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

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE
OCT 8 2009

SUPREME COURT DOCKET NO. 2009-112

OCTOBER TERM, 2009

Michael Montgomery, Meagan Maria Clapp and Aaron Joy Montgomery	}	APPEALED FROM:
v.	}	Windham Superior Court
Cheshire Handling d/b/a Riverside Reload Center, and Green Mountain Railroad d/b/a Green Mountain Intermodal, et al.	}	DOCKET NO. 51-2-05 Wmcv
		Trial Judge: David Suntag

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

Plaintiff Michael Montgomery appeals from the trial court's order denying his request for relief from a 2005 superior court judgment.* He argues that defendants committed a fraud upon the court by taking contrary positions in defending themselves against various lawsuits filed by plaintiff. We affirm.

The nature of plaintiff's claim requires us to review the procedural history in some detail. Plaintiff was seriously injured at work in 2002 when he was struck by a forklift operated by a co-employee. Plaintiff received workers' compensation benefits through his employer, NLR. Plaintiff also sued NLR and his co-employee for negligence in Windsor Superior Court. NLR moved for judgment in its favor, arguing that the action was barred by the exclusive remedy provisions of the Workers' Compensation Act (WCA). See 21 V.S.A. § 622 (with certain exceptions, rights and remedies granted to injured employee under Workers' Compensation Act exclude all other rights and remedies of employee at common law or otherwise on account of such injury). In support of its position, David Wulfson, the president of NLR and related corporate entities, averred in relevant part that plaintiff was "a W-2 Employee of the NLR Company" at the time of his accident; he was receiving worker's compensation benefits through NLR's insurer; and plaintiff was at no time employed by any other of NLR's related corporate entities. In September 2003, the Windsor Superior Court granted NLR's motion for judgment on the pleadings, finding that Montgomery was required to show "genuine intentional injury" to maintain his action against NLR, and he failed to do so. Plaintiff's appeal to this Court was dismissed as untimely filed in February 2004.

Following this decision, in November 2004, plaintiff moved to amend his complaint in Windsor Superior Court to add the defendants at issue in the instant case. The motion to amend

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* For simplicity's sake, we refer to plaintiffs in the singular. The remaining plaintiffs are Montgomery's son and stepdaughter.

was denied in January 2005. Plaintiff then filed a complaint against the above-named defendants in Windham Superior Court, raising claims of negligence and other claims. Defendants moved for summary judgment, arguing in part that plaintiff's own allegations demonstrated that they were "employers" within the meaning of the WCA, and thus, they were immune from suit pursuant to the exclusive remedy rule. Defendants pointed to plaintiff's assertion that all defendants were "one and the same corporate entity, with the same and/or similar corporate directors and officers; pervasive control of one entity over another, and intermingling of business activities and management." As additional support for their position, defendants included another affidavit from David Wulfson. Wulfson described the interrelationship between NLR and the named defendants, and stated that the type of work carried out by NLR was the same type of work that could have been carried out by the other named defendants as part of the regular course of business.

The trial court granted summary judgment to defendants. It found that plaintiff faced a Catch-22—he could not show that any or all of the named defendants had enough control over the operations of NLR so as to be liable without simultaneously establishing that defendants were statutory employers entitled to rely on the exclusivity provision of the WCA. In reaching its conclusion, the court addressed plaintiff's argument that defendants had taken contrary positions as to whether he was employed only by NLR. Plaintiff maintained that given Wulfson's first affidavit, defendants should be barred from asserting that they were his "employer" within the meaning of the WCA. The court rejected plaintiff's reasoning. It explained that the definition of "employer" under the WCA was much broader than the general, every day meaning of the term. See 21 V.S.A. § 601(3) (defining "employer" for purposes of WCA). As a result, an assertion that a person was not an employee of a company in one context was not necessarily contradictory and should not preclude stating that he was an employee in another context. The court thus rejected plaintiff's suggestion that defendants could not be statutory employers as a matter of law. While the court found the question of whether defendants were in fact plaintiff's "employer" to be disputed, it ultimately concluded that whatever plaintiff could discover about the relationship between defendants and NLR, they would not be able to prove their claims—either there would be no duty, or if there were, the exclusivity provision would apply. The court thus granted summary judgment to defendants on all claims. We affirmed this decision on appeal. See Montgomery v. Cheshire Handling, No. 2005-401, 2006 WL 5849676 (Vt. July 12, 2006) (unreported mem.).

In September 2005, plaintiff sued the same defendants and NLR in federal district court. He raised the same state law claims as those previously adjudicated as well as a claim under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. Plaintiff's state law claims were dismissed. As to the FELA claim, plaintiff asserted that he was a railroad employee because NLR acted as a single enterprise with certain named defendants. See 45 U.S.C. § 51 (to maintain FELA action, plaintiff must be employed by a common carrier and his job must be in furtherance of interstate or foreign commerce). Plaintiff sought to introduce statements made by defendants in state court proceedings as to their corporate interrelationship and asked the court to make findings to this effect. The court denied the motion. Were it to grant plaintiff's request, the court explained, defendants would seek to introduce evidence of positions taken by plaintiff in that same litigation which were inconsistent with the positions taken in the FELA litigation. In the state proceeding, plaintiff asserted that the various corporations were not all the same entity, which was the opposite of the position taken by plaintiff in the FELA litigation. The court

recognized that the state proceedings involved the definition of employer for purposes of workers' compensation coverage, which differed substantially from the issue presented in the federal litigation. Moreover, the court continued, the state courts did not adopt the position of either party, and thus, neither party was estopped from taking any position they chose in the federal litigation.

Shortly thereafter, the court ruled on the merits of defendants' assertion that the FELA claim should have been brought in the state actions and thus, it was barred by the doctrine of res judicata. The court rejected this argument. It reasoned that at the time Montgomery filed his complaint in Windsor Superior Court, he had no information that would support a FELA claim because he had no means of establishing that he was an employee of a railroad. The court noted that there was "more than a whiff of unfairness" as to the affidavits offered by Wulfson in the various cases. The court observed that defendants successfully avoided being subject to the discovery that would have provided a basis for plaintiff's FELA claim by obtaining a dismissal from one court on the ground that NLR alone was Montgomery's employer, and by obtaining a dismissal from another court on the ground that the other defendants were all the same entity as NLR. Under these circumstances, the court concluded that defendants could not rely on the defense of res judicata in the FELA action. Following a trial, a jury determined that NLR had not acted as a single business enterprise with Vermont Railway, or Green Mountain Railroad, and thus, plaintiff was not a railroad employee under FELA. Plaintiff moved for a new trial, arguing that the weight of the evidence did not support the jury's finding on this point, and the court denied his request in January 2008.

In June 2008, plaintiff moved via motion and independent action in equity to set aside the Windham Superior Court's September 2005 decision. Plaintiff essentially argued that the 2005 decision should be set aside because: defendants made misrepresentations to the court as to their corporate relationship; the federal court conclusively decided as much; the doctrine of collateral estoppel now precluded defendants from arguing otherwise; and defendants' attorney's involvement elevates this matter to the level of a "fraud upon the court." The court denied plaintiff's request. It explained that under Vermont Rule of Civil Procedure 60(b)(3), a party must bring a motion to set aside a judgment for fraud or misrepresentation by an adverse party within one year from the entry of judgment, which plaintiff plainly failed to do. While there was no time limit under Rule 60(b)(6) for cases involving a fraud upon the court, the court explained that such an allegation was more serious than ordinary fraud under Rule 60(b)(3), both in implication and scope. The court found plaintiff's allegations insufficient to meet this standard. The court stated that, even assuming that defendants made misrepresentations and assuming that it was immaterial that the superior court did not rely on the alleged misrepresentations in reaching its 2005 decision, plaintiff still failed to allege that the resulting harm was of great public significance or that the harm extended beyond the parties involved. The court similarly could not glean "a deliberately planned and carefully executed scheme" from defendants' alleged conduct. The court similarly found no grounds to allow plaintiff's independent action in equity. This appeal by plaintiff followed.

Plaintiff argues that he is entitled to relief from judgment because the evidence shows that defendants committed a fraud upon the court. He points to the federal district court's observations as support for his position. According to plaintiff, he established that the harm caused by defendants' actions was "of great public significance," and that "the harm extended

beyond the parties involved." Plaintiff also challenges the court's denial of his request for relief as an independent equitable action.

We review the court's Rule 60 ruling for abuse of discretion, and we find no abuse of discretion here. Kotz v. Kotz, 134 Vt. 36, 40 (1975) (trial court's decision will not be disturbed unless it "clearly and affirmatively appears" that court abused or withheld its discretion). Rule 60(b) is "intended to accomplish justice in extraordinary situations that warrant the reopening of final judgments after a substantial period of time." Riehle v. Tudhope, 171 Vt. 626, 627 (2000) (mem.). As stated above, Rule 60(b)(3) allows for relief based on fraud or misrepresentations by an adverse party, but as the trial court found, relief under Rule 60(b)(3) is time-barred. Plaintiff failed to show he was entitled to relief under the catch-all provision of Rule 60(b) due to a fraud upon the court. See Godin v. Godin, 168 Vt. 514, 518 (1998) (noting that catch-all provision is available only when a ground justifying relief is not encompassed within any of the first five classes of the rule).

As we recognized in Godin, the fraud-upon-the-court doctrine "has generally been reserved for only the most egregious misconduct evidencing . . . an unconscionable and calculated design to improperly influence the court." Id. at 519. Plaintiff maintains that counsel's submission of Wulfson's affidavit and testimony caused harm of great public significance because it "adversely impacted the court's ability to adjudicate [plaintiff's] cases." The record does not support this assertion. Plaintiff was aware at the time of the 2005 proceedings of the conduct he now characterizes as fraudulent. Indeed, he brought the allegedly contradictory affidavits to the attention of the superior court and argued that, based on the first Wulfson affidavit, defendants could not claim to be his "employer" under the WCA. The court rejected this argument. The federal district court similarly rejected plaintiff's assertion that defendants were bound by assertions made by Wulfson in the Windham action. The federal court did not find that the affidavits constituted a fraud upon the court, as plaintiff suggests. Its observation that it would be unfair to allow defendants to assert the affirmative defense of res judicata in the federal litigation does not compel a finding in plaintiff's favor here under the doctrine of collateral estoppel or otherwise. Indeed, the federal court explicitly recognized that the state proceedings involved the definition of employer for purposes of workers' compensation coverage, which differed substantially from the issue presented in the federal litigation. For this and other reasons, this case is not like Stamp Tech., Inc. v. Lydall/Thermal Acoustical, Inc., cited by plaintiff. See 2009 VT 91, ¶ 16 (observing in dicta that party moving for summary judgment in two related cases could not urge the trial court to adopt as fact two contradictory propositions regarding liability).

Plaintiff's reliance on Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1994), is equally misplaced. We recognized in Godin that since Hazel-Atlas was decided, "courts and commentators alike have observed that the fraud-on-the-court doctrine must be narrowly applied, or it would become indistinguishable from ordinary fraud, and undermine the important policy favoring finality of judgments." 168 Vt. at 518. Plaintiff's allegations in this case simply do "not approach the kind of calculated, egregious 'defiling' of the adjudicative process that has traditionally characterized fraud on the court." Id. (citation omitted). At the very most, plaintiff's allegations would fall under misrepresentation by a party, and as the trial court found, relief on such grounds is time-barred. The court acted well within its discretion in denying plaintiff's request.

There are similarly no grounds that warrant relief in equity. See Rule 60(b) (noting that this rule "does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . or to set aside a judgment for fraud upon the court"). "It has long been recognized that the independent action clause in Rule 60(b) simply preserves the historical authority of the courts of equity to reform judgments in special circumstances." Levinsky v. State, 146 Vt. 316, 318 (1985) (per curiam) (citation omitted). The essential elements of such an action are:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

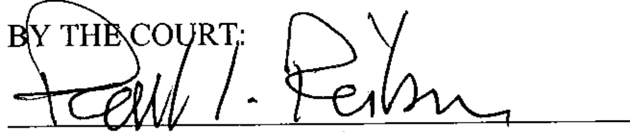
Id. at 319.

We have recognized that this equitable power must "be exercised guardedly, as it carries with it an inevitable clash of two competing principles of judicial administration: the principle of finality and repose of judgments, which is so fundamental to our system of justice, and the ultimate principle that justice must be done unto the parties." Id.

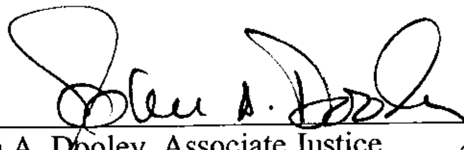
We agree with the trial court that equitable considerations do not warrant relief from judgment here. As stated above, plaintiff waited almost three years before making his motion, despite ample notice of defendants' alleged "misrepresentations." Plaintiff suggests that his request was timely because he was the victim of "continuing misleading and fraudulent representations made in federal courts." He raises this argument for the first time on appeal, and we do not address it. See Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 459 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal."). Even if it were preserved, however, we would find it unavailing. The trial court reasonably determined that it would be unfair to allow plaintiff to revisit the state court litigation at this late stage, particularly given that he was essentially attempting to circumvent the one-year time limit set forth in Rule 60(b)(3). Additionally, as the trial court explained, the 2005 superior court judgment was based on a finding that plaintiff could not succeed on his negligence claims against defendants. The superior court did not rely on the Wulfson affidavit in reaching this conclusion in 2005, and the absence of discovery on the interrelationship between NLR and defendants was immaterial. We agree with the trial court that this is not a case where an independent action in equity should be entertained.

Affirmed.

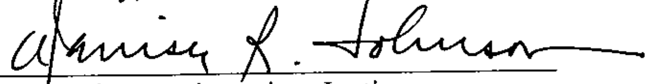
BY THE COURT:



Paul L. Reiber, Chief Justice



John A. Dooley, Associate Justice



Denise R. Johnson, Associate Justice