UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-2802
Summary Calendar

JAMES W. FARRELL, LON J. FARRELL,
SCOT J. FARRELL, ROBERT E. SAMPSON,
and ALAN G. BLOCK,

Plaintiffs-Appellants,

versus

DENNIS K. GERLAND, ET AL.,

Defendants,

GERLAND'S FOOD FAIR, INC.,

Defendant-Appellee.

* * * * *

No. 92-2412
Summary Calendar

JAMES W. FARRELL, ET AL.,

Plaintiffs-Appellants,

versus

DENNIS K. GERLAND, ET AL.,

Defendants,

GERLAND'S FOOD FAIR, INC.,

Defendant-Appellee.

Appeals from the United States District Court for the
Southern District of Texas
CA H 87 2073

(July 9, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.[*]

GARWOOD, Circuit Judge:

In these consolidated appeals involving a commercial dispute, plaintiffs-appellants, James W. Farrell, Lon J. Farrell, Scott J. Farrell, Robert E. Sampson, and Alan G. Block (collectively "Farrell"), appeal in cause No. 92-2412 the denial of their FEDERAL RULE OF CIVIL PROCEDURE 60(b) motions seeking relief from a take nothing judgment entered against them under FEDERAL RULE OF CIVIL PROCEDURE 54(b), and in cause No. 91-2802 they appeal the denial of their FEDERAL RULE OF CIVIL PROCEDURE 59 motion to reconsider a default judgment awarding over $228,000 to defendants-appellees, Dennis K. Gerland, Supermarket Technology Corporation, and Gerland's Food Fair, Inc. (collectively "Gerland"), on Gerland's counterclaim against Farrell. We affirm the denial of appellants' Rule 60(b) motions. However, we vacate the judgment in Gerland's favor on its counterclaim against Farrell and remand the counterclaim for a new trial.

Facts and Proceedings Below

In 1985, Supermarket Technology Corporation (Supermarket Technology) contracted with Gerland's to operate energy saving refrigeration equipment in two Gerland's Food Fair grocery stores.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

To finance the venture, the owner of Supermarket Technology, Dennis K. Gerland, convinced Farrell to join him in forming a general partnership, Super Tech III, with Gerland serving as the general partner. The partnership purchased the equipment from Supermarket Technology and then leased it back to Supermarket Technology which operated the equipment in the two Gerland's stores and assigned a portion of the revenues from the Gerland's contracts to the partnership. From January 1986 through August 1986,[1] the refrigeration equipment did not work properly and its malfunctioning resulted in the spoilage of various food items causing Gerland's Food Fair to incur a substantial loss. Gerland's Food Fair cancelled its contracts with Supermarket Technology causing the general partnership and its partners to incur a loss.

In May, 1987, Farrell sued Gerland in Texas state court alleging breach of contract, breach of fiduciary duty, misrepresentation, Texas Deceptive Trade Practice, and federal securities fraud claims alleging that Dennis Gerland fraudulently enticed them to join the partnership by making numerous misrepresentations. Gerland removed the case to the federal district court below and filed a counterclaim against Farrell, alleging breach of contract and negligence claims on the grounds that the partnership had failed to service the equipment properly.

On October 12, 1988, the district court ordered that a joint pretrial order be filed by December 29, 1989. On November 13, 1989, Gerland filed a motion for summary judgment seeking dismissal

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[1] Farrell alleged that the equipment malfunctioned even before the partnership was formed.

of Farrell's claims and requesting the entry of a final judgment pursuant to FEDERAL RULE OF CIVIL PROCEDURE 54(b). Farrell's counsel, Samuel L. Childs, failed to file a pretrial order or to respond in any way to the summary judgment motion.

On January 19, 1990, Gerland again moved for summary judgment and asked the district court to strike Farrell's pleadings because Farrell's counsel failed to file Farrell's portion of the pretrial order, file a response to the summary judgment motion, and conduct discovery. Finally, on January 29, 1990, Farrell's counsel responded to this motion, complaining that he needed more time since he could not prepare for trial without deposing Dennis Gerland who was under bankruptcy protection. Farrell's counsel made no attempt to depose Gerland prior to his filing bankruptcy and made no attempt to seek the bankruptcy court's permission to depose Gerland after the bankruptcy filing. The district court did not grant Gerland's request to strike Farrell's pleadings or grant Farrell's delay request.

On August 7, 1990, the district court granted a partial summary judgment in favor of Gerland dismissing all Farrell's claims against Gerland; this judgment included an appropriate certificate under FEDERAL RULE OF CIVIL PROCEDURE 54(b) making it final and appealable. Farrell's counsel failed to file a timely notice of appeal from this judgment.

The August 7, 1990 summary judgment did not dispose of Gerland's counterclaim against Farrell for breach of contract. On April 19, 1991, the district court held a pretrial conference concerning this claim. Farrell's counsel, however, had not filed

the pretrial order, almost a year and a half after it was due and after warnings in Gerland's summary judgment memorandums three months previously. Farrell's counsel arrived late to this April 19, 1991 conference.

As a penalty for Farrell's counsel's failure to comply with filing deadlines, the district court struck Farrell's pleadings in defense to Gerland's counterclaim, granted Gerland a default judgment on the issue of liability, and ordered a hearing three days later on the issue of damages.

At the damages hearing, on April 22, 1991, despite the fact that Gerland's pleadings requested damages of not less than $10,000, the district court entered judgment in favor of Gerland for $146,000 in actual damages, $82,159.48 in prejudgment interest, and $45,000 in attorneys' fees. A judgment was entered for these amounts on April 26, 1991. Farrell timely filed Rule 59(e) motions for reconsideration, but they were denied on June 13, 1991.

Farrell then learned that during the time that attorneys Childs and Colvert had been representing it, those attorneys had been ill. For two years prior to a doctor's visit in February of 1991, Childs claims that he felt sluggish, disoriented, took uncharacteristic naps during the day, was unable to concentrate, ignored or put many matters aside, missed deadlines, and lacked energy and attention span. Childs believed that he was able to handle simple cases, but not complex ones.

Eventually Childs decided that he was so disoriented that he should see a doctor. At this doctor's visit, his first in six years, he was diagnosed with diabetes mellitus and treated. He

claims that he recovered by May of 1991.

During the period of his illness, Childs handled numerous cases. Many cases, including some complex ones, he handled effectively. In others, he missed deadlines resulting in complaints from his clients, threats of malpractice, and substitution of counsel. He filed several law suits, conducted discovery, counselled business, closed business transactions, made court appearances up to three to four times a week, mostly to argue motions, but did not try any cases.

In 1987 Childs hired attorney Colvert to assist him in the Farrell case and in several other cases. Colvert prepared the first draft of most court documents and appeared at depositions on Farrell's behalf without Childs. Childs was counsel of record and received all communications from the court and opposing counsel about deadlines and conference dates. At the April 22, 1991 damages hearing, Colvert, not Childs, cross-examined witnesses and argued before the court, even though Colvert was not admitted to practice in the Southern District of Texas. Childs admitted that he failed to keep Colvert apprised of developments in the case, such as the fact that he had failed to respond to the summary judgment motion that was granted in August 1990.

Unknown to Farrell was the fact that Colvert had been placed on disciplinary probation by the Texas State Bar for cocaine dependency on April 15, 1991. It is unclear when this dependency began and whether it impaired Colvert's efforts while the case was pending.

Farrell claims that he did not become aware of Childs' illness

and Colvert's cocaine dependency until September 25, 1991. On September 27, 1991, Farrell changed counsel and filed a Rule 60(b) motion for relief from final judgment on the ground of excusable neglect claiming that Childs' diabetes mellitus made him incapable of representing it. This motion claimed that both the Rule 54(b) judgment of August 7th, 1990, and the judgment of April 26, 1991 should be set aside. The district court denied this motion on the grounds that Childs' medical impairment did not amount to excusable neglect under Rule 60(b)(1) as evidenced by the fact that he handled other cases effectively.

On April 8, 1992, appellants filed a second Rule 60(b) motion alleging that co-counsel Colvert was incapable of representation because of a cocaine dependency. This motion was also denied.

Farrell appeals the denial of both Rule 60(b) motions and the denial of the Rule 59(e) motion to reconsider the April 26, 1991 judgment finding liability by default on Gerland's counterclaim and awarding damages after trial.

Discussion

I. The Rule 60(b) Motions

Farrell filed two Rule 60(b) motions. The first sought relief from both the Rule 54(b) judgment of August 7, 1990, which dismissed Farrell's claims against Gerland, and the judgment of April 26, 1991, which granted Gerland recovery on its counterclaim against Farrell, on the grounds that Childs' conduct constituted excusable neglect under Rules 60(b)(1) and 60(b)(6). The second sought relief from both judgments based on the conduct of Colvert under Rules 60(b)(1) and 60(b)(6).

We review denials of Rule 60(b) motions under the abuse of discretion standard. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990); *Knapp v. Dow Corning Corp.*, 941 F.2d 1336, 1338 (5th Cir. 1991); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981).

Rule 60(b) provides that a court may relieve a party from a final judgment for: "(1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment." FEDERAL RULE OF CIVIL PROCEDURE 60(b) (West 1992). A Rule 60(b)(1) motion cannot be brought more than one year after the original judgment was entered. *Id.*

Rules 60(b)(1) and 60(b)(6) offer mutually exclusive remedies such that "a court cannot grant relief under (b)(6) for any reason which the court could consider under (b)(1)." *Solaroll Shade and Shutter Corp. v. Bio-Energy Systems*, 803 F.2d 1130, 1133 (11th Cir. 1986) (citations omitted). Thus, "where the reason for relief is embraced in Clause (b)(1), the one year limitation cannot be circumvented by use of Clause (b)(4) or (b)(6)." *Gulf Coast Building & Supply Co. v. Int'l Brotherhood of Electrical Workers*, 460 F.2d 105, 108 (5th Cir. 1972). *See Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 133 (4th Cir.), *cert. denied*, 113 S.Ct. 70 (1992). Relief because of attorney misconduct is available under Rule 60(b)(1). *See Solaroll*, 803 F.2d at 1133.

Farrell relied on the same evidence and arguments of attorney neglect in support of both motions showing that its reason for relief was the same for both motions. Thus, we treat Farrell's motions only as Rule 60(b)(1) motions.

Farrell's Rule 60(b)(1) motions were filed more than one year after entry of the August 7, 1990 Rule 54(b) judgment they were seeking to overturn. Therefore, the district court properly denied Farrell relief from the August 7, 1990 judgment. *Gulf Coast*, 460 F.2d 108.

Farrell's Rule 60(b)(1) motions challenging the April 26, 1991, judgment were filed within a year of that judgment so we will examine whether the district court abused its discretion in finding that the conduct of Childs and Colvert did not constitute "excusable neglect" under 60(b)(1). The negligence, carelessness, or indifference of a client's lawyer, such as missing deadlines, does not constitute excusable neglect under Rule 60(b). *Lavespere*, 910 F.2d at 173; *Knapp*, 941 F.2d at 1338 (that attorney did poor job of marshalling the facts before the trial court did not reflect the malfeasant discharge of responsibility sufficient to merit relief under Rule 60(b)); *Engleson v. Burlington Northern R.R. Co.*, 972 F.2d 1038, 1043 (9th Cir. 1992)(pleading errors negligent, but not excusable neglect); *United States v. One 1978 Piper Navajo PA-31 Aircraft*, 748 F.2d 316, 319 (5th Cir. 1984) (counsel's failure to appear to defend, or to request time extension because of office workload not excusable neglect). Excusable neglect involves more egregious attorney conduct than mere negligence. *See, e.g.*, *Seven Elves*, 635 F.2d at 400 (attorney withdrawal from case without informing court or client resulting in default judgment is excusable neglect).

Farrell contends that Childs' and Colvert's medical problems made their inadequate representation excusable neglect. The

district court found otherwise, with adequate support in the record. The evidence does not compel the conclusion that either Childs or Colvert were medically incompetent to practice law, and the district court could properly find that their conduct here resulted from carelessness. During the period that Childs negligently represented Farrell, Childs successfully handled cases for other clients, he appeared in court and closed business transactions. Childs was primarily responsible for defending Farrell and the record does not compel the conclusion that Childs' diabetic condition so was so severe that it destroyed his ability to adequately represent Farrell. The district court did not abuse its discretion in denying Farrell Rule 60(b) relief.

II. The April 1991 Judgment

Farrell also asserts that the district court erred in denying its Rule 59(e) motion seeking reconsideration of the April 1991 default judgment on the issue of liability because lesser sanctions were appropriate in light of Childs' misconduct.[2]

FEDERAL RULE OF CIVIL PROCEDURE 16(f) permits a court to impose sanctions if a party fails to obey a pretrial order. Because imposing liability by default like "dismissal with prejudice is the ultimate penalty, a district court should employ this sanction only when there is a `clear record of delay or contumacious conduct by

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[2] Farrell properly raised this issue in his Rule 59(e) motion. In *Lavespere*, 910 F.2d at 174, we noted that the burden on a party seeking reconsideration under Rule 59 is far less than under Rule 60(b). "[T]he mover need not first show that her default was the result of mistake, inadvertence, surprise, or excusable neglect or that the evidence is such as to show that the judgment was manifestly wrong." *Id.* (case reopened on the basis of evidentiary materials not timely submitted).

the plaintiff,' and `lesser sanctions would not serve the best interests of justice.'" *John v. State of Louisiana*, 828 F.2d 1129, 1131 (5th Cir. 1987) (quoting *Price v. McGlathery*, 792 F.2d 472, 474 (5th Cir. 1986).[3] "[W]e have said that we cannot affirm a dismissal unless the district court expressly considered alternative sanctions and determined that they would not be sufficient to prompt diligent prosecution or the record reveals that the district court employed lesser sanctions prior to dismissal . . . that in fact proved to be futile." *Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513, 1521 (5th Cir. 1985).

"In addition, a district court should consider aggravating factors including whether the plaintiff himself [as opposed to plaintiff's counsel] contributed to the delay, whether the defendant suffered actual prejudice, and whether the delay was intentional." *John*, 828 F.2d at 1131; *Callip*, 757 F.2d at 1519. "The presence of one aggravating factor, along with the record of delay or contumacious conduct and consideration of lesser sanctions will support a dismissal with prejudice." *Price v. McGlathery*, 792 F.2d 472, 475 (5th Cir. 1986). "`[T]he failure to appear at a pretrial conference may, in the context of other evidence of delay, be considered by a District Court as justifying a dismissal with prejudice.'" *Id.* (quoting *Link v. Wabash R.R. Co.*, 82 S.Ct. 1386, 1391 (1962). We apply the abuse of discretion standard in

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[3] *See also Velazquez-Rivera v. Sea-Land Service, Inc.*, 920 F.2d 1072, 1075-1079 n.11 (1st Cir. 1990) (reversing sanction of default and summarizing cases on both sides of the issue).

reviewing grants of default judgments under Rule 16(f). *John*, 828 F.2d at 1131.

We agree with the district court that Childs' conduct reflects a clear and contumacious record of inaction. Childs failed to conduct discovery, allowed a summary judgment to be entered dismissing his clients' claims, and failed to file a pretrial order. However, no delay or prejudice to other parties or the court resulted from Childs' inaction. Gerland continued prosecuting its counterclaim without interruption. The summary judgment proceedings, the pretrial conference, and the trial on damages all occurred as scheduled.

The district court should have imposed a less severe sanction than granting a default judgment on the issue of liability for several reasons considered cumulatively. First, the sanction of default was too severe, given Childs' conduct. Childs' conduct only served to harm Farrell and did not interfere with the prosecution of Gerland's claim or with the timely and orderly administration of justice. Second, there is no indication that the district court considered imposing less severe sanctions than default. *Compare John*, 828 F.2d at 1132 ("the trial judge in this case did impose less severe sanctions before dismissing with prejudice" and the court still reversed the default sanction). *See Callip*, 757 F.2d at 1519; *Hornbuckle v. Arco Oil & Gas Co.*, 732 F.2d 1233 (5th Cir. 1984) (default sanction remanded for express findings on whether less sufficient sanctions would be appropriate). Also, no evidence showed that, other than a standard warning on the Rule 16 scheduling order, the district court warned

Farrell or its counsel in advance that a default sanction could be entered against it.

Third, an available lesser sanction would have been a sufficient and appropriate penalty in this case. One appropriate sanction would have been to limit Farrell to Gerland's pretrial order. This sanction would allow the trial to go forward as scheduled, would prevent Farrell from calling witnesses or introducing evidence, but would allow Farrell to cross-examine Gerland's witness. Gerland would not be relieved of the duty to prove its case on the issue of liability. This sanction also limits, without eliminating, the harm to Farrell from his attorneys' behavior.

Other possible sanctions include sanctioning Farrell's attorneys, Childs and Colvert, in lieu of punishing Farrell. *John*, 828 F.2d 1132 ("While recognizing that a party is `bound by the acts of his lawyer-agent' and may suffer dismissal with prejudice if his counsel is chargeable with clear delay or contumacy, the proper punishment for an inept lawyer is to assess fines, attorney's fees, or costs against the lawyer without harming the client.") (citation omitted).

Fourth, none of the aggravating factors favoring the entry of default are present in the record. No evidence suggested Farrell was responsible for the failure to file the pretrial order. The inaction and procedural errors in this case were committed by Farrell's lawyers, Childs and Colvert. Gerland suffered little prejudice from Farrell's failures to file a pretrial order or conduct discovery. In fact, Gerland probably benefitted by these

errors inasmuch as they weakened Farrell's case. Unlike *Price*, 792 F.2d at 475, the record does not indicate that the errors by Childs and Colvert were intentional (as opposed to merely negligent). There is no evidence that Farrell intended to allow the entry of a default judgment.

The district court would not have been prejudiced by a lesser sanction. Judicial economy was not served by the entry of this default because a trial was held on the issue of damages and because no delay resulted from Childs' behavior. Farrell's counsel appeared at the pretrial conference, though late, and appeared at the trial on damages as well. The only purpose served by this default sanction was punitive. Imposing liability on a defendant is a more severe sanction than dismissing a plaintiff's claim without prejudice, and should only be used rarely after a party begins to defend an action.

In sum, since no delay or prejudice resulted from the attorneys' inaction and lesser sanctions would have been sufficient, the punishment did not fit the crime in this case. We hold that the district court abused its discretion in imposing the sanction of a default judgment on Gerland's counterclaim against Farrell in light of the conduct of Farrell, Farrell's counsel, and the availability of less severe sanctions.[4]

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[4] We do not reach the issue of whether the district court erred in awarding default damages far in excess of the amount requested. FED. R. CIV. P. 54(c) (West 1992) ("[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment"); *Compton v. Alton S.S. Co.*, 608 F.2d 96, 104 n.16 (4th Cir. 1979). We also do not reach the issue of whether Gerland sufficiently pleaded the elements necessary for its breach of contract claim and whether

Conclusion

The district court's orders denying Rule 60(b) relief as to the Rule 54(b) judgment of August 7, 1990 dismissing with prejudice all of Farrell's claims against Gerland is affirmed. The judgment of April 26, 1991 granting Gerland damages on its counterclaim against Farrell is reversed and Gerland's counterclaim against Farrell (including damages, if liability is established) is remanded.

AFFIRMED in part; REVERSED and REMANDED in part.

Super Tech Investment Fund III as a" delegatee of performance" had and breached a duty to perform contracts for Supermarket Technology. *See generally Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365, 369-71 (Tex. Civ. App.SQAustin 1982, writ ref'd n.r.e.); *McKinnie v. Milford*, 597 S.W.2d 953 (Tex. Civ.App.SQTyler 1980, writ ref'd n.r.e). The record does not contain all of the contracts so we could not determine the contractual duties owed by each party anyway. Gerland's pleadings also allege that Farrell negligently serviced the refrigeration equipment, but it is unclear from the pleadings whether the partnership ever attempted to service the equipment.