Doe v. Doe, 6 ROP Intrm. 221 (1997)
JOHN DOE,
Appellant,

v.

JANE DOE,
Appellee.

CIVIL APPEAL NO. 20-96
Civil Action No. 271-94

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: August 25, 1997

Counsel for Appellant: Oldiais Ngiraikelau

Counsel for Appellee: Roy T. Chikamoto

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; ALEX R. MUNSON, Part-time Associate Justice

MILLER, Justice:

The issue presented on this appeal, as framed by appellant John Doe ("Appellant"), is as follows:

> Whether the trial court abused its discretion in denying defendant's Rule 60(b) motion without holding an evidentiary hearing, where the Appellant presented facts showing that, due to his counsel's inexcusable neglect coupled with a concern for the welfare of appellee, he was precluded from presenting a complete defense and, as a result, deprived of a fair trial.

We conclude that because Rule 60(b) does not permit relief from judgment because of an attorney's inexcusable neglect,[1] the denial of Appellant's motion was not an abuse of discretion.

[1] We view the reference to counsel's "concern for the welfare of appellee" not as a separate basis for relief, but as a specific instance of counsel's alleged negligence, *i.e.*, that out of undue sympathy, he failed to vigorously cross-examine her.

⊥222 BACKGROUND

Judgment was rendered in favor of appellee Jane Doe ("Appellee") and against Appellant on January 24, 1996. Appellant timely filed a motion for a new trial pursuant to Rule 59(a) of the ROP Rules of Civil Procedure. On March 19, 1996, the trial court entered an order denying Appellant's motion for a new trial.

On April 1, 1996, Appellant, represented by new counsel, filed a motion for reconsideration in which he first raised the issue presented here. After holding a hearing (not an evidentiary hearing) in which oral arguments were presented, the trial court entered an order on May 7, 1996 denying Appellant's motion for reconsideration.

This appeal was filed on June 4, 1996. By previous order, we concluded that Appellant's motion for reconsideration did not toll the time for appealing the original judgment or the initial order denying his motion for a new trial, and accordingly dismissed the appeal to that extent as untimely. We noted, however, that if the motion for reconsideration were construed as a motion for relief from judgment pursuant to Rule 60(b), an appeal from the order denying that motion would be timely. We accordingly permitted the appeal to proceed on that basis.

ANALYSIS

ROP Civ. Pro. R. 60(b) provides a number of specific bases upon which a trial judge may relieve a party from a judgment or order. The portions of Rule 60(b) relevant to this appeal state: "the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) . . . excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment."[2] We conclude that where a party cannot demonstrate "excusable neglect" justifying relief from a judgment under Rule 60(b)(1), he may not obtain relief on ⊥223 the basis of "inexcusable neglect" under Rule 60(b)(6).[3]

Rule 60(b)(6) is intended "to cover unforeseen contingencies." 7 Moore's Federal Practice ¶ 60.27[2] (p. 60-274). Thus, we have recently held that "if a judgment is challenged for one of the five reasons specifically enumerated within Rule 60(b(1) - (5), the petitioner cannot rely upon the catch-all provision of Rule 60(b)(6)." *Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 86 (motion based upon fraud of an adverse party, untimely under Rule 60(b)(3), could not be

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[2] As Appellant does not argue that the order should be vacated on the basis of any of the other reasons enumerated in Rule 60(b), the quoted portion of the Rule is the only portion relevant to this inquiry. A reading of the Rule confirms that none of the other reasons set forth therein arguably offers Appellant a basis for relief.

[3] As noted above, we consider Appellant's motion as if it had been brought under Rule 60(b)(6). Although the question is not before us, we have no reason to believe the result would change had the motion been timely filed under Rule 59(a), which permits the granting of a new trial only "for manifest errors of law apparent in the record or for newly discovered evidence." *See, e.g., Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976)("[Such motions] are not intended merely to relitigate old matters nor . . . to allow the parties to present the case under new theories.").

granted under Rule 60(b)(6)). In the present circumstances, in light of the express inclusion of "excusable neglect" in Rule 60(b)(1), it is impossible to characterize "inexcusable neglect" as such an "unforeseen contingency" as to fall within the scope of Rule 60(b)(6).

Some cases, now relied upon by Appellant, have nevertheless held that relief is available under Rule 60(b)(6) where an attorney is grossly negligent. *See, e.g., L.P. Steuart, Inc. v. Matthews*, 329 F.2d 234 (D.C. Cir. 1964) ("Clause (1) of Rule 60(b) is not[,] and clause (6) is[,] broad enough to permit relief when . . . counsel . . . grossly . . . neglect[s] a diligent client's case . . ."). We believe that such cases are inconsistent with the proposition that "a court cannot grant relief under (b)(6) for any reason which the court could consider under (b)(1)," *Solaroll Shade and Shutter v. Bio-Energy Systems* , 803 F.2d 1130, 1133 (11th Cir. 1986) (noting that " *L.P. Steuart* and its progeny are at odds with this established policy"), and are contrary to logic. It simply does not make sense to vacate a judgment for excusable neglect (pursuant to Rule 60(b)(1)) and for gross neglect (pursuant to Rule 60(b)(6)), but not for the middle ground of inexcusable neglect: if one finds that vacating an order is justified even in the case of gross neglect, then why would one not vacate an order in the case inexcusable neglect? *See* 7 Moore's Federal ⊥224 Practice ¶ 60.27[2] note 45 (pp. 60-289). We conclude, therefore, that "counsel's negligence, whether gross or otherwise, is never aground for Rule 60(b) relief," *Dickerson v. Board of Education*, 32 F.3d 1114, 1118 (7th Cir. 1994).

We realize that as a result of this holding, unless he chooses to bring an action for legal malpractice, Appellant will bear the burden of his attorney's alleged shortcomings. [4] We agree with the trial court, however, that, as between Appellant and Appellee, that is as it should be:

> The [Appellant] selected his own counsel to represent him in this matter. If the [Appellant] chose unwisely, the penalty for that decision should fall on the [Appellant] and not on the [Appellee] who had no part in the selection.

The trial court's order denying Appellant's motion for reconsideration is accordingly AFFIRMED.

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[4] We should emphasize that we have taken Appellant's allegations at face value for purposes of this appeal. We express no opinion as to whether trial counsel acted negligently or not.