Sugiyama v. NECO Eng'g, Ltd., 9 ROP 262 (Tr. Div. 2001)

JOHN SUGIYAMA,
Plaintiff,

v.

NECO ENGINEERING, LTD.,
Defendant.

CIVIL ACTION NO. 00-173

Supreme Court, Trial Division
Republic of Palau

Decided: December 4, 2001

[1] **Civil Procedure:** Relief from Judgment; **Judgment:** Relief from Judgment

A motion pursuant to Rule 60(b) is the proper vehicle to set aside an agreed judgment entered into by an attorney without his client's consent.

[2] **Civil Procedure:** Relief from Judgment; **Judgment:** Relief from Judgment

A Rule 60(b) motion must be made within a reasonable time after the dismissal order was entered, and under subsections (1), (2), and (3) of the Rule, not more than one year after the judgment, order, or proceeding was entered or taken.

[3] **Civil Procedure:** Relief from Judgment; **Judgment:** Relief from Judgment

The one-year ceiling found in Rule 60(b) is an outer limit beyond which no motion may be filed, and all Rule 60(b) motions, even those that satisfy the one-year requirement, must be made within a reasonable time.

[4] **Civil Procedure:** Relief from Judgment; **Judgment:** Relief from Judgment
⊥263
Although the court has the power to entertain a Rule 60(b) motion made barely within the one-year limit, as the delay in making the motion approaches one year, there should be a corresponding increase in the burden that must be carried to show that the delay was reasonable.

[5] **Civil Procedure:** Relief from Judgment; **Judgment:** Relief from Judgment

The court must ascertain the reasonableness of the delay in making a Rule 60(b) motion under the specific circumstances of each case, keeping in mind that a motion for relief should be brought as soon as practicable after the grounds for the relief become available.

[6] **Civil Procedure:** Relief from Judgment; **Judgment:** Relief from Judgment

In a case where the basis of a Rule 60(b) motion was an allegation that an attorney entered into a settlement agreement without authority, the grounds for the motion should have been apparent immediately, and the only reason for delay should have been the time required to find a new attorney to assemble the necessary papers.

[7] **Civil Procedure:** Relief from Judgment; **Judgment:** Relief from Judgment

Client, not adverse party, should bear the burden of his attorney's alleged shortcomings.

LARRY W. MILLER, Associate Justice:

[1] This matter is before the Court on plaintiff's motion pursuant to ROP R. Civ. Pro. 60(b) to set aside this Court's Order of October 13, 2000, which ordered that it should be "in its entirety dismissed with prejudice." Although that Order was based on a Stipulation for Dismissal with Prejudice signed by counsel for both parties, plaintiff contends that his former counsel was without authority to do so. The factual contentions made by plaintiff in his affidavit, which are rebutted by the affidavit of both defendant's and his own former counsel, cannot be credited or discredited without a hearing from which the Court could make credibility determinations. Moreover, there is ample precedent that a 60(b) motion is a proper vehicle to set aside an agreed judgment entered by an attorney without his client's consent.[1] However, because the Court believes that this motion was not "made within a reasonable time" after the dismissal order was entered, it will be denied.

The complaint in this action was filed on September 18, 2000, coupled with a request for a temporary restraining order. The principal issue raised was whether plaintiff's right to cure his default in making a $500,000 payment due under his contract with defendant – and upon which his right to operate a rock quarry in Ngatpang was contingent – had expired on September 12, 2000, as defendant contended and plaintiff had initially conceded, or whether plaintiff instead had until October 12, 2000, to come up with the money. The Court entered a TRO and set a hearing on plaintiff's motion for a preliminary injunction for September 29, 2000. On the date set for hearing, however, counsel for both parties explained on the record that a settlement had been reached on the basis of which the motion for preliminary ⊥264 injunction would be withdrawn and the case would be dismissed with prejudice. As described to the Court, the parties had agreed that plaintiff could resume operation of the quarry if he paid $500,000 plus late fees and additional expenses by October 12, 2000; if the payment was not made, plaintiff would "walk away" with nothing. *See* p. 266 *infra*. On October 13, 2000, the Stipulation for Dismissal with Prejudice (dated October 6, 2000), was filed with the Court along with a proposed dismissal order, quoted above, which the Court signed that same day.

The present motion was filed on October 15, 2001. In an affidavit, plaintiff avers that,

---

[1] *E.g.*, *Bradford Exch. v. Trein's Exch.*, 600 F.2d 99, 102 (7th Cir. 1979): "Although an attorney of record is presumed to have his client's authority to compromise and settle litigation, a judgment entered upon an agreement by the attorney may be set aside on affirmative proof that the attorney had no right to consent to its entry."

before the September 29, 2000 hearing, he told his counsel "to continue to pursue possession of aggregate at the quarry that belongs to me, along with equipment and supplies there that are also mine" and that he "made it clear to him that any settlement of this matter would have to provide for the return of those items, or at least allow me to continue to pursue them." Affidavit of John Sugiyama, October 15, 2001, at ¶ 2.

[2-4] Rule 60(b) provides that a motion to set aside a judgment or order "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Because plaintiff has not specified under what subsection of the Rule he is proceeding, it is not clear whether his motion is subject to the one-year ceiling,[2] which he has just barely satisfied.[3] It is clear, however, that the one-year ceiling is an outer limit beyond which no motion may be filed, but that all Rule 60(b) motions – even those that satisfy the one-year requirement – must "be made within a reasonable time." *Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 85 (1997); 12 Moore's Federal Practice (3d ed. 1988), § 60-65[2][b] ("Even a motion that is made within the one-year period may be denied if the court determines that it is not made within a reasonable period of time."). As one court has put it:

> Although the fact that a motion was made barely within the one-year limit gives the court the *power* to entertain it, as the delay in making the motion approaches one year there should be a corresponding increase in the burden that must be carried to show that the delay was "reasonable."

Amoco Overseas Oil v. Compagnie Nationale Algerienne, 605 F.2d 648, 656 (2d Cir. 1979) (emphasis in original).

⊥265

[5, 6] There is no single rule for what is reasonable: in differing circumstances, courts have concluded that a delay of nearly seven years was justified by the actions of the opposing party, *United States v. Baus*, 834 F.2d 1114, 1121-23 (1st Cir. 1987); while an unexplained delay of two months and ten days was unreasonable, *McCullough v. Walker Livestock*, 220 F. Supp. 790, 796-97 (W.D. Ark. 1963). A common theme running through many of the cases, however, is that a motion for relief should be brought as soon as practicable after the grounds for the relief become available.[4] In cases where the basis of the motion is an allegation that an attorney entered into a

---

[2]Moore's suggests that the motion is properly considered under Rule 60(b)(6), but notes that "other cases have granted relief in this situation under Rule 60(b)(1)." 12 Moore's Federal Practice § 60.48[4][a] (3d ed. 1998). Of course, if relief is potentially available "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 (1997) (citing *Klapprott v. United States* , 69 S. Ct. 384 (1949)). Because this case turns on the "reasonable time" limitation, rather than the one-year maximum, this issue need not be resolved here.

[3]Since the one-year anniversary of the October 13 Order fell on a Saturday, it appears that, under ROP Civ. Pro. R. 6(a), plaintiff had until Monday, October 15, to file his motion. *See Amoco Overseas Oil v. Companie Nationale Algerienne*, 605 F.2d 648, 656 (2d Cir. 1979).

[4]*E.g.*, *Nat'l Org. for Women v. Operation Rescue* , 47 F.3d 667, 669 (4th Cir. 1995) (where motion was based on subsequent decision, trial court did not abuse its discretion in concluding that "defendants should be denied relief because they failed to take action for over a year after" the decision); *Fed. Land Bank of St. Louis v. Cupples Bros.*, 889 F.2d 764, 767 (8th Cir. 1989) (where motion was based on newly-

settlement agreement without authority, the grounds for the motion should be apparent immediately, and the only reason for delay should be the time required to find a new attorney to assemble the necessary papers.[5]

Here, the grounds for plaintiff's motion were available as soon as the Order was filed dismissing the action with prejudice. Even without the extraordinary efforts of plaintiff's new counsel,[6] it should have taken no more than a couple of months, if not weeks, to bring it before the Court. *See* n.5 *supra*. A delay of a full year was not reasonable.

Plaintiff attributes the delay to his failure, until just recently, to appreciate the significance of the words "with prejudice". The Court is doubtful whether that lack of understanding, in no way the fault or responsibility of defendant, should matter.[7] In ⊥266 any event, however, whatever uncertainty plaintiff had about the impact of the dismissal should have been dispelled by his reading of the transcript of the September 29, 2000 hearing, which he says he obtained in the spring of this year, and in which the significance of "with prejudice" to the claim plaintiff now says he wished to preserve was made entirely clear:

> In the unfortunate event that Mr. Sugiyama's unable to pay Mr. Etpison by the 12th, the following terms and conditions will apply. The stipulation for dismissal with prejudice will be filed the following morning of the 13th, Mr. Sugiyama, without notice walks away from the quarry, all equipment, all stock piles, all dynamite, including the stock pile in Malakal, with no payment or re[mun]eration of whatsoever . . . .

---

enacted statute, relief denied where defendant "ha[d] not explained its failure to bring the motion in the twelve months between the Act's effective date, when the basis for the motion arose, and affirmance of the foreclosure judgment"); *Sec. Mut. Cas. Co. v. Century Cas. Co.*, 621 F.2d 1062, 1068 (10th Cir. 1980) (where "April 11 order should have made the parties aware of . . . grounds for Rule 60(b)(1) relief," motion denied in the "absence of any showing of reasons for the delay after the April 11 order until July 14 when the motion . . . was filed").

[5]The facts recited in various cases where relief was sought on this basis, and timeliness was not an issue, show that the motion was filed within one to three months of the problematic judgment or order. *E.g.*, *Sur. Ins. Co. v. Williams*, 729 F.2d 581, 582 (8th Cir. 1984) (judgment entered on December 21, 1982, motion filed on February 14, 1983); *Smith v. Widman Trucking & Excavating*, 627 F.2d 792, 795 (7th Cir. 1980) (order entered on December 22, 1977, motion filed on March 2, 1978); *Bradford Exchange*, 600 F.2d at 1010 (injunction entered on January 24, 1978, motion filed on February 21, 1978); *Assocs. Discount Corp. v. Goldman*, 524 F.2d 1051, 1053 (3d Cir. 1975) (judgment entered on September 28, 1970, motion filed on December 21, 1970). By contrast, a delay of eight months from the entry of stipulated judgment to the motion to vacate it was found to be unreasonable. *Helene Curtis Indus. v. Dinerstein*, 17 F.R.D. 223, 225 (E.D.N.Y. 1955).

[6]According to the affidavit accompanying his motion to withdraw as counsel, he was approached by plaintiff on Friday, October 12, and worked through the weekend to file this motion on Monday, October 15.

[7]In a perhaps analogous context, statutes of limitations may be extended because of fraudulent concealment, 14 PNC § 409, or even when a person is unable to understand or exercise his legal rights, *see id.* § 406 (tolling the statute while a person "is a minor or is insane or is imprisoned"), but not merely because he is unaware that he has a cause of action. *See* 51 Am. Jur. 2d *Limitation of Actions* § 215 (2000) (re *Plaintiff's ignorance of facts or law*).

Even starting the clock from the spring of this year, the Court finds that plaintiff delayed unreasonably by waiting until October to bring this motion.

[7] The Court has not ignored plaintiff's assertion that at the time of the dismissal and even after he had read the transcript, his counsel "told [him] that he had left open other means for [him] to recover [his] aggregate, equipment and supplies."[8] Even were that true – which his former counsel flatly denies and as to which the Court, of course, expresses no opinion – it is plaintiff, and not defendant, that should "bear the burden of his attorney's alleged shortcomings." *See Doe v. Doe*, 6 ROP Intrm. 221, 224 (1997).[9] Plaintiff's motion is accordingly denied.[10]

So Ordered.

---

[8]Plaintiff's assertion raises the obvious question of when, assuming he believed he had other avenues for relief, he intended to utilize them. Plaintiff had surrendered the quarry site to defendant in September 2000. Surely, for plaintiff's own purposes, his hopes of recovering anything left behind there required him to act without undue delay.

[9]The strict holding of *Doe v. Doe* is that "counsel's negligence, whether gross or otherwise, is never a ground for Rule 60(b) relief." *Id.* Here, even though the Court has recognized that an unauthorized settlement *may* be a ground for such relief, the Court believes that the same principle should apply, and that counsel's further malfeasance cannot then be tacked on to excuse plaintiff's failure to seek such relief in a timely fashion.

[10]Also pending is the motion to withdraw filed by plaintiff's current counsel. No opposition having been received, that motion is granted.