SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

MARK Z. JACOBSON, Ph.D., **Plaintiff,** **v.** **CHRISTOPHER T.M. CLACK, Ph.D., et al.,** **Defendants.**	**Case No. 2017 CA 006685 B** **Judge Elizabeth C. Wingo**

ORDER

Before the Court is Plaintiff Mark Z. Jacobson's Motion for Reconsideration of Order Granting Defendants' Motions For Costs and Attorney's Fees Under the D.C. Anti-SLAPP Act, filed May 18, 2020 (hereinafter "Motion" or "Motion to Reconsider"), Defendant National Academy of Sciences' Opposition to Plaintiff's Motion for Reconsideration of Order Granting Defendants' Motions for Costs and Attorney's Fees Under the D.C. Anti-SLAPP Act, filed June 1, 2020, Defendant Christopher Clack's Opposition to Plaintiff's Motion for Reconsideration, also filed June 1, 2020 ("Clack Opposition"), and Plaintiff Mark Z. Jacobson's Reply in Support of His Motion for Reconsideration, filed June 8, 2020 ("Reply"). In the Motion, Plaintiff Mark Z. Jacobson ("Plaintiff" or "Dr. Jacobson") asks this Court to reconsider its April 20, 2020 Order, granting both the Motion for an Award of Attorney's Fees and Costs Pursuant to D.C. Code § 16-5504(a), filed by Defendant National Academy of Sciences ("NAS") on March 7, 2018, and Defendant Christopher Clack's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act, § 16-5504(a), filed by Defendant Dr. Christopher Clack ("Dr. Clack") on March 7, 2018. For the following reasons, Plaintiff's Motion is **DENIED.**

I. PROCEDURAL HISTORY

The procedural history of this matter is set forth in detail in this Court's April 20, 2020 Order, and will only be summarized in brief here. Dr. Jacobson initiated this action on September 29, 2017, by filing his Complaint against Dr. Clack and NAS, setting forth four claims against Defendants, that is, defamation against both Defendants, and breach of contract and promissory estoppel against NAS, arising out of an article published by NAS on June 19, 2017 and co-authored by Dr. Clack and 20 other scientists and scholars ("the Clack Article") that evaluated an article previously published by NAS and co-authored by Dr. Jacobson ("the Jacobson Article").

On November 8, 2017, the parties jointly filed a Consent Motion by All Parties For Leave to Exceed Page Limitations on the Briefing of Motions to Dismiss and Adjusted Deadlines for Oppositions and Replies, citing, among other sources, this Court's Supplement to General Order on Trial Procedures, Judge Elizabeth Wingo, Civil Calendar 14 (January 2017) (hereinafter "Supplement to the General Order"). *See* Consent Motion, at 4. That motion was granted in part on November 20, 2017; specifically, although the Court increased its standard page limitations, it declined to expand those limitations to the extent sought by the parties, that is, 30 pages, and instead permitted the parties 25 pages to address the issues.

On November 27, 2017, each Defendant filed a special motion to dismiss pursuant to the D.C. Anti-SLAPP Act, codified as D.C. Code § 16-5501, *et seq.*, or, in the alternative, pursuant to Super. Ct. Civ. R. 12(b)(6), seeking to dismiss all claims against them. Dr. Jacobson opposed each motion and filed a motion for leave to take targeted discovery pursuant to D.C. Code § 16-5502(c)(2) on January 5, 2018. On February 2, 2018, at the Initial Scheduling Conference in this matter, this Court orally denied Dr. Jacobson's targeted discovery motion and set a motions

hearing on the pending motions to dismiss. At the motions hearing on Defendants' special motions to dismiss held on February 20, 2018, the parties presented arguments on the pending motions. At the conclusion of the hearing, the Court took the motions under advisement. Two days later, on February 22, 2018, Dr. Jacobson voluntarily dismissed the action without prejudice pursuant to Super. Ct. Civ. R. 41(a)(1)(A)(i).

Defendants thereafter filed their Motions for Attorneys' Fees on March 7, 2018, arguing that they remained entitled to costs and reasonable attorney's fees pursuant to § 16-5504(a) of the D.C. Anti-SLAPP Act, and sought a schedule for the submission of legal fees and expenses. After extensive briefing, including not just oppositions and replies, but sur-replies, this Court issued its April 20, 2020 Order, concluding that Defendants had prevailed within the meaning of the D.C. Anti-SLAPP Act, and that there were no special circumstances on this record that would render an award unjust. The Court therefore also set a schedule to determine the appropriate award. Thereafter, on May 18, 2020, Plaintiff filed the instant Motion for Reconsideration, which Defendants oppose.

II. LEGAL STANDARD

The Superior Court Civil Rules do not explicitly recognize or designate a "motion for reconsideration," but "[t]he term has been used loosely to describe two different kinds of post-judgment motions." *Fleming v. District of Columbia,* 633 A.2d 846, 848 (D.C. 1993). The first is a motion brought pursuant to Super. Ct. Civ. R. 59(e), which authorizes the filing of a motion to alter or amend a judgment; the second is a motion brought pursuant to Super. Ct. Civ. R. 60(b), which authorizes a party to seek relief from a final judgment or order for specified reasons. *Id.*; *see also Frain v. District of Columbia,* 572 A.2d 447, 449 (D.C. 1990). In this case, Plaintiff cites to both Rule 59 and 60.

"'Motions under either rule [59(e) or 60(b)] are committed to the broad discretion of the trial judge.'" *Onyeneho v. Allstate Ins. Co.*, 80 A.3d 641, 644 (D.C. 2013) (quoting *District No. 1 – Pacific Coast District v. Travelers Casualty & Surety Co.*, 782 A.2d 269, 278 (D.C. 2001)). "The nature of a motion is determined by the relief sought, not by its label or caption." *Wallace v. Warehouse Employees Union #730*, 482 A.2d 801, 804 (D.C. 1984) (citing Coleman *v. Lee Washington Hauling Co.,* 388 A.2d 44, 46 (D.C. 1978)). "The difference between Rule 59(e) and Rule 60(b) motions [is] whether, for the first time, the movant is requesting consideration of additional circumstances; if so, the motion is properly considered under Rule 60(b), but if the movant is seeking relief from the adverse consequences of the original order on the basis of error of law, the motion is properly considered under Rule 59(e)." *Wallace*, 482 A.2d 801 at 804 (citations omitted). In general, however, "neither Rule 59(e) nor Rule 60(b) is designed to enable a party to complete presenting its case after the court has ruled against it," and any motion for reconsideration of a final order "may not be used to raise arguments or present evidence that could have been raised prior to the entry of judgment." *See District No. 1 – Pacific Coast District v. Travelers Casualty & Surety Co.*, 782 A.2d 269, 278 (D.C. 2001) (quotations, brackets, ellipses, and citations omitted). Which rule a motion is filed under is not dispositive; the Court will treat the motion as being filed under the appropriate rule based on the nature of the relief sought. *Id.*

In this Court's view, however, neither Rule 59 nor Rule 60 are applicable here as both apply only to final orders or judgments. And as the Court of Appeals has explicitly stated, "[a]n order awarding attorney's fees but not determining the amount of the fees is not final." *Khawam v. Wolfe*, 84 A.3d 558, 574-75 (D.C. 2014). As noted in *Khawam*, "[f]or an order to be final, it must dispose of the whole case on its merits so that the court has nothing remaining to do but to

execute the judgment or decree already rendered." *Id.* at 574 (internal quotation marks and citation omitted). Here, however, Plaintiff seeks reconsideration before the amount of attorneys' fees owed has been determined. Therefore, in this Court's view, this motion to reconsider is governed not by Rule 59 or 60, but by Rule 54(b), which governs requests for reconsideration of orders that "do not constitute final orders in a case." *Cobell v. Norton*, 224 F.R.D. 266, 271 (D.D.C. 2004).[1] Pursuant to Rule 54(b), "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." D.C. Super. Ct. Civ. R. 54(b). "A court may grant a Rule 54(b) motion 'as justice requires.'" *Chaney v. Capitol Park Assocs., LP*, 2013 D.C. Super. LEXIS 6, *2 (May 20, 2013, Ramsey, J.) (quoting *Cobell*, 224 F.R.D. 266 at 272. "In determining whether reconsideration is warranted, the Court may consider 'whether the Court has patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the parties, has made an error not of reasoning, but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the court.'" *Id.* (quoting *Grogan v. Holder*, 892 F. Supp. 2d 118 (D.D.C. 2012)). The Court concludes that as the nature of the relief sought controls, it is appropriate to treat the motion as though filed under the appropriate rule.

III. ANALYSIS

In this case, Plaintiff asks the Court to reconsider its April 20, 2020 ruling on the basis that 1) the Court "ignored the relevant holding" of *Competitive Enter. Inst. v. Mann*, 150 A.3d

[1] "Rule 54 is substantially identical to its federal counterpart, and is therefore construed in light of the meaning given to the federal rule." *Chaney v. Capitol Park Assocs., LP*, 2013 D.C. Super. LEXIS 6, *2 (May 20, 2013, Ramsey, J.) (*citing Washington Inv. Partners of Del., LLC v. Sec. House, K.S.C.C.*, 28 A.3d 566, 580 (D.C. 2011)).

1213 (D.C. 2016); 2) newly discovered evidence "demonstrate[s] that the contested statements were not mere scientific disagreements, but admitted factual errors by the Clack Authors;" and 3) the Court erred in directing Plaintiff to pay attorney's fees "merely because he chose to forgo further litigation." *See* Motion at 1, 2 and 6. For the reasons stated below, the Court will deny the Motion on both procedural and substantive grounds.

As an initial matter, Plaintiff filed his 31-page motion, and 9-page reply, in clear violation of this Court's Supplement to the General Order, which states

> In accordance with the General Order, "Memoranda that exceed ten pages in length are discouraged." No party may submit a motion and memorandum of points and authorities that exceeds 15 pages (excluding exhibits) without leave of the Court. Leave will be granted only in extraordinary circumstances. If a party fails to comply with these rules, the Court may summarily deny the motion…

See Supp. Gen. Order at 4. The Supplement to the General Order also states that "[r]eplies may not exceed five pages without leave of the Court." *Id.*[2] The Supplement contains no expiration date, and on its face, applies to all of this Court's matters on Civil Calendar 14. Given that this Court's Supplement to the General Order was removed from the Court's website when the undersigned judicial officer rotated to a new division, the Court would certainly excuse the failure to comply with its Order had no reason to be aware of the Court's Order. Here, however, where Plaintiff actually filed a joint motion in this matter that expressly referenced this Court's Supplement to the General Order in order to seek an extension of the page limits contained therein, and where the Court's response to that consent motion granted only a limited extension, indicating the Court's clear preference for concise, focused arguments, there is simply no excuse for filing a motion of more than double the page limit, nor a reply almost double the page limit,

[2] The Court notes that its Supplement to the General Order was updated periodically to reflect changes in contact information for chambers staff during the two years this judicial officer was specifically assigned to the Civil Division. The substance of the order, however, never changed.

without seeking leave of court to do so.[3] The violation is particularly egregious here, where much of the motion is spent rehashing arguments already considered and rejected in evaluating the original motions. Thus, on this procedural ground alone, the Court would find summary denial appropriate.

The Court also finds, perhaps more importantly, that the motion is substantively without merit as well. To the extent that Defendant merely rehashes arguments regarding the application of *Mann* to the facts of this case, or the appropriate application of the fee-shifting provision of the Anti-SLAPP Act in this case, the Court continues to find such arguments unpersuasive, and will not re-address issues, such as the application of *Mann*, thoroughly covered in the April 20, 2020 Order.[4] Indeed, in response to Defendants' challenge to Plaintiff's failure to identify new authority in his motion, Plaintiff can point to only two new cases in the entire 31-page document, *see* Reply, at 2 n.2, neither of which suggest reconsideration of this Court's prior order is warranted.[5] Similarly, to the extent that Defendant asserts that "new evidence" compels a different conclusion than this Court reached in its April 20, 2020 Order, the Court also finds such arguments unpersuasive, largely for the reasons set forth in the Clack Opposition. *See* Clack Opposition at 5-9. The Court notes that the argument with respect to the first alleged

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[3] Moreover, if for some reason, Plaintiff believed, despite the lack of any expiration date within the Order, that the Order no longer governed cases on Calendar 14, as Calendar 14 is now handled by the Honorable Jose Lopez, then one would expect Plaintiff to abide by Judge Lopez's Supplement to General Order, which is also on the Superior Court's website, and which also states that "[n]o party may submit a motion and memorandum more than fifteen pages long without leave of the court," and that "[n]o party may submit a reply more than five pages long without leave of the court." Supplement to General Order, Judge Jose M. Lopez, Civil Calendar 14, at 3-4.

[4] Thus, the Court notes, for example that it finds wholly without merit the assertion in Reply that "Defendants completely fail to rebut Plaintiff's argument that the Court erred in the burden of proof applied" such that "the Court may treat this argument as conceded", as the burden of proof argument rests entirely on the *Mann* case, which, as noted above, and as both Defendants argued, *see* Clack Opposition at 9-10, and NAS Opposition at 8, the Court carefully and fully considered in reaching its original conclusion.

[5] The first of those cases, *Regal West Corp. v. Grapecity, Inc.*, 2013 U.S. Dist. LEXIS 38036 (W.D. Wash. March 19, 2013) is not factually analogous, and sheds no light on the issues here. Similarly, the other, *Bakos v. CIA,* 2019 U.S. Dist. LEXIS 133396 (D.D.C. August 8, 2019), does not address the Anti-SLAPP Act's fee-shifting provisions, but instead addresses the Equal Access to Justice Act and appropriately follows controlling caselaw with respect to statutes employing the term "prevailing party," which, as discussed in this Court's April 20, 2020 Order, is not the term used in the Anti-SLAPP statute. *See* April 20, 2020 Order at 7-11.

"admission" is particularly unpersuasive; even without Dr. Caldeira's Declaration, attached as Exhibit A to the Clack Opposition, the exchange on its face is clearly not an admission that the Clack Paper contained false facts, but a continued challenge to the accuracy of the Jacobson article as written. *See* Motion, Ex. 1 ("Yes, I should have realized that when someone writes that 67.66% of the load is flexible, they might mean to convey that 100% of the load is flexible but only 67.66% of the time."). Indeed, to make the argument that such a statement constitutes an admission, in his original Motion, Plaintiff edited the statement to remove all context and omitted everything after "realized." *See* Motion, at 7. In short, Plaintiff's Motion to Reconsider fails to persuade the Court that it has "patently misunderstood" the Plaintiff or "made a decision outside the adversarial issues presented to the Court by the parties," that the Court has "made an error not of reasoning, but of apprehension" or that "a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the court," or indeed that there is any reason to conclude that reconsideration in this case is in the interests of justice. *See Grogan*, 892 F. Supp. 2d at 121. Therefore, the motion fails on the merits as well.

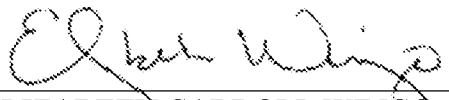
IV. CONCLUSION

For all of the above-stated reasons, this Court will deny Plaintiff's Motion to Reconsider on both procedural and substantive grounds. The Court notes that a review of the docket confirms that the parties have fully briefed their respective positions on the actual attorneys' fees to be awarded here, which will be addressed by separate order.

Accordingly, it is this 25th day of June, 2020, hereby

ORDERED that Plaintiff Mark Z. Jacobson's Motion for Reconsideration of Order Granting Defendants' Motions For Costs and Attorney's Fees Under the D.C. Anti-SLAPP Act is **DENIED.**

SO ORDERED.



JUDGE ELIZABETH CARROLL WINGO
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
(*Signed in Chambers*)

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