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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-181

NOVEMBER TERM, 2004

Michael J. Trahan	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Family Court
	}	
Claire J. Trahan	}	
	}	DOCKET NO. F657-7-96 Cndm
		Trial Judge: Alden T. Bryan

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

Defendant ex-wife appeals the family court's order denying her V.R.C.P. 60(b) motion to reopen the parties' divorce on grounds of fraud on the court. We affirm.

After twenty-six years of marriage, the parties were divorced by the family court's December 31, 1998 final order. During the divorce proceedings, the parties disputed the value of the payroll business that they had started together in 1987 and jointly owned at the time of their divorce. The principal issue of contention concerned whether the business or the business's clients owned $2.175 million of funds from uncleared employee checks and other errors. Plaintiff ex-husband argued that the money belonged to the business's clients and thus could not be considered in estimating the value of the business. Defendant argued that the funds belonged to the business and thus should be considered a marital asset. The family court found that, more likely than not, the $2.175 million did not belong to the business, and based its distribution of marital property, in part, on this finding. Neither party appealed the final divorce order, and in March 1999, pursuant to that order, plaintiff paid defendant $800,000 for her interest in the business.

In October 1999, defendant filed suit in the superior court against plaintiff, the business, and the business's attorneys who had created a trust for the disputed funds. Defendant had discovered that $1.8 million of the funds held in trust had been transferred to a business corporate account before the parties' divorce was final. Defendant's amended complaint included (1) a shareholder derivative claim that sought an accounting to determine whether there had been a misappropriation of corporate funds; and (2) a breach-of-fiduciary-duty claim against the trustees for failing to reconcile the $2.175 in trust funds before transferring a portion of them to a corporate account. The superior court dismissed the complaint, concluding that defendant was collaterally estopped by the

final divorce order from relitigating ownership of the $2.175 million. This Court affirmed the superior court's decision, stating that defendant had had an adequate opportunity to contest ownership of the $2.175 million at the divorce hearing, Trahan v. Trahan, 2003 VT 100, ¶ 9, 14 Vt. L. Wk. 335 (mem.) [hereinafter Trahan I], and that defendant's complaint amounted to an impermissible collateral attack on the 1998 divorce judgment, id. ¶ 11. We noted that if defendant disagreed with the property award, the proper avenue of relief was for her either to appeal the final divorce order or file a Rule 60(b) motion to set aside that order. Trahan I, 2003 VT 100, ¶ 11.

In January 2004, approximately three months after Trahan I issued, defendant filed a Rule 60(b) motion in the family court to set aside the divorce judgment. She claimed that she was entitled to relief under V.R.C.P. 60(b)(6) because plaintiff's attempts to hide marital assets amounted to a fraud upon the court. Following a nonevidentiary hearing, the family court denied the motion, concluding that her motion was not timely filed with respect to Rule 60(b)(3) (fraud, misrepresentation, or other misconduct of an adverse party) and did not fall within the catchall provision of Rule 60(b)(6). On appeal, defendant argues that the family court abused its discretion by denying her Rule 60(b)(6) motion without affording her an opportunity to present evidence that plaintiff had committed a fraud upon the court.

A Rule 60(b) motion decision is committed to the sound discretion of the trial court and will not be disturbed on appeal unless the moving party clearly and affirmatively demonstrates from the record that the court's discretion was withheld or otherwise abused. Riehle v. Tudhope, 171 Vt. 626, 628 (2000) (mem.). Rule 60(b)(6) "allows a court, upon such terms as are just, to relieve a party from a final judgment for any reason other than those set forth in the other sections of the rule, as long as the request for relief is made within a reasonable time." Id. at 627; accord Kellner v. Kellner, 2004 VT 1, ¶ 12, 15 Vt. L. Wk. 13 (mem.). "Although the grounds for relief under Rule 60(b)(6) are broadly stated, and the rule must be interpreted liberally to prevent hardship or injustice, interests of finality necessarily limit when relief is available." Riehle, 171 Vt. at 627. As we have stated on many occasions, "Rule 60(b)(6) may not substitute for a timely appeal or provide relief from an ill-advised tactical decision or from some other free, calculated, and deliberate choice of action." Id.; accord Kellner, 2004 VT 1, ¶ 12.

Here, defendant cannot seek relief from the divorce judgment based on a claim of ordinary fraud because such a claim must be brought within one year of the judgment. See V.R.C.P. 60(b). Defendant argues, however, that she may seek relief from judgment beyond the one-year deadline under Rule 60(b)'s catchall provision because husband perpetrated a fraud upon the court. See Godin v. Godin, 168 Vt. 514, 517-19 (1998) (addressing whether fraud alleged by ex-wife was fraud upon court and thus encompassed within Rule 60(b)(6)). In Godin, we stated that the fraud-on-the-court doctrine would quickly incorporate all forms of fraud unless it were narrowly applied, and thus that "the doctrine has generally been reserved for only the most egregious misconduct evidencing . . . an unconscionable and calculated design to improperly influence the court." 168 Vt. at 518-19. Hence, the doctrine embraces only those instances of fraud in which the court itself is defiled or the fraud is perpetrated by court officers so that the judiciary cannot perform as an impartial adjudicator. Id. at 519.

Defendant makes virtually no attempt to demonstrate that her claims meet this stringent test. Rather, she argues that the law-of-the-case doctrine precluded the superior court from ruling that her claims did not fall within Rule 60(b)(6) because plaintiff never appealed the court's statement in the final divorce order that if defendant's fears came true concerning the $2.175 million, all the testimony in the divorce hearing would amount to a colossal fraud upon defendant and the court. We find no merit to this argument. The court's off-hand comment was not intended to state a fact or make a ruling of law, rather it was merely an aside to underscore the ruling. Certainly, the court did not intend to preclude itself from ruling that any later allegations of fraud could not be brought under Rule 60(b)(6). In any event, even if defendant could show that her allegations of fraud fit within the catchall provision, she has failed to demonstrate that her Rule 60(b)(6) motion was brought within a reasonable time, as required by the rule. Defendant did not file her Rule 60(b) until nearly five years after the divorce judgment because of her tactical decision to bring a separate action in the superior court and not simultaneously seek relief in family court, even though years earlier she knew of the facts that led her to file the motion. Under these circumstances, the motion was not filed within a reasonable time. Cf. Kellner, 2004 VT 1, ¶ 14 (party waiting over three years to seek relief under Rule 60(b)(6) bears burden of showing that extraordinary circumstances caused delay).

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned