2020 VT 61

No. 2018-225

Jeffrey-Michael Brandt

v.

Lisa Menard et al.

Supreme Court

On Appeal from
Superior Court, Chittenden Unit,
Civil Division

December Term, 2019

Robert A. Mello, J.

Jeffrey-Michael Brandt, Pro Se, Tutwiler, Mississippi, Plaintiff-Appellant.

Michael J. Leddy of McNeil, Leddy & Sheahan, P.C., Burlington, for Defendants-Appellees.

Matthew F. Valerio, Defender General, and Emily Tredeau, Prisoners' Rights Office, Montpelier, for Amicus Curiae Prisoners' Rights Office.

PRESENT: Reiber, C.J., Robinson, Eaton and Carroll, JJ., and Morris, Supr. J. (Ret), Specially Assigned

¶ 1. **REIBER, C.J.** Plaintiff inmate appeals the trial court's order denying his motion for relief from judgment pursuant to Vermont Rule of Civil Procedure 60(b). We reverse and remand.

¶ 2. In January 2017, plaintiff filed a complaint seeking compensatory and punitive damages for defendants' alleged violations of his state and federal statutory and constitutional rights to free speech and association. On September 11, 2017, the trial court dismissed the complaint on res judicata grounds. Copies of the decision and other related orders were sent to the parties the same day. However, on October 2, 2017, plaintiff's copies were returned to the court

as undeliverable, apparently because plaintiff had been moved to a new prison. On February 27, 2018, plaintiff sent a letter to the trial court asking that copies of the rulings be sent to him in Pennsylvania where he was incarcerated. The court sent the copies to plaintiff on the following day. On March 19, 2018, plaintiff moved to reopen the judgment pursuant to Vermont Rule of Civil Procedure 60(b), arguing that he had not been "timely notified of the [September 11, 2017] entry of judgment in time for [him] to enter a notice of appeal." On June 13, 2018, the trial court denied plaintiff's motion, ruling that it was really a request for an extension of time to file an appeal pursuant to Vermont Rule of Appellate Procedure 4(d), which requires such motions to be filed no later than thirty days after expiration of the original thirty-day appeal period. Plaintiff appealed.

¶ 3. "A motion for relief from judgment is addressed to the discretion of the trial court and is not subject to appellate review unless it clearly and affirmatively appears from the record that such discretion was withheld or otherwise abused." Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 149 Vt. 365, 368, 543 A.2d 1320, 1322 (1988) (quotations and citation omitted). "Whether the court has authority to exercise its discretion [under Rule 60(b)] is a legal issue that we review de novo." Penland v. Warren, 2018 VT 70, ¶ 6, 208 Vt. 15, 194 A.3d 755.

¶ 4. Vermont Rule of Civil Procedure 60(b) provides that "[o]n motion and upon such terms as are just," a trial court "may relieve a party . . . from a final judgment, order, or proceeding" for various reasons, which include:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . ; (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . ; or (6) any other reason justifying relief from the operation of the judgment.

A Rule 60(b) motion "shall be filed within a reasonable time." V.R.C.P. 60(b). For some of the enumerated reasons provided in Rule 60(b), the motion must be filed "not more than one year after

the judgment, order, or proceeding was entered or taken." V.R.C.P. 60(b); see also Brown v. Tatro, 136 Vt. 409, 411, 392 A.2d 380, 382 (1978) ("The one year bar is an absolute one where it applies . . . .").

¶ 5. "The hallmark of Rule 60(b) intervention is the prevention of hardship or injustice." Rule v. Tobin, 168 Vt. 166, 174, 719 A.2d 869, 874 (1998); Manosh v. Manosh, 160 Vt. 634, 635, 648 A.2d 833, 835 (1993) (mem.) ("A V.R.C.P. 60(b) motion is invoked to prevent hardship or injustice and therefore should be liberally construed."). At the same time, "[t]he rule does not protect a party from tactical decisions which in retrospect may seem ill advised, and it is not an open invitation to reconsider matters concluded at trial." Penland, 2018 VT 70, ¶ 7 (quotations and citations omitted). In addition, "[w]e must be concerned about the certainty and finality of judgments so that litigation can reach an end," id. (quotation omitted), and "a motion for relief is not intended to function as a substitute for a timely appeal," Tetreault v. Tetreault, 148 Vt. 448, 451, 535 A.2d 779, 781 (1987).

¶ 6. We have not previously addressed whether Rule 60(b) permits a trial court to vacate and re-enter judgment to enable a delayed appeal where the moving party failed to receive notice of the judgment at issue. Prior to 1991, federal courts generally held that Federal Rule of Civil Procedure 60(b), which is nearly identical to Vermont Rule of Civil Procedure 60(b), could be used to provide this relief under certain circumstances. See Vencor Hosps., Inc. v. Standard Life & Accident Ins. Co., 279 F.3d 1306, 1310 (11th Cir. 2002); see also Coles v. Coles, 2013 VT 36, ¶ 6, 193 Vt. 605, 73 A.3d 681 (explaining we consider federal case law in analyzing Vermont procedural rules that are "substantively identical" to federal rules); compare V.R.C.P. 60(b), with F.R.C.P. 60(b). In 1991, the Federal Rules of Appellate Procedure were amended to add Rule 4(a)(6), which allows for the reopening of the time to appeal due to lack of notice. See Vencor Hosps., Inc., 279 F.3d at 1309. Following this amendment, federal courts generally have held that Federal Rule 4(a)(6) provides the exclusive remedy for when a party has failed to receive notice

of the entry of judgment and that Rule 60(b) cannot be used to provide relief in that situation. See id. at 1311; 16A C. Wright et al., Federal Practice & Procedure § 3950.3 (5th ed. 2020) ("Prior to the 1991 adoption of Rule 4(a)(6), some cases had allowed the use of Federal Rule of Civil Procedure 60(b) to reopen a judgment and start the appeal time running again. . . . But subsequent decisions hold that now that the rulemakers . . . have acted to provide a means (in Rule 4(a)(6)) for relieving a party from the consequences of failure to learn of the entry of the judgment, resort to Rule 60(b) as a means for extending the appeal time is no longer proper.").

¶ 7. Some state courts have held likewise, pointing to their counterparts to Rule 4(a)(6). See, e.g., Barnett v. Monumental Gen. Ins. Co., 97 S.W.3d 901, 902 (Ark. Ct. App. 2003) (holding that its counterpart to Rule 4(a)(6) could not "be extended by use of [Arkansas's] Rule 60 to cure problems of lack of notice"). Some states that do not have a counterpart to Rule 4(a)(6) have relied on their counterparts to Federal Rule of Civil Procedure 77(d), which provides that lack of notice of the entry of judgment does not affect the time for appeal except as set forth in the appellate rules. See, e.g., Altmayer v. Stremmel, 891 So. 2d 305, 309 (Ala. 2004) (holding that Alabama's counterpart to Rule 77(d) "exclusively governs situations in which a party claims lack of notice of the entry of a judgment or order" and that "relief under Rule 60(b) cannot be substituted" for that "exclusive remedy" (quotations omitted)).

¶ 8. Other state courts, however, have permitted such relief under extraordinary circumstances, despite similar limitations set by their counterparts to Rule 4(a)(6) and Rule 77(d). The Arizona Court of Appeals has held that when relief under its counterpart to Rule 4(a)(6) is not available, "a party may request that a judgment be set aside for purposes of taking a delayed appeal under [Arizona Rule of Civil Procedure] 60(b)." Chung v. Choulet, 459 P.3d 498, 501 (Ariz. Ct. App. 2020) (setting forth relevant factors for this request and citing Park v. Strick, 669 P.2d 78, 81-82 (Ariz. 1983) (in banc), and Rodgers v. Watt, 722 F.2d 456, 460 (9th Cir. 1983) (en banc), superseded by Federal Rule of Appellate Procedure 4(a)(6), as recognized by In re Stein, 197 F.3d

421, 426 (9th Cir. 1999)). The only significant difference between Federal Rule 4(a)(6) and Arizona's counterpart is the shorter time period provided for bringing a motion to reopen the appeal period due to lack of notice—30 days instead of the federal rule's 180. See Ariz. R. Civ. App. P. 9(f)(2); see also Ariz. R. Civ. P. 58(c)(3) (including language nearly identical to Federal Rule 77(d)(2)). The District of Columbia, which has nearly identical counterparts to Rule 4(a)(6) and Rule 77(d), has also held it permissible to vacate and re-enter judgment under Rule 60(b) under certain circumstances. Minor v. Springfield Baptist Church, 964 A.2d 205, 206 (D.C. 2009) (per curiam); D.C. Superior Ct. R. Civ. P. 77(d)(2); D.C. Ct. App. R. 4(a)(7)(B) (allowing 180 days to bring motion to reopen time for appeal). Other states that have a counterpart rule to Rule 77(d), but no counterpart to Rule 4(a)(6), have also held that using Rule 60(b) for this kind of relief can be proper in some extraordinary circumstances. See Old Republic Ins. Co. v. O'Neal, 788 S.E.2d 40, 48, 50 (W. Va. 2016); Ahearn v. Anderson-Bishop P'ship, 946 P.2d 417, 422-23 (Wyo. 1997).

¶ 9. We agree with these state courts and hold that Vermont Rule of Civil Procedure 77(d) and Vermont Rule of Appellate Procedure 4(c), which are nearly identical to Federal Rules 77(d) and 4(a)(6), do not absolutely bar the type of relief sought here. As with the Arizona rule, the primary difference between Vermont Rule 4(c) and Federal Rule 4(a)(6) is a shorter window of time in which a party who has not received notice may seek to extend the time to bring an appeal—90 days instead of 180. This difference is significant, particularly considering the equitable purpose of Rule 60(b). See Manosh, 160 Vt. at 635, 648 A.2d at 835 ("A V.R.C.P. 60(b) motion is invoked to prevent hardship or injustice and therefore should be liberally construed."). Such relief is severely limited, but Rule 60(b) may properly provide relief, in the form of vacating and re-entering the judgment for the purpose of enabling a timely appeal, in rare, exceptional circumstances. In determining whether such extraordinary circumstances exist, relevant considerations may include whether the clerk provided notice as required by Vermont Rule of Civil Procedure 77; whether the party had actual notice; whether the relief sought would create

prejudice to the other party; whether the moving party acted diligently in attempting to learn the date of the decision; whether the moving party acted diligently after receiving actual notice; and other "extraordinary, unique, or compelling circumstances." See Chung, 459 P.3d at 501; see also Park, 669 P.2d at 82.

¶ 10. Certainly, Rule 60(b) cannot be used simply to circumvent the requirements of the Vermont Rules of Appellate Procedure. See Tetreault, 148 Vt. at 451, 535 A.2d at 781; cf. In re Mahar Conditional Use Permit, 2018 VT 20, ¶ 16, 206 Vt. 559, 183 A.3d 1136 (relying on time limits and exceptions in procedural rules to "balance the tension between fairness and the finality of judgments that exists in all types of cases" and noting "appeal period . . . does not indefinitely stay open, even if a party did not get notice of the underlying judgment"). Mere lack of notice or excusable neglect are insufficient. Vermont Rule of Appellate Procedure 4(c) and 4(d) provide the proper remedies in those situations. See Mahar Conditional Use Permit, 2018 VT 20, ¶ 16; see also V.R.A.P. 4(c) (providing avenue to reopen time for appeal due to lack of notice); V.R.A.P. 4(d) (providing avenue to extend time to file notice of appeal due to excusable neglect). Rule 60(b) relief "relating to timeliness of an appeal is available only under the most unusual, rare, compelling and propitious circumstances." See First Nat'l Bank of Polk Cty. v. Goss, 912 S.W.2d 147, 151 (Tenn. Ct. App. 1995).

¶ 11. We turn now to the facts of this appeal. Plaintiff argued in his Rule 60(b) motion that he was entitled to relief from judgment under Rule 60(b)(1) and 60(b)(6) because he did not timely receive notice of the judgment "through no fault of his own." The trial court construed this filing as a motion under Vermont Rule of Appellate Procedure 4(d), and because it did not meet the time requirements of Rule 4(d), the court denied the motion. The court erred by treating the motion as a request to extend the appeal period under Rule 4(d). Plaintiff's motion was made pursuant to Rule 60(b) and should be resolved on its merits. See Penland, 2018 VT 70, ¶ 10 (reversing and remanding where trial court declined to exercise discretion under Rule 60(b)

because it erroneously concluded it lacked jurisdiction to do so). As we have explained above, the trial court does have discretion to vacate and re-enter judgment to enable a timely appeal under rare, exceptional circumstances. The Rule 60(b) motion was timely under any subsection of Rule 60(b) because it was filed within one year of the entry of judgment.

¶ 12. Accordingly, we reverse and remand so the court may consider whether plaintiff did fail to receive notice; if so, whether that failure, together with other circumstances, could provide a basis for relief under Rule 60(b); and whether, within its discretion, relief from judgment under Rule 60(b) is appropriate. Because we decide plaintiff's appeal on these grounds, we need not consider the other arguments raised by the parties and amicus curiae.

Reversed and remanded for further proceedings consistent with this opinion.

FOR THE COURT:

Chief Justice