

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-379

DECEMBER TERM, 2003

Annette E. Gras	}	APPEALED FROM:
	}	
v.	}	Grand Isle Superior Court
	}	
David C. Carter	}	DOCKET NO 29-8-98GiCv
	}	
	}	Trial Judge: Ben Joseph

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

Plaintiff Annette E. Gras¹ appeals from the trial court's denial of her request for a hearing on the merits and its denial of her motion to reopen her appeal in this breach of fiduciary trust action. Plaintiff argues that the trial court erred by failing to address the issues raised by this Court in its August 1999 entry order. We affirm.

The facts underlying plaintiff's breach of fiduciary trust complaint are set forth in this Court's August 1999 entry order in which we reversed and remanded the trial court's grant of summary judgment for defendant. See Annette Gras v. Marion Kuhlmann, No. 99-139 (August 18, 1999) (three-justice mem.). We concluded that the trial court erred in determining that it lacked jurisdiction to hear plaintiff's appeal based on its belief that the issues raised in plaintiff's complaint had previously been determined in Franklin Lamoille Bank v. Peters Farm Assoc., Ltd. & Marion Kuhlmann, No. 97-092 (Jan. 8, 1998) (three-justice mem.). We explained that the trial court's ruling related to the doctrines of issue and claim preclusion, but the court did not mention either doctrine in its opinion. We reversed and remanded to allow the trial court to consider the applicability of these doctrines. On remand, the trial court reconsidered the allegations raised in plaintiff's complaint and granted summary judgment for defendant in July 2001. Plaintiff did not timely appeal this decision.

In July 2002, plaintiff filed a request for a hearing on the merits. The court denied her request in August 2002, explaining that summary judgment had been granted for defendant and the case was closed. Plaintiff filed a notice of appeal on August 12, 2002. On August 21, 2002, plaintiff filed a motion to reopen her appeal, asserting that her case had been closed without notice and without an opportunity for her to be heard. The court denied the motion on August 26, 2002.

On appeal, plaintiff complains that the trial court erred by failing to address the issues identified by this Court in its August 1999 entry order. As noted above, plaintiff did not timely appeal the trial court's July 2001 grant of summary judgment for defendant and we are therefore without jurisdiction to review this decision on appeal. See V.R.A.P. 4. The only issue before this Court is whether the trial court abused its discretion in denying plaintiff's request for a hearing on the merits and her motion to reopen her case.

Rule 60(b) of the Vermont Rules of Civil Procedure allows the court to relieve a party from a final judgment for mistake, inadvertence, surprise, or excusable neglect or any other reason justifying relief from the operation of the judgment. V.R.C.P. 60(b). While the rule "will not serve to relieve a party from its free, calculated and deliberate choices, it is invoked to prevent hardship and injustice and thus shall be liberally construed and applied." Bingham v. Tenney, 154 Vt. 96, 99 (1990). The trial court has broad discretion in deciding a V.R.C.P. 60(b) motion and its decision "will stand on review unless the record clearly and affirmatively indicates that such discretion was withheld or

otherwise abused." Id. The party challenging the motion' s denial bears the burden of proving an abuse of discretion. Id.

In this case, the court denied plaintiff' s motion for a hearing on the merits because summary judgment had been granted to defendant in July 2001. The court denied her motion to reopen without explanation. Plaintiff did not articulate a valid basis for a grant of relief under V.R.C.P. 60(b). Contrary to plaintiff' s assertion, she was provided with an opportunity to be heard on the merits of defendant' s motion for summary judgment. The record shows that plaintiff filed responsive pleadings and was given the opportunity to present evidence at a November 2000 hearing. We therefore conclude that the trial court did not abuse its discretion in denying plaintiff' s motions.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Footnote

1. Ms. Gras died during the pendency of this appeal and her sons Gerald S. Gras and Seaton A. R. Gras have moved to be substituted as parties pursuant to V.R.C.P. 25(a). In a July 30, 2003 entry order, we stated that the issues of whether plaintiff' s claim was extinguished upon her death and whether her sons are "proper parties" for substitution under V.R.C.P. 25(a) would be considered with the merits of the appeal. Neither party briefed these issues and based on our rejection of plaintiff' s arguments on appeal, we do not address them.