**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 92-2498**
**Summary Calendar**

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**IN RE: HOUSTON OIL TRUST SECURITIES LITIGATION MDL-625**

**FRANK T. KOUTRAS,**

**Plaintiff-Appellant,**

**VERSUS**

**HOUSTON OIL & MINERALS CORP., TENNECO, INC., ET AL.,**

**Defendants,**

**HOUSTON OIL & MINERAL CORP.,**

**Defendant-Appellee.**

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Appeal from the United States District Court
for the Southern District of Texas
(MDL-625; CA-H-85-4062)

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March 22, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Frank T. Koutras appeals the denial of his Fed. R. Civ. P. 60(b) motion for relief from two orders of the district court: (1) granting summary judgment for the appellees, and (2) dismissing the

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

case "for want of prosecution".[2] We hold that the district court abused its discretion in denying the motion, and remand for further proceedings consistent with this opinion.

I.

This litigation arises out of Tenneco, Inc.'s, acquisition of Houston Oil & Mineral Corporation (HOM) in 1981. Koutras is one of many HOM shareholders who, following the merger, sued HOM, Tenneco, and other defendants in several lawsuits in various states, for securities violations, misrepresentations, and other statutory and common law claims for relief relating to the acquisition.

The various suits were consolidated in the Southern District of Texas in 1982 (***Fine***), and a nationwide class of plaintiffs was certified in 1983. Koutras, however, opted out of the class and filed an individual action in the District of Nevada in 1984. Upon the defendants' motion to the Judicial Panel on MultiDistrict Litigation (MDL panel), Koutras's suit was transferred to the Southern District of Texas in 1985, pursuant to 28 U.S.C. § 1407, for "coordinated or consolidated pretrial proceedings" with ***Fine***.

Following extensive discovery, the class plaintiffs reached a settlement agreement in June 1986 with HOM, Tenneco, and one other defendant; and ***Fine*** was dismissed that September as to those

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[2] Koutras initially also appealed the summary judgment and the dismissal. In his reply brief, however, he concedes that this court lacks jurisdiction, because his notice of appeal was untimely as to those two orders. *See* Fed. R. App. P. 4(a)(1). Thus, our review is limited to the denial of the Rule 60(b) motion, from which timely appeal was taken. Although signed on May 22, 1992, the order was not entered until May 28, 1992; and the notice of appeal was filed on June 26, 1992, within the 30 days allowed by Fed. R. App. P. 4(a)(1).

defendants. The court retained jurisdiction for purposes of distributing the settlement and over the non-settling defendants. Koutras was given the opportunity to opt back into the class to partake in the settlement, but declined. Thus, his individual action remained pending.

Little occurred in that suit over the next few years. In May 1987, counsel for Tenneco and HOM took Koutras's deposition. The appellees state that, in October 1988, trial was set for January 1989.[3] Koutras, however, failed to appear for the docket call. His counsel, Michael Morrison, has a Nevada address, and later stated by affidavit that he had no knowledge or notice of the docket call, but would have attended had he received notice.

Also in January 1989, Koutras moved the MDL panel to remand his case to the District of Nevada, stating that the pre-trial proceedings, for which the case had been transferred initially, had concluded when ***Fine*** settled, and that his case was ready for trial.[4] The district court struck the motion for non-compliance with local rules, however; and Koutras did not refile. By affidavit, Morrison later indicated that he was unaware that the motion had been struck. He stated that in February 1990, he had inquired of the district court whether there was a faster or better way to have the case remanded and set for trial, and was advised

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[3] Although the appellees have included in their record excerpts a copy of a "Notice of Setting" apparently issued them by the case manager, no record of the setting appears in the docket entries.

[4] There is some question about whether Koutras filed the remand motion with the proper authority; he apparently filed it with the district court rather than with the MDL panel.

that the remand motion was the proper procedure. He then continued to await ruling on the earlier filed motion.

In March 1991, the defendants moved for summary judgment, contending that Koutras's deposition testimony was contrary to the allegations in the pleadings. The certificate of service simply stated that all counsel had been served. Again, Koutras did not respond and did not appear at the motion hearing; and, again, Koutras's counsel later stated by affidavit that he never received notice of either the motion or hearing. On July 25, the district court granted the motion, based only on Koutras's failure to respond.

On the same day, the district court *sua sponte* entered a Final Judgment dismissing the case "for want of prosecution".[5] In support, it cited Fed. R. Civ. P. 4(j), which mandates dismissal of claims against a defendant for failure to perfect service on that defendant within 120 days of the filing of the complaint, and a Fifth Circuit case applying it. Additionally, the court cited a Supreme Court case applying Fed. R. Civ. P. 41(b), which allows dismissal for, *inter alia*, "failure ... to prosecute". The Rule 4(j) grounds were apparently based on the inadvertent statement by appellees' counsel that Koutras had failed to serve process on *any* of the defendants.[6]

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[5] At the summary judgment hearing, the court had ruled: "Motion for summary judgment is granted. Additionally, the case is dismissed for want of prosecution."

[6] Appellees' counsel answered "no" when asked whether any of the defendants had been served. In context, however, it appears that counsel may have intended his answer only with respect to the 15

Morrison testified by affidavit that he did not learn of the summary judgment and dismissal until August 5, 1991. Shortly thereafter, he wrote to the district court, alerting it that he would be submitting a Rule 60 motion.[7] On September 3, 1991, Koutras moved for relief from both the summary judgment and the dismissal, pursuant to Fed. R. Civ. P. 60(b). In response, the appellees contested relief only from the dismissal for want of prosecution; they had no objection to reconsideration of the motion for summary judgment on the basis of lack of notice. Almost ten months later, the district court denied the motion without explanation.

II.

Rule 60(b) provides for relief "[o]n motion and upon such terms as are just" from a final judgment, order, or proceeding for reasons including, among other things, "mistake, inadvertence, surprise, or excusable neglect". Fed. R. Civ. P. 60(b)(1). "Review of a denial of a Rule 60(b) motion is limited to the abuse of discretion standard to ensure that 60(b) motions do not undermine the requirement of a timely appeal". ***First Nationwide***

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defendants besides HOM and Tenneco. Counsel had clearly stated that HOM and Tenneco were the only two defendants that *had* been served, which, in fact, they were. Our reading of the summary judgment hearing transcript, when viewed in connection with the district court's reliance on Rule 4(j) in its dismissal order, indicates that the district court was under the mistaken impression that neither HOM nor Tenneco had been served. Morrison later explained, again by affidavit, that Koutras had intentionally abandoned the claims against the other defendants.

[7] The appellees submitted a copy of this letter in their record excerpts.

***Bank v. Summer House Joint Venture***, 902 F.2d 1197, 1200 (5th Cir. 1990). Naturally, however, our review entails some inquiry into the propriety of the underlying orders from which relief is sought.

First, we hold that the district court abused its discretion in denying relief from the dismissal. As explained above, the dismissal apparently was based, at least in part, on the erroneous belief that neither HOM nor Tenneco had been served. And, to the extent that the district court may have relied on Rule 41(b),[8] we also reverse, because of the absence of (1) a clear record of delay or contumacious conduct, and (2) an express determination that lesser sanctions would not prompt diligent prosecution. *See* ***Berry v. CIGNA/RSI-CIGNA***, 975 F.2d 1188, 1191 (5th Cir. 1992). We recognize that this standard applies for purposes of direct appeal only, however, "[i]n the context of this case, ... a Rule 60(b)(1) motion alleging excusable neglect raises the same questions and requires virtually the same analysis as would an appeal from [the dismissal order itself]". ***Silas v. Sears, Roebuck & Co.***, 586 F.2d 382, 386 (5th Cir. 1978).[9]

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[8] The appellees defend the dismissal only on this basis; the cases upon which they rely address only Rule 41(b), not Rule 4(j).

[9] In ***Silas***, this court held that dismissal was "much too severe a response" for counsel's failure to appear at a pretrial conference, where the Rule 60(b) motion was filed within the time allowed for filing an appeal, and the motion was supported with counsel's affidavit clearly explaining the reasons for the failure. 586 F.2d at 386-87. Although Koutras's Rule 60(b) motion was filed 40 days after the dismissal was entered (10 days after the time for appeal had run), Morrison had notified the court, by telephone and by letter, of his intention to file the motion and the grounds in support of it well within the time for appeal. *Cf.* ***Pryor v. U.S. Postal Service***, 769 F.2d 281, 287-88 (5th Cir. 1985) (distinguishing ***Silas***, where the motion for relief was filed nearly

Second, we hold that the district court also abused its discretion in denying relief from the summary judgment. At no time have the appellees asserted that Koutras did, in fact, receive notice of the summary judgment motion; and the district court never made such a finding. To the contrary, as noted, the appellees did not, and do not, oppose reconsideration of the motion, in the event that relief is granted from the dismissal. (They do not even address this issue in their brief here.)[10] Additionally, Morrison's actions at all times were consistent with his affidavit testimony that he did not receive notice of the various proceedings he missed. Specifically, we find it telling that, on January 17, 1989, he filed the motion to remand to the District of Nevada, yet missed the January 19 docket call -- the scheduling of which, also tellingly, does not appear in the court's records. Because the district court based summary judgment solely on Koutras's failure

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three months after dismissal, and the supporting memorandum, filed nearly a month after that, offered only the "unsubstantiated general assertion that [counsel] was too busy ..."); ***Williams v. Brown & Root, Inc.***, 828 F.2d 325, 328-29 (5th Cir. 1987) (distinguishing ***Silas***, where plaintiff asserted meritorious grounds for relief on appeal, but had not raised them in the district court).

[10] Koutras's failure to receive various notices from the district court clerk's office, including the scheduling of the hearing on the summary judgment motion, is apparently attributable to the clerk having an incorrect address for Morrison. In his reply brief, Koutras admits that Morrison may have failed to notify the clerk of his address change. Regardless of any such neglect, however, Koutras would have learned of the summary judgment motion had the appellees served Morrison a copy of it, as required by Fed. R. Civ. P. 5(a). The record shows that they *did* have his correct address, and they do not contend otherwise.

to appear to contest it,[11] because there were indications that Koutras never received notice of that motion, and because the appellees did not object to reconsideration, we hold that the district court abused its discretion in denying the motion for relief from the summary judgment.

III.

For the foregoing reasons, the order of the district court is **REVERSED**, and the case is **REMANDED** for further proceedings consistent herewith.

**REVERSED and REMANDED**.

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[11] We are not unmindful that, in a direct appeal from a summary judgment, this in itself constitutes reversible error. *See* ***Hibernia National Bank v. Administracion Cent. Sociedad Anonima***, 776 F.2d 1277, 1279 (5th Cir. 1985) (summary judgment cannot be granted simply because there is no opposition, even if failure to oppose violates a local rule; the movant still bears the burden of establishing the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law); *see also* ***John v. State of Louisiana***, 757 F.2d 698, 708 (5th Cir. 1985).

Rule 60(b), however, may not be used as "an avenue for challenging mistakes of law that should ordinarily be raised by timely appeal". ***Aucoin v. K-Mart Apparel Fashion Corp.***, 943 F.2d 6, 8 (5th Cir. 1991). Therefore, we do not rely solely on this error in reversing the ruling on the 60(b) motion.