UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40267
Summary Calendar

JONATHAN ALAN AISNER, ETC., ET AL.,

Plaintiffs-Appellees,

versus

NEW YORK LIFE INSURANCE COMPANY,

Defendant/Third-Party Plaintiff-Appellee,

versus

C. RANDY SHIELDS,

Third-Party Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas
(4:92-CV-147)

(November 25, 1994)

Before POLITZ, Chief Judge, DAVIS and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Charles Randy Shields appeals denial of his motion to vacate

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

a default judgment in an interpleader action to allocate the proceeds of his deceased wife's life insurance policy. Finding no error, we affirm.

Background

Shields, a former insurance agent, married Anne Rogers Maurer, an anesthesiologist, twice. The first marriage, from May 1989 to June 1990, ended in divorce. Shortly before the divorce, Maurer executed a will leaving her estate to her minor son by a previous marriage. Maurer and Shields reconciled, moved from Texas to Kentucky, and were remarried in May 1991. Six weeks later Shields shot and killed Maurer and was convicted of manslaughter and sentenced to 14 years imprisonment.

Shields was the named beneficiary of Maurer's life insurance policy with New York Life Insurance Company. But with Shields on trial for Maurer's death, the temporary administrator of her estate, together with Maurer's first husband as next friend of her son, filed suit in Texas state court to obtain the benefits of the policy for the child. New York Life removed the suit to federal court and filed a cross-claim and third-party interpleader action, naming the plaintiffs, Shields, and the administrator appointed by the State of Kentucky as stakeholders. Shields was served in jail by certified mail but failed to file a responsive pleading. New York Life was dismissed after depositing the $595,000 policy proceeds into the registry of the court. The original plaintiffs settled with the Kentucky administrator, obtained a default

judgment against Shields, who by this time had been convicted, and were awarded the funds on deposit. Shields' motion to set aside the default judgment was denied and he timely appealed.

Analysis

Fed.R.Civ.P. 55 directs that motions to set aside default judgments be brought under Fed.R.Civ.P. 60(b). We review denial of Rule 60(b) motions for abuse of discretion, including errors of law and defects that would render the default judgment void.[1] We find none herein.

1. Service of Process.

In the first of several procedural objections, Shields contends that service of process was insufficient because it did not comply with 28 U.S.C. § 2361, which prescribes service by the United States Marshal for statutory interpleader actions. To the extent that 28 U.S.C. § 2361 conflicts with the Federal Rules of Civil Procedure, it has been superseded.[2] Rule 4(e) allows service of process "pursuant to the law of the state in which the district court is located." Rule 106(a)(2) of the Rules of Civil Procedure of Texas, the forum state herein, authorizes service of process by certified mail. Service was valid.

2. Failure to appoint guardian ad litem.

Invoking Rule 17.04 of the Kentucky Rules of Civil Procedure,

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[1] **In re Dierschke**, 975 F.2d 181 (5th Cir. 1992); 6 Moore's Federal Practice, ¶ 55.09 at 55-60.

[2] 28 U.S.C. § 2072.

Shields maintains that he was entitled to the appointment of a guardian ad litem. Rule 17.04 provides:

> Actions involving adult prisoners confined either within or without the State may be brought or defended by the prisoner. If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he is unable to make defense.

Shields insists that this rule is applicable in federal court because it relates to capacity to sue or be sued, which, according to Rule 17(b) of the Federal Rules of Civil Procedure, is "determined by the law of the individual's domicile." We disagree. At one time, in many jurisdictions, prisoners were considered civilly dead.[3] Contrary to this tradition, Kentucky Rule 17.04 gives prisoners the capacity to sue or be sued.[4] By contrast, Rule 17.03 addresses persons without capacity -- "infants and persons of unsound mind." Unlike Rule 17.04, it does not authorize such persons to litigate on their own behalf. Shields has the capacity under Kentucky law to defend himself; therefore, the state law entitlement to a guardian ad litem does not apply in federal court in Texas.[5]

3. Venue.

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[3]**State ex rel. Stephan v. O'Keefe**, 235 Kan. 1022, 686 P.2d 171, cert. denied, 469 U.S. 1088 (1984); **Lombardi v. Peace**, 259 F.Supp. 222 (S.D.N.Y. 1966).

[4]**Shaffer v. Tepper**, 127 F.Supp. 892 (E.D.Ky. 1955).

[5]The **Erie** doctrine, if applicable, does not help Shields because Kentucky is not the forum state.

Shields contends that venue was improper. An objection to venue must be raised within the time for answering.[6] This Shields did not do. The objection is waived.

4. Discretionary considerations.

A party seeking to overturn a default judgment as an abuse of discretion must demonstrate a meritorious defense.[7] In the case *sub judice*, that means Shields must allege facts showing that the applicable slayer statute does not bar him from collecting the proceeds of Maurer's insurance policy. Shields urged only two such "facts" to the district court; those that he raises for the first time on appeal are not properly before us and will not be considered. First, he contended that his manslaughter conviction was not final.[8] That may be a defense under the Kentucky slayer statute, KRS § 381.280, which excludes as a beneficiary one who "takes the life of the decedent and is convicted therefor of a felony." According to Shields, Kentucky courts construe the statute to require exhaustion of appeals before the policy proceeds are forfeited. It is not a defense, however, under the Texas slayer statute, for article 21.23 of the Insurance Code provides:

> The interest of a beneficiary in a life insurance policy . . . shall be forfeited when the beneficiary is the

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[6]Fed.R.Civ.P. 12(h)(1).

[7]**Moldwood Corp. v. Stutts**, 410 F.2d 351 (5th Cir. 1969).

[8]That argument no longer appertains. His appeal to the Court of Appeals was pending when the default judgment was entered. Since then the Court of Appeals has affirmed the conviction and Shields has filed a petition for discretionary review with the Kentucky Supreme Court. **Commonwealth v. Shields**, Nos. 92-CA-1485-MR, 92-CA-2748-MR (Ky.Ct.App., July 29, 1994).

> principal or an accomplice in willfully bringing about the death of the insured.

Applying Texas choice of law rules, we are convinced that the applicable statute is that of Texas, not Kentucky.[9] Accordingly, the pertinent question is not the finality of Shields' conviction but rather the factual issue whether he willfully caused Maurer's death. Shields had the burden to articulate specific facts which, if believed, could establish that he did not.[10] Protestations that his conviction was not final do not suffice.

Equally unavailing is the second "fact" alleged by Shields -- that his manslaughter conviction does not disqualify him because willfulness is not an element of manslaughter. That argument is no substitute for a "definite recitation of facts"[11] that would indicate lack of willfulness. We find no error in the denial of the motion to set aside the default judgment.

5. Future litigation.

Finally, Shields challenges the provision of the judgment enjoining him "from instituting or prosecuting any proceeding in any state or United States court affecting the life insurance

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[9]Texas applies the most significant relationship test. **Duncan v. Cessna Aircraft Co.**, 665 S.W.2d 414 (Tex. 1984). Maurer's insurance policy was issued in Texas pursuant to an employee benefit plan for Texas employees. Texas has a substantive interest in assuring that the employee benefits provided its employees do not fall into the wrong hands. Kentucky's interests are more tenuous; Maurer and Shields happened to move there shortly before her death.

[10]**Moldwood**; **United States v. One 1978 Piper Navajo PA-31 Aircraft**, 748 F.2d 316 (5th Cir. 1984).

[11]**Moldwood**, 410 F.2d at 352.

policy in question here or proceeds thereunder." Shields complains that it precludes him from pursuing the policy proceeds should his manslaughter conviction be vacated. We do not read the injunction as preventing such.

AFFIRMED.