IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-11055
Summary Calendar

JOSEPH J. REY,
Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA,
Defendant-Appellee.

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

JOSEPH J. REY,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(5:94-CV-71-C c/w 94-CV-104-C)
(March 31, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Joseph Rey appeals the denial of his motion to set aside judgment under FED. R. CIV. P. 60(b). Finding no abuse of discretion, and hence no reversible error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.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

Rey filed a petition seeking an injunction against the government to prevent it from obtaining possession of a 1991 Dodge pickup that had been given to Rey by Lonnie Clark for payment toward $23,000 in legal services rendered by Rey. Rey also sought a declaration that his common-law possessory lien against Clark's property was superior to the government's pending forfeiture claim. Rey amended his petition, seeking to include protection regarding a cashier's check for $25,000.

The government filed an answer and a counterclaim, contending, inter alia, that the pickup truck and the check were derived from proceeds obtained by Clark as a result of his participation in violations of 18 U.S.C. §§ 2, 1341, and 1956, to which Clark had pleaded guilty. The government also asserted that Clark had entered a "Consent Decree of Forfeiture" and that on May 4, 1994, the court had ordered that the pickup and the check be condemned and forfeited.

The government also filed an action seeking declaratory and injunctive relief to enjoin Rey from negotiating or otherwise disposing of the $25,000 check pending a determination of entitlement by the district court. The court granted the government's motion for a temporary restraining order, then entered a preliminary injunction enjoining Rey from negotiating or otherwise disposing of the cashier's check until the entitlement issue was adjudicated.

On July 28, 1994, Rey and the government presented an "Agreed

Judgment and Order of Dismissal." The parties stipulated that Rey would surrender the $25,000 cashier's check to the government as well as any claim he had to the 1991 Dodge pickup. The parties further agreed that Rey would receive $9,000 from the proceeds of the surrendered items, representing the attorneys' fees Rey had expended representing Clark. Rey agreed to dismiss the pending action and to indemnify the government from third-party claims up to the sum of $9,000. After considering the agreement, and "having been assured that no further action [was] necessary," the court dismissed the case with prejudice.

Clark was sentenced on August 22, 1994, and on August 30, 1994, he appealed his conviction, which appeal is still pending in this court. After Clark appealed, the government chose to hold the distribution of all seized funds and property pending either the resolution of the appeal or a release from Clark.

On October 19, 1994, Rey filed a motion to set aside the judgment. The court denied the motion, stating that "[t]he mere breach of an agreement by a party fails to justify setting aside a settlement," and citing Sawka v. Healtheast Inc., 989 F.2d 138 (3d Cir. 1993). The court further determined that Rey had failed to demonstrate fraud or excusable neglect that would justify the requested relief.

II.

Rey contends that the court erred because it failed to consider rule 60(b)(6), which provides that a court may set aside

a judgment for "any other reason justifying relief from the operation of the judgment," when it denied his motion to set aside the judgment. Rey also argues that he believed that the government had the legal right to the cashier's check, but "[t]hat has proven false and could very well be covered by Rule 60[b] . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of adverse party."

As to Rey's argument that the district court did not consider rule 60(b)(6) when denying his motion, as noted above, the district court cited Sawka v. Healtheast, 939 F.2d 138 (3d Cir. 1993), for the proposition that a breach of a settlement agreement, without more, did not justify rule 60(b) relief. Sawka addressed both rule 60(b)(1) and rule 60(b)(6). 989 F.2d at 140-41. Thus, the district court implicitly considered rule 60(b)(6).

The district court's denial of a rule 60(b) motion is reviewed for abuse of discretion. Seven Elves v. Eskenazi, 635 F.2d 396, 402 (5th Cir. Unit A Jan. 1981). "It is not enough that the granting of relief might have been permissible, or even warranted))denial must have been so unwarranted as to constitute an abuse of discretion." Id. A district court should consider the following factors when considering a rule 60(b) motion:

> (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; . . . (7) whether there are any intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Id.

As for a motion under rule 60(b)(6), the movant must show the initial judgment to have been manifestly unjust, as "Clause 6 is a residual or catch-all provision to cover unforeseen contingencies))a means to accomplish justice under exceptional circumstances. Edward H. Bohlin Co. v. Banning Co., 6 F.3d 350, 357 (5th Cir. 1993). In Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673, 1675 (1994), the Court noted in dictum that some courts of appeals have held that the reopening of a dismissed suit by reason of breach of a settlement agreement can be obtained under rule 60(b)(6). The Court also cited cases from circuits holding that rule 60(b)(6) does not require vacating a dismissal order whenever a settlement agreement has been breached. Id.

In Kokkonen, the Court emphasized that (unlike in the instant case) the respondent sought to enforce a settlement agreement, not to reopen the dismissed suit by reason of breach of the agreement that was the basis for the dismissal. Id. Also, it is not necessarily true, in the instant case, that the agreement, inasmuch as it states that it "remains prepared to comply with the settlement agreement . . . once the Clark appeal is resolved."

Accordingly, we do not believe this case is so extreme as to indicate an abuse of discretion. There is no showing of "manifest unjustness" or "exceptional circumstances." The denial of the rule 60(b) motion is AFFIRMED.