IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

SANDI JOHNSON and CARY JOHNSON,	§	
Plaintiffs,	§	
	§	
v.	§	**EP-12-CV-420-PRM**
	§	
SAMUEL HENDERSON and COURTNEY SIMMONS,	§	
Defendants.	§	

ORDER GRANTING MOTION TO RECONSIDER

On this day, the Court considered Plaintiffs Sandi Johnson and Cary Johnson's "Motion to Reconsider" (ECF No. 31) [hereinafter "Motion"], filed on April 28, 2014. Plaintiffs request that the Court reopen the above-captioned case pursuant to Federal Rule of Civil Procedure 60 and either assess damages against Defendants based on damages awarded in a related case or, in the alternative, set a hearing on damages in the above-captioned cause. *Id.* After due consideration, the Court is of the opinion that Plaintiffs' Motion should be granted for the following reasons.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Proceedings Before Judge Walter Smith

Plaintiffs filed their "Original Complaint" (ECF No. 1) on April 26, 2011. Therein, Plaintiffs sought damages for the death of Hank Johnson. *Id.* On March 8, 2012, Plaintiffs filed their initial "Request for Entry of Default and Motion for Default Judgment" (ECF No. 11) [hereinafter "Motion for Default Judgment"] as to Defendants Samuel Henderson and Courtney Simmons.[1]

On April 4, 2012, Plaintiffs filed their "Request for Judicial Notice and Motion for Entry of Judgment Without a Hearing" (ECF No. 13). In that pleading, Plaintiffs requested that the court, Judge Walter S. Smith Jr. presiding, take judicial notice of their First Amended Complaint and jury verdict from a prior related case, *Sandi Johnson & Cary Johnson v. Trae Thompson, et al.* ("*Johnson I*"), Case No. 6:10-cv-00186-WSS (W.D. Tex. filed on July 9, 2010). On April 13, 2012, Judge

[1] On May 19, 2011, Plaintiffs voluntarily dismissed Defendants Kalpesh Govind, John Govind, Mehandra Govind, and Executive Inn of Hearne pursuant to Federal Rule of Civil Proedure 41(a). Not. Dismissal, ECF No. 7.

Smith heard testimony on Plaintiffs' request for judicial notice and entry of default judgment. Minutes, ECF No. 14.

On October 11, 2012, Judge Smith recused himself from the above-captioned cause, and the case was reassigned to Judge Frank Montalvo. Order Recusal, Oct. 11, 2012, ECF No. 16; Order Transferring Case El Paso Division, Oct. 19, 2012, ECF No. 17.[2]

B. Proceedings Before Judge Montalvo

On February 28, 2013, the court, Judge Montalvo presiding, determined that "a court may not judicially notice the truth or falsity of allegations made in another lawsuit" and instructed Plaintiffs to resubmit their Motion for Default Judgment with affidavits establishing damages, or, alternatively, to request an evidentiary hearing. Order Granting Entry Default, ECF No. 18. That same day, the duly designated deputy clerk entered Defendants' default. District Clerk's Entry Default.

Plaintiffs subsequently renewed their request that the court take judicial notice of the jury's award in *Johnson I*. Pl.'s Resp., Mar. 28,

[2] This case was given a new cause number: EP-12-CV-420-FM.

2013, ECF No. 19. Judge Montalvo denied this request.[3] On December 30, 2013, Judge Montalvo ordered Plaintiffs to request an evidentiary hearing, if necessary, by January 10, 2014, and to resubmit their Motion for Default Judgment along with supplemental briefings by January 13, 2014. Order Resubmit Mot. Default J. & Suppl. Briefing, ECF No. 21. Judge Montalvo cautioned Plaintiffs that failure to respond to any portion of the order would result in dismissal of the above-captioned cause without further notice. *Id.* On January 13, 2014, Plaintiffs filed their "Motion for Permission to Withdraw and Motion for Stay" (ECF No. 22) [hereinafter "Motion to Withdraw and Stay"], requesting that Plaintiffs' counsel be permitted to withdraw and asking for a stay of the case.

On January 17, 2014, Judge Montalvo entered final judgment, denying permission to withdraw and dismissing Plaintiffs' complaint without prejudice. Order Den. Mot. Permission Withdraw & Dismiss. Failure Prosecute, ECF No. 24. On February 17, 2014, Plaintiffs filed a

[3] However, the Court allowed Plaintiffs to purchase a transcript of the April 13, 2012, hearing, which contained testimony about damages, and to submit the transcript for the court's consideration. Pl.'s Resp., Mar. 28, 2013, ECF No. 19. On July 15, 2013, a transcript of the April 13, 2012, hearing was entered by the United States District Court for the Western District of Texas, Waco Division.

"Recusal Motion" (ECF No. 25), which Judge Montalvo referred to Judge Fred Biery, Chief Judge of the Western District of Texas. Order Referring Recusal Mot., Feb. 21, 2014, ECF No. 27. On February 24, 2014, the Recusal Motion was granted and the case was randomly assigned to the Court. Order Reassigning Case, ECF No. 28.[4]

II. LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) permits the court, upon motion by a party, to "relieve a party or legal representative from a final judgment, order, or proceeding" for a number of reasons. Fed. R. Civ. P. 60(b). "By its very nature, the rule seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.'" *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981) (quoting *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970)). "Rule 60(b) vests in the district courts power 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Id.* (internal citations omitted).

[4] The case was assigned the cause number EP-12-CV-420-PRM.

III. ANALYSIS

A. Rule 60(b)(1)—Mistake of Counsel

Plaintiffs argue that the "original January 17, 2014 Order was the product of a mistaken assumption . . . that [Plaintiff's attorney] would be permitted to withdraw and that new counsel would be given sufficient time to carry out the wishes of Plaintiff[s]." Mot. 2. As a result, Plaintiffs argue that Federal Rule 60(b)(1) applies—that they should be relieved from the final judgment based on "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). However, the Fifth Circuit has held that the "inadvertent mistake" of counsel does not warrant relief pursuant to Rule 60(b)(1). *See William v. Brown & Root, Inc.*, 828 F.2d 325, 329 (5th Cir. 1987) ("We are unwilling to say that an attorney's inadvertent failure to observe a procedural deadline constitutes sufficiently unique or unusual circumstances to merit relief from a dismissal without prejudice."); *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) ("In fact, a court would abuse its discretion if it were to reopen a case under Rule 60(b)(1) when the reason asserted as justifying relief is one attributable solely to counsel's carelessness with

or misapprehension of the law or the applicable rules of court."). Here, on December 30, 2013, Judge Montalvo ordered Plaintiffs to provide supplemental briefing on the issue of damages, to resubmit their Motion for Default Judgment with affidavits by January 13, 2014, and to request an evidentiary hearing, if necessary, by January 10, 2014. Order Resubmit Mot. Default J. Judge Montalvo's Order stated that "[f]ailure to respond to any portion of this Order will result in dismissal of the case without further notice." *See id.* 3. On January 13, 2014, Plaintiffs filed their Motion to Withdraw and Stay, requesting that Plaintiffs' attorney be permitted to withdraw from the case and that Judge Montalvo "stay proceedings in this case for 60 days." Mot. Withdraw & Stay 1, ECF No. 22. Plaintiffs' mistaken assumption that their Motion to Withdraw and Stay would suffice to comply with Judge Montalvo's request for supplemental briefing constitutes an "inadvertent mistake" of counsel and does not warrant relief pursuant to Federal Rule 60(b)(1). *See William*, 828 F.2d at 329.

B. Rule 60(b)(1)—Mistake of Law

Plaintiffs again rely on Rule 60(b)(1) to argue that the "Court made a mistake of law in assuming that it lacked authority to consider the verdict and evidence from a related case." Mot. 2. While "[t]he law of this circuit permits a trial judge, in his discretion, to reopen a judgment on the basis of an error or law. . . . such reopenings are certainly not mandatory." *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977). "The orderly process of appeal usually is far more appropriate to deal with such errors."[5] *Id.*; *McMillan v. MBank Fort Worth, N.A.*, 4 F.3d 362, 367 (5th Cir. 1993) ("A motion for relief under Rule 60(b)(1) is "not a substitute for the ordinary method of redressing judicial error—appeal." (internal citations omitted)). "We have also held that Rule 60(b) may not be used to provide an avenue for challenges of mistakes of law that should ordinarily be raised by timely appeal." *Pryor v. U.S. Postal Serv.*, 769 F.2d 281, 286 (5th Cir. 1985) (collecting cases). Here, Plaintiffs urge the Court to reopen the case to

[5] It would be more appropriate for a district court to "reconsider and correct its own errors, particularly if they are of an obvious nature amounting to little more than clerical errors." *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977).

consider a legal argument that was previously before the Court. The Court concludes that an appeal is the preferred and more appropriate avenue for reconsideration upon legal grounds.

C. Rule 60(b)(6)—Any Other Reason that Justifies Relief

Lastly, Plaintiffs argue that the Court should reopen the case pursuant to Rule 60(b)(6), the residual clause of Rule 60(b), which provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). "Relief under this section is granted 'only if extraordinary circumstances are present.'" *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 642 (5th Cir. 2005) (citation omitted) (citing *American Totalisator Co., Inc. v. Fair Grounds Corp.,* 3 F.3d 810, 815 (5th Cir.1993)).

Plaintiffs urge the Court to consider their February 17, 2014, motion to recuse Judge Frank Montalvo from this case. Recusal Mot., ECF No. 25. Plaintiffs attached a letter to their Recusal Motion—a "Complaint of Misconduct against U.S. District Judge Montalvo (W.D. Tex.)" addressed to the Fifth Circuit. In that letter, Plaintiffs assert

that Judge Montalvo issued a permanent protective order on May 31, 2013, compelling Plaintiff Sandi Johnson to remove a video from the Internet. Mot. Recusal Ex. 2, at 1. Plaintiffs allege that this protective order was based on an ex parte communication between Judge Montalvo and a witness from the case *Johnson I,* and that the protective order was issued without providing Plaintiffs an opportunity to respond. *Id.*

In the instant Motion, Plaintiffs argue that "Judge Montalvo was influenced by derogatory statements about Plaintiff Sandi Johnson and [her attorney] that were made by LaToshia Boxley in her ex parte communications with [Judge Montalvo]." Mot. 3. Plaintiffs assert that Judge Montalvo's dismissal of the case was a result of his prejudice toward Plaintiff and her counsel based upon his ex parte communications. *Id.* ("Judge Montalvo became increasingly hostile until finally dismissing the case outright."). Thus, Plaintiffs urge the Court to reconsider the dismissal of the case. Mot. 3.

The Court construes Plaintiffs' 60(b)(6) claim to be predicated upon a violation of 28 U.S.C. § 455(a). "That section provides in relevant part: 'Any . . . judge . . . of the United States shall disqualify

himself in any proceeding in which his impartiality might reasonably be questioned.'" *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1407–08 (5th Cir. 1994) (citing 28 U.S.C. § 455(a))). "Although § 455 does not speak to vacating a judgment, Rule 60(b)(6), in conjunction with § 455, does provide 'a procedure whereby, in appropriate cases, a party may be relieved of a final judgment.'" *Id.* at 1408 (quoting *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 863 (1988)).

"Rule 60(b)(6) relief is ... neither categorically available nor categorically unavailable for all § 455(a) violations." *Id.* at 1412. In order to determine whether a judgment should be vacated for a violation of § 455(a), courts should consider (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process.[6] *Id.*

[6] When a party relies on § 455(a) to invoke Rule 60(b)(6) relief, a court will consider § 455(a)'s requirements in order to determine whether the party's original motion for recusal was timely. *See Travelers*, 38 F.3d at 1410. "It is well-settled that . . . one seeking disqualification must do so at the earliest knowledge of the facts demonstrating the basis for such disqualification." *Id.* (citing *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir. 1982)). Here, Plaintiffs moved for disqualification of Judge Montalvo shortly after dismissal of the case. It appears that Plaintiffs were aware of the ex parte communication as early as November 2013.

Plaintiffs' Recusal Motion states that the "presiding judge apparently has obtained false and derogatory information about Plaintiff Sandi Johnson and the undersigned as a result of ex parte communications with a witness in a related case before the Court." Recusal Mot. 1. While partiality or bias against an attorney is not enough to require disqualification, since the contents of the ex parte communication are unknown, the Court cannot determine whether the ex parte communication would result in bias favoring or disfavoring Plaintiffs. *See Travelers*, 38 F.3d at 1412 ("Partiality for or against an attorney, who is not a party, is not enough to require disqualification unless it can be shown that such a controversy would demonstrate bias for or against the party itself." (internal citations omitted)). Since Judge Montalvo had access to an ex parte communication[7] whose

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See Recusal Mot. Ex. 2, at 1. However, due to the inactivity of the docket between April 2013 and January 2014, the Court concludes that Plaintiffs may not have been aware of Judge Montalvo's alleged bias against Plaintiffs until the case was dismissed in January 2014. Accordingly, the Court concludes that Plaintiffs' Recusal Motion was timely.

[7] *See* Order Regard. Protect. Order, *Sandi Johnson & Cary Johnson v. Trae Thompson, et al.*, Case No. 12-cv-418-FM (W.D. Tex. Nov. 18, 2013) ECF No. 153.

contents are unknown, the Court is of the opinion that the denial of Plaintiffs' Motion may risk injustice to Plaintiffs.

As to the second factor, Plaintiffs do not identify whether a denial of relief in this case would produce injustice in other cases, and the Court does not have a reason to believe that it would. Accordingly, this factor does not suggest that Plaintiffs should be provided relief from the final judgment.

Lastly, the Court concludes that denying the Motion may risk undermining the public confidence in the judicial process. "The goal of section 455(a) is to avoid even the appearance of partiality." *Henderson v. Dep't of Pub. Safety & Corr.*, 901 F.2d 1288, 1295 (5th Cir. 1990). Since the contents of the ex parte communication are unknown, the public may believe that the ex parte communication contained matter that resulted in partiality against Plaintiffs, whether or not that belief is correct. Accordingly, out of an abundance of caution, the Court grants Plaintiffs' Motion pursuant to Rule 60(b)(6).

D. Motion for Default Judgment

The Court further concludes that Plaintiffs should resubmit their Motion for Default Judgment and supplement their motion with the appropriate legal standards, facts, and analysis.[8]

E. Damages Hearing

In their Motion, Plaintiffs request that the Court take "judicial notice of the $8,659,200.00 damages award in *Sandi Johnson, et al*"—in essence requesting that the Court assess the damages amount as determined by a jury in *Johnson I* against the Defendants in the instant case.[9] Mot. 3. The Court declines to do so. It is well established within

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[8] For example, *Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998), sets forth the factors for establishing default judgment and *Nihimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975), explains that a party moving for default judgment must ensure that its pleadings have established a viable claim for relief.

[9] The case Plaintiffs cite to support their argument is inapposite. *Salazar v. Islamic Republic of Iran* merely states, in a footnote, that "a court may take judicial notice of related proceedings and records in cases before the same court" but notes that a party opposing judicial notice of a given fact "must be afforded an opportunity to be heard." 370 F. Supp. 2d 105, 109 n.6 (D.D.C. 2005). Plaintiffs assert that the "implicit rule of *Salazar et al.* is that defaulting defendants have no grounds to object when the court takes judicial notice of its finding in related proceedings in the same court." Mot. 4–5. The Court does not object to the rule that it may take judicial notice of its findings in related proceedings held before it. However, the rule that Plaintiffs derive from *Salazar* does not bear upon the ability of the Court to

this Circuit that, while a court may take judicial notice of related proceedings and court records from previous cases from before the same court, a "court cannot take judicial notice of factual findings of another court." *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 829 (5th Cir. 1998). Thus, Plaintiffs' request that the Court assess damages against Defendants as determined by a jury in *Johnson I* is denied.

Accordingly, the Court concludes that a hearing is necessary to determine damages in the above-captioned cause and therefore grants Plaintiffs' request for an evidentiary hearing on damages. (*United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979) "The case law is clear that a judgment by default may not be entered without a hearing unless the amount claimed is a liquidated sum or one capable of mathematical calculation.")

IV. CONCLUSION

The Court concludes that Plaintiffs' Motion should be granted and that Plaintiffs should be afforded relief from the Court's final judgment issued on January 17, 2014.

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assess damages in this case based upon the damages determined in *Johnson I*. Thus, the Court concludes that this footnote does not support Plaintiffs' view that the Court may assess damages in the instant case based on a damages award in a previous case.

IT IS ORDERED that Plaintiffs Sandi Johnson and Cary Johnson's "Motion to Reconsider" (ECF No. 31) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs Sandi Johnson and Cary Johnson resubmit their Motion for Default Judgment, pursuant to the guidelines provided by the Court, by **July 7, 2014**, at **5:00 p.m. Mountain Time**.

IT IS FINALLY ORDERED that the above-captioned cause is scheduled for an **EVIDENTIARY HEARING** in Courtroom 622, on the Sixth Floor of the United States Courthouse, 525 Magoffin Avenue, El Paso, Texas, for **July 14, 2014,** at **8:00 a.m. Mountain Time.**

SIGNED this **13th day** of **June, 2014**.

PHILIP R. MARTINEZ
UNITED STATES DISTRICT JUDGE