

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3665
Summary Calendar

ALFRED DEMPSEY,

Plaintiff-Appellant,

versus

ARCO OIL & GAS CO.,
A DIVISION OF ATLANTIC RICHFIELD
COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-90-3279-I)

(June 2, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Appellant asks us to reverse the district court's denial of a motion for relief from final judgment under Fed. R. Civ. P. 60(b) based on the appellee's alleged fraudulent actions. We do not find the denial an abuse of discretion and therefore affirm.

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

Alfred Dempsey claims that he sustained a personal injury when he was transported from an ARCO Oil & Gas Co. drilling platform in a personnel basket to a charter boat in rough seas. The district court granted the defendant ARCO summary judgment and we affirmed. Dempsey v. ARCO Oil & Gas Co., 809 F. Supp. 437 (E. Dist. Louisiana 1992), aff'd without opinion, 980 F.2d 1444 (5th Cir. 1992). One of the bases for the district court's decision was that the captain of the charter boat, not ARCO, was responsible for the decision whether or not to proceed with the transfer despite the rough weather.

Over one year after the district court entered its summary judgment, Dempsey moved for relief from the final judgment under Rule 60(b) in this court, followed by a "motion for recall of mandate or order." These motions were denied. He then filed a motion for relief from final judgment under Rule 60(b) in the district court, arguing that the summary judgment should be vacated because Michael Christovich, ARCO's counsel of record, allegedly committed fraud upon the court in connection with an affidavit submitted by ARCO in support of its summary judgment motion. Dempsey alleged that Christovich fabricated portions of the affidavit he prepared for the captain of the charter boat, and then notarized the captain's affidavit even though it was not signed in his presence. Dempsey buttressed his claims of fraud by again

arguing that ARCO failed to respond to an important discovery request.¹

The appellant devotes much of his brief to factual inaccuracies in the captain's affidavit, which boil down to the following. First, in his affidavit the captain stated that he was in charge of the vessel on the date of the accident; in a deposition for another lawsuit arising from an incident occurring on the same vessel on the same day, however, the captain testified that he did not recall that day and was unsure whether he, or another individual, was the captain on duty that day. Second, in his affidavit the captain stated that he believed the weather conditions on the day of the accident were safe for a personnel transfer and that the transfer occurred without incident; in his deposition, however, the captain testified that he did not recall the events of the day. Dempsey argues at length that these factual inconsistencies prove that Mr. Christovich fabricated the contents of the captain's affidavit in order to advance ARCO's defense.

Dempsey further supports his allegation of fraud by emphasizing Christovich's notarization of the charter-boat captain's affidavit outside of his presence. The district judge agreed with Dempsey that this improper notarization "border[ed] on the reprehensible" and sanctioned Christovich by ordering him to perform 32 hours of pro bono work. Dempsey argues that the

¹ Dempsey argued that Christovich failed to produce a weather forecast ostensibly covered in a request for production of documents to ARCO. This argument was raised in the district court pending summary judgment and again in his original appeal to this court. We found no reversible error when we first examined Dempsey's contentions nor do we now as part of his Rule 60(b) action.

totality of the above acts and circumstances amount to a fraud on the court justifying relief from the final judgment under Fed. R. Civ. P. 60(b), Rule 11 sanctions, and attorneys fees and costs. The district court denied relief from the judgment.

DISCUSSION

This court reviews a district court's denial of a Rule 60(b) motion for abuse of discretion. Lee v. Village of River Forest, 936 F.2d 976, 978-79 (5th Cir. 1991). A reversal will be granted "only upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." 936 F.2d at 978. Supporting this limited review is a strong policy in favor of the finality of judgments. Id. Fraud upon the court is reserved for only the most egregious misconduct, and requires a showing of an unconscionable plan or scheme which is designed to improperly influence the court in its decision. Wilson v. Johns-Manville Sales Corp., 873 F.2d 868, 872 (5th Cir.), cert. denied, 493 U.S. 977 (1989). The narrow concept of fraud upon the court embraces only the species of fraud which defiles or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner. Id.

The district court was well within its discretion in ruling that the actions and circumstances Dempsey complains about did not rise to the level of fraud upon the court. As to the discrepancies in the charter-boat captain's deposition and affidavit testimony, the district court stated that "There is not

a scintilla of evidence that Mr. Christovich fabricated or caused to be fabricated the content of [the captain's] affidavit. . . . [Christovich] was deliberate and conscientious, going to considerable lengths to verify the content and truthfulness of the affidavit." Dempsey vigorously contests these findings, citing evidence from which he infers that Christovich was aware of statements contrary to those contained in the affidavit signed by the charter-boat captain. The inferences are not compelling. Given the various fora in which testimony was taken, the uncertain memory of the charter-boat captain, and the fact that some of the inconsistencies are reconcilable, we are not persuaded that the district court clearly erred in crediting Christovich's affidavit concerning the circumstances of the captain's signing of his affidavit.²

As to the improper notarization, the district court distinguished a decision relied on by Dempsey, Illinois Central R.R. Co. v. R.R. Land, Inc., 1992 W.L. 38109, Civil Action No. 86-86 (E.D. La., Feb. 18, 1992), which found that notarization outside of the presence of the affiant did amount to fraud upon the court, by noting that Christovich had made considerable efforts to verify the affidavit's accuracy. Upon considering the facts of the two cases, we cannot say that the judge abused his discretion by

² The district court emphasized that the contested portions of the affidavit were superfluous to its decision to grant summary judgment. Dempsey correctly argues that Rule 60(b) does not require a showing that a new trial would probably produce a new result. At least partially because of this superfluity, however, the district court was persuaded that the factual inconsistencies were not part of an unconscionable plan or scheme designed to improperly influence the court, but were apparently more likely due to errors in the captain's memories and/or unintentional errors by Christovich.

holding that Christovich's improper notarization did not amount to a fraud upon the court.

We find no reversible error in the district court's treatment of Dempsey's Rule 60(b) motion. We decline to modify the sanctions already assessed by the district court or its determination of attorney fees. The district court's order is therefore in all respects AFFIRMED.