

IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00496 COA

TYREE W. BROWN

APPELLANT

v.

THE DOW CHEMICAL COMPANY AND SONFORD PRODUCTS CORPORATION

APPELLEES

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

TRIAL JUDGE: HON. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT (1ST DIST)

ATTORNEY FOR APPELLANT:

TYREE W. BROWN, *PRO SE*

ATTORNEY FOR APPELLEES:

CAMILLE HENICK EVANS

NATURE OF THE CASE: WRONGFUL DEATH

TRIAL COURT DISPOSITION: CASE DISMISSED

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

This appeal stems from the efforts of Tyree Brown to undo the settlement of a lawsuit brought by the Calvin Brown estate of which he is an heir. Acting *pro se*, Brown assigns as error the refusal of the Circuit Court of the First Judicial District of Hinds County to set aside a dismissal of the lawsuit

following settlement. We conclude that the circuit court did not err and, therefore, affirm its judgment. The Dow Chemical Company and Sonford Products Corporation have moved for sanctions against Brown based upon the alleged frivolous nature of his appeal and motions. Brown's disregard for the merits and legal soundness of his positions and the procedures he employed warrant additional proceedings to determine whether sanctions are justified.

FACTS

Calvin Brown was employed at a Sonford company plant when he became ill and died allegedly from exposure to manufacturing chemicals purchased from Dow. In 1980, a wrongful death suit was filed by Calvin's mother and sister on behalf of all of his statutory heirs who were determined by a chancery court to include Tyree Brown. Several years later, a settlement was reached with Sonford, and the chancery court ordered that the net proceeds of the settlement be distributed equally among the heirs. Two years later, a settlement was reached with Dow and was concluded by counsel representing all of the heirs and the administratrix of the estate. As a part of the settlement, the administratrix dismissed the circuit court action, and the settlement was approved by the chancery court in which the estate had been opened following petition by the heirs. Releases were executed by all of the heirs except two. Tyree Brown did not sign a release.

In 1994, Brown submitted a "Petition to Vacate Judgment for Fraud Upon the Court," ostensibly seeking to set aside the dismissal of the circuit court action which was made consistent with the settlement of the cases. Specifically, Brown contended that he should have been given notice of the settlement, that the settlement should not have been announced until all settlement papers were executed, and that his mother was not competent at the time of the settlement. Brown did not submit any proof of these allegations and failed to rebut the fact that he was represented by counsel in settlement negotiations. The circuit court treated the petition as a motion under Mississippi Rule of Civil Procedure 60(b)(1), (4), and (6), and denied it. In denying the motion, the circuit court recognized that the same claims had previously been raised in federal litigation.

DISCUSSION

1. Rule 60(b) Relief

Rule 60 provides:

On motion . . . the court may relieve a party . . . from a final judgment . . . for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

. . . .

(4) the judgment is void; [or]

. . . .

(6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment . . . was entered

M.R.C.P. 60(b). Brown's petition to vacate the judgment dismissing his case alleged that Dow "allowed and sanctioned a collaboration and conspiracy and perpetration of a fraudulent verbal settlement agreement," that "this perpetration of fraud was in collaboration with [attorneys for the plaintiffs]," that Dow and these attorneys "all failed to disclose the proposed illegal verbal settlement agreement or its terms to [Brown]," that "all parties and all attorneys of record failed to disclose their intent to settle and settled [Brown's interest in the pending litigation] without his knowledge or permission," that the settlement was ordered without his consent, and that his interest in the settlement "was fraudulently misrepresented, concealed and dissolved." Evidently, part of Brown's position is owed to his belief that a conspiracy exists in which the "thirty-odd lawyers" he used in pursuing this case were "bought and paid under the table" by Dow and Sonford. In addition, Brown alleges that a federal judge has participated in perpetrating the fraud that allegedly resulted in the entry of the circuit court order dismissing the case.

These allegations arguably fall within the categories considered by the trial court. They are, however, allegations which were presented over one year previously to a federal court. Consequently, the trial court was well within its discretion in concluding that the motion, without even addressing its merit, was filed unreasonably late. *Overbey v. Murray*, 569 So. 2d 303, 306 (Miss. 1990). Moreover, our review of the record reveals a total lack of evidence to support Brown's conclusory allegations.

An additional issue, however, is whether the judgment of dismissal entered by the trial court is void. We conclude that it is not. "[A] judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *Id.* (citation omitted). In this case, the only allegations relating to whether the judgment is void concern whether Brown received notice of the settlement of the claims of the estate of Calvin Brown. Thus, assuming that Brown was entitled to notice, due process is implicated. Our review of the record in this case reveals that Brown received notice of the settlement, both personally and through notice to his attorneys. Consequently, the judgment of dismissal, on this issue, is not void and was not subject to be set aside as such.

Accordingly, we affirm the trial court's denial of the motion.

2. Appellant's Pending Motions

Brown has filed several motions on appeal. The sole remaining motion is a motion for writ of error, ostensibly pursued under Mississippi Rule of Appellate Procedure 21. Because we already have disposed of the same issues after briefing by the parties, there is no need to consider the motion. It is denied. *See King v. Thigpen*, 441 So. 2d 1365, 1366 (Miss. 1983) (citation omitted).

3. Sanctions

Dow and Sonford have requested that sanctions be imposed against Brown for pursuing a frivolous appeal and motions. We agree that, under the circumstances of this case, sanctions should be

considered.

Rule 38 of the Mississippi Rules of Appellate Procedure states "[i]n a civil case to which Miss. Code Ann. § 11-3-23 (1991) does not apply, if the Supreme Court or Court of Appeals will determine that an appeal is frivolous, it will award just damages and single or double costs to the appellee." M.R.A.P. 38. "[A] pleading or motion is frivolous . . . only when, objectively speaking, the pleader or movant has no hope of success." *Tricon Metals & Serv., Inc. v. Topp*, 537 So. 2d 1331, 1335 (Miss. 1989). Inquiry into whether a party had any hope of success is an objective one "to be exercised from the vantage point of a reasonable party in [the litigant's] position as it filed and pursued its claim." *Id.* *Pro se* plaintiffs are subject to the same rules of procedure and substantive law as represented parties and, accordingly, are subject to the sanctioning power of the courts.

Under this standard, we must consider whether Brown would have had any hope of success in pursuing his motion to set aside the judgement of dismissal and his petition for writ of error. We also must consider the unsuccessful attempts, by motion, in this Court to enjoin Dow from distributing a chemical which it manufactures.

Brown has in several state and federal court proceedings attempted to undo the settlement of a lawsuit against Dow and Sonford relying on the most tenuous of arguments. In this case, Brown did not even address arguments concerning whether he had exercised reasonable diligence in bringing his motion to set aside. He maintained the same positions in federal court over one year prior to the filing of his state court motion to set aside. The federal courts rejected his position, and Brown turned his attention to the state courts.

Accordingly, we order the Appellant within thirty days to show cause why his actions in this case do not amount to a frivolous appeal under Mississippi Rule of Appellate Procedure 38 and why sanctions should not be imposed. In addition, we order that the Appellees submit within thirty days an accounting of their attorneys' fees and expenses for the appeal. Upon review of these materials we will address what if any sanctions will be imposed upon Brown.

THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY IS AFFIRMED. IT IS ORDERED THAT THE APPELLANT WITHIN THIRTY DAYS SHOW CAUSE WHY HIS APPEAL SHOULD NOT BE DECLARED FRIVOLOUS AND WHY SANCTIONS, IN THE FORM OF COSTS AND ATTORNEYS FEES, SHOULD NOT BE AWARDED. COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT.

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

APPENDIX

Chronology of Litigation Events

Date Jurisdiction Description of Event

July 31, 1986 Circuit Court Order
pursuant to settlements

July 31, 1986 Chancery Court Order
pursuant to settlements

August 11, 1985 U.S. District Court Dismissal of original suit with prejudice

February 27, 1987 U.S. District Court Dismissal of first new suit with prejudice

September 24, 1987 U.S. District C
aside dismissal of first new suit and
Order to Issue Forthwith Dema
Intervention to Conclude This Matt
Based on the Factual Documents and

February 26, 1988 Fifth Circuit Order dismissing appeal of first new suit

March 22, 1988 Fifth Circuit Order
appeal dismissal

March 29, 1989 U.S. District Court Order granting motion to dismiss second new suit

March 31, 1989 U.S. District Cou
requiring that leave be obtained from
any future actions

October 24, 1989 Fifth Circuit Order affirming dismissal of second new suit

January 17, 1990 U.S. District Court
to file third new suit complaint and a

Dow

March 7, 1990 Fifth Circuit Order dismissing appeal of Magistrate's order.

October 30, 1991 U.S. District Cour
for leave to file fourth new suit

December 7, 1993 Fifth Circuit App
leave to file fourth new suit disn
awarded

February 4, 1994 U.S. District Cour
denied and clerk directed to return an

February 22, 1994 Circuit Court Brown's motion to vacate dismissal of case

April 12, 1994 Circuit Court Order denying Brown's motion to vacate

May 6, 1994 MWCC Order denying
of dismissal with prejudice

May 13, 1994 Circuit Court Brown'
motion for leave to proceed on appea

May 24, 1994 Circuit Court Order granting leave to proceed *in forma pauperis*

June 27, 1994 Supreme Court Dow's motion to dismiss appeal

August 8, 1994 Supreme Court Order denying motion to dismiss appeal

August 12, 1994 Circuit Court Brown
complaint, motion to set aside order

October 17, 1994 Supreme Court
supplementation of record

October 31, 1994 Circuit Court Order
file amended complaint, to set aside
compensation settlement, and motion

November 4, 1994 Supreme Court Order to Circuit Court to supplement record

November 23, 1994 Circuit Court Order supplementing appeal record

January 4, 1995 Supreme Court Brown's motion for writ of error

February 16, 1995 Supreme Court Order
error for consideration on the merits
Appeals; Order denying second
supplementation of record

May 26, 1995 Supreme Court Dow
record excerpts

June 23, 1995 Supreme Court Brown
of certain chemicals

June 29, 1995 Supreme Court Dow
Brown's motion to enjoin

August 7, 1995 Supreme Court Order
striking some of Brown's record excerpts

August 16, 1995 Supreme Court Order
passing motion for sanctions to Court

September 21, 1995 Supreme Court Order on Brown's motion for appointment of counsel

January 18, 1996 Court of Appeals Order denying motion for appointment of counsel