UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Case No.: 1:99CV1193
	)	
Plaintiff,	)	
v.	)	JUDGE POLSTER
	)	
JOHN DEMJANJUK,	)	
(a/k/a Iwan Demjanjuk)	)	
	)	
Defendant.	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT JOHN DEMJANJUK'S MOTION TO RECONSIDER MEMORANDUM OF OPINION AND ORDER OF DECEMBER 20, 2011

INTRODUCTION

John Demjanjuk's Motion to Reconsider Memorandum of Opinion and Order of December 20, 2011 ("Motion" or "Motion to Reconsider") provides no legal or factual basis for reconsideration. Demjanjuk does not suggest that he is presenting any facts that were not known to him at the time that his Rule 60 motion was pending, and he cites no legal authority in support of his Motion. Instead, he rehashes old arguments, raises specious claims of "unresolved contradictions" that he could have raised earlier, and offers evidence that was previously in his possession, much of which actually strengthens the Government's case and none of which calls into question the soundness of this Court's decisions. Demjanjuk's meritless request for this Court to revisit matters it has conclusively decided is nothing more than an effort to prolong this litigation by any means necessary, and it should be denied.

ARGUMENT

Demjanjuk cites no legal basis for his Motion for Reconsideration, but he is essentially asking the Court to reverse the Order that it entered under Fed. R. Civ. P. 60 denying his request for extraordinary relief. While "the Federal Rules [of Civil Procedure] do not contemplate motions to 'reconsider and vacate'" judgments, "a motion which asks a court to vacate and reconsider, or even to reverse its prior holding, may properly be treated under Rule 59(e) as a motion to alter or amend a judgment." Smith v. Hudson, 600 F.2d 60, 62-63 (6th Cir. 1979). See also Moody v. Pepsi-Cola Metropolitan Bottling Co., 915 F.2d 201, 206 (6th Cir. 1990) (treating motion to reconsider as motion to amend or alter judgment under Rule 59(e)).

"[A] motion to reconsider should not be used to re-litigate issues previously considered." American Marietta Corp. v. Essroc Cement Corp., 59 F. App'x. 668, 671-72 (6th Cir. 2003). Rather, a court may grant a Rule 59(e) motion only if the moving party shows "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." ACLU of Ky. v. McCreary County, 607 F.3d 439, 450 (6th Cir. 2010) (internal citations omitted).

Demjanjuk has not presented evidence that any of these prerequisites for invoking Rule 59(e) exists. Rather, he "has done no more here than repeat and belabor the same arguments" that he raised in his original motion for Rule 60 relief. Brickner v. Voinovich, 55 F. App'x. 241, 243 (6th Cir. 2002). Therefore, his motion for reconsideration should be denied.

Demjanjuk attaches publicly available 1985 congressional testimony given by Office of Special Investigations ("OSI") then-Director Neal Sher (Def. Exh. B) and contends that it supports his prior claim that the Cleveland FBI was investigating Demjanjuk. (Motion at 3).

Specifically, he cites Sher's unremarkable statement that OSI routinely checked with the FBI and other federal agencies when investigating suspected Nazi criminals. Rather than providing new information, Sher's 1985 public testimony, which has been available for decades, is perfectly consistent with the Government's evidence -- specifically, statements that Sher and former OSI trial attorney Jonathan Drimmer made in affidavits supporting the United States' Opposition to Motion to Reopen ("Opposition") and that were summarized in the Opposition at 32: "[P]er its standard practice, in August 1979, prior to the start of the first denaturalization trial, OSI checked with the FBI and with other U.S. agencies seeking any records pertaining to Demjanjuk, and had received a response that the FBI possessed no records on John Demjanjuk." (Opposition at 32; Attachments 26 ¶ 4, 25 ¶ 4).

Similarly unavailing is Demjanjuk's citation to his Exhibit A (a 1985 FBI teletype) as evidence that the Cleveland FBI was involved in investigations of Demjanjuk and other alleged Nazi war criminals. (Motion at 3). As is obvious from its text, this document, produced to Defendant before he filed his Rule 60 Reply Brief, is nothing more than a routine FBI response to a request it received from its Italian counterpart, the Italian National Police, for mugshots and fingerprints of John Demjanjuk, which the Bureau obtained from the Cuyahoga County Sheriff's Department. The contention that this document indicates that the Cleveland FBI was "investigating" John Demjanjuk or his wartime activities cannot be taken seriously.

Demjanjuk belatedly informs the Court that in June 2011, the Federal Public Defender contacted a private investigative firm and requested assistance with interviewing witnesses in Demjanjuk's hometown of Dubovi Makharyntsi, Ukraine. (Def. Exh. E ¶ 4). While Demjanjuk suggests that the investigative firm has found new, exculpatory information, the investigative

report (id.) shows that what was "uncovered" is not helpful to Demjanjuk. According to the report's author, the Federal Public Defender first contacted her firm a month before it filed its Rule 60 Motion. (Id. ¶ 4). She acknowledges that her investigator first spoke to both interviewees from Dubovi Makharyntsi cited in her report on October 20, 2011, nearly two weeks before Demjanjuk filed his Reply Brief in support of his Rule 60 Motion, and again on November 16 and 17, 2001, over a month before the Court ruled on the Motion. (Id. ¶¶ 6, 15). Indeed, Demjanjuk could have interviewed these people in Ukraine at least two decades ago. He does not explain why he failed to do so or why he did not bring his information to the Court's attention in a timely manner.

Even if Demjanjuk had timely notified the Court of this investigation, its results would not support his motion because they are not exculpatory. Demjanjuk suggests that his investigator has uncovered new evidence supporting his fanciful and long-ago discredited theory that his cousin, Ivan Andreeovich Demjanjuk, was the Ivan Demjanjuk who served the Nazis as an armed death camp and concentration camp guard. Specifically, he cites her interview with the son of a man named Petro Bondaruk, regarding an interview that the KGB conducted of his father in 1969. (Id. ¶¶ 15-27). The fact that the KGB searched for Ivan Demjanjuk in Dubovi Makharyntsi in 1969 is not new information – the Court discussed this in its 2002 denaturalization decision and rejected the notion that this search indicated that Ivan Andreeovich Demjanjuk was the Nazi camp guard Ivan Demjanjuk. United States v. Demjanjuk, No. 1:99 CV 1193, 2002 WL 544622, *13 (N.D. Ohio Feb. 21, 2002). Moreover, to the extent that Bondaruk's hearsay statements regarding what his father purportedly told him about his interview with the KGB would be admissible, the statements are actually consistent with the

Court's finding. According to the investigator, Bondaruk's son said that the KGB asked his father if a photo (of Ivan Andreeovich Demjanjuk) depicted his father's long-ago friend, Ivan M. Demjanjuk (i.e., the defendant in the instant case). His father told his questioner(s) – correctly – that it did not. (Def. Exh. E). Assuming Bondaruk's recounting of his father's 1969 encounter with the KGB is accurate, at most it indicates that, years prior to the U.S. Government's filing of the initial denaturalization case against Defendant, the KGB explored the possibility that Ivan Andreeovich Demjanjuk was the Nazi guard they were seeking, and Bondaruk confirmed for them that he was not. Thus, Bondaruk's purported statements to the KGB further undermine the argument that Ivan A. Demjanjuk was the man who served the Nazis at Sobibor and other camps.[1]

In addition, according to Bondaruk's son, his father said that "Ivan A. Demjanjuk was skinny, and Ivan M. Demjanjuk was rather a big and strong man." (Id. ¶ 18). As the Court has found, admitted Sobibor guard Ignat Danilchenko described the Demjanjuk who served with him there as "heavyset." Demjanjuk, 2002 WL 544623 *3, 4. Moreover, as Demjanjuk knows but does not mention, Bondaruk identified him in three photospreads shown to him by a Soviet prosecutor in 1979. The photospreads and protocols (statements) were produced to Defendant in 1987 and 1999.

Similarly, in his Motion for Reconsideration, Demjanjuk for the first time argues that the Government withheld a statement that purportedly was taken from Ignat Danilchenko by the Soviets in 1983 or 1984.[2] Demjanjuk does not explain why he did not previously raise the

[1] Bondaruk died in 2007, and the other two witnesses allegedly having personal knowledge of Demjanjuk referenced in Defendant's Exhibit E died in 2003 and June 2011. (Def. Exh. E ¶ 14).

[2] The Government long ago produced to Demjanjuk all Danilchenko statements it possessed. As is

possible existence of a 1983 or 1984 Soviet-taken statement about Sobibor, even though Demjanjuk raised this argument with the court in Germany months before he filed his Rule 60 motion. According to an Associated Press story published in February 2011, Demjanjuk's German defense attorney moved the German court early that month to locate a purported 1983/1984 Danilchenko statement. (See, e.g., www.usatoday.com/news/world/2011-02-09-demjanjuk-trial_N.htm). The Munich court rejected Demjanjuk's motion and it convicted him three months later.

documented in the e-mail attached as Defendant's Exhibit D to the Motion, in February 2011, in response to a request from the German prosecutor, the Government searched for and did not locate any additional Danilchenko statements. The e-mail shows that several days later, through additional research, the Government located and sent to the German prosecutor and judge a link to and copy of a page of a book containing excerpts of a reported 1985 Danilchenko statement taken by the Soviet government for the German authorities in the re-prosecution of former Sobibor SS officer Karl Frenzel. As those excerpts indicate, and as Demjanjuk knows because he obtained the full statement, during his trial in Germany, it does not mention him. See "Demjanjuk Defense Says it Has New Evidence" http://abcnews.go.com/International/wireStory?id=12864615.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that this Court deny Defendant's Motion for Reconsideration.

Dated: January 12, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2012, I electronically filed the foregoing Government's Opposition to Defendant John Demjanjuk's Motion to Reconsider Memorandum of Opinion and Order of December 20, 2011 with the Clerk of the Court using the CM/ECF system which will send notification to the attorneys of record for Defendant:

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I hereby certify that on January 12, 2012, I sent a copy of the foregoing Government's Opposition to Defendant John Demjanjuk's Motion to Reconsider Memorandum of Opinion and Order of December 20, 2011 to Michael Tigar, who is counsel of record for Defendant, but who is not registered to receive notification through the CM/ECF system:

Michael E. Tigar
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/s Susan Masling
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