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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-369

MARCH TERM, 2007

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| Edward Brady and Rosemary Brady | } | APPEALED FROM: |
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| | } | |
| v. | } | Chittenden Superior Court |
| | } | |
| CU York Insurance Co., One Beacon | } | |
| Insurance Co., and J.W. & D.E. Ryan Inc. | } | DOCKET NO. S1223-02 CnC |
| | | Trial Judge: Ben W. Joseph |

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

Plaintiffs Edward and Rosemary Brady appeal from the superior court's denial of their motion for relief from judgment. We affirm.

This is the second time that this case is before us. In the first appeal, a panel of this Court affirmed the superior court's judgment enforcing a settlement agreement reached by the parties following mediation of plaintiffs' suit against their homeowner's insurance carrier, defendant CU York Insurance Company/One Beacon Insurance Group (York/OneBeacon), and their plumber, defendant J.W. & D.E. Ryan (Ryan). See Brady v. CU York Ins. Co., Docket No. 2005-323 (March 29, 2006). Plaintiffs filed the underlying suit after being offered what they believed was inadequate compensation from York/OneBeacon for damages to their home caused by a cracked toilet tank allegedly resulting from Ryan's negligence. Following protracted litigation, plaintiffs signed a settlement agreement with defendants, but then refused to sign the releases presented to them in furtherance of the agreement.

After the superior court granted defendants' motion to enforce the agreement, plaintiffs appealed. Contemporaneous with the appeal, plaintiffs filed a motion for relief from judgment under V.R.C.P. 60(b). The court denied the Rule 60(b) motion before the appeal was decided. On appeal, we affirmed the superior court's decision to enforce the agreement, but ruled that the court did not have jurisdiction, while the appeal was pending, to rule on the 60(b) motion. Accordingly, we remanded the matter for the court to reconsider the motion. Upon remand, the court denied the motion without holding a hearing, ruling that plaintiffs had not made a sufficient showing that York/OneBeacon and Peerless were affiliated entities or had any kind of a business relationship that affected the instant case.

Plaintiffs' principal argument is that the superior court ignored their proffered evidence, which was sufficient to warrant an evidentiary hearing on their Rule 60(b) motion. In their motion, plaintiffs sought relief from judgment under subsection 60(b)(3), alleging that York/OneBeacon engaged in fraud and misconduct by failing to disclose its membership in the same insurance group that included Peerless Insurance, Ryan's insurer. In response to the motion, Ryan filed an affidavit of a claims manager for Peerless stating that neither Peerless nor its owner, Liberty Mutual Insurance Company, is in the same insurance group or has a corporate affiliation with York/OneBeacon. In turn, Edward Brady submitted an affidavit stating that (1) he agreed to accept the settlement based on the assumption that it was the best that he could get after arm's length negotiations between independent parties that were independently insured; (2) he relied on assurances that York/OneBeacon and Peerless did not have ties to each other; (3) had he known that York/OneBeacon and Peerless belonged to the same insurance group, he would have held out for a higher settlement; (4) during the May 2005 hearing on defendants' motion to enforce the settlement, he "got an inkling" that York/OneBeacon and Peerless were linked when Ryan's attorney stated that he was "just along for the ride"; (5) he obtained a document published by A.M. Best Company indicating that, effective November 2001, Liberty Mutual and OneBeacon Insurance Group had entered into a transaction transferring operations in forty-two states from OneBeacon to Liberty Mutual's Regional Agency Markets Business Units.

Defendants responded with an affidavit from Liberty Mutual's Vice-President of Claims, Regional Companies of Agency Markets, stating that (1) neither Peerless nor Liberty Mutual is affiliated with York/One Beacon; (2) the 2001 transaction referred to in the A.M. Best report contemplated the transfer of business from OneBeacon to Liberty Mutual but did not include insurance policies issued by OneBeacon in New England, New York, or New Jersey; (3) before and after the 2001 transaction, Pearless and York/OneBeacon operated as independent companies in Vermont competing with each other for business; and (4) because Peerless and York/OneBeacon operated as independent companies in Vermont, the settlement in this case was to be funded separately by the two companies. In turn, plaintiffs acknowledged that York/One Beacon and Peerless were not "technically" in the same group, but cited as "circumstantial" evidence of a financial connection between the two insurers a 2004 report from A.M. Best on OneBeacon referring to the in-house administration of claims previously managed by Liberty Mutual and noting that OneBeacon had been repositioned as a Northeast regional property-casualty company through its November 2001 agreement with Liberty Mutual, resulting in the transfer of approximately $1.5 billion in property/casualty premiums and associated infrastructure. Following the filing of these opposing memoranda and accompanying affidavits, the superior court concluded that defendants' affidavits demonstrated no business relationship between York/OneBeacon and Peerless, that the transaction described in the A.M. Best reports cited by plaintiffs did not involve Vermont, and that York/OneBeacon and Peerless were competitors in the Vermont marketplace and hence negotiated with plaintiffs as separate entities.

Plaintiffs contend that, based on the evidence they submitted, the superior court was compelled to hold an evidentiary hearing on their Rule 60(b) motion. We disagree. As we stated in this first appeal in this case, although generally a hearing should precede a decision on a motion to set aside a judgment, a court may deny such a motion without holding a hearing when the motion lacks merit. See Blanchard v. Blanchard, 149 Vt. 534, 537 (1988). Under V.R.C.P. 78(b)(2), a party

requesting the opportunity to present evidence "shall include a statement of evidence which the party wishes to offer." Based on this proffer, "the court may decline to hear oral argument and may dispose of the motion without argument." Id.

In this case, plaintiffs had a full opportunity to identify any evidence to prove that York/OneBeacon engaged in fraud and misconduct by failing to inform plaintiffs during settlement negotiations that the company was affiliated with Ryan's insurer. In separate affidavits, plaintiffs cited the two A.M. Best reports, York/OneBeacon's waiver of its subrogation rights against Peerless, and a comment allegedly made by Ryan's attorney indicating that York/OneBeacon's attorney was taking the lead in the case. None of this proffered evidence suggests that York/OneBeacon and Peerless were affiliated companies acting as a single entity in negotiating with plaintiffs. Plaintiffs cited no additional evidence to demonstrate that the two insurance companies were affiliated and conspired against plaintiffs. On the other side, in response to plaintiffs' allegations, defendants submitted affidavits unequivocally averring that the two companies were not affiliated and acted as independent entities with respect to the settlement negotiations. The affidavits expressly explained that the November 2001 transaction cited by plaintiffs did not apply in Vermont. In any event, given these submissions, the court acted well within its discretion in denying plaintiffs' motion without holding a hearing. See United States v. 8136 S. Dobson St., 125 F.3d 1076, 1086 (7th Cir. 1997) (concluding that plaintiff was unable to demonstrate how trial court abused its discretion by declining to hold hearing after offering plaintiff full opportunity to submit proffer of evidence in support of motion).

Plaintiffs complain that the superior court considered only part of the evidence that they submitted in support of their order, but the court's reference to plaintiffs' multiple "affidavits" demonstrated that it considered all of the documentation submitted by plaintiffs. In the end, plaintiffs' submissions amounted to nothing more than suspicion and speculation. The A.M. Best reports were vague and could not even remotely lead one to the conclusion that York/OneBeacon and Peerless acted as a single entity in negotiating with plaintiffs. Further, according to Edward Brady's own description, the comment by Ryan's attorney raised only "an inkling" of suspicion in him, not enough for him to raise the issue at the May 2005 hearing on the motion to enforce the settlement agreement. Moreover, York/OneBeacon's decision to waive its subrogation rights against Ryan no less suggests consideration for the contribution Ryan's insurer made to the settlement than it does fraud against plaintiffs. In short, even accepting as true that plaintiffs would have held out for more money if they had known that York/OneBeacon and Peerless acted as a single entity in the settlement negotiations, plaintiffs' submissions failed to support the motion's premise that the insurers were not independent entities. The court considered all of the parties' submissions with respect to plaintiffs' motion and acted within its discretion in denying the motion without holding an evidentiary hearing. See Lyddy v. Lyddy, 173 Vt. 493, 497 (2001) (mem.) (noting that trial court's decision on Rule 60(b) motion is committed to its sound discretion and will stand on review unless record indicates that such discretion was abused).

Plaintiffs also argue that the superior court erred by requiring them to prove their claim by clear and convincing evidence because they made a sufficient showing of a prima facie case and they claimed misconduct in addition to fraud. We find this argument unavailing. Plaintiffs explicitly alleged in their motion that they were entitled to a new trial pursuant to Rule 60(b)(3) because their

insurer committed fraud and misconduct in negotiating the settlement agreement underlying the judgment against them. Plaintiffs claimed that York/OneBeacon and Peerless intentionally led them to believe that the two companies were assessing liability independently. Thus, the explicit and implied tenor of their allegations was that the companies acted intentionally, and not negligently, to mislead plaintiffs. The trial court was correct that "to obtain relief under V.R.C.P. 60(b)(3), [plaintiffs were] required to demonstrate fraud by clear and convincing evidence." Gavala v. Claassen, 2003 VT 16, ¶ 5, 175 Vt. 487. After reviewing the parties submissions, the court was not persuaded that plaintiffs had made a sufficient showing either to require an evidentiary hearing or to support their allegations of fraud. We find no abuse of discretion because plaintiffs' submissions failed to support, under any standard, the underlying premise of their fraud allegations—that the two insurers were acting as a single entity in negotiating with them.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Brian L. Burgess, Associate Justice