

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3329
Summary Calendar

ALLEMAND BOAT COMPANY,

Plaintiff-Appellee,

VERSUS

EUGENE KIRK,

Defendant-Appellant.

No. 92-3330
Summary Calendar

ALLEMAND BOAT COMPANY,
As Owner of the M/V CAPTAIN AL, Praying for Exoneration from
and/or Limitation of Liability,

Plaintiff-Appellee,

VERSUS

EUGENE KIRK, et al.,

Claimants,

EUGENE KIRK,

Claimant-Appellant.

No. 92-3331
Summary Calendar

EUGENE KIRK,

Plaintiff-Appellant,

VERSUS

ALLEMAND BOAT COMPANY,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana
(CA 91 1600 K, CA 91 2329 K & CA 91 3386 K)

(November 18, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

In this matter, we consider three consolidated appeals resulting from adverse judgments against Eugene Kirk stemming from an alleged injury he sustained as a deckhand for Allemand Boat Company ("Allemand"). We conclude that we are without jurisdiction as to some of the matters urged on appeal, and as to the other matters, finding no error, we affirm.

* 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

The alleged injury occurred in November 1990. In April 1991, Allemand filed a complaint for declaratory judgment¹ against Kirk, seeking a declaration that Allemand was not liable for maintenance and cure on the ground that Kirk had wilfully concealed a pre-existing condition and was not injured in the service of the ship. Allemand's attorney requested Kirk's counsel to file some response to the action and threatened to seek a default judgment if responsive pleadings were not filed. Kirk's counsel, indicating that he did not wish to jeopardize a Jones Act proceeding he planned to file in state court, refused to respond in the federal action. Consequently, Allemand requested and received a clerk's entry of default.

On June 12, 1991, at a conference with counsel, the magistrate judge asked Kirk's attorney to file an answer and to move to set aside the default. That same day, Kirk's counsel filed only an answer and failed to move to set aside the default.

Two days later, Kirk filed a state court Jones Act suit regarding the incident. On June 25, 1991, Allemand filed a second federal suit seeking exoneration from and/or limitation of liability.² A month later, the state Jones Act proceeding was stayed pending the outcome of the limitation and declaratory suits. The federal district court directed that all claims against

¹ The appeal of the declaratory judgment proceeding is No. 92-3329.

² We refer hereinafter to this action as the limitation suit. The appeal in this action is No. 92-3330.

Allemand should be made in the limitation action. The same judge began handling both the limitation and the declaratory suits.

On September 10, 1991, in the absence of any response from Kirk, Allemand filed a request for entry of default in the limitation proceeding. On that date, Kirk filed an answer in the limitation case, despite the requirement in Rule F(5) of the Supplemental Rules for Certain Admiralty and Maritime Proceedings that a claim be filed first. Also on September 10, Kirk filed a separate Jones Act and general maritime law action in federal court.³ Eight days later, Kirk filed motions to set aside the preliminary entries of default in the limitation and declaratory suits.

On September 23, 1991, the district court denied, without prejudice, the motions to set aside. The order was grounded on the fact that Kirk had failed to file a claim in the limitation action, as required by rule F(5); that the motions to set aside were not accompanied by required memoranda as required by the local rules; and that the motions presented no legal or factual grounds in support. The court also directed Allemand to show cause why the limitation action should not be dismissed for failure to prosecute or to file a motion for default judgment; Kirk's attorney was told to send a copy of the order to his client.

In response to the order, Allemand filed motions for default judgment and for costs and/or sanctions in the limitation and

³ The appeal of the federal Jones Act and general maritime claim is No. 92-3331.

declaratory suits. On October 23, 1991, the district court granted the default motions and motions for costs and/or sanctions as unopposed; on October 28, the court entered a final judgment in the declaratory case, declaring that Kirk is not entitled to maintenance and cure; on October 29, the court entered judgment in the limitation action in favor of Allemand, exonerating it from liability.

On December 11, 1991, Allemand filed a motion for summary judgment in the federal Jones Act and general maritime case, asserting that it was barred by res judicata as a result of the other two federal judgments. On January 9, 1992, Kirk moved to dismiss his federal Jones Act and general maritime proceeding. On January 10, the court granted Allemand's summary judgment motion as unopposed. On February 28, Kirk's motion for dismissal was denied.

On February 19, Kirk filed motions for relief from judgment in the limitation and declaratory suits, pursuant to Fed. R. Civ. P. 60(b), which the district court denied on March 25. In the same order, the court denied Kirk's motion for reconsideration of the summary judgment in the Jones Act and general maritime proceeding and dismissed the case with prejudice.

II.

Allemand contends that we are without jurisdiction to review the final judgments entered on October 28 and 29. We agree. Kirk's notices of appeal in the declaratory and limitation actions state that Kirk appeals "from the order and judgment entered . . .

in favor of the plaintiff, and from the denial of defendant's Motion for Relief from Judgment entered on March 26, 1992, and from the imposition of sanctions in this matter." According to Fed. R. App. P. 4(a)(1) and (4), however, a notice of appeal must be filed no later than thirty days following the entry of final judgment or of an order denying a motion made under Fed. R. Civ. P. 59.

The instant motions for relief from judgment do not qualify as rule 59 motions, for the purpose of tolling the time for taking an appeal, as they were served more than ten days after judgment, see rule 59(b), (d), and, in fact, were not filed and served until almost six months had passed. See Harcon Barge Co. v. D & G Boat Rentals, 784 F.2d 665, 667-68 (5th Cir. 1986) (en banc). Thus, we cannot review directly the default judgments entered in October; our appellate jurisdiction is limited to consideration of the district court's denial of the rule 60(b) motions for relief from judgment entered in the limitation and declaratory actions and to review of the judgment of dismissal in the Jones Act and general maritime case.

III.

We review only for abuse of discretion a district court's denial of a rule 60(b) motion for relief from judgment. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. Unit A Jan. 1981). Appellate review of a motion denying relief from judgment does not entail consideration of the underlying judgment. Browder v. Director, Dep't of Corrections, 434 U.S. 257, 263 n.7 (1978).

We affirm the denial of the motions for relief from judgment for essentially the reasons set forth by the district court in its Order and Reasons entered in the declaratory action on March 26, 1992. The court noted that Kirk failed to respond despite being properly served and being warned by both the court and opposing counsel: "[T]he undersigned judge, the magistrate judge, and opposing counsel all worked to assist Kirk's counsel. Kirk's counsel, however, failed to return phone calls and otherwise accept the assistance being provided to him." The court recounted, as well, that when it denied Kirk's motion to set aside the default, it did so without prejudice, affording Kirk an opportunity to rectify the problem. Having received no response from Kirk, however, the court entered the default judgments.

As the district court stated, our test for evaluating a motion for relief from default judgment under rule 60(b) contains the following factors:

(1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether)) if the judgment was a default or a dismissal in which there was no consideration of the merits)) the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether)) if the judgment was rendered after a trial on the merits)) the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Seven Elves, 635 F.2d at 402. We added that these factors must be

weighed "in the light of the great desirability of preserving the principle of the finality of judgments." Id.

In its order, the district court emphasized that Kirk was trying to use rule 60(b) as a substitute for appeal, having failed to take a direct appeal from the adverse judgments. Moreover, "Kirk waited almost five months to seek relief. The court is hard-pressed to find such wait to be reasonable." Regarding any merits to Kirk's claim of injury, the court opined as follows:

Kirk provides no evidence upon which the court might evaluate the merits of his claims. No affidavits, deposition testimony, or documents have been introduced to substantiate that Kirk even suffered an injury while in the service of the plaintiff's vessel. The interest in deciding this case on the merits and the merits of defendant's claims, therefore, do not weigh in favor of vacating the final judgment.

The district court also used the factors listed in Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1280 (5th Cir. 1985): "(1) the extent of prejudice to the plaintiff; (2) the merits of the defendant's asserted defense; and (3) the culpability of defendant's conduct." The court observed that Kirk "simply fails to allege any defense" or to "offer some credible evidence to sustain his right to the defense claimed." The court additionally found that Kirk, as distinguished from his attorney, was partially to blame by allowing the time for appeal to expire and delaying in finding new counsel.

In summary, the district court concluded that

justice would be disserved by granting relief. Defendant's counsel disregarded the rules of this court, refused to accept guidance from the court and opposing counsel, and otherwise interfered with the efficient administration of justice. In addition, Kirk, the

litigant, unreasonably delayed in seeking relief even after being apprised in strong language of his counsel's conduct and the possible ramifications.

We cannot say that the court abused its discretion in so deciding. Accordingly, its orders denying relief from judgment must stand.

IV.

Given that the default judgments are to remain undisturbed, res judicata bars the assertion of Kirk's Jones Act and general maritime claims. Accordingly, we also must affirm the summary judgment entered in that action.

V.

Kirk challenges the district court's award of \$8,000 in fees and costs in the declaratory action. Nothing in the record convinces us that the amount awarded is unreasonable or that the district court's finding is clearly erroneous. Apparently, the amount is well below the costs Allemand incurred as a result of Kirk's counsel's dilatory behavior.

VI.

We conclude that the district court properly considered the applicable factors in denying relief from judgment. By no means can its actions be viewed as an abuse of discretion. The judgments appealed from, accordingly, are AFFIRMED.