

**IN THE COURT OF APPEALS 02/27/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 93-CA-00513 COA**

**JOHN D. BALTAR**

**APPELLANT**

**V.**

**W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD. APPELLEE**

**CONSOLIDATED WITH**

**NO. 93-CA-00982 COA**

**JOHN D. BALTAR APPELLANT**

**V.**

**W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD. APPELLEE**

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

TRIAL JUDGE: HON. RICHARD WAYNE MCKENZIE

COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GEORGE W. NEVILLE

ATTORNEY FOR APPELLEE:

LAWRENCE C. GUNN, JR.

NATURE OF THE CASE: CONTRACT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED IN FAVOR OF W.R. FAIRCHILD CONSTRUCTION IN COUNTY COURT; CIRCUIT COURT AFFIRMED LOWER COURT HOLDING.

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

McMILLIN, J., FOR THE COURT:

We consider today two cases commenced in the County Court of Forrest County by W.R. Fairchild Construction Company, Ltd. (hereafter "Fairchild") against John D. Baltar, in both of which summary judgment was rendered against Baltar. Baltar's initial unsuccessful attempts in the county court to set aside the judgments were appealed, again unsuccessfully, to the Forrest County Circuit Court. The cases, consolidated at the circuit court level, are now before this Court on separate appeals of two rulings by the circuit court. The two appeals were consolidated by order of the Mississippi Supreme Court prior to referral to this Court for decision. Upon consideration of the matter, we have concluded that the result obtained in the circuit court was correct, and we hereby adjudicate the finality of the county court judgments.

I.

FACTS

On March 16, 1989, the County Court of Forrest County granted summary judgment against Baltar in two separate proceedings pending in that court. Both judgments were in favor of Fairchild. Baltar had filed answers in both cases, acting pro se, and listed a post office box as his mailing address. Copies of the summary judgment motions and the notices of hearing were served on Baltar by mailing the documents to him at that address as permitted under Rule 5 of the Mississippi Rules of Civil Procedure. Baltar did not appear at the hearing where the judgments were granted.

On July 5, 1989, Baltar filed motions seeking to set aside the judgments in both cases, claiming that he had not received the copies of the motions and notices sent through the mail, and that he was, therefore, unaware of the summary judgment proceedings. He claimed that he had changed his mailing address after filing his answers and had relied upon the United Postal Service to forward his mail. He introduced evidence tending to show that he had experienced problems in receiving forwarded mail.

The county court judge denied the motions to set aside the judgments by orders entered in both causes on July 27, 1990. Baltar was, at this stage, represented by counsel. The record reflects that Baltar's counsel, by letter dated August 3, 1990, indicated to the clerk that he had been directed by his client to file an appeal in both cases to the Circuit Court of Forrest County. However, the letter does not bear a clerk's stamp or other indication of a delivery date. There is no indication that a copy of the letter was sent to opposing counsel. The only evidence that can be gleaned from the record

regarding a time of receipt of the letter by the clerk is a reply note typed onto the letter by the clerk which bears the handwritten notation "8-8-90." Baltar produced no evidence in the record that would support a finding that the letter was received by the clerk at any earlier date than August 8, 1990.

A formal notice of appeal, together with a tender of the estimated costs of the appeal, was filed with the clerk on August 15, 1990. Fairchild thereupon filed a motion to dismiss the appeal as being untimely filed. The circuit court, by judgment entered on March 29, 1993, ruled that the two county court judgments should be "affirmed in all respects," without stating upon what ground the judgments of the lower court were being affirmed.

On April 28, 1993, Baltar filed a notice of appeal from that judgment to the Mississippi Supreme Court. That same day he filed a pleading entitled "Petition for Rehearing" in the circuit court, seeking (a) to point out errors in the circuit court's affirmance of the judgments, (b) alleging assessment of improper damages by the county court, and (c) claiming newly discovered evidence of fraud in the procurement of the judgments. The clerk's stamp has a date entry only; therefore, it is impossible to determine whether the notice of appeal or the rehearing petition were filed first except to note that the appeal documents were entered first on the clerk's docket. The motion was noticed for hearing on May 18, 1993, and, apparently in preparation for the hearing, Baltar had a number of subpoenas issued.

On May 13, 1993, Fairchild filed a motion entitled "Motion to Quash Subpoenas and to Cancel Notice of Hearing." The primary basis for Fairchild's motion was that the circuit court no longer had jurisdiction of the matter, since Baltar had previously filed a notice of appeal to the Mississippi Supreme Court. For reasons not apparent from the clerk's papers, the May 18, 1993, hearing was not held.

On June 8, 1993, Baltar filed in the circuit court an additional pleading entitled "Amended Motion To Set Aside Judgment Based Upon Fraud Upon the Court." That motion stated that it was being brought pursuant to Mississippi Rule of Civil Procedure 60(b)(6). The thrust of the motion was that both judgments obtained in the County Court of Forrest County were obtained through false factual allegations in the pleadings and in affidavits supporting the summary judgment motions. The circuit court subsequently entered an order on July 27, 1993, denying "the presently pending petition for rehearing and motion to vacate." We construe the "motion to vacate" as being the Amended Motion to Set Aside Judgment Based Upon Fraud Upon the Court referenced above. The court did not state the basis for its denial of relief, either in a bench ruling or in the order itself.

On August 23, 1993, Baltar filed a notice of appeal from the circuit court's July 27 order. Upon motion of Fairchild filed in the Mississippi Supreme Court, the April 28 appeal and the August 23 appeal were consolidated in this proceeding. The consolidated appeals were subsequently assigned by the Mississippi Supreme Court to this Court for decision.

## II.

### DISCUSSION

It would be an understatement to say that this case has followed a twisted and tortuous procedural journey to arrive before this Court for resolution. While we must confess a degree of admiration for Baltar's dogged efforts to keep this case alive, we must nevertheless conclude that his efforts, since a very early stage of the proceedings, have simply been in vain.

We determine that Baltar's cause, on the present state of the record, was irretrievably lost when he failed to timely perfect his appeal from the County Court of Forrest County to the Forrest County Circuit Court from the orders denying his motion to set aside the default judgments. The law in effect at that time was quite clear. The only right of appeal available to Baltar from such an adverse ruling in a county court civil proceeding in 1993 was the statutory right created by section 11-51-79 of the Mississippi Code of 1972. That section states that "[a]ppeals from the county court shall be taken and bond given within ten (10) days from the date of the entry of the final judgment or decree on the minutes of the court . . . ." Miss Code Ann. § 11-51-79 (1972). There is no evidence in the record that a notice of appeal was filed within the ten days following entry of the order. Certainly no deposit of costs or appeal bond was filed within the ten day period. Therefore, we conclude that this case is controlled by *Johnson v. Evans*, 517 So. 2d 570, 571 (Miss. 1987). In that case, a j.n.o.v. was entered by the County Court of Lauderdale County on June 25. *Id.* at 570. An appeal to Lauderdale County Circuit Court was filed on July 24, and the circuit court, in considering the appeal, set aside the j.n.o.v. *Id.* The Mississippi Supreme Court reversed the action of the circuit court, holding that the failure to post the bond was jurisdictional, and that the circuit court had no jurisdiction to consider the appeal on the merits. *Id.* at 571.

In the present case, we have neither notice nor bond (or deposit of costs in lieu of a bond) within the statutory ten days. The circuit court, having never obtained jurisdiction of the two cases, was correct in entering its March 29, 1993, judgment affirming the county court judgment. For the same reason, it had no jurisdiction to entertain the subsequent motions filed by Baltar for rehearing or to set aside the lower court's judgments based upon an alleged fraud upon the court. While we readily concede Baltar's right to pursue an action to set aside judgments procured by fraud under Mississippi Rule of Civil Procedure 60(b), he must present that motion in the proper forum.

Aside from the jurisdictional problem, the circuit court was simply not the proper forum to file for relief under Rule 60(b). Even assuming that Baltar had perfected his appeal to the circuit court in a timely manner, any subsequent claim for relief under Rule 60(b) would still lie in the trial court, which was in this instance the county court and not the circuit court. It must be remembered that, in cases such as this, the circuit court acts purely as an appellate court. "Appeals should be considered solely upon the record as made in the county court and may be heard by the appellate court in term time or in vacation." Miss. Code Ann. § 11-51-79 (1972). "Procedural matters regarding appeals from county to circuit or chancery court, not otherwise prescribed, are governed by the Rules of the Mississippi Supreme Court." *Allen v. Mayer*, 587 So. 2d 255, 261 (Miss. 1991). Mississippi Rule of Civil Procedure 60(b) specifically contemplates the possibility of a party seeking relief during the pendency of an appeal and unequivocally provides that the motion must be brought in the trial court.

"Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein." M.R.C.P. 60(b). If the motion could be filed with the appellate court, this provision of the rule would be nonsensical. The circuit court was, therefore, correct in refusing any relief on either of Baltar's motions filed in that court since, besides the lack of jurisdiction issue, the county court was the proper forum for seeking any Rule 60(b) relief.

There is one procedural twist left in this case with which we must deal. After Baltar perfected this appeal to the Mississippi Supreme Court, Fairchild filed a motion to docket and dismiss in the Supreme Court, stating as a ground for relief that the appeal from county to circuit court was untimely filed. That is, of course, the basis upon which we have decided the case today. The Mississippi Supreme Court denied the motion to docket and dismiss, without opinion and without stating its rationale. We must, therefore, deal with the question of whether, despite our view of the proper outcome of the case, that resolution has been foreclosed to us by the earlier action of the Supreme Court. We conclude that it has not, and that the denial of the motion to docket and dismiss did not serve to adjudicate the issues raised on appeal on the merits.

At the time the Supreme Court was considering Fairchild's motion to docket and dismiss, there were two separate appeals pending. One of them, on its face, involved a denial of relief under Mississippi Rule of Civil Procedure 60(b), alleging fraud in the procurement of the initial judgments. The issue of the proper forum to pursue this Rule 60(b) relief was not before the Supreme Court on the motion, and the possibility existed, based upon the motion to docket and dismiss alone, that Baltar could have been entitled to relief under Rule 60(b) without regard to the timeliness of the appeal from county to circuit court. Therefore, the granting of the motion to docket and dismiss at that time had the possibility of foreclosing consideration of an issue facially before the Court but not raised in the motion. Since the order denying the motion to docket and dismiss does not state its grounds and does not purport to reach the merits of the motion, we interpret that order as being a procedural order only, reserving all issues for consideration on the merits, rather than attempting to dispose of them piece-meal in the limited arena of the Court's motion practice.

The judgments of the County Court of Forrest County became final for all purposes ten days after entry of that court's order refusing Baltar's motion to set aside the summary judgments in the absence of a timely perfected appeal. The Forrest County Circuit Court acquired no jurisdiction to consider the matter further based upon Baltar's untimely attempt to perfect his appeal to that court, and, therefore, by logical extension, this Court acquired no jurisdiction by Baltar's subsequent attempts to appeal the actions of the circuit court. Baltar's attempts to raise the issue of fraud under Rule 60(b) were brought in a forum having no jurisdiction and are, therefore, a nullity.

III.

CONCLUSION

In drafting the mandate of this Court based upon our opinion, we are instructed by the case of

*Brandon v. Interstate Life & Accident Co.*, 149 Miss. 814, 116 So. 739 (1928). In that case, the Supreme Court affirmed the circuit court's decision on a county court appeal. The appellee requested that "[t]he circuit court be directed to remand the case to the county court for enforcement . . . ." *Id.* at 739. The Supreme Court stated as follows:

It is unnecessary for such an order to be included in the judgment here rendered by this court. In due course, the clerk of this court will certify the judgment here rendered to the circuit court, from which the case was appealed. It will then become the duty of the clerk of that court to deal with the judgment as if no appeal to this court had been taken, and to certify the action of the circuit court in affirming the judgment to the county court so that it may proceed with the enforcement of the judgment.

*Id.* at 739-40.

Our decision is based upon the assumption that the circuit court decided this case adverse to Baltar on the basis of the untimeliness of his appeal, which we have determined to be the correct disposition. In such case, the proper technical procedure would have been to dismiss the appeal for want of jurisdiction rather than affirm the lower court. The result is the same, however, since the judgment of the county court becomes final whether it is affirmed on appeal or whether the appeal is dismissed for want of jurisdiction. We, therefore, dismiss this appeal for lack of jurisdiction, the effect of which action is to affirm the results, if not the specific language, of the judgment of the Circuit Court of Forrest County entered March 29, 1993, and the order of that Court entered July 27, 1993, that result being an adjudication of the finality of the county court judgments. To the extent

necessary, we are confident that the procedures of *Brandon v. Interstate Life & Accident Co.* will be carried out in due time.

**THESE APPEALS ARE DISMISSED FOR LACK OF JURISDICTION. THE MARCH 17, 1989, JUDGMENT OF THE COUNTY COURT OF FORREST COUNTY GRANTING SUMMARY JUDGMENTS IN FAVOR OF FAIRCHILD IS AFFIRMED. COSTS OF THESE APPEALS ARE TAXED TO BALTAR.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., AND COLEMAN, DIAZ, AND SOUTHWICK, JJ., CONCUR. BARBER, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY KING AND PAYNE, JJ.**

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**BARBER, J., CONCURRING:**

Although I find the result in this case unfortunate, I must agree that narrowly it is legally correct. The court finds appropriately that because Baltar did not file a timely appeal, the circuit court was without jurisdiction to hear the appeal. The result is that Baltar's appeal is procedurally barred from consideration by the circuit court as well as by this Court pursuant to section 11-51-79 of the Mississippi Code. This bar was recognized by the court in *Johnson v. Evans*, 517 So. 2d 570-71 (Miss. 1987), which held that failure to post the required bond within the time prescribed by law is jurisdictional, and circuit courts have no power to hear the appeal where such a failure exists.

I cannot, however, merely concur in the opinion above without stating that the circumstances giving rise to this appeal could have, and perhaps should have, been given more careful consideration by the

county court. This level of review may have prevented the summary manner in which the default judgment was issued. Additionally, it could possibly have prevented the seemingly unfair result in this case.

When a party is not responding to discovery requests, it is customary and proper to file a motion to compel. With the motion granted, and an order issued to that effect, further non compliance could warrant sanctions. In this cause, however, Fairchild bypassed this procedure and instead requested the most severe sanction possible, that of summary judgment and dismissal of Baltar's cross claim. In *White v. White*, 509 So. 2d 205, 209 (Miss. 1987), the supreme court stated that "[a] court should be reluctant to impose the most severe sanction of dismissal where the goal of judicial economy and efficiency is not served." The court further stated that "dismissal for discovery violations is a 'draconian' remedy or a 'remedy of last resort', only to be applied in extreme circumstances." *Id.*

In *Palmer v. Biloxi Regional Medical Center*, 564 So. 2d 1346, 1356 (Miss. 1990), the court noted that sanctions for failure to respond to discovery should only be granted when appropriate but that "[d]ismissal under Rule 56 can only be based on the insufficiency of evidence - not on violation of procedure." Furthermore, In *Hurst v. Southwest Mississippi Legal Services*, 610 So. 2d 374, 383-84 (Miss. 1992), the court held that Rule 56(e) "does not entitle a party to summary judgment by default where the non-moving party files no response. Even in the absence of a response, the court may enter judgment only 'if appropriate;' *i.e.* if no genuine issue of material fact exists." In this case, the county court could have relied on Baltar's pleadings as a basis for denying the motion for summary judgment. Instead, the county court apparently disregarded the answers, defenses and counterclaims and ruled that there were no disputed facts at issue and that there were no defenses available to Baltar, a pro se litigant. It is with these findings that I take exception. Unfortunately, Baltar's delay in filing his appeal precludes a review of the county court's findings.

**KING AND PAYNE, JJ., JOIN THIS SEPARATE WRITTEN OPINION.**