

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 11-80331-CV-HURLEY/HOPKINS

**JONATHAN E. PERLMAN,
Plaintiff,**

vs.

**BANK OF AMERICA, N.A.,
Defendant.**

ORDER ON PLAINTIFF’S MOTION FOR CLARIFICATION

THIS CAUSE comes before the Court upon Plaintiff’s Motion for Clarification of the Court’s Order Denying Motions for Reconsideration [ECF No. 103]. Plaintiff requests clarification as to whether the Court’s prior order functioned as an “indicative ruling” under Fed. R. Civ. P. 62.1(a)(3). Rule 62.1(a)(3) states that when a district court lacks authority to grant a motion due to the pendency of an appeal, the court may “state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.”

When the Court denied Plaintiff’s motions for reconsideration, it did so primarily because the twenty-eight-day deadline under Rule 59 had lapsed. The Court also noted that Plaintiff’s Notice of Appeal [ECF No. 88] divested it of jurisdiction to consider the motion. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). However, even if this appeal were not pending, the Court would be unable to grant the relief requested because of the expiration of the Rule 59 deadline. Thus, Rule 62.1(a)(3) does not apply, because the Court only indicated that Plaintiff’s motion for reconsideration would have raised a substantial issue if (1) the Court had not lost jurisdiction by operation of the notice of appeal, and more importantly, (2) if the motion for

Order on Motion for Clarification
Perlman v. Bank of America, N.A.
Case No. 11-cv-80331-DTKH

reconsideration had been timely filed. As it stands, the motion for reconsideration does not raise a substantial issue in the absence of the appeal because it was untimely.

Plaintiff notes that its untimely Rule 59 motion could be construed as a motion under Rule 60(b), to which the 28-day jurisdictional bar would not apply. *Mahone v. Ray*, 326 F.3d 1176, 1177-78 n.1 (11th Cir. 2003). However, Plaintiff failed to demonstrate that the prerequisites for relief under Rule 60(b) were satisfied. *Gates v. Syrian Arab Republic*, 646 F.3d 1, 5 (D.C. Cir. 2011). Specifically, Plaintiff did not show that the “newly discovered evidence” included in the motions for reconsideration could not have been discovered in time to file the motions prior to the Rule 59 deadline as would be required under Rule 60(b)(2). In addition, Plaintiff did not explain why this case would fall within the exceedingly narrow catch-call provision of Rule 60(b)(6). *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). For these reasons, Plaintiff is not entitled to relief under Rule 60(b), and recharacterization of its Rule 59 motion would be unavailing.

In light of the foregoing, it is hereby **ORDERED** and **ADJUDGED** that to the extent Plaintiff seeks clarification beyond that provided in this Order, Plaintiff’s motion [ECF No. 103] is **DENIED**.

DONE and **SIGNED** in Chambers in West Palm Beach, Florida, this 16th day of July, 2012.


Daniel T. K. Hurley
United States District Judge

Copies to counsel of record