SO ORDERED.
SIGNED this 16th day of March, 2021

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

MARGARET ELIZABETH KINNEY

Debtor

Case No. 3:20-bk-30540-SHB
Chapter 7

MARGARET ELIZABETH KINNEY
and WILLIAM KINNEY

Plaintiffs

v.

Adv. Proc. No. 3:20-ap-3028-SHB

ANDERSON LUMBER COMPANY, INC.
BLUE TARP FINANCIAL, INC.; and
KIZER & BLACK, ATTORNEYS, PLLC

Defendants

MEMORANDUM AND ORDER ON
RULE 60 MOTION FOR RELIEF OF FINAL JUDGMENT

Before the Court is the Rule 60 Motion for Relief of Final Judgment ("Rule 60(b) Motion") filed by Plaintiffs on February 22, 2021 [Doc. 138], through which they ask the Court

to set aside the now-final[1] Order entered January 13, 2021 ("January 13 Order") [Doc. 131], on the Memorandum Opinion on Defendants' Motions to Dismiss ("Dismissal Memorandum Opinion") [Doc. 130]. As their bases for the requested relief, Plaintiffs rely on subsections (3), (4), and (6) of Federal Rule of Civil Procedure 60(b),[2] which provide that the Court may set aside or relieve a party from a final judgment or order for "(3) fraud . . . , misrepresentation, or misconduct by an opposing party; (4) [if] the judgment is void; . . . or (6) [for] any other reason that justifies relief[.]" Plaintiffs argue the following:

> The court made two primary legal points in dismissing this Adversary Proceeding, (1) the application of *Rooker-Feldman*, and (2) Plaintiff's failure to certify under Judge Varlan's injunction. We will demonstrate herein that [the] *Rooker-Feldman* [doctrine] does not apply to this case because the Circuit Court for Blount County did not have subject matter jurisdiction over Anderson's case, or personal jurisdiction over the plaintiffs, which is an issue this court has declined to address although it was specifically requested to do so. Secondly, Judge Varlan's injunction was void from its inception, because it violated our First Amendment right to petition the government for a redress of grievances."

[Doc. 139 at pp. 1-2.[3]]

"Because courts should not 'disturb the finality of a judgment without good reason[,]' the party seeking relief under Rule 60(b) 'bears the burden of establishing the grounds for such relief by clear and convincing evidence.'" *In re Ivens Props., Inc*., No. 13-32471, 2014 WL 667659, at

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[1] The Order dismissing Plaintiffs' claims in this adversary proceeding became final on January 27, 2021 (*see* Fed. R. Bankr. P. 8002(a)(1)), and the Rule 60(b) Motion (which falls within Federal Rule of Bankruptcy Procedure 9024) did not relieve Plaintiffs of their appeal deadline because it was not filed until February 22, 2021. *See* Fed. R. Bankr. P. 8002(b)(1)(D). Nor did the initial Rule 60(b) Motion (denied without prejudice for procedural reasons on February 18, 2021 [Doc. 136]) operate to extend the time for appeal under Rule 8002(b)(1)(D) because it was not filed until February 9, 2021 [Doc. 134]. Most critically, Plaintiffs may not now seek to extend the time for appeal. *See* Fed. R. Bankr. P. 8002(d)(1).

[2] Rule 60 applies in adversary proceedings pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure.

[3] Plaintiffs also argue that the Court "was statutorily disqualified under 28 U.S. Code § 455 for bias or partiality, beginning on July 2, 2020; and since then has taken our property, and that of our daughter Sarah, to pay a void judgment procured by fraud by Anderson Lumber Company, Inc. in state court." [Docs. 138 at p. 2, 139 at p. 1.] Plaintiffs first raised the issue of disqualification of the assigned judge on February 9, 2021. [Ex Parte Statement Concerning Dismissal of Adv. Proc. No. 3:20-ap-3032, Request to Issue a Protective Order and Enjoin Further Proceedings at 1, *In re Kinney*, No. 3:20-bk-30540-SHB (Bankr. E.D. Tenn. Feb. 9, 2021), ECF No. 176.] Because the Court denied Plaintiffs' request for disqualification on February 22, 2021 [Mem. & Order at 2-8, *In re Kinney*, No. 3:20-bk-30540-SHB (Bankr. E.D. Tenn. Feb. 11, 2021), ECF No. 179], the issue needs no further discussion here.

*1 (Bankr. E.D. Tenn. Feb. 20, 2014) (quoting *Brown v. Timmerman–Cooper,* No. 2:10-cv-283, 2013 WL 3776585, at *2 (S.D. Ohio July 17, 2013) (citation omitted); *Info–Hold, Inc. v. Sound Merch., Inc.,* 538 F.3d 448, 454 (6th Cir.2008)); *see also McCurry ex rel. v. Adventist Health Sys./Sunbelt, Inc.,* 298 F.3d 586, 592 (6th Cir. 2002) ("The party seeking to invoke the Rule bears the burden of establishing that its prerequisites are satisfied."). Moreover, a party may not "use a Rule 60(b) motion as a substitute for an appeal, or as a technique to avoid the consequences of decisions deliberately made yet later revealed to be unwise." *Hopper v. Euclid Manor Nursing Home*, 867 F.2d 291, 294 (6th Cir. 1989) (citations omitted). Similarly, a motion that "simply rephrases the allegations . . . contained in [a] complaint . . . fails to 'establish that the facts of [the] case are within one of the enumerated reasons contained in Rule 60(b).'" *Johnson v. Unknown Dellatifa*, 357 F.3d 539, 543 (6th Cir. 2004) (quoting *Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir. 1993)); *see also Moore v. Bauman*, No. 20-1115, 2020 WL 8472439, at *3 (6th Cir. Dec. 23, 2020) (holding that a motion that "merely reiterates the argument raised in the petition . . . is insufficient to warrant relief under Rule 60(b)").

Contrary to Plaintiffs' assertions otherwise, the Court's Dismissal Memorandum Opinion fully addressed all issues raised by them in their Rule 60(b) Motion. Indeed, the Rule 60(b) Motion merely reiterates Plaintiffs' arguments made in opposition to Defendants' motions to dismiss concerning the final judgments of the Blount County Circuit Court and the United States District Court for the Eastern District of Tennessee ("District Court"), both of which were directly addressed in the Dismissal Memorandum Opinion.

I. Rule 60(b)(3)

Under subsection (3), a court may set aside a final judgment that is based on an opposing party's fraud, misrepresentation, or misconduct. To satisfy this subsection, Plaintiffs would have

to establish by clear and convincing evidence that Defendants "engaged in fraud[4] or other misconduct" that prevented Plaintiffs "from fully and fairly litigating [***this***] case." *RDI of Mich., LLC v. Mich. Coin-Op Vending, Inc*., No. 08-11177, 2011 WL 3862347, at *6 (E.D. Mich. Sept. 1, 2011).

The Rule 60(b) Motion does not allege any fraud or misconduct by Defendants ***in this adversary proceeding***. Instead, Plaintiffs once again aver that the final judgments of the Blount County Circuit Court and the District Court are based on fraud. Their arguments, however, do not fall within the scope of Rule 60(b)(3). Furthermore, contrary to Plaintiffs' assertions otherwise, the Court fully acknowledged and disposed of Plaintiffs' allegations of fraud in the Blount County Circuit Court and District Court cases on pages 16-18, 23-28, and 32-34 of the Dismissal Memorandum Opinion [Doc. 130].

Because Plaintiffs have failed to provide any allegation or evidence that Defendants in this adversary proceeding engaged in any fraud or misrepresentation *in this adversary proceeding* that resulted in entry of the January 13 Order, the Court will deny their request under Rule 60(b)(3).

II. Rule 60(b)(4)

A judgment is subject to being set aside under subsection (4) if the judgment is determined to be void. Because "Rule 60(b)(4) strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate

[4] "Fraud is the knowing misrepresentation of a material fact, or concealment of the same when there is a duty to disclose, done to induce another to act to his or her detriment. Fraud thus includes 'deliberate omissions when a response is required by law or when the non-moving party has volunteered information that would be misleading without the omitted material.'" *Info-Hold, Inc.*, 538 F.3d at 456 (internal citations and quotation marks omitted). Additionally, "'[f]raud cannot be unintentional, and the use of the prefix 'mis-' in both 'misrepresentation' and 'misconduct' also suggests that the moving party under the rule must show that the adverse party committed a deliberate act that adversely impacted the fairness of the relevant legal proceeding [in] question.'" *In re Gibson & Epps, L.L.C.*, 468 B.R. 279, 298 (Bankr. E.D. Tenn. 2012) (quoting *Stooksbury v. Ross,* No. 3:09-CV-498, 2012 WL 523668, at *7 (E.D. Tenn. Feb. 16, 2012) (citations omitted)).

a dispute[,] . . . [it] applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269, 271 (2010). Courts, therefore, interpret Rule 60(b)(4) narrowly, and the inquiry is whether a court had "'jurisdiction of the subject matter, or of the parties, or it acted in a manner inconsistent with due process of law.'" *Carter v. Fenner*, 136 F.3d 1000, 1006 (5th Cir. 1998) (quoting *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996) (citations omitted)). For example, "[the l]ack of notice and sufficient service of process leading ultimately to lack of due process properly renders a judgment void within the meaning of Rule 60(b)(4)." *In re Smith*, 622 B.R. 26, 41 (Bankr. W.D. Tenn. 2020). Nevertheless, "[f]ederal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Espinosa*, 559 U.S. at 271 (quoting *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986)).

Rule 60(b)(4) embodies an important distinction between a void judgment and an erroneous one, and a "judgment is not void merely because it is erroneous." *Chambers v. Armontrout*, 16 F.3d 257, 260 (8th Cir.1994) (quotation omitted).

> This distinction between void and erroneous judgments serves to prevent the use of the Rule as a substitute for an appeal. *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989) ("The parties may not use a Rule 60(b) motion as a substitute for an appeal."). "[I]f a party fails to appeal an adverse judgment and then files a Rule 60(b)(4) motion after the time permitted for an ordinary appeal has expired, the motion will not succeed merely because the same argument would have succeeded on appeal." *Kocher v. Dow Chem. Co.*, 132 F.3d 1225, 1229 (8th Cir. 1997) (citation omitted).

Jalapeno Prop. Mgmt., LLC v. Dukas, 265 F.3d 506, 516 (6th Cir. 2001) (Batchelder, J., concurring) (citations omitted); *see also Espinosa*, 559 U.S. at 270 ("[A] motion under Rule 60(b)(4) is not a substitute for a timely appeal.").

As with their argument under subsection (3), Plaintiffs argue that the judgment of the Blount County Circuit Court is void because "[t]he Defendants prevailed not on the merits, but rather through fraud and corruption, making the state judgment invalid," and with respect to the District Court orders, Plaintiffs argue that "res judicata cannot apply to the federal court decisions because the state level judgments were contaminated by extrinsic fraud and fraud upon the court . . . [and that e]ven though the Defendants [*sic*] fraud is readily ascertainable, the federal courts have failed in their duty to enforce the Fifth Amendment, further failing to protect Plaintiffs as required by the Fourteenth Amendment." [Doc. 139 at p. 14.] They also argue that Judge Varlan's "claim of frivolous as applied to [their] pleadings and allegations, included none of the descriptions made by the Supreme Court in defining a frivolous claim, and is therefore invalid." [*Id.* at p. 12.]

Once again, Plaintiffs' arguments in the Rule 60(b) Motion were addressed in the Dismissal Memorandum Opinion, in which the Court ruled that Plaintiffs cannot collaterally attack a final judgment of the state court – in this case, the Blount County Circuit Court – in federal court. [Doc. 130 at pp. 18-19, 23-28.] Regarding their attempt to attack the validity of the January 18, 2019 Order of then-Chief District Judge Thomas Varlan in *Kinney v. Anderson Lumber Co., Inc.*, No. 3:18-cv-227-TAV-HGB (E.D. Tenn. Jan. 18, 2019), ECF No. 31 (the "Restraining Order), as noted by this Court in the Dismissal Memorandum Opinion, Plaintiffs chose not to appeal Judge Varlan's dismissal or the impact of the Restraining Order "for private reasons." [Doc. 130 at p. 18 (quoting Doc. 95 at p. 19.)] As explained in the Dismissal Memorandum Opinion, "this Court is not authorized to sit as a reviewer of the decisions of either the district court or the Sixth Circuit Court of Appeals, [and] Plaintiffs' remedy, if any existed, was before the district court or on appeal to the Sixth Circuit or, ultimately to the United States Supreme Court." [Doc. 130 at p. 34.]

Simply, Plaintiffs cannot "use a Rule 60(b) motion as a substitute for an appeal,[5] or as a technique to avoid the consequences of decisions deliberately made [even if they are] later revealed to be unwise." *Hopper*, 867 F.2d at 294. Plaintiffs' Rule 60(b) Motion presents nothing beyond what they previously argued, and they have failed to prove by clear and convincing evidence that the January 13 Order, which is based on the Dismissal Memorandum Opinion, is void.

III. Rule 60(b)(6)

Subsection (6) applies "only in exceptional or extraordinary circumstances which are not addressed in the first five numbered clauses of the Rule" since "almost every conceivable ground for relief is covered under the other subsections of Rule 60(b)." *In re Reiman*, 431 B.R. 901, 910 (Bankr. E.D. Mich. 2010) (quoting *Hopper*, 867 F.2d at 294; *Rogan v. Countrywide Home Loans, Inc. (In re Brown)*, 413 B.R. 700, 705 (B.A.P. 6th Cir. 2009)). "Consequently, courts must apply Rule 60(b)(6) relief only in 'unusual and extreme situations where principles of equity mandate relief.'" *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)). Additionally, because the Rule 60(b) subsections are "mutually exclusive," *Pioneer Inv. Servs. Co. v. Brunswick*, 507 U.S. 380, 393 (1993), subsection (6) "can be used only as a residual clause in cases which are not covered under the first five subsections of Rule 60(b)." *Pierce v. United Mine Workers of Am. Welfare & Ret. Fund for 1950 and 1974*, 770 F.2d 449, 451 (6th Cir. 1985).

Plaintiffs cite to Rule 60(b)(6) as a basis for relief in their Rule 60(b) Motion; however,

[5] The Court finds it perplexing that Plaintiffs continue to choose not to pursue appeal of decisions that they so adamantly believe are incorrect. They did not appeal the Blount County Circuit Judgment that they have asked this Court to set aside, nor did they appeal the district court's decision in *Kinney v. Anderson Lumber Co., Inc.*, No. 3:18-cv-227-TAV-HGB, and now, they have failed to appeal this Court's decision, choosing instead a procedural tool that is wholly ineffective to give them the relief that they seek.

they do not address how their arguments fall within the scope of this subsection in any substantive way. Instead, their arguments are specifically limited to application of subsections (3) and (4). Furthermore, as previously discussed, all of the arguments raised by Plaintiffs were previously decided by the Court in the Dismissal Memorandum Opinion, and they have offered nothing "exceptional" or "extraordinary" in their Rule 60(b) Motion to mandate application of subsection (6) by the Court.

ORDER

For the foregoing reasons, the Court directs that the Rule 60 Motion for Relief of Final Judgment filed by Plaintiffs on February 22, 2021 [Doc. 138], is DENIED.

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