Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-206

MARCH TERM, 2003

Merike Petrich	}	APPEALED FROM:
	}	
	}	
v.	}	Windsor Superior Court
	}	
Twin Pines Housing Trust, Inc. and	}	
Wallace Roberts	}	DOCKET NO. 236-5-96 Wrcv
		Trial Judge: Alan W. Cook

In the above-entitled cause, the Clerk will enter:

Plaintiff Merike Petrich appeals the Windsor Superior Court's denial of her motion for relief from judgment under V.R.C.P. 60(b). We find no abuse of the trial court's discretion in ruling on her motion, and we affirm.[1]

The facts essential to the disposition of this case are undisputed. In May 1996, plaintiff filed a complaint for damages against her former employer, defendant Twin Pines Housing Trust, and her supervisor, defendant Wallace Roberts, following her termination from Twin Pines. At the beginning of trial in January 1998, plaintiff entered into a settlement agreement with Roberts. In the settlement, Roberts agreed to a judgment against him for $150,000, and assigned his right to pursue Twin Pines's insurer to collect on the judgment. In exchange, plaintiff agreed not to seek satisfaction of the judgment from Roberts personally. Trial proceeded against Twin Pines. At the close of the trial, the jury found for plaintiff and awarded her $150,000 in damages. Twin Pines appealed the verdict to this Court.

In March 1999, while the appeal was pending here, the insurer for Twin Pines filed a petition for declaratory relief against Roberts and plaintiff in the United States District Court for the District of New Hampshire. The insurer, known as AXA, sought a declaration that it was not responsible under the Twin Pines policy to satisfy the judgment against Roberts or Twin Pines. Plaintiff was not represented by counsel in the federal action. Nevertheless, through their respective counsel in the state litigation, the parties engaged in settlement discussions. The key settlement communications took place in late November and early December 1999.

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[1] Plaintiff moved to have this case heard by the full Court, noting that the decision of the three-justice panel would not have precedential effect and arguing that this case is as important as others heard by the full Court. Because we conclude that this case does not meet the standards of V.R.A.P. 33.2(b), we deny the motion.

On November 30, 1999, plaintiff sent an email to her attorney rejecting an offer to settle the claim against Twin Pines that had been communicated to her previously. In her message, plaintiff stated: "[M]y last and most generous offer is [$]150,000 within 10 days, plus they drop the federal case and I will not try to collect from AXA." Plaintiff's attorney communicated plaintiff's offer to opposing counsel and informed him that the offer was open until December 10, 1999. On December 9, 1999, plaintiff received two emails from her attorney. The first email she opened and read contained a counteroffer of $120,000 and a query from her attorney about authorizing him to offer $140,000 in response. Plaintiff responded immediately and indicated that she would not accept anything less than $150,000. Her attorney's second email stated that the counteroffer included an agreement to drop all other claims, including the federal declaratory action. Plaintiff's response to the second email stated, in pertinent part, "Sure, for $150,000, but not for $120,000." A few minutes after she sent her response to her attorney's second email, plaintiff sent another response which stated that she would require another $10,000 to drop the case in New Hampshire. Before learning about that second email, plaintiff's counsel communicated plaintiff's offer to settle all claims, including the claims pending in federal court in New Hampshire, for $150,000. The following day, opposing counsel faxed a letter to plaintiff's counsel accepting the terms of the $150,000 offer.

After the terms of the settlement were agreed to in December 1999, plaintiff decided to back out of the agreement. We remanded Twin Pines' appeal of the jury verdict back to the superior court to determine whether an enforceable settlement agreement existed. Upon remand to the superior court, plaintiff moved for relief from the judgment under V.R.C.P. 60(b). In her motion, plaintiff alleged that her attorney inadequately represented and advised her in the negotiation process which resulted in a settlement to which she had not intended to agree. Twin Pines moved to enforce the settlement. The superior court held evidentiary hearings on both motions on September 22, October 19, and December 19, 2000.[2] On December 26, 2000, the court issued a written decision declaring that the parties had entered into a binding and enforceable settlement agreement, and denied plaintiff's relief under V.R.C.P. 60(b). The court's findings and conclusions reflect that the communications of November and December 1999 were dispositive of the issue. Plaintiff thereafter filed two motions for a new hearing, which the court denied in early 2001. On March 12, 2001, plaintiff appealed the matter to this Court, and we dismissed the appeal as untimely on May 9, 2001.

On October 10, 2001, plaintiff filed another Rule 60(b) motion, which she amended on November 6, 2001. In her motion, plaintiff made several allegations against her attorney, including that he fraudulently induced her to settle in December 1999 by misrepresenting the settlement with Roberts to her, withholding critical information about the Roberts settlement, and lying during the hearings on the existence and enforceability of the December 1999 settlement. In particular, she alleged that her lawyer lied when he testified that he was unaware of her second email on December 9 upping the settlement offer by $10,000 to drop the federal lawsuit. She argued that she was entitled to relief under Rule 60(b)(2) (newly discovered evidence), (3) (judgment procured through fraud), and (6) (any other reason justifying relief). The court convened an evidentiary hearing on plaintiff's motion on March 12, 2002. By order dated April 4, 2002, the court denied plaintiff relief under Rule 60(b), and plaintiff filed the present appeal.

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[2] Plaintiff's attorney was granted permission to withdraw on May 9, 2000, and plaintiff has represented herself pro se since that time at the superior court and in this Court.

Before addressing the substance of plaintiff's appellate claims, it is important to state that the trial court's December 26, 2000 order finding the existence of an enforceable settlement between the parties is not subject to review in this appeal because plaintiff did not timely appeal that order as we indicated previously. The only order subject to review here is the trial court's April 4, 2002 order denying plaintiff relief under V.R.C.P. 60(b). It is well settled that whether to grant relief under Rule 60(b) is a matter committed to the trial court's discretion. Richwagen v. Richwagen, 153 Vt. 1, 3 (1989). We will reverse the court's disposition of the motion only where the record clearly and affirmatively shows that the court withheld or abused its discretion in ruling on the motion. Id. at 3-4; see also Bardill Land & Lumber, Inc. v. Davis, 135 Vt. 81, 82 (1977). Rule 60(b) provides relief only in extraordinary circumstances and is not intended to allow the court to reconsider matters disputed and resolved at trial. See John A. Russell Corp. v. Bohlig, 170 Vt. 12, 24 (1999). In addition, the Rule offers no protection from ill-advised tactical decisions or counsel's "careless ignorance of the law." Rule v. Tobin, 168 Vt. 166, 174 (1998).

Characterizing the April 4, 2002 decision on her Rule 60(b) motion as vague and confused, plaintiff claims the court committed reversible error by failing to adequately address her claims of fraud. She argues that she obtained numerous documents after the December 26, 2000 decision that demonstrate collusion between her lawyer and Twin Pines to secure a judgment that was based on fraud and perjury by her lawyer. According to plaintiff, the additional evidence she gathered after the December order issued would have destroyed her lawyer's credibility during the hearings in the fall of 2000, and he was the only witness who testified in support of Twin Pines's claim that the parties had settled in December 1999. As a result, plaintiff argues, the court would have found that her lawyer lied about not seeing the second email she sent on December 9, 1999 until after Twin Pines had accepted her $150,000 offer, and, consequently, the parties had not in fact reached a settlement. In essence, plaintiff seeks to reopen the judgment to allow her another opportunity to impeach her lawyer's credibility.

None of the evidence plaintiff submitted, nor the arguments she sets forth in her brief, persuade us that the trial court abused its discretion by denying her motion. First, Rule 60(b)(2), which gives the court discretion to reopen a judgment based on newly discovered evidence, does not contemplate relief when the new evidence is cumulative or impeaching only. See Good v. Ohio Edison Co., 149 F.3d 413, 423 (6th Cir. 1998) (newly discovered evidence under F.R.C.P. 60(b)(2) "cannot be merely impeaching or cumulative"); Weissmann v. Freeman, 120 F.R.D. 474, 476 (S.D.N.Y. 1988) (same). The court did not, therefore, abuse its discretion by denying plaintiff another opportunity to prove her claim that her lawyer's testimony at the settlement hearings in the fall of 2000 was not credible.

Second, although the trial court may provide relief under Rule 60(b)(3) on the basis of fraud, the fraud must have been perpetrated by an adverse party. V.R.C.P. 60(b)(3) (court may provide relief from judgment where judgment was obtained by "fraud . . . , misrepresentation, or other misconduct of an adverse party"). In this case, plaintiff alleges that she was misled and lied to by her attorney rather the adverse party in this case, Twin Pines. Therefore, 60(b)(3) is inapplicable to plaintiff's claim, and the court did not abuse its discretion in so concluding.[3] Moreover, although plaintiff is convinced that her

[3] Plaintiff believes her claim of fraud is analogous to the fraud found in Bardill Land & Lumber, Inc. v. Davis, 135 Vt. 81 (1977). We disagree. For Bardill to be analogous to this case, plaintiff would have to present evidence showing that Twin Pines itself submitted a "false answer to a specific inquiry" under oath. Id. at 82. No such evidence appears in the record.

attorney and Twin Pines colluded to procure a settlement from her through fraudulent means, the record lacks any evidence to support her conviction.

Third, relief under Rule 60(b)'s catchall provision, subsection (b)(6), is intended to prevent hardship and injustice. Richwagen, 153 Vt. at 4. Although it must be liberally construed, "there are necessarily limits on when relief is available." Id. For example, one may invoke subsection (b)(6) "only when a ground justifying relief is not encompassed within any of the first five subsections of the rule." Olde & Co. v. Boudreau, 150 Vt. 321, 323 (1988). Here, plaintiff's claims center on the evidence she gathered after the December 2000 judgment which she asserts proves her lawyer provided misleading legal advice prior to the settlement and untruthful testimony at the settlement hearing. As such, her claims fall within the (b)(2) category, and relief under (b)(6) is unavailable.

Plaintiff also argues that the court denied her an adequate opportunity to present her motion by failing to swear her in at the March 12, 2002 hearing, providing her with only thirty minutes to present evidence and arguments on her motion, and preventing her from demonstrating that the findings in the December 26, 2000 order were clearly erroneous. She also asserts that the court was biased against her and should have allowed her to present her motion to a jury. Even assuming those claims have merit, plaintiff never brought them to the trial court's attention in the first instance. Therefore, the claims are waived on appeal. Harrington v. Dep't of Employment & Training, 152 Vt. 446, 448 (1989). As to her claim of bias, it is based largely on how the court decided her motion. Adverse rulings do not demonstrate bias. State v. Streich, 163 Vt. 331, 355 (1995).

Like the trial court, we are mindful of Twin Pines's interest in the finality of the settlement judgment, especially because Twin Pines rightly believed that the litigation with plaintiff had come to an end in December 1999 when it accepted plaintiff's settlement offer. See Richwagen, 153 Vt. at 4 (courts must be concerned with the finality and certainty of judgments "so that litigation can reach an end"). As the trial court noted, plaintiff's current dispute is, in reality, with her attorney. She may consider pursuing other remedies for his alleged transgressions. But on this record, it would be unfair to deny Twin Pines the benefit of its 1999 agreement for reasons unrelated to Twin Pines. The litigation between plaintiff and Twin Pines must now come to an end. The trial court did not abuse its discretion by so deciding.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice