ALM | LAW.COM

New York Law Journal

SECOND CIRCUIT REVIEW

The Meaning of 'Misconduct' Under Rule 60: 'Adidas America, Inc. v. Thom Browne'

By Martin Flumenbaum and Brad S. Karp
May 27, 2026

In *Adidas America, Inc. v. Thom Browne, Inc.*, No. 24-1510,—F.4th—(2d Cir. Apr. 29, 2026), the U.S. Court of Appeals for the Second Circuit addressed whether a party's negligent failure to produce relevant documents during discovery constitutes "misconduct" warranting relief from a final judgment under Federal Rule of Civil Procedure 60(b)(3).

In a unanimous opinion authored by Circuit Judge Michael H. Park, joined by Senior Circuit Judge José A. Cabranes and Circuit Judge Beth Robinson, the Second Circuit affirmed the district court's denial of adidas's motion for relief from judgment, holding that adidas failed to show the newly discovered evidence probably would have changed the verdict under Rule 60(b)(2), and a merely negligent discovery violation does not constitute "misconduct" under Rule 60(b)(3).

The decision is significant because, on an issue of first impression in the circuit, the court established that "misconduct" under Rule 60(b)(3) requires more than mere negligence—aligning the standard with the heightened culpability required for comparable remedies under Rule 37.

MARTIN FLUMENBAUM *and* BRAD S. KARP *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, specializing in complex commercial and white-collar defense litigation.* MICHAEL J. PISEM, *a litigation associate with the firm, assisted in the preparation of this column.*

Martin Flumenbaum

Brad S. Karp

Background and the District Court's Decision

Adidas sued Thom Browne for trademark infringement, trademark dilution, and unfair competition over Thom Browne's use of its Four-Bar motif in a new line of activewear, claiming they are similar to adidas's "Three-Stripe" mark. The case went to trial before Judge Jed S. Rakoff in the Southern District of New York, and the jury found Thom Browne not liable on all counts. Adidas appealed to the Second Circuit, and the verdict was upheld.

While that appeal was pending, Thom Browne produced several new emails in a separate litigation between the parties in the United Kingdom. These emails included internal discussions among Thom Browne executives expressing concern the four-bar could "look like Adidas" and that "it is inevitable that our 4bar in white be read as adidas stripes" on designs being made for FC Barcelona One email from

Thom Browne himself stated that "we shouldn't use the four bar because of adidas..."

Adidas moved for relief from the final judgment under Rules 60(b)(2) and 60(b)(3), which provides that "on just terms" a court can relieve a party from a final judgment because of newly discovered evidence or "fraud..., misrepresentation, or misconduct by an opposing party."

The district court held an evidentiary hearing and found that the non-production of these emails resulted from a paralegal's mass edit on documents containing the search term "adidas," which changed their coding fields to "needs further review," excluding them from Thom Browne's counsel's review workflow, ultimately resulting in the documents not being reviewed or produced. However, the district court denied adidas's motion, finding that the emails probably would not have changed the verdict under Rule 60(b)(2) and that Thom Browne's counsel did not act negligently under Rule 60(b)(3).

The Second Circuit's Analysis

Rule 60(b)(2): Newly Discovered Evidence

Under Rule 60(b)(2), a movant must demonstrate, among other things, that newly discovered evidence was "of such importance that it probably would have changed the outcome." The Second Circuit discerned no abuse of discretion in the district court's denial of adidas's motion on this ground.

The court identified three reasons the emails probably would not have changed the verdict. First, the emails do not bear directly on any of the relevant factors under *Polaroid Corp. v. Polarad Elecs. Corp.,* 287 F.2d 492, 495 (2d Cir. 1961) for determining whether an allegedly infringing product created a reasonable likelihood of confusion. Although adidas characterized the emails as "admissions" that confusion was likely, likelihood of confusion is an objective standard, and the emails reflected only executives' opinions.

Second, more direct evidence of consumer confusion—such as a consumer survey adidas presented—did not persuade the jury, making it unlikely that the emails would have made a difference. Third, the emails did not address Thom Browne's main defenses—that adidas claimed to "own all stripe designs" and that the companies in fact compete in different markets at different price points. The district court, which had the benefit of observing the trial, did not err in finding the newly discovered evidence probably would not have changed the outcome.

Rule 60(b)(3): The Meaning of "Misconduct"

The more significant aspect of the decision is the court's analysis of Rule 60(b)(3), which provides that a court may relieve a party from a final judgment for "fraud..., misrepresentation, or misconduct by an opposing party." On an issue of first impression, the Second Circuit interpreted the meaning of "misconduct" under Rule 60(b)(3), holding that it does not encompass merely negligent discovery violations.

The court acknowledged that the term "misconduct" is "susceptible to different meanings," and therefore looked to the surrounding Federal Rules of Civil Procedure for guidance. Critically, the court turned to Rule 37, which governs discovery sanctions. Under Rule 37(e)(2), the most severe sanctions—an adverse inference instruction, dismissal, or default judgment—may be imposed only when a party "acted with the intent to deprive another party of the information's use in the litigation."

The court reasoned that just as a negligent discovery violation would not support sanctions comparable to vacating a final judgment under Rule 37, negligent violations likewise should not justify the "extraordinary judicial relief" of vacating a final judgment under Rule 60(b)(3). If it did, the court observed, a party could obtain a new trial for negligent conduct that typically would merit only a modest discovery sanction, such as cost-shifting, which would be an anomalous result.

The court also examined historical evidence, finding it consistent with its conclusion. Before Rule 60(b), courts focused on the presence or absence of conduct akin to fraud when discussing an opposing party's wrongdoing as an equitable ground for relief.

The rules committee's proceedings on Rule 60 in 1945 and 1946 indicated that the rule was

drafted with intentional wrongful acts in mind, such as "tricks played by one party upon the other." Given the "incorporation of fraud and the like within the scope of the rule," the court found that the most natural understanding of "misconduct" is that—like fraud—it requires more than mere negligence.

The court emphasized the severity of the remedy in Rule 60 as well. Emphasizing that "final judgments should not be lightly reopened," the court stressed that vacating a jury verdict would deprive Thom Browne of the benefit of a judgment obtained after trial and appeal, cause it to operate under a cloud of legal liability, and force it to expend additional resources defending the case anew. While intentional discovery violations may warrant such consequences, mere negligence does not.

Finally, the court rejected adidas's argument that reading "misconduct" to require more than mere negligence would render it redundant with "fraud" and "misrepresentation." The court noted that "misconduct" can encompass intentional acts that do not involve deception or trickery (i.e., fraud) or the making of a false or misleading statement (i.e., misrepresentation), giving as an example "filing meritless motions and pleadings to induce delay and cause their opponent to incur needless expenses." Therefore, reading rule 60(b)(3) to require more than mere negligence did not violate the canon against surplusage.

Having established the legal standard, the court then assessed Thom Browne's discovery violation of not producing the emails. Citing *Pension Comm. of Univ. of Montr. Pension Plan v. Banc of Am. Secs.*, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010), the court held that negligence in discovery is "a failure to conform to the standard of what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding."

The Second Circuit disagreed with the district court's finding that Thom Browne's counsel did not act negligently, holding instead that an associate's failure to review the four emails at issue—despite their obvious relevance and their "needs further review" tag—did constitute negligence in discovery.

But the court concluded that the conduct was "no worse than negligent." Counsel took the "widely-recognized step" of reviewing potentially responsive documents, "but apparently missed some" documents, mismanaging its discovery review. While negligent, the conduct did not rise to gross negligence or reckless behavior, and, while the court declined to decide which level of culpability would be needed for a reversal under Rule 60(b)(3), mere negligence was insufficient for adidas to be entitled to relief from the judgment.

Conclusion

The Second Circuit's decision in *Adidas v. Thom Browne* has significant practical consequences for parties seeking post-judgment relief based on an opponent's discovery failures. A merely negligent discovery violation—even one resulting in the non-production of relevant documents—does not constitute "misconduct" under Rule 60(b)(3). By anchoring its analysis in the text and structure of the Federal Rules and the severity of the remedy, the court aligned the standard for vacating a final judgment with the heightened culpability requirements for comparable sanctions under Rule 37.

Lesser discovery failures remain subject to lesser sanctions such as cost-shifting or compelled production, but they cannot support reopening a case after verdict. Going forward, parties seeking relief under Rule 60(b)(3) based on an opponent's discovery failures must demonstrate conduct worse than negligence—though the court expressly declined to define the precise level of culpability (e.g., gross negligence or recklessness) that would suffice.