UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2115
Summary Calendar

ESTELLA SILVA,

Plaintiff-Appellant,

VERSUS

HARRIS COUNTY, ETC., ET AL.,

Defendants,

HARRIS COUNTY, AUDITORS OFFICE,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 91-2558)

September 30, 1993

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

The sole issue we address in this appeal by Estella Silva, *pro se*, is whether the district court erred in denying her Fed. R. Civ. P. 60(b) motion on the basis of newly-discovered evidence. Because the district court did not consider the motion on its merits before denying it, we **VACATE** and **REMAND**.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Silva was employed in the Harris County Auditor's office from August 1977 until July 1991. In September 1991, Silva, *pro se*, filed an employment discrimination suit against the Harris County Auditor's Office and several individual defendants. Silva alleged that the Auditor's office had denied her merit increases based on her national origin, and also claimed wrongful termination.[2]

Although discovery was scheduled to conclude in August 1992, defendants moved for summary judgment in April of that year. The summary judgment motion was based on evidence that Silva's merit increases and rehiring were denied due to her problems with punctuality and attendance, as well as her inability to cooperate with employees and supervisors. In response to the motion, Silva moved for an extension of time, referring specifically to her need to locate witnesses, including a former co-worker, Deborah LaDay. Without ruling on the motion, the district court granted summary judgment in early June.

After entry of final judgment, Silva moved for reconsideration of the summary judgment, stating that she was "still in the process of obtaining the affidavits, and preparing her response." The

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[2] Because the wrongful termination claim was not included in Silva's Equal Employment Opportunity Commission charge, the district court dismissed the claim for failure to exhaust administrative remedies.

At the same time, the court dismissed the individually-named defendants, not statutorily-defined "employer[s]" for Title VII purposes. The court ordered Silva to name her employer as a defendant. In April 1992, Silva filed a second amended complaint, naming Harris County as her employer, and adding a new allegation of retaliation.

district court denied the motion, and Silva timely appealed. While her appeal was pending, Silva filed a motion in district court for relief from judgment under Fed. R. Civ. P. 60(b). She moved to vacate the district court's order denying her motion for reconsideration of the summary judgment, and to reopen the case based on newly-discovered evidence under Rule 60(b)(2).[3] She attached three affidavits, including that of Deborah LaDay. The district court denied the Rule 60(b) motion in December 1992, stating that "[t]he case is currently on appeal to the United States Court of Appeals for the Fifth Circuit." Silva timely appealed the denial of her Rule 60(b) motion, and it is this appeal that is before us.[4]

II.

We review the denial of a Fed. R. Civ. P. 60(b) motion only for abuse of discretion. *E.g.*, ***Williams v. Brown & Root, Inc.***, 828 F.2d 325 (5th Cir. 1987); ***Wilson v. Thompson***, 638 F.2d 801 (5th Cir. Unit B 1981); *see* ***Browder v. Director, Dept. of Corrections***, 434 U.S. 257 (1978) (holding that standard of review is abuse of

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[3] "New evidence" properly falls within the ambit of Rule 60(b)(2); *compare*, ***Alvestad v. Monsanto Co.***, 671 F.2d 908 (5th Cir. 1982) (holding district court did not abuse its discretion in denying a Rule 60(b) motion that alleged only that the court had misinterpreted the law), *cert. denied*, 459 U.S. 1070 (1982).

Silva also moved to vacate the judgment based on Rule 60(b)(6), "any other reason justifying relief".

[4] In January 1993, we dismissed Silva's original appeal for failure to prosecute. In June 1993, we rejected Silva's attempt to reinstate her dismissed appeal or to consolidate it with this appeal. At the same time, we denied Harris County's motion to dismiss the present appeal on jurisdictional grounds.

discretion, and appeal of denial of Rule 60 motion does not bring up underlying judgment for review).

The abuse of discretion standard of review is of limited use in this case, however. In denying Silva's motion, it does not appear that the district court exercised its discretion; the order denying the motion states only that the "case is currently on appeal to the United States Court of Appeals for the Fifth Circuit."[5] Although the order does not state specifically that the motion was denied *because* an appeal was pending, the language of the order suggests that the pending appeal was the sole reason for the district court's denial of the motion. This raises the question of the proper course of action for a district court, when faced with a Rule 60(b) motion while an appeal is pending.

The effect of a pending appeal on a Rule 60(b) motion has been disputed. Although Rule 60(a) specifically permits correction of clerical errors while an appeal is pending, Rule 60(b) does not speak to the issue of whether the district court can consider a 60(b) motion after an appeal has been taken. On the other hand, certain motions filed under Rule 60(b) must be filed within one year of the ruling in issue, during which period the matter will often be on appeal. In short, it will often be the case that a Rule 60(b) motion will -- indeed must -- be filed while an appeal

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[5] In a preceding sentence, the order states that Silva's earlier motion to reconsider the summary judgment order was denied. But, that sentence seems more of a statement of procedural history than a reason for denying the Rule 60 motion. Moreover, Silva's grounds for her Rule 60(b) motion are different from those of her motion to reconsider the judgment.

is pending. Therefore, the question is which court can deal with the motion during appeal.

In a few Circuits, a pending appeal is held to deprive the district court of the power to consider Rule 60(b) motions, once notice of appeal has been filed.[6] Our court, however, allows district courts to consider Rule 60(b) motions on their merits, despite a pending appeal. After considering such a motion, the district court may either deny the motion, or ask leave of our court to grant it. ***Lairsey v. Advance Abrasives Co.***, 542 F.2d 928 (5th Cir. 1976); ***Ferrell v. Trailmobile, Inc.***, 223 F.2d 697 (5th Cir. 1955).

In order to grant such a motion, the district court must ask leave of the appellate court, or request a remand, because an appeal, of course, transfers jurisdiction over the case to the court of appeals. ***Willie v. Continental Oil Co.***, 746 F.2d 1041, 1046 (5th Cir. 1984); ***Alvestad v. Monsanto Co.***, 671 F.2d 908, n.2 (5th Cir.), *reh'g denied*, 679 F.2d 250 (5th Cir.), *and cert. denied*, 459 U.S. 1070 (1982). However, this transfer of jurisdiction does not completely deprive the district court of the power to consider a post-notice of appeal Rule 60(b) motion. Instead,

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[6] *See, e.g.,* ***National Org. for Women v. Terry***, 886 F.2d 1339, 1349 (2d Cir. 1989), *cert. denied in* ***Terry v. New York State Nat'l Org. for Women***, 495 U.S. 947 (1990); ***Norman v. Young***, 422 F.2d 470, 474 (10th Cir. 1970), *but see,* ***Aune v. Reynders***, 344 F.2d 835, 841 (10th Cir. 1965). *See also*, ***Wilson v. Thompson***, 638 F.2d at 803 (noting split in circuits); *and* 11 **Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil** § 2873 (1973).

> [w]hen a Rule 60(b) motion is filed while an appeal is pending, this circuit, along with other circuits and the commentators, has expressly recognized the power of the district court to consider *on the merits* and deny a 60(b) motion filed after a notice of appeal, because the district court's action is in furtherance of the appeal.

Willie v. Continental Oil Co., 746 F.2d at 1046 (citing ***Lairsey v. Advance Abrasive Co.***, 542 F.2d 928) (emphasis added); ***Beliz v. W.H. McLeod & Sons Packing Co.***, 765 F.2d 1317, 1326 (5th Cir. 1985); ***Wilson v. Thompson***, 638 F.2d at 803.

As the language emphasized above indicates, the district court has two choices: either grant the motion, *if* given leave to do so by the appellate court; or consider the motion *on its merits*, and deny it. But, the district court does not have the option simply to deny the motion, without considering it on its merits; *i.e.*, without exercising its discretion. *Compare*, ***Wilson v. Thompson***, (affirming the district court's denial of a Rule 60(b) motion made after appeal was taken, because, *in the district court's discretion*, the new evidence that was the subject of the motion was cumulative).

This reading of ***Lairsey*** and its progeny also comports with the policy reasons for this procedure. That is, allowing the district court to consider a Rule 60(b) motion on its merits, despite a pending appeal, provides a logical and efficient method of resolving the motion. As the ***Lairsey*** court reasoned, the district court in many cases "is better able than we to decide" the validity of the motion. 542 F.2d at 931. Further, the district court's

action on the motion often provides the most efficient resolution of the issue.

> [I]n some instances a decision by the district court on the motion will wash out the appeal. Permitting the district court to have the first bite at the issue is a direct way of reaching a problem which otherwise can be attacked circuitously--if the motion were addressed to this court we could remand with directions to the district court to consider it, or we could affirm subject to the district court's considering the motion.

Id. According to this reasoning, the district court's better ability to decide the motion on its merits, along with considerations of efficiency, militate against its dismissing the motion without exercising its discretion, *i.e.*, without examining the motion on its merits. Here, however, the district court did not reach the merits of Silva's Rule 60(b) motion before dismissing it.

III.

For the foregoing reasons, we **VACATE** the denial of Silva's Rule 60(b) motion and **REMAND**.[7]

VACATED and REMANDED

[7] The motion by Harris County to file record excerpts in excess of 40 pages is **DENIED** as moot.