

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-417

SEPTEMBER TERM, 2006

Carl Wetherby and Marina Wetherby	}	APPEALED FROM:
	}	
v.	}	Franklin Superior Court
	}	
Leland Vincent	}	
	}	DOCKET NO. S331-03 Fc

Trial Judge: Ben Joseph

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

Defendant Leland Vincent appeals from the trial court=s denial of his motion for relief from judgment. He argues that: (1) the trial court erred as a matter of law in ruling that consideration of his motion was precluded by this Court=s decision on an earlier Rule 60(b) motion; and (2) he is entitled to relief because the underlying judgment was based on a stipulation that was never read nor explained to him by prior counsel. We reverse and remand.

The underlying facts are largely set forth in our previous decision on defendant=s first Rule 60(b) motion. See Wetherby v. Vincent, 2004-014 (September 1, 2004) (three-justice panel). We briefly restate them here.

In July 2003, plaintiffs sued defendant, who was then approximately eighty years old and had difficulty hearing and seeing. Plaintiffs alleged that defendant and his elderly sister, who died in May 2003, had reneged on a written contract to sell plaintiffs their home for \$52,000. Plaintiffs sought a writ of attachment and specific performance of the contract. Through counsel, defendant responded to the complaint by filing a motion for summary judgment. One day before the attachment hearing, the parties filed a stipulation with the court, agreeing that the court could resolve the attachment hearing issue as well as the lawsuit on the merits by consideration and ruling upon the parties' summary judgment pleadings. Plaintiffs then responded to the motion for summary judgment, asserting that they were entitled to relief under the doctrine of promissory estoppel. Although ordered by the court to respond to this argument, defendant's attorney failed to do so, and the court granted summary judgment to plaintiffs. Shortly thereafter, defendant's attorney filed a motion for relief from judgment, asserting that he had assumed that under V.R.C.P. 56(c)(1) he was entitled to additional time in which to file a supplemental motion for summary judgment. The court denied the motion.

Defendant appealed to this Court, asserting that the trial court had erred by construing the parties' stipulation as restricting the legal issues that the parties could raise and by concluding that his opposition to plaintiffs' motion for summary judgment was untimely. Vincent, 2004-014, at 2. We rejected this argument, and affirmed the trial court's decision. We explained that the parties had agreed that the case could be decided on their motions for summary judgment. The court gave defendant a limited amount of time to file a response to plaintiffs' motion. When he failed to do so, and further failed to seek additional time for a response, the court entered its order based on the parties' cross-motions for summary judgment, just as the parties contemplated in their stipulation. Then, and only then, did defendant attempt to file a renewed summary judgment motion with a completely new theory alleging facts that would have been known to him when the litigation started. Under these circumstances, we concluded, the trial court acted well within its discretion in denying defendant's motion for relief from judgment. Id. at 3.

Shortly after our decision was issued, defendant, with the assistance of new counsel, filed a second motion for relief from judgment with the trial court. Defendant asserted that he was never informed of, nor did he consent to, the terms of the stipulation. He argued that he was entitled to relief because no attorney has

authority to do any act that has the effect of irrevocably renouncing or barring his or her client=s right of action without the client=s permission, and Rule 60(b) provides the court with authority to grant relief from judgment in circumstances where the need for truth outweighs the need for finality. In lieu of a hearing, the parties submitted agreed-upon facts to the trial court. They agreed that: (1) defendant did not read the stipulation because of his failing eyesight; (2) his attorney did not read or explain fully the stipulation to him; (3) defendant thus did not understand that by signing the stipulation, he would be waiving his rights to present all but one defense and all counterclaims, as well as his right to an evidentiary hearing; and (4) had counsel and/or defendant known these facts, the stipulation would not have been signed. In a September 2005 entry order, the trial court denied the Rule 60(b) motion, finding that it was based on contentions that were considered and rejected@ by this Court. This appeal followed.

Defendant first argues that the trial court erred in ruling that consideration of the issues raised in his second Rule 60(b) motion was precluded by this Court=s decision on the prior Rule 60(b) motion. He argues that the doctrine of issue preclusion does not apply, and that the court therefore erred as a matter of law in denying the motion. We agree.

Rule 60(b) 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 discretion in ruling on a Rule 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. at 99. In this case, we conclude that the court abused its discretion because the basis offered for its decision was incorrect as a matter of law. See Courtyard Partners v. Tanner, 157 Vt. 638, 639 (1991) (mem.) (although trial court=s ruling on a Rule 60(b) motion is discretionary, this Court may remand case to prevent failure of justice when warranted by the circumstances).

The trial court=s decision appears to rest on the doctrine of collateral estoppel, or issue preclusion. That

doctrine Abars the subsequent re-litigation of an issue which was actually litigated and decided in a prior case between the parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action.@ Berlin Convalescent Ctr., Inc. v. Stoneman, 159 Vt. 53, 56 (1992) (emphasis added, internal quotation marks and citation omitted). As reflected by the language cited above, the doctrine does not apply to subsequent filings in the same action.* See, e.g., Studiengesellschaft Kohle v. Eastman Kodak Co., 713 F.2d 128,131 (5th Cir. 1983) (Aissue preclusion is applicable only in subsequent actions, not within the same action@); cf. G. & C. Merriam Co. v. Saalfeld, 241 U.S. 22, 29 (1916) (AThe doctrine of res judicata furnishes a rule for the decision of a subsequent case between the same parties or their privies respecting the same cause of action. Obviously, the rule for decision applies only when the subsequent action has been brought.@).

Even assuming that the doctrine did apply, however, the issue before the trial court was not the same as that previously decided by this Court. See Berlin Convalescent Ctr., Inc., 159 Vt. at 56-57 (identifying elements of issue preclusion, including requirement that issue be Athe same as that raised in the later action@). As stated above, defendant=s first Rule 60(b) motion was based on his assertion that the trial court erred by construing the parties= stipulation as restricting the legal issues that the parties could raise and by concluding that his opposition to plaintiffs= motion for summary judgment was untimely. Vincent, 2004-014, at 2. In the current motion, defendant asserts that he did not knowingly agree to the stipulation, and that his attorney was consequently without authority to relinquish his right of action without his consent. These issues are not the same. Although we conclude that the grounds offered by the court in support of its decision are unavailing, we decline defendant=s request that we enter grant the motion as a matter of law in this appeal. The trial court has wide discretion in considering Rule 60(b) motions, and it should evaluate the merits of the request in the first instance. We therefore reverse the court=s decision, and remand it for reconsideration on the merits.

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice

* We reject plaintiffs' contention that we should not consider this issue because it was not directly raised by defendant below. Even if the issue was not specifically raised below, it formed the basis of the trial court's decision, and this Court may consider it sua sponte. Cf. Merrilees v. Treasurer, State of Vermont, 159 Vt. 623, 623 (1992) (Court considered issue of res judicata sua sponte, noting that ample and persuasive precedent allows a court to raise res judicata on its own where the parties have failed to raise it and consequently waived the right to do so).