Hampton's] allegations have now been fully investigated, we will waive the 45-day limit." (Summary judgment)

SUMMARY JUDGMENT AND SURVIVING CLAIMS

In August of 2021, the lower court issued a summary judgment in which the retaliation claim survived dismissal. A- ( ).

The Lower court took into consideration the facts of the case, during its summary judgment decision, but dismissed the hostile, adverse work environment and harassment claims as untimely. Applying the legal standard for summary judgment, it found Hampton's retaliation claim as triable.

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-48 (1986). (Defendant failed to do this for the "retaliation claim" and thus summary judgment was denied for retaliation.)

In addition, the Lower Court, in its summary judgment order, acknowledged Hampton's sexual harassment facts as follows under its Rule 56.1 Statement of Facts procedure:

> In June 2010, Maggiore called Hampton into her office and asked him to remove his shirt so she could see his new tattoo that he posted on Facebook. DE 47 ¶¶ 16-17.
>
> • In February 2012, Maggiore asked Hampton if he wanted to "fuck" her. DE 47 ¶ 21.

> • In February 2012, Maggiore asked Hampton to come into her office to "earn back" his sick time and rubbed his arm on three occasions. DE 47 ¶¶ 22-23.
>
> • In fall 2012, Maggiore commented that if Hampton was not with his girlfriend, she would "snatch him up." DE 47 ¶ 28.
>
> • In 2013, Hampton overheard Maggiore and another employee discussing anal sex in a common area. DE 47 ¶ 29.
>
> • On January 26, 2015, Maggiore touched Hampton in the stomach area and commented on his weight loss. DE 47 ¶ 33.
>
> • On May 12, 2015, Hampton informed management officials of Maggiore's alleged harassment. DE 47 ¶ 35.
>
> • On May 13, 2015, Maggiore scratched her thigh in front of Hampton and stated, "I was scratching my leg. I don't want you [to] think I was scratching my crotch or anything." DE 47 ¶ 37.
>
> • On June 3, 2015, Maggiore requested that Hampton report to her when he arrives at work. DE 47 ¶ 39.
>
> A - (43).

SUMMARY OF THE ARGUMENT

The lower court's decision should be reversed because there was operative fraud (stipulation) which undermined appellant, Mr. Hampton's case in chief.

Mr. Hampton was unable to present facts to the trier of fact; this is fraud which warranted a new trail pursuant to Tyson. Mr. Hampton did not consent to said stipulation. A - (95). In addition, the stipulation document (PDF) originated from the defendant counsel as the owner of the file, Megan Freismuth. A - (98).

The lower court ordered former Appellant attorneys, Mathew Mark and Thomas Ricotta, to provide Mr. Hampton with his case file, which subsequently revealed the degree of unconsented attorney representation and originators of documents. A-(98) and A- (82)(Notice to proceed before magistrate judge).

Mr. Hampton does not agree with the Order's dictate that after hearing of the stipulation he consented to its use through failure to stop the trial. Mr. Hampton's then attorneys owed Mr. Hampton a duty of care, consistent with ethical legal representation or the parameters of the legal profession to discuss the stipulation before trial or signature. New York Bar Rule 1.2:

> (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

New York Bar Rule 1.4: then states:

> (a) A lawyer shall:
> (1) promptly inform the client of:
> (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;
> (ii) any information required by court rule or other law to be communicated to a client; and
> (iii) material developments in the matter including settlement or plea offers.
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished.
> (3) keep the client reasonably informed about the status of the matter;

> (4) promptly comply with a client's reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Essentially, NYBAR Rules 1.2 and 1.4 required attorneys Ricotta and Masks to provide Mr. Hampton with the written stipulation before it was entered on or around September 2022[2]. To consult with him on whether or not Mr. Hampton accepted the four-corners of the stipulation they had entered on his behalf. This was never done and defendant counsel took advantage of this.

A client has a fiduciary expectation that his attorneys present his case in his best interests[3]; and not in the most economical expeditious manner for the defendant's convenience. Attorneys Mark and Ricotta only called one witness[4], Mr. Hampton, and admitted only one piece of evidence for him ---- stipulating to appellee's evidence admission. This was fraud against the client; beneficial to the defendant – who originated the stipulation document. It did not produce a full court with complete testimony but a tailored court; tailored towards acquittal of the defendant through sanitized advocacy.

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[2] The Lower Court should have held an evidential hearing on the issue before dismissing the issue in its Order. This was a procedural mistake by the Lower Court.
[3] This includes calling witnesses and presenting evidence wanted by the client when so requested by the client. At the minimum the client's request should be addressed not ignored by counsel.
[4] While Appellee called three witnesses for their case.

This appellate court is tasked with the difficult task of considering whether unethical legal representation falls within the "clear and convincing" rule warranting classification as operative fraud against Mr. Hampton if it originated from defendant, here DENIS MCDONOUGH, in his Official Capacity as Secretary of the United States Department of Veterans Affairs, Defendant-Appellee[5]. And if that's the case, to then question, whether the jury's decision was "egregious," towards Mr. Hampton considering this fraud.

In sum, Mr. Hampton avers that the lower court did not engage in this legal reasoning required by the prevailing caselaw and that de novo review has been triggered by such oversight.

STANDARD OF REVIEW

Rule 60(b)(3) Standard of Review

Rule 60(b) 3 generally provides that "[o]n motion and just terms" a party may be relieved from, inter alia, a final judgment for mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud. Fed. R. Civ. P. 60(b). Rule 60(b)(3) specifically allows the Court to relieve a party from final judgment for "fraud (whether previously called intrinsic or extrinsic),

[5] Mr. Hampton's appellate argument is that the fraud originates from Appellee: both the stipulation and the unconsented notice to proceed before magistrate judge came from defendant unless they can show otherwise. See A-(93) 'stipulation' and A - (82) 'consent to go before magistrate judge.' These two documents were initiated and drafted by defendant counsel on behalf of defendant – an evidential hearing by Lower Court can disprove this allegation, but the PDF originator software states that the 'stipulation' PDF's owner was Megan Friesmuth. A- (98).

misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). Rule 60(b), however, is considered "a mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional circumstances." *Juliao v. Charles Rutenberg Realty, Inc.*, No. 14-CV-808 (JMA) (AYS), 2020 WL 2513443, at * 2 (E.D.N.Y. May 15, 2020) (internal quotation and citation omitted).

Relief under Rule 60(b)(3) "is only available if the moving party establishes by clear and convincing evidence that the opposing party engaged in fraud or other misconduct." *Tyson v. City of N.Y.*, 81 F. App'x 398, 400 (2d Cir. 2003), (summary order). Rule 60(b) is not a procedural vehicle to obtain a second bite at the apple, a request for relief "cannot serve as an attempt to relitigate the merits." Id. "To obtain relief, the movant must have been prevented from fully and fairly presenting his case." *Breslow v. Schlesinger*, 284 F.R.D. 78, 82 (E.D.N.Y.).
2012). "The burden of proof on a Rule 60(b) motion is on the party seeking relief from the earlier judgment or order." *Obra Pia Ltd. v. Seagrape Invs. LLC,* No. 19-CV-7840 (RA), 2021 WL 1978545, at *2 (S.D.N.Y. May 18, 2021).
This Court reviews a misapplication of law under Rule 60 (b)3, judicial misinterpretation of the law, *denovo*.

*

Rule 59 (a) (1) (A) Standard of Review

Pursuant to Rule 59(a)(1)(A) "the court may, on motion, grant a new trial on all or some of the issues—and to any party . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed R. Civ P. 59 (a)(1)(A).

"The decision whether to grant a new trial under Rule 59 'is committed to the sound discretion of the trial judge.'" *Crews v. Cty. of Nassau*, 149 F. Supp. 3d 287, 292 (E.D.N.Y. 2015) (quoting *Stoma v. Miller Marine Servs.,* Inc., 271 F. Supp. 2d 429, 431 (E.D.N.Y. 2003)). "Grounds for granting a new trial include verdicts that are against the weight of the evidence, substantial errors in the admission or rejection of evidence, and non-harmless errors in jury instructions, and verdict sheets." *Sass v. MTA Bus Co.,* 6 F. Supp. 3d 229, 233 (E.D.N.Y.), adhered to on reconsideration, 6 F. Supp. 3d 238 (E.D.N.Y. 2014) (internal citations omitted).

"A motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." Id. (quoting *Snyder v. N.Y.S. Educ. Dep't*, 486 Fed. Appx. 176, 177 (2d Cir. 2012)); see also *Manley v. AmBase Corp.,* 337 F.3d 237, 245 (2d Cir. 2003) .The Court may grant a new trial "even if there is substantial evidence supporting the jury's verdict," however, as the Second Circuit has made clear, the Court "should only grant such a motion when the jury's verdict

is 'egregious.'" *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134(2d Cir. 1998) (emphasis added).

This Court reviews a misapplication of law under Rule This Court reviews a misapplication of law under Rule 59 (a) (1) (A), judicial misinterpretation, *denovo*.

ARGUMENT

I: RULE 60 (b) (3) JUDGMENT WAS ERRONOUS BECAUSE THE STANDARD OF CLEAR AND CONVINCING WAS MISAPPLIED BY THE LOWER COURT.

This appellate court has to consider what and when "clear and convincing," legal evidence warranting fraud in a court under rule 60 (b) 3 has been presented, not as a fact inquiry but first as a legal inquiry ---- the lower court failed to do this. More succinctly when is evidence deemed "clear and convincing," proof of fraud, by law – what is the legal operative standard and limits?

The Lower District court failed to apply *Tyson v. City of N.Y.*, 81 F. App'x 398, 400 (2d Cir. 2003) (summary order) on "clear and convincing evidence," setting fraud before the court. The *Moore* court stated:

> Plaintiff alleges that T–Mobile committed fraud by removing this case from state court when the state court had " '[e]xclusive jurisdiction' to adjudicate [Telephone Consumer Protection Act] cases" and by "alleging an arbitration agreement that did not exist." Pl.'s Mot. Recons. at 2–3. These allegations do not contain any evidence of fraud or misconduct committed by T–Mobile's counsel. Plaintiff's other allegations of fraud or misconduct committed by T–Mobile are equally frivolous. *Moore v. T-Mobile USA, Inc.,* No. 14 CIV. 7724 GBD AJP, 2015 WL 1780942, at *1 (S.D.N.Y. Apr. 15, 2015)

Mr. Hampton established fraud and misconduct by adducing evidence that is beyond the *Tyson* criteria, as applied in the *Moore* case, *supra*.

Mr. Hampton did not merely conclude but averred:

"This is exactly what the defendant did [when] they allowed their witnesses to go up on the stand and misrepresent themselves and others that were within the VA health system. They allowed their witnesses to commit fraud." (ECF 88 at 3.)

Litigation without the client's consent is fraud; but what is worrying is that the Lower Court did not state why such a stipulation would not qualify as fraud under *Tyson's* clear and convincing criteria. This is not about judicial discretion; but about the Lower Court's failure to categorize and determine whether the "Hampton stipulation" is clear and convincing evidence given legal ethical obligations under NYSBAR Rule 1.2 and 1.4 and the prevailing standard of *Tyson*.

As a matter of law, the Lower Court failed to apply the criteria for clear and convincing evidence which warrants the award of a Rule 60 (b) 3 motion because it did not discuss the kind of evidence which would be fraud categorically. *Id*.

The Lower Court without a working parameter of what is "clear and convincing," evidence then considered why certain Mr. Hampton's arguments fell short of showing fraud:

(1) Defendant failed to provide a complete copy of Mr. Hampton's electronic personnel file, (2) Defendant's case was built on false witness testimony given by conspiring witnesses, and (3) Mr. Hampton received ineffective assistance of counsel. A- ( ).

This is beyond the kind of evidence presented in the *Tyson* or the M*oore* case. Thus, this matter should have been distinguished by the Lower Court based on the gravitas of the allegations.

The Lower Court then stated:

"First, neither Mr. Hampton nor his counsel raised to the Court that Defendant failed to produce any requested discovery that was necessary for trial, let alone the personnel file that Mr. Hampton now asserts was incomplete. Defendant also represents that a complete copy of Mr. Hampton's personnel file was produced during discovery, and Defendant never received a deficiency letter regarding missing records. More importantly, Mr. Hampton's argument does not support a finding of any type of fraud or misconduct. A ( ) (Emphasis added).

This conclusion is erroneous because it presupposes that the burden of showing the fraud on Mr. Hampton waives the court's own discretion under Rule 60 b (3) and ended the issue because it was shown untimely. Even a court on its own accord could effectuate Rule 60 b (3) in the face of fraud. The fact that Mr. Hampton did not raise the issue until the end does not mean the fraud was not operative or damaging. Late notice of fraud does not mean lack of fraud.

Mr. Hampton's motion motive was not to relitigate their case, as the Order states, but he was putting the court on notice that omissions and facts have presented a case with inherent fraud at the terminal stage: that he was now aware of omissions of evidence during discovery which limited his case-in-chief.

The Order then states that:

However, the jury was presented with the parties' desired evidence and witnesses, and it was their province to make credibility determinations accordingly. See *Fincher v. Depository Trust & Clearing Corp*., 604 F.3d 712, 725 (2d Cir. 2010) ("[T]he assessment of a witness's credibility is a function reserved for the jury."). That the jury perhaps found a theory Mr. Hampton never advanced at trial unpersuasive is unsurprising to say the least. However, Mr. Hampton had every opportunity to present his evidence, cross-examine the witnesses, and make his credibility contentions to the jury. A ( )

This above is patently untrue, the Hampton Stipulation limited Mr. Hampton's case. The jury was not presented with the [full evidence], but what the attorneys agreed to, in violation of Mr. Hampton's right to contract's right freely. Mr. Hampton only called one witness, only introduced one piece of evidence; the opening and closing arguments by Hampton's counsel failed to connect the sexual harassment (not a claim, but factually operative) to the retaliation claim on the verdict form, a decision Mr. Hampton did not approve. And based on a stipulation he never consented to. To argue that it was "agreed upon by parties," without an evidential hearing, was a procedural error by the Lower Court; in the manner of a substantiative due process error[6].

The fraud is the legal representation working against his interests outside of the legal confines allowed by the Rules which govern lawyer ethical conduct. Mr.

[6] The Seventh Amendment, right to a jury trial becomes operative when the court agrees that the plaintiff's claims should not be dismissed but adjudicated by the jury. It does not confer any rights, but Rule 59, is a vehicle for such the Seventh Amendment because it allows for adjudication of controversy where a plaintiff avers his Seventh Amendment was violated.

Hampton has since filed a complaint with the bar regarding his former counsel. The court failed to address why such fraud cannot be categorized as "clear and convincing," under *Tyson*. The court failed to address, when does legal malpractice rise to the level of fraud against the client, warranting a new trial? Thus, this appeal raises the question anew on appeal: whether legal malpractice undermining a client's wishes, in violation of the Rules of ethical representation (informed consent) through unconsented actions, a stipulation, is not clear and convincing evidence, of fraud against the client under Rue 60 b (3)?

Third, Mr. Hampton avers that he received ineffective assistance of counsel. Mr. Hampton states that despite his insistence, his trial counsel did not involve him in all aspects of the case including which witnesses to call, and with respect to certain agreements made with Defendant. Chief among Mr. Hampton's grievances is that, without his knowledge, trial counsel stipulated with Defendant's counsel that the parties would not mention, or present evidence related to, inter alia, Mr. Hampton's already dismissed sexual harassment and hostile work environment claims.

Mr. Hampton does not provide any evidence to support a finding that his trial counsel acted fraudulently. Instead, Mr. Hampton seems to disagree with his trial counsels' handling of certain matters. Those grievances, regardless of how meritorious, do not provide a basis for relief under. A - (18)

This is untrue. Mr. Hampton stated pointedly that the stipulation, limiting his evidence during trial was a product of lawyer-client fraud. A - (91) (Hampton motion for Rule 60 (b) 3 and Rule 59).

> "Relief from counsel's error is usually sought pursuant to Rule 60(b)(1) on the theory that such error constitutes mistake, inadvertence or excusable neglect." *Webb v. City of New York*, No. 08-CV-5145 (CBA) (JO), 2010 WL 3394537, at *3 (E.D.N.Y. Aug. 23, 2010) (internal quotation marks and

> citations omitted). However, attorney negligence is not sufficient grounds for relief and "a person who selects counsel cannot thereafter avoid the consequences of the agent's acts or omissions." See *Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir. 1986). ("Mere dissatisfaction in hindsight with choices deliberately made by counsel is not grounds for finding the mistake, inadvertence, surprise or excusable neglect necessary to justify Rule 60(b)(1) relief.").
>
> A - (18)

Here, the change by the lower court from its 60 (b) 3 analysis to 60 (b) 1, does not escape the need for evidential determination of Mr. Hampton's accusations to the degree that the court concluded, "no fraud" for both statutory instruments.

Furthermore, the Lower Court stated in its Order:

> Mr. Hampton's ineffective assistance of counsel argument is misplaced since "a lawyer's purported shortcomings present no cognizable ground for relief in a civil matter, where the Sixth Amendment right to counsel does not apply." *Singh v. Home Depot U.S.A.,* Inc., 580 F. App'x 24, 25 (2d Cir. 2014) (summary order). Moreover, as Mr. Hampton admits, he became aware of the subject stipulation the first day of trial when it was mentioned by the undersigned. Ultimately, he decided not to raise the issue with the Court because his trial counsel supposedly advised him that mentioning sexual harassment would cause the case to be thrown out. Nonetheless, Mr. Hampton had the opportunity to raise the issue with the Court then, or to press the issue further with his trial counsel but elected not to do so. A - (18).

The legal basis for the conclusion here that the failure to end the trial when Mr. Hampton received notice of the unconsented stipulation is an erroneous one because no caselaw supports such a conclusion. Stated plainly, there is no caselaw which supports that when an individual, here Mr. Hampton, partially (and not

substantively) receives notice of the fraud, he has the burden to end the trial, or the fraud is waived?

For several reasons, clients realize later the gravity, impact and legal significance of fraud committed in the courtroom as lay people, after the fact. To blame Mr. Hampton for failing to raise the objection to a stipulation entered without his consent is to assume Mr. Hampton had the legal mind, despite his lay status, to understand the gravity of the situation. This is untrue. Mr. Hampton is not a trained legal mind. His subjective circumstance or arguable legal mind is a factor which should weigh in his favour.

In reaching its erroneous conclusion the Order failed to weigh the various legal opinions on categorization and precedent, on what is defined as fraud from even a comparative basis. Mr. Hampton has met his burden for Rule 60(b)(3) relief, which requires clear and convincing evidence of fraud or misconduct because his asserted fraud qualifies beyond the legal definitions of fraud in this particular instance. See *Castro v. Bank of New York Mellon,* 852 F. App'x 25, 30 (2d Cir. 2021) (summary order) ("[U]nsubstantiated assertion[s] do[] not satisfy the clear-and-convincing standard required to show fraud."). However, here, stating that the Hampton stipulation was fraudulent cannot be seen as a "mere assertion" warranting application of *Castro*, as the precedent, because it was concrete factual evidence, presented to the court via affidavits.

Mr. Hampton showed fraud or misconduct by Defendant – the stipulation, and that he lacked the opportunity to present his case in full and fairly as a result of defendant counsels suggestion and origination of the Hampton stipulation. Mr. Hampton's case was denied or restrined through stipulation; he did not present witnesses, cross-examine Defendant's witnesses regarding any alleged inconsistencies, and introduce evidence to support his case, through the execution of an unconsented stipulation which violated his Right to contract. By deception, Mr. Hampton's then legal counsel entered a legal contract, the stipulation, with legal limitation not agreed upon by Mr. Hampton. A – (91). This is classical fraud.

Anderson's Dictionary on Law defines "fraud" as:

> Craft, cunning, cheating, imposition, circumvention.
> An artifice to deceive or injure[7].

II: RULE 60 (b) 3 JUDGMENT WAS ERRONOUS BECAUSE THE LOWER COURT FAILED TO APPLY THE STANDARD FOR EGREGIOUS VERDICT IN LIGHT OF EVIDENCE.

As previously alluded to, *supra*:

"A motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." Id. (quoting *Snyder v. N.Y.S. Educ. Dep't*, 486 Fed. Appx. 176, 177 (2d Cir. 2012)); see also *Manley v. AmBase Corp.,* 337 F.3d 237, 245 (2d Cir. 2003) (same). The Court may grant a new trial "even if there is substantial evidence supporting the jury's verdict," however, as the Second Circuit has made clear, the Court "should only grant such a motion when the jury's verdict is

[7] William C. Anderson (1891) A Dictionary of Law (474).

'egregious.'" *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134(2d Cir. 1998) (emphasis added). A - (18).

Mr. Hampton's request for relief from the final judgment should be granted and a new trial given because the "Hampton Stipulation, rendered the jury incapable of fully understanding Mr. Hamptons case. It limited his ability to prosecute and adduce evidence which would have gone to the jury room to be decided by the jury.

Basis For Legal Classification As Egregious:

The Hampton jury result is egregious for several legal reasons: one, it is egregious because a jury trial is fact based not legal, unless facts are presented to the jury the jury has no basis to rule in one's favor.

Two, it is egregious because the verdict could have been in Mr. Hampton's favor given the omitted facts i.e., it was not a harmless error. This is based on the history of the case, in which the matter survived a bench trial summary judgment. If this matter had not undergone summary judgment review, then this court, the Second circuit, would not have a basis to weigh whether there were triable issues subject to presentation facts. The summary judgment order was conclusive of this issue because of its standard – denied if, there is a genuine issue subject to jury determination. Fact issues, including witness credibility and inconsistencies in the opposing parties' summary judgment papers and proofs, can only be resolved at trial. *American Mfrs. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres,*

Inc., 388 F.2d 272 (2d Cir. 1967). If there is any doubt as to the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment must be denied. *Jaroslawicz v. Seedman*, 528 F.2d 727, 731 (2d Cir. 1975).

Finally, it is egregious because, Mr. Hampton's case, by virtue of the unconsented stipulation, was essentially the case, the defendant, wanted against them because the "Hampton Stipulation[8]."

This matter at bar should be classified under the egregious standard or caveat of *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134(2d Cir. 1998), cautioned by the Second circuit. As it is a miscarriage of justice in which a jury could have easily rule in Mr. Hampton's favor when presented with a complete evidential case.

III. LOWER COURT'S DECISION SHOULD BE REVERSED BECAUSE STIPULATION VIOLATED MR. HAMPTON'S RIGHT TO CONTRACT.

Anderson's Dictionary of Law defines a contract as:

> A deliberate engagement between competent parties, upon a legal consideration, to do or, or not to do, certain acts[9].

In the American context, the right to contract is a right protected under State contract laws, the Uniform Commercial Code - as commerce, and a legal right every individual has as a private entity to determine for themselves its outward limitation,

[8] The Lower Court has to inquire further on who drafted this onerous Hampton stipulation.
[9] Willian C. Anderson (1891) A Dictionary of Law (246).

process, detriment and obligation. *Id, supra*. This is undebatable: every individual has a right to determine the terms of the contract binding them.

It is uncontroverted that the Hampton stipulation is a contract *per se* by definition, on behalf of Mr. Hampton, in a legal setting. The "Hampton Stipulation," limited his rights; the kind of evidence he could use in his trial and finally, the witnesses he could call. *Id*. A- (95), "Hampton Stipulation." The consideration here was "economic efficiency."

Thus, the Hampton stipulation is a legal contract entered by his former representatives, attorneys Mathew Mark and Thomas Ricotta on his behalf, albeit without Mr. Hampton's consent. And guaranteeing "economic efficiency," for a trial without sufficient evidence in Mr. Hampton's case in chief. For a valid contract to be legal there must a meeting of minds as to terms and legal right. Here, there was no meeting of minds between Mr. Hampton and the defendant on the terms of the contract. This contract [Hampton stipulation] was *void ab initio* as opposed to being *voidable* (as to breach)[10].

This court should deem this contract as unconstitutional on first impression, due to the lack of (Mr. Hampton's) consent (or meeting of minds) or return the case to the Lower Court for an evidential hearing consistent with contract adjudication;

[10] Oliver Wendell Holmes (1881) The Common Law (308). (Lecture IX, Discussing the inherent difference between void and voidable).

the Seventh Amendment and Procedural safeguards; in particular, the Fourteenth Amendment's Procedural Due process Clause:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

By reverse incorporation, through the Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added).

See also, *Bolling v. Sharpe*, 347 U.S. 497 (1954).

REQUEST FOR ORAL ARGUEMENT:

Mr. Hampton is requesting an oral argument pursuant to Local Rule 34.1(a) and Federal Rule of Appellate Practice Rule 34.

CONCLUSION

For the reasons set forth above, the Judgment of the District Court should be reversed and remanded for a new trial. In the alternative the Judgment should be

remanded for an evidential hearing by the lower court to determine whether or not the "Hampton stipulation," was knowingly entered - *ab initio*.

SIGNATURE BLOCK

Dated: August 18th, 2023,
Livingston, New Jersey 07040

Respectfully Submitted,

By /s/Kissinger N. Sibanda Esq
Dr. Kissinger N. Sibanda Esq
P.O. Box 714
Livingston, New Jersey 07039
Tel: 862-250-9684
Attorney for Mr. Hampton-Appellant

THE LAW OFFICES OF
KISSINGER N. SIBANDA

CERTIFICATION THAT CASE HAS NO OTHER APPEALS

Mr. Hampton certifies that there are no other appeals in the Second Circuit involving this case and, in any Court, State or Federal.

CERTIFICATE OF COMPLAINCE WITH
TYPE-VOLUME LIMITATION, TYPEFACE
REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32 (a) 7 (B) because this brief contains 8,000 words, excluding, the parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii).
2. This brief complies with typeface Requirements of Fed.R.App.P. 32 (a) 5 and the type style requirements because it has been prepared using windows 11 in Times New Roman 14 pt.

Dated: August 18th, 2023
Livingston, New York

/s/ Kissinger N. Sibanda Esq

Dr. Kissinger N. Sibanda, Esq

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DANIEL HAMPTON	)	
Mr. Hampton-Appellant,	)	23-305-cv
v.	)	
DENIS MCDONOUGH	)	
Defendant-Appellee	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 18th, 2023, I electronically filed Brief for Appellant with the Clerk of the United States Court of Appeals by using the Appellate CM/ECF. I further certify that all participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system. Finally, I certify that six copies of hardcopy of the foregoing were sent via certified mail to the clerk of the court.

Dated: August 18th, 2023

/s/Kissinger N. Sibanda
Dr. Kissinger N. Sibanda, Esq