UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-40292

(Summary Calendar)

JONATHAN ALLEN AISNER, As next of friend of Adam Joseph Maurer Aisner, ET AL.,

Plaintiffs-Appellees,

versus

THE PENN MUTUAL LIFE INSURANCE COMPANY, ET AL.,

Defendants,

versus

RANDY SHIELDS, Individually and as trustee for Adam Joseph Aisner,

Defendant-Counter-Defendant-Appellant,

versus

THE PENN MUTUAL LIFE INSURANCE COMPANY,

Interpleader-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas

(4:92-CV-6)

(April 28, 1995)

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

PER CURIAM:[*]

The district court entered a default judgment against Charles Randy Shields for failing to file a responsive pleading. Shields filed a motion to set aside the default judgment, but it was denied by the district court. Shields appeals the denial of his motion; we affirm.

I

Penn Mutual Life Insurance Company ("Penn Mutual") issued a life insurance policy on the life of Anne Rogers Maurer-Shields. The policy provided that in the event of her death, Penn Mutual would pay half of the policy proceeds to Maurer-Shields' husband, Randy Shields, in his personal capacity, and half to Shields as the trustee for Adam Joseph Maurer Aisner, Maurer-Shields' son from an earlier marriage. After a Kentucky court convicted Randy Shields of manslaughter in connection with the death of his wife, however, his status as a beneficiary was called into doubt.[1] Jonathan Alan Aisner, as next friend of Adam Joseph Maurer Aisner, and Marie Vanhoose Sayre, the temporary administratrix of the Maurer-Shields' estate, sued Penn Mutual in Texas state court to recover the policy benefits. Penn Mutual removed the case to federal court and interplead Allen Gailor, whom the State of Kentucky had designated

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] Shields has filed petitioned the Kentucky Supreme Court for discretionary review of his conviction.

the administrator of Maurer-Shields' estate, and Randy Shields.

The district court entered a default judgment against Randy Shields for failing to file a responsive pleading. In its order, the district court denied Shields the proceeds of the policy and enjoined him from further legal action involving the policy. Pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure, Shields filed a motion to set aside the default judgment. The district court denied both this motion and his subsequent Rule 59(e) motion to alter, amend, or vacate the order refusing his motion to set aside the default judgment. *See* Fed. R. Civ. P. 59(e). The district court granted Shields' motion to proceed in forma pauperis on appeal. Shields argues that the district court improperly denied his motion to set aside the default judgment, claiming that (1) the court did not properly serve him with process, (2) Kentucky law should apply in determining the effect of his conviction on his rights under his former wife's policy, and (3) the district court's injunction prevents him from receiving his share of the policy if the Kentucky Supreme Court reverses his conviction.[2]

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[2] After failing to make a timely objection to venue in district court, Shields argues on appeal that venue was not proper in the Eastern District of Texas. Shields has waived his improper venue claim and may not assert such a claim before this Court. *See* Fed. R. Civ. P. 12(h)(1) (requiring defendant to make improper venue objection in responsive pleading or in amendment to such pleading); *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979) (citing *Commercial Casualty Ins. Co. v. Consolidated Stone Co.*, 278 U.S. 177, 181, 49 S. Ct. 98, 99, 73 L. Ed. 2d 252 (1929) (holding that venue may be waived through failure to make timely objection)).

Shields also claims that the relief granted by the district court in its default judgment))specifically, that Penn Mutual is discharged from further liability and that Shields is enjoined from further proceedings involving the policy in question))exceeds the relief sought by Penn Mutual. This claim is wholly without merit as Penn Mutual specifically requested both forms of relief in its interpleader.

II

We review the district court's denial of Shields' motion to set aside the default judgment for abuse of discretion. *See CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 63 (5th Cir. 1992). In considering a motion to set aside a default judgment, a district court may consider several factors: (1) Whether setting the default aside would prejudice the other party; (2) whether the default was willful; and (3) whether the movant asserted a meritorious defense. *Id.* at 64 (citing *United States v. One Parcel of Real Property*, 763 F.2d 181, 183 (5th Cir. 1985)).

A

Shields claims that the district court erred in denying his motion to set aside the default judgment because the court did not properly serve him with process, which Shields argues rendered the judgment void. Shields relies on 28 U.S.C. § 2361 (1988), which he claims requires service by a United States marshal in interpleader actions. A deputy sheriff in Louisville, Kentucky, personally served Shields. Shields' reliance on § 2361 is misplaced, however, because Rule 4 of the Federal Rules of Civil Procedure supersedes § 2361 to the extent that § 2361 conflicts with the 1983 revisions to Rule 4, which allow any adult non-party to complete service in the district in which a claimant resides.[3] Fed. R. Civ. P.

[3] *See* the Federal Rules Enabling Act, 28 U.S.C. § 2072 (1988). The Rules Enabling Act provides in pertinent part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
> (b) Such rules shall not abridge, enlarge or modify any

4(c)(2)(A). Thus, the court did not err in permitting service upon Shields by the deputy sheriff in Kentucky.

B

Shields also contends that the district court should have set aside its default judgment because of its failure to appoint a guardian ad litem for Shields. We addressed this issue in *Aisner v. New York Life Ins. Co.*, No. 94-40267, slip op. at 3-4 (5th Cir. Nov. 25, 1994), in which Shields asserted claims similar to those in the present case against New York Life Insurance Company. In *New York Life*, we held that Shields was not entitled to a guardian ad litem in federal court in Texas. "In this circuit, one panel may not overrule the decision))right or wrong))of a prior panel, absent en banc reconsideration or a superseding contrary decision of the Supreme Court. In re *Dyke*, 943 F.2d 1435, 1442 (5th Cir. 1991); *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991); *Brown v. United States*, 890 F.2d 1329, 1336 (5th Cir. 1989). We are thus bound by our decision in *New York Life*.

C

Shields asserts that the default judgment should be set aside because Kentucky law requires that he be allowed to exhaust his state-court appeals before being disqualified as a beneficiary. The district court held that Texas choice of law rules dictate using Texas law to determine the effect of Shields' conviction on

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> substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Id.

his rights under his former wife's insurance policy. We hold that Shields' conviction is final for the purposes of disqualifying him as a beneficiary regardless of whether we apply Kentucky or Texas law.

Under Kentucky law, disqualification of a beneficiary occurs if "the beneficiary under any insurance policy takes the life of the decedent and is convicted therefor of a felony." Ky. Rev. Stat. Ann. § 381.280 (Michie/Bobbs-Merrill 1994). Kentucky courts have held that § 381.280 applies "as soon as a conviction occurs, regardless of whether an appeal is taken." *Roberts v. Wilcox*, 805 S.W.2d 152, 153 (Ky. Ct. App. 1991). Under Texas law, a beneficiary is disqualified from recovering under a life insurance policy "when the beneficiary is the principal or an accomplice in willfully bringing about the death of the insured." Tex. Ins. Code. art. 21.23 (Vernon Supp. 1995); *see also* Tex. Probate Code § 41(d) (disqualifying beneficiary if "convicted and sentenced as a principal or accomplice in wilfully bringing about the death of the insured").[4] In Texas, a beneficiary's conviction is final upon

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[4] Shields contends that he may still be a beneficiary under Texas law because, under Kentucky law, willfulness is not an element of manslaughter. Shields' claim is without merit under either Kentucky or Texas law. Shields' was convicted of first-degree manslaughter under a statute providing in pertinent part:

> (1) A person is guilty of manslaughter in the first degree when:
> (b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance.

Ky. Rev. Stat. Ann. § 507.030 (Michie 1971 & Supp. 1994). The Kentucky disqualification statute merely requires a felony conviction of the beneficiary in the death of the policy holder. Ky. Stat. Ann. § 381.280; *see Mounts v. United States*, 838 F. Supp. 1187, 1195 (E.D. Ky. 1993) (holding that § 381.280

exhaustion of the defendant's first appeal of right. *Metropolitan Life Ins. Co. v. White*, 972 F.2d 122, 124 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1426, 122 L. Ed. 2d. 795 (1993). Thus, Shields' conviction is final under either Texas or Kentucky law and the district court did not abuse its discretion in refusing to set aside the default judgment.

D

Lastly, Shields argues that the default judgment will prevent him from receiving his share of the insurance policy if the Kentucky Supreme Court overturns his conviction. Although the judgment enjoins Shields from taking any further action involving the policy proceeds, we have previously held that the injunction does not bar Shields from making such a claim in the event that his conviction is vacated. *See New York Life* at 6-7. We are bound by our earlier holding because one Fifth Circuit panel may not overrule the decision of a prior panel, right or wrong, without en banc reconsideration or a contrary superseding holding from the Supreme Court. *Dyke*, 943 F.2d at 1442; *Pruitt*, 932 F.2d at 465; *Brown*, 890 F.2d at 1329.

III

For the foregoing reasons, we AFFIRM the district court's denial of Shields' motion to set aside the default judgment.

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applies to either intentional or non-intentional felony convictions). The Supreme Court of Texas has held that a beneficiary loses his or her rights under an insurance policy even if the killing, while intentional, was committed under "immediate influence of sudden and violent passion from an adequate cause." *Greer v. Franklin Life Ins. Co.*, 221 S.W.2d 857, 859-60 (Tex. 1949).