

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00624 COA

JOHNNIE STRINGER MOVING & STORAGE, INC., A MISSISSIPPI CORPORATION

APPELLANT

v.

FAYE F. FORTENBERRY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HOWARD L. PATTERSON, JR.

COURT FROM WHICH APPEALED: MARION COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

FOREST M. DANTIN

ATTORNEY FOR APPELLEE:

JAMES C. RHODEN

NATURE OF THE CASE: CIVIL- RULE 60 (B) MOTION FOR RECONSIDERATION

TRIAL COURT DISPOSITION: CHANCERY COURT DENIED MOTION FOR
RECONSIDERATION

BEFORE FRAISER, C.J., BARBER, AND McMILLIN, JJ.

BARBER, J., FOR THE COURT:

Stringer was sued in the Marion County Chancery Court for past due rents accruing on property leased from Fortenberry. Fortenberry moved for summary judgment and, after a hearing on the motion, the chancery court granted summary judgment pursuant to Rule 56 of the Mississippi Rules of Civil Procedure. Stringer then filed a Rule 60(b) motion for reconsideration. Said motion was denied by the Chancellor and, feeling aggrieved, Stringer appeals this decision. Stringer raises the following issues on appeal:

1. Whether, under Rule 60(b) of the Mississippi Rules of Civil Procedure, the trial court erred in overruling the defendant's motion for reconsideration, given the facts before it.
2. Whether, under Mississippi case law, the Plaintiff was entitled to a judgment for rentals which had not accrued prior to October 27, 1993, the date the suit was filed.

FACTS

Fortenberry is a resident of Marion County who owned certain real property in Marion County on May 18, 1982. At this time she entered into a salt water injection agreement with Champlin Petroleum Company. Thereafter, Champlin assigned this agreement to Stringer. Fortenberry and Stringer subsequently entered into a new salt water injection agreement on December 11, 1991. The basic language remained the same, although several changes were made at the Plaintiff's request.

In the Spring of 1993, a representative of the Mississippi Oil and Gas Board, which regulates salt water disposal wells, informed Stringer that the well could no longer operate in its current condition. Stringer attempted to bring the well's pressure in compliance with the regulations at considerable expense, but was unsuccessful. Therefore, in June of 1993, the well was plugged and abandoned under the Board's supervision. Stringer paid the rent owing to Fortenberry under the lease agreement until June 14, 1993. Thereafter, Stringer discontinued rental payments on Fortenberry's property.

On October 27, 1993, Fortenberry filed suit which resulted in this appeal.

ANALYSIS

DID THE TRIAL COURT ERR IN DENYING STRINGER'S MOTION FOR RECONSIDERATION PURSUANT TO RULE 60(b)?

Rule 60(b) of the Mississippi Rules of Civil Procedure reads as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) fraud, misrepresentation, or other misconduct of an adverse party;
- (2) accident or mistake;
- (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
- (6) any other reason justifying relief from the judgment.

M. R. C. P. 60(b).

The standard of review on appeal from the denial of a Rule 60(b) motion is abuse of discretion. *Accredited Sur. & Casualty Co. v. Bolles*, 535 So. 2d 56, 58 (Miss. 1988). In their analysis of the distinctions between a Rule 60(b) motion for relief from judgment and a Rule 59(e) motion to alter or amend a judgment, the supreme court has explained that:

Rule 59(e) motions go to the heart of the matter to those issues predicate to a decision on the merits. Rule 60(b) is for extraordinary circumstances, for matters collateral to the merits, and affords a much narrower range of relief than Rule 59(e). Rule 60(b) specifies certain limited grounds upon which final judgments may be attacked. An appeal from denial of Rule 60(b) relief *does not bring up the underlying judgment for review*. . . .

Rule 60(b) provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances, and that neither ignorance nor carelessness on the part of an attorney will provide grounds for relief. Additionally, it has been said that a party is not entitled to relief merely because he is unhappy with the judgment, but he must make some showing that he was justified in failing to avoid mistake or inadvertence; gross negligence, ignorance of the rules, or ignorance of the law is not enough.

. . . [F]undamentally, Rule 60(b) is not an escape hatch for lawyers and litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies. Rule 60(b) is designed for the extraordinary, not the commonplace. . . .

[T]he movant under Rule 59 bears a burden considerably lesser than a movant under Rule 60(b). When hearing a motion under Rule 59(e), a trial court proceeds de novo, if not ab initio. . . . Rule 60(b) motions on the other hand, proceed on the assumption that the trial court has entered a valid and enforceable judgment which has become final. When considering such a motion, the trial court proceeds under Rule 60(b)'s mandate that finality considerations be balanced against any equities movant may assert. Finality of judgments as a policy reason for denial is not nearly so strong when the motion is under Rule 59(e) as when Rule 60(b) is invoked. Put otherwise, the trial court has considerably broader discretionary authority under Rule 59(e) to grant relief than it does under Rule 60(b).

Bruce v. Bruce, 587 So. 2d 898, 903-04 (Miss. 1991).

Stringer was properly noticed of the hearing on Fortenberry's motion for summary judgment. Inexplicably, Stringer chose not to file a written response addressing the merits of the summary judgment motion. Then, when summary judgment is rendered in favor of Fortenberry, Stringer squanders the opportunity to file a Rule 59(e) motion to amend the judgment and instead files a Rule 60(b) motion for reconsideration. The filing of a motion to amend would have allowed the trial court a much more deferential standard on review of the judgment. In any event, such motion must be filed within ten days of the entry of judgment. Furthermore, Stringer could have appealed the trial court's decision to grant summary judgment. This would also have allowed the appellate court to examine the underlying judgment.

In evaluating the denial of a Rule 60(b) motion, however, it is not within our proper scope of review to evaluate the validity of the underlying judgment. Instead, we are to consider only whatever extraordinary circumstances the movant may assert for matters which are *collateral* to the merits. We find that Stringer has failed to make any showing of exceptional circumstances which *do not* attack the merits of the underlying judgment. For these reasons, and given the interest of finality in judgments, we are forced to conclude that the chancellor did not abuse his discretion in denying the motion for reconsideration.

WAS THE PLAINTIFF ENTITLED TO A JUDGMENT FOR RENTALS WHICH HAD NOT ACCRUED PRIOR TO THE DATE THE SUIT WAS INSTITUTED?

Stringer argues that the trial court was clearly in error when it awarded the present value of the rental which would accrue over the remaining term of the lease because the lease agreement did not contain an acceleration clause. In support of this proposition, Stringer cites the holding in *Frey v. Abdo*, 441 So. 2d 1383, 1385 (Miss. 1983) which states that because the lease agreement did not contain an acceleration clause, "any payment not yet due before suit was brought was not yet actionable." *Frey* explained that "[w]ithout . . . an acceleration clause the lessor, upon default by lessee, would generally have to wait until each installment is due before filing suit for that particular installment." *Id.*

While we might find this argument meritorious on review of a motion for summary judgment, we cannot do so on review of a denial of relief under Rule 60(b). The decision in *Bruce*, makes it clear that on appeal, we do not consider the validity of the underlying judgment; we consider only matters which are collateral to the merits. Therefore, even if Stringer is correct in his assertion that the award of the total present value of all future rents was improper, it is beyond our scope of review in this appeal. Additionally, Stringer failed to assert this particular argument in his motion for reconsideration. We feel compelled to remind litigants of the admonition in *Bruce*, that "Rule 60(b) is not an escape hatch for lawyers and litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies. Rule 60(b) is designed for the extraordinary, not the commonplace." *Bruce*, 587 So. 2d at 904.

THE JUDGMENT OF THE MARION COUNTY CHANCERY COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.