UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5634
Summary Calendar

CHARLES A. CASTILLE, JR.,

Plaintiff-Appellee,

VERSUS

JAMES F. POMROY,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(93-CV-535)

(June 7, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

James Pomroy challenges the district court's prompt denial of various post-judgment motions. We **AFFIRM**.

I.

On July 21, 1993, judgment was entered against Pomroy on a promissory note for, *inter alia*, the principal sum of $770,000, and $40,517.07 in attorneys' fees.[2] No appeal was taken.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

[2] The judgment followed Castille's motion for judgment on the pleadings, or, in the alternative, summary judgment. That motion

On December 10, 1993, Pomroy filed a motion seeking relief from judgment pursuant to Fed. R. Civ. P. 60(b)(5) and (6),[3] alleging that Castille's foreclosure on a refinery in Louisiana, owned by CAS Refining, Inc., "satisfied Plaintiff's Judgment".[4] In addition, Pomroy moved for a stay of execution, under Rule 62(b),[5] pending resolution of the Rule 60(b) motion. Finally, Pomroy applied for a temporary restraining order (TRO), pursuant to Rule 65(b), barring Castille from executing on the judgment until the Rule 60(b) motion was adjudicated.

The gravamen of these motions was to prevent Castille's execution against Pomroy's property in Connecticut. Pomroy claimed that Castille was seeking such execution only because procedural irregularities regarding the foreclosure sale of CAS' Louisiana refinery resulted in the sale's failure to satisfy the judgment. From this explanation, Pomroy asserted that the district court should relieve him from any further obligations under the judgment.

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noted that Pomroy's answer had admitted every allegation contained in Castille's complaint and had offered no affirmative defenses. In addition, attached to the motion were various exhibits in support of summary judgment. Pomroy did not contest the motion.

[3] Rule 60(b)(5) affords relief from judgment to a party when, *inter alia*, "the judgment has been satisfied". Fed. R. Civ. P. 60(b)(5). Rule 60(b)(6) relieves a party from the judgment "for any other reason justifying relief". Fed. R. Civ. P. 60(b)(6).

[4] Apparently, "Pomroy and CAS were liable in solido on the indebtedness represented by the note."

[5] Rule 62(b) allows a district court, "[i]n its discretion", to stay execution of judgment pending disposition of a Rule 59 or Rule 60 motion. Fed. R. Civ. P. 62(b).

The district court, after conducting a hearing on the day the motions were filed, denied them. It ruled that "the judgment against Pomroy ... has not been satisfied and should not otherwise be stayed." In addition, it found that Pomroy "failed to establish the elements necessary for the issuance of a [TRO] because he has an adequate remedy at law". Finally, it informed Pomroy that he "may take an interlocutory appeal" of the order to this Circuit pursuant to 28 U.S.C. § 1292.

II.

Pomroy challenges the district court's denial of his Rule 60(b) motion, as well as the denials of his motion for stay pending disposition of the Rule 60(b) motion and the application for a TRO pending disposition of the same. He bases our jurisdiction on § 1292.

A.

Although Pomroy asserts that we have appellate jurisdiction under § 1292 for all of his claims, unquestionably, we possess jurisdiction under 28 U.S.C. § 1291 to entertain a timely appeal from the denial of a Rule 60(b) motion. *See, e.g.*, ***Williams v. Brown & Root, Inc.***, 828 F.2d 325, 328 n.5 (5th Cir. 1987) We review the denial of such a motion only for an abuse of discretion. *E.g.*, ***id.*** at 328.

1.

Pomroy asserts principally that the district court erred in denying the Rule 60(b) motion because it "fail[ed] to consider the Motion for Relief from Judgment or to consider same without a full

hearing on the merits". According to Pomroy, "[a] trial on the merits [of the Rule 60(b) motion] would require at least two (2) days and would present numerous witnesses and documents. The one (1) hour in chambers hearing on December 10, 1993, did not and could not have considered Pomroy's" motion.

This assignment of error borders on the absurd. "[A] decision to hear oral testimony on motions is within the sound discretion of the district court." ***Wilson v. Johns-Manville Sales Corp.***, 873 F.2d 869, 872 (5th Cir.) (citing ***Gary W. v. Louisiana***, 601 F.2d 240, 244 (5th Cir. 1979)), *cert. denied*, 493 U.S. 977 (1989). In the absence of specific factual representations, either to the district court or to this court, as to why a more elaborate hearing should have been held on the Rule 60(b) motion (as discussed *infra*, the district court's ruling was correct), we cannot conclude that the district court's prompt hearing on this matter, followed by its swift disposition of the motions, was an abuse of discretion.[6]

2.

In addition, Pomroy contends that the district court erred by refusing to find jurisdiction to consider the Rule 60(b) motion. The district court did not adjudge an absence of jurisdiction; it denied the motion. In fact, at the conclusion of the hearing, the court stated that the judgment "hasn't been satisfied. It's rendered on the books, just hasn't been collected. That's obvious,

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[6] Nor will we place our imprimatur on Pomroy's suggestion that the district court moved too quickly. If anything, the district court is to be commended for convening a hearing on the day the motions were filed, especially in that a TRO was requested.

it hasn't been satisfied". Likewise, in the order denying the motions, the district court stated that it "also finds that the judgment against Pomroy ... has not been satisfied and should not otherwise be stayed."

The district court did not abuse its discretion in finding that the judgment was not satisfied and thus denying relief pursuant to Rule 60(b)(5); indeed, it reached the manifestly correct conclusion, because Castille had not received the sums to which the judgment entitled him. As the district court correctly perceived, the question Pomroy presents is really "whether [Castille]'s properly trying to collect [the judgment]. And you have got a cause of action for that ... a cause of action that [] arose subsequent to this judgment." Put differently, if Castille has been somehow at fault in attempting to execute on the judgment, Pomroy may have a cause of action arising from that conduct; it does not follow, however, that a district court must find that the underlying judgment itself is satisfied, and thus afford relief under Rule 60(b)(5). Nor did the district court abuse its discretion in refusing to set aside the judgment for equitable reasons under Rule 60(b)(6).

B.

Pomroy also challenges the district court's refusal to issue a temporary restraining order or to stay execution of judgment. These challenges raise serious jurisdictional concerns.[7] We need

[7] It is axiomatic that a district court's order granting or denying a TRO is usually not appealable. *E.g.*, ***Smith v. Grady***, 411 F.2d 181, 186 (5th Cir. 1969); *see also* Charles Alan Wright &

not address these concerns, however, because we hold that Pomroy's challenges are rendered moot by our affirming the denial of the Rule 60(b) motion.

Pomroy's contention is simply that the district court "did not have adequate time to consider" his various motions. His challenge is thus bootstrapped to his appeal of the denial of his Rule 60(b) motion; indeed, the stated purpose for both the application for a TRO and the request for a stay was to give the district court time

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Arthur R. Miller, 11 Federal Practice & Procedure § 2962 at 616-17 (1973). It cannot be contended that the district court's denial of the TRO was tantamount to a decision on the merits or a dismissal of the claim (the ruling on the underlying Rule 60(b) motion was the dispositive ruling). Likewise, the application for the TRO cannot be characterized as a preliminary injunction request. Thus, this court may lack jurisdiction to rule on this issue. *See* Wright & Miller, § 2962 at 616-17 & nn. 92-94; *see also* ***Smith***, 411 F.2d at 186 (recognizing that if ruling on TRO is really a preliminary injunction ruling, then court possesses appellate jurisdiction). But, as discussed *infra*, we need not reach this issue.

Uncertainty abounds regarding whether the order denying the Rule 62(b) stay of execution is appealable; this circuit apparently has not squarely addressed this issue. We are also unaware of any other decision on this issue, and the parties cite us to none. Again, in light of our determination that this issue is rendered moot by our disposition of the Rule 60(b) issue, we need not reach it.

Also, we need not address whether these orders are properly appealable under § 1292. The district court, as discussed *supra*, stated that its order was appealable under § 1292. This itself raises serious concerns; but, once again, our disposition of the Rule 60(b) issue renders this issue moot.

The ordinary procedure, it would seem, would be to appeal the denial of the Rule 60(b) motion, and then request a stay pending appeal (first from the district court, and then from this court). *See* Fed. R. App. P. 8(a); Fed. R. Civ. P. 62(d). In fact, Pomroy moved for a stay pending appeal, which another panel of this Circuit denied. Such a course of action avoids the jurisdictional concerns raised by this appeal.

to resolve the Rule 60 motion.[8] Considering that the district court promptly exercised its discretion and denied the Rule 60(b) motion on the day of filing, and further considering our holding that, in so doing, the court did not abuse its discretion, we see no controversy before us regarding the TRO and stay orders.[9]

III.

For the foregoing reasons, we

AFFIRM.

[8] In fact, a Rule 62(b) stay cannot persist once the Rule 60(b) motion is adjudicated. ***In re Zapata Gulf Marine Corp.***, 941 F.2d 293, 295-96 (5th Cir. 1991) (issuing writ of mandamus to dissolve Rule 62(b) stay operating to bar enforcement of underlying judgment because district court had decided Rule 60(b) motion).

[9] Pomroy does not assert that he was somehow harmed by the district court's refusal to stay execution or issue a TRO in the brief period of time between the filing and denial of those motions.