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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JANE DOE I, JANE DOE II, and JANE DOE III, :
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 : Plaintiffs, :
 :
 : -against- :
 :
 : EMMANUEL CONSTANT, a.k.a. TOTO :
 : CONSTANT, :
 :
 : Defendant. :
-----X

04-Civ-10108 (SHS)

ORDER

SIDNEY H. STEIN, U.S. District Judge.

Defendant Emmanuel Constant has moved pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure for relief from an Order dated August 16, 2006, which granted plaintiffs' motion for a judgment by default. Constant argues that the Order is void because this Court had neither subject matter jurisdiction over this action nor personal jurisdiction over Constant. For the reasons that follow, the motion is denied.

I. THE MOTION, WHILE INEXPLICABLY DELAYED, IS NEVERTHELESS TIMELY UNDER RULE 60(b)(4) ALTHOUGH IT IS NOT TIMELY IF CONSTRUED UNDER RULE 60(b)(1) OR RULE 60(b)(6).

Rule 60 motions must be filed within "a reasonable time." Fed. R. Civ. P. 60(c)(1). Constant's motion, however, comes twenty-two months after the entry of a certificate of default by the Clerk of Court, nearly fourteen months after plaintiffs' motion for a default judgment was granted, over thirteen months after a fact hearing was held to determine damages, and almost one year after the Court awarded plaintiffs \$19 million in damages.

Constant offers no excuse for the delayed filing of this motion or for his total—until now—disregard of this litigation, except that he has been "incarcerated in Suffolk County for a case unrelated to this matter," (Reply Memorandum filed Jan. 7, 2008 ("Reply Mem.") at 6-7),

for part of the time this litigation has been pending. He concedes however, that he has been able to participate in his “other cases” while incarcerated. (Id. at 7.)

Constant also specifically admits that he was served with the summons and complaint in this action in January 2005. (Id. at 6.) Indeed, he was not incarcerated at that time since he was personally served in front of 26 Federal Plaza in New York City. (Findings of Fact and Conclusions of Law dated Oct. 24, 2006 (“Findings”) at 1-2.) He asserts, however, that he promptly hired an attorney to represent him in this action but that the attorney ignored repeated attempts by Constant to “follow up” on the complaint. (Reply Mem. at 6-7.) Constant does not present a shred of support for these assertions, and, in any event, does not contest the clear record evidence that he personally received notice of numerous filings and orders in this action including the summons and complaint, (Findings at 1-2), the certificate of default issued by the Clerk of Court, (Notice of Entry of Clerk’s Certificate of Default dated Dec. 7, 2005), plaintiffs’ motion for a default judgment, (Findings at 2), and a copy of the order granting judgment for plaintiffs by default and scheduling a hearing to determine damages. (Id.) Despite receiving notice at every stage of these proceedings, Constant inexcusably failed to contact the Court or make any attempt to protect his interests in this litigation for a period of nearly two years. See New York v. Green, 420 F.3d 99, 109 (2d Cir. 2005) (A party’s unexplained inaction in the face of a notice of default, which “clearly signal[s] . . . that [the party’s] counsel had not taken the requisite steps to defend [its] interests,” supports a finding of willful default.).

Although Constant’s unexplained delay in filing the instant motion is excessive, with respect to Rule 60(b)(4) motions, which seek relief from “void” judgments, “[c]ourts have been exceedingly lenient in defining the term ‘reasonable time’ . . . [and] it has been oft-stated that, for all intents and purposes, a motion to vacate a default judgment as void may be made at any

time.” Beller & Keller v. Tyler, 120 F.3d 21, 24 (2d Cir. 1997) (internal citations and quotation marks omitted); see also Grace v. Bank Leumi Trust Co., 443 F.3d 180, 190 (2d Cir. 2006); State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada, 374 F.3d 158, 179 (2d Cir. 2004); Cent. Vt. Pub. Serv. Corp. v. Herbert, 341 F.3d 186, 189 (2d Cir. 2003). Accordingly, despite the unwarranted and unexplained delay, this Court will consider Constant’s Rule 60(b)(4) motion on the merits.¹

II. CONSTANT’S MOTION LACKS MERIT.

Rule 60(b)(4) provides for relief from “void” judgments. “[A] judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.” In re Texlon Corp., 596 F.2d 1092, 1099 (2d Cir. 1979) (citation and quotation marks

¹ Constant brings this motion explicitly pursuant to Rule 60(b)(4). Mindful that he is pro se, the Court notes that the motion could conceivably be construed to seek relief under Rule 60(b)(1) on the ground of “mistake, inadvertence, surprise, or excusable neglect,” or Rule 60(b)(6) which authorizes vacatur for “any other reason that justifies relief.” Even if this Court were to construe the motion under either Rule 60(b)(1) or Rule 60(b)(6), the motion would still be denied.

First, motions pursuant to Rule 60(b)(1) must be made within one year of entry of the order or judgment from which relief is sought. Fed. R. Civ. P. 60(c)(1). Because Constant’s motion was made more than one year following the August 16, 2006 order granting plaintiffs’ motion for default judgment, it is not cognizable under Rule 60(b)(1). Warren v. Garvin, 219 F.3d 111, 114 (2d Cir. 2000) (The one-year limitations period applicable to Rule 60(b)(1) motions is “absolute.”).

Second, although not subject to the strict one-year period, a Rule 60(b)(6) motion must still be made within a “reasonable” time. Fed. R. Civ. P. 60(c)(1). In contrast to motions under Rule 60(b)(4) which seek relief from “void” judgments, courts are considerably less lenient in deciding whether a party’s delay in filing a motion invoking the other provisions of Rule 60(b) was “reasonable.” See, e.g., Young v. Coughlin, No. 87-Civ-01122, 2001 U.S. Dist. Lexis 15323, at *4 (N.D.N.Y. Sept. 24, 2001) (fourteen month delay in filing a motion under Rule 60(b)(6) was unreasonable); see also Graham v. Sullivan, No. 86-Civ-163, 2002 U.S. Dist. Lexis 18240, at *13 (S.D.N.Y. Sept. 23, 2002) (same); Peyser v. Searle Blatt & Co., 99-Civ-10785, 2001 U.S. Dist. Lexis 20739, at *6 (S.D.N.Y. Dec. 14, 2001) (sixteen month delay unreasonable). Given his unexcused disregard of these proceedings for nearly two years, Constant’s motion was not made within a reasonable time and is properly denied. In any event, even if the Court were to entertain the motion pursuant to Rule 60(b)(6), Constant has failed to demonstrate “extraordinary circumstances” excusing his failure to participate in the underlying litigation, which are a prerequisite to relief under Rule 60(b)(6). See Grace, 443 F.3d at 190 n.8 (“[A] Rule 60(b)(6) motion requires ‘extraordinary circumstances’ which ‘typically do not exist where the applicant fails to move for relief promptly.’” (citing 12 James Wm. Moore, Moore’s Federal Practice § 60.48[3][c] and Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 462 (2d Cir. 1994))); Alvarado v. Manhattan Worker Career Ctr., No. 01-Civ-9288, 2003 WL 22462032, at *2-3 (S.D.N.Y. Oct. 30, 2003); see also Nemaizer v. Baker, 793 F.2d 58, 63 (2d Cir. 1986).

omitted). Construed liberally, Constant's pro se papers argue that the August 16, 2006 Order is void because this Court lacked subject matter jurisdiction over the suit and because Constant was not subject to the personal jurisdiction of the Court.

A. Constant's Challenge to this Court's Subject Matter Jurisdiction Is Without Merit

"In the context of a Rule 60(b)(4) motion, a judgment may be declared void for want of jurisdiction only when the court 'plainly usurped jurisdiction,' or, put somewhat differently, when 'there is a total want of jurisdiction and no arguable basis on which it could have rested a finding that it had jurisdiction.'" Cent. Vt. Pub. Serv. Corp., 341 F.3d at 190 (quoting Nemaizer, 793 F.2d at 65). Plaintiffs brought this action pursuant to the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 note. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The statute has been construed to provide jurisdiction over claims asserting violations of universally recognized norms of international law as well as over claims of torture and attempted extrajudicial killing pursuant to the TVPA. (Findings at 8.)

In its Order granting plaintiffs' motion for default judgment and again in its Findings of Fact and Conclusions of Law, this Court ruled that it had jurisdiction over the claims in this action pursuant to the ATS and the TVPA. Constant does not now challenge those rulings, but instead raises several affirmative defenses to the underlying claims in this litigation which, according to Constant, demonstrate that the Court lacked subject matter jurisdiction over the action. Constant contends that (1) plaintiffs' claims were barred by the applicable statute of limitations; (2) plaintiffs failed to exhaust available remedies in Haiti as required by the TVPA;

and (3) the claims by Jane Doe III are precluded pursuant to the doctrine of res judicata because he believes she previously litigated similar claims to final judgment against FRAPH, the organization which Constant founded and led in Haiti, in the United States District Court for the Eastern District of New York. Because none of these arguments, even if true, implicate the subject matter jurisdiction of the Court, they do not provide a basis for relief under Rule 60(b)(4). See Diaz v. Kelly, 515 F.3d 149, 153 (2d Cir. 2008) (“Since a statute of limitations is a defense . . . [it is] not . . . jurisdictional.”); Scherer v. Equitable Life Assurance Soc’y of the United States, 347 F.3d 394, 398 (2d Cir. 2003) (“[R]es judicata is an affirmative defense [that] must be pled in a timely manner or it may be waived.”); Jean v. Dorelien, 431 F.3d 776, 781 (11th Cir. 2005) (“[T]he exhaustion requirement pursuant to the TVPA is an affirmative defense”); Wiwa v. Royal Dutch Petroleum Co., No. 96-Civ-8386, 2002 U.S. Dist. LEXIS 3293, at *55-56 (S.D.N.Y. Feb. 28, 2002) (same); Barrueto v. Larios, 291 F. Supp. 2d 1360, 1364-67 (S. D. Fla. 2003) (“[T]he exhaustion requirement of the TVPA is not jurisdictional.”); Abiola v. Abubakar, 267 F. Supp. 2d 907, 910 (N. D. Ill. 2003) (Because “the TVPA is not a jurisdictional statute . . . failure to comply with its [exhaustion] requirement[does not] strip[] the Court of jurisdiction.”)

Constant also argues that plaintiffs adduced insufficient evidence that he acted “under color of law” as required to impose liability for torture and extrajudicial killing under the ATS and the TVPA. However, pursuant to an extensive evidentiary hearing during which the Court heard the testimony of several lay and expert witnesses and received documentary evidence, the Court has already rendered factual findings detailing the close relationship between FRAPH and the government of Haiti and has already specifically held that Constant and FRAPH acted “under color of law” by working in concert with the government. (Findings at 3-4, 9 n.3.) Constant

presents no evidence in support of his bald self-serving assertions that FRAPH did not have anything to do with the government of Haiti and has not demonstrated that this Court's findings of fact and conclusions of law were in error in any respect. Accordingly, Constant has failed to demonstrate that the August 16, 2006 Order is void for want of subject matter jurisdiction.

B. Constant Is Subject to the Personal Jurisdiction of this Court

Constant also argues that the August 16, 2006 Order is void because this Court lacked personal jurisdiction over him. Constant does not present any argument in support of this contention except to state that the summons and complaint that were personally served on him in January 2005 inaccurately identified him as the "commander" of the "Revolutionary Front for the Advancement and Progress of Haiti" when in fact he was the "Secretaire General" and "leader" of the "Front for the Advancement and Progress of Haiti," both of which have the French acronym of "FRAPH." (Affidavit of Emmanuel Constant dated Dec. 28, 2007 in Support of Reply Mem. ¶¶ 12-15; Amended Memorandum of Law in Support of Defendant's Rule 60(b)(4) Motion dated Feb. 6, 2008 ("Am. Mem.") at 20.) Constant asserts that this misidentification of his title and the name of his organization stripped the Court of jurisdiction over his person. (Am. Mem. at 20.)

Rule 4(a)(1)(B) of the Federal Rules of Civil Procedure requires a summons to be "directed to the defendant." However, the standards set forth in Rule 4 "are to be liberally construed, to further the purpose of finding personal jurisdiction in cases in which the party has received actual notice." Grammenos v. Lemos, 457 F.2d 1067, 1070 (2d Cir. 1972). Defects in the form of summons are considered technical and a dismissal is not proper unless the party can demonstrate actual prejudice. Crane v. Battelle, 127 F.R.D. 174, 177 (S.D. Cal. 1989). There is no conceivable doubt that defendant was the leader of FRAPH, a violent and brutal paramilitary

organization in Haiti. (Findings at 3-4.) Where a summons misnames the defendant but “the summons and complaint [give him] adequate notice that [he is] being sued, and . . . no prejudice result[s] from the misnaming,” dismissal of the action is improper. Kroetz v. AFT-Davidson Co., 102 F.R.D. 934, 937 (E.D.N.Y. 1984).

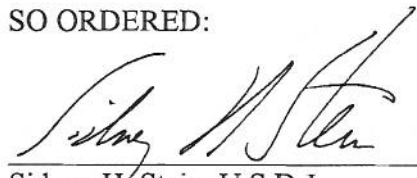
In this case, Constant does not deny receiving actual notice of this litigation and indeed concedes that he was personally served with process in the Southern District of New York in January 2005. Constant has not shown any prejudice from his alleged misidentification as the “commander” instead of the “Secetaire General” of FRAPH. Accordingly, Constant has not demonstrated that the August 16, 2005 Order is void for lack of personal jurisdiction.

III. CONCLUSION

For the reasons set forth above, Constant’s Rule 60(b)(4) motion for relief from the Order dated August 16, 2006 on the ground that it is void is denied.²

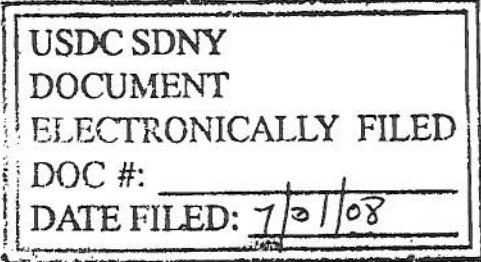
Dated: New York, New York
July 30, 2008

SO ORDERED:



Sidney H. Stein, U.S.D.J.

² Constant has submitted three separate legal memoranda totaling in excess of forty pages of argument plus several affidavits and numerous exhibits in support of his motion. On May 29, 2008, this Court denied his request for additional time in which to file yet another memorandum. (See Memorandum Endorsement dated May 29, 2008). On June 7, 2008 Constant acknowledged that Order but nevertheless submitted a thirty-two page additional legal memorandum. In accordance with the May 29, 2008 Order, Constant’s June 7, 2008 memorandum, submitted in total disregard of the May 29, 2008 Order, will not be considered by this Court. In any event, Constant’s submission would not alter the decision of this Court even if it were considered because it does not raise any arguments not previously addressed in Constant’s earlier filings.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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04-Civ-10108 (SHS)

ORDER

SIDNEY H. STEIN, U.S. District Judge.

In accordance with this Court's prior orders permitting the sealing of information regarding plaintiffs' identities and plaintiffs' requests in letters to the Court dated January 14, 2008 and April 4, 2008 that certain filings in this action be redacted to protect plaintiffs' anonymity,

IT IS HEREBY ORDERED that:

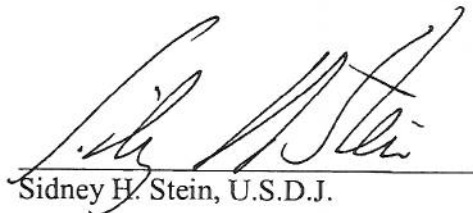
1. Plaintiffs are to publicly file no later than August 15, 2008 redacted versions of the following documents omitting references to the relevant litigation in the United States District Court for the Eastern District of New York:
 - a. Defendant's Reply Memorandum in Support of Defendant's Rule 60(b)(4) Motion filed Jan. 7, 2008 [Docket # 77];
 - b. Letter to the Court from Jennifer M. Green dated Jan. 14, 2008;
 - c. Defendant's submission dated Feb. 6, 2008, including Defendant's Amended Memorandum in Support of Defendant's Rule 60(b)(4) Motion, Defendant's Motion to Hold the Decision on Defendant's 60(b)(4) Motion in Abeyance

Pending Submission of Defendant's Amended and Corrected Memorandum of Law, and all papers appended thereto;

- d. Letter to the Court from Jennifer M. Green dated Apr. 4, 2008; and
2. Defendant's Memorandum of Law in Support of Defendant's Rule 60(b)(4) Motion filed Jan. 7, 2008 [Docket # 77] shall be removed from the public docket and filed under seal; and
3. Unredacted versions of the following documents shall be filed under seal:
 - a. Letter to the Court from Jennifer M. Green dated Jan. 14, 2008;
 - b. Defendant's submission dated Feb. 6, 2008, including Defendant's Amended Memorandum in Support of Defendant's Rule 60(b)(4) Motion, Defendant's Motion to Hold the Decision on Defendant's 60(b)(4) Motion in Abeyance Pending Submission of Defendant's Amended and Corrected Memorandum of Law, and all papers appended thereto;
 - c. Letter to the Court from Jennifer M. Green dated Apr. 4, 2008; and
 - d. Defendant's Memorandum in Reply to Plaintiffs' Memorandum dated Jun. 7, 2008.

Dated: New York, New York
July 31, 2008

SO ORDERED:



Sidney H. Stein, U.S.D.J.