

RECEIVED

Aug 08 2023

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2022-001312

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten is theAppellant,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Insurance Company,
Interinsurance Exchange of the Automobile Club, John Ammendola, Trustgard
Insurance Company, SC Department of Public Safety, Chevrolet, GMC, Unknown
John Does, Defendants,

Of whom Kevin Carter is theRespondent.

**RESPONDENT’S RETURN TO APELLANT’S “MOTION FOR LEAVE TO FILE
RULE 60 (b), SCRPC, MOTION AND PETITION FOR LIFT OF AUTOMATIC
STAY, REMAND, AND STAY OF APPEAL PENDING TRIAL COURT RULING
ON RULE 60 (b), SCRPC, MOTION”**

Wesley B. Sawyer, Esquire
S.C. Bar No. 100229
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
wsawyer@murphygrantland.com
Attorney for Respondent

SUMMARY

In this, her second appeal of the case, Appellant filed this Motion/Petition as yet another delay tactic to further drag out this case that has been ongoing for more than five (5) years. Appellant's Motion makes three requests: (1) for the Court to grant her leave to file a Rule 60(b) motion in the Circuit Court; (2) for the automatic stay in the Circuit Court to be lifted; and (3) for this appeal to be stayed while the Circuit Court decides the proposed Rule 60(b) motion. Each of these requests should be denied. Appellant provides no explanation for why she would be entitled to relief under Rule 60 (b). Without any colorable basis for filing the Rule 60 (b) motion, a grant of Plaintiff's requested Motion here would serve only to further delay this already old case.

I. Appellant's Motion for Leave to File Rule 60(b) Motion should be denied.

A. Appellant's Motion should be denied because it does not set forth a Rule 60(b) ground for her Motion, giving the Court no reason to grant her leave to file such a motion.

Under Rule 60(b), there are five distinct grounds on which a party may move to be relieved from a final judgment or order:

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) mistake, inadvertence, surprise or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (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.

Rule 60(b), SCRCF. A Rule 60(b) motion must assert at least one of these grounds for relief. It is common practice for a party seeking leave from this Court to file a Rule 60(b) motion to file a copy of the proposed motion. Appellant not only failed to follow this practice, but she did not

provide any basis for filing a Rule 60(b) motion, and she has not forecasted any argument for such a motion.

Appellant's Motion does not identify which, if any, ground justifies Rule 60(b) relief. Appellant also fails to set forth any evidence, argument or case law to support Rule 60(b) relief. Rather, her Motion merely recites the Rule itself. (Appellant's Mot., p. 8). Therefore, on this basis alone, Appellant's Motion should be denied. *See Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 78, 832 S.E.2d 760, 769 (Ct. App. 2019) ("The circuit court did not err in denying Curry's Rule 60(b) motion because he has not shown any of the grounds for relief provided by the rule were present."). Although *Curry* may have been a review of the trial court's denial of a Rule 60(b) motion, it shows that Appellant must provide some justification before leave to file the Rule 60(b) motion is appropriate. Although the Court has discretion to grant leave, Appellant's Motion gives no basis upon which to exercise this discretion. The Motion provides no reason why the Court should let Appellant return to the Circuit Court and file a Rule 60(b) motion there.

B. Appellant's Motion should be denied because she did not promptly seek Rule 60(b) relief and granting her leave to seek such relief would prejudice Respondent.

In determining whether to grant relief under Rule 60(b), the court considers the following factors: "(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party." *Rodriguez v. Gutierrez*, 391 S.C. 323, 331, 705 S.E.2d 94, 99 (Ct. App. 2011). Here, Gersten has not promptly sought relief. In August 2022, the Circuit Court dismissed her case based on her "drawn-out history of dilatory proceedings" and her stringing Respondent along in litigation "for over four years without having [provided] basic discovery responses." (August 22, 2022 Circuit Court Order). Those delays followed Appellant's first appeal, which was dismissed when she failed to follow orders of this Court.

Appellant's delays have continued during this second appeal. Rather than promptly filing a Rule 60(b) or Rule 59(e) motion with the Circuit Court, Gersten instead filed a notice of appeal in September of 2022. Thereafter, on January 18, 2023, this Court dismissed her appeal due to Gersten's continued delay and failure to comply with Court rules. (January 18, 2023 Order). In this appeal alone, Gersten has filed six (6) motions for extensions of time, all of which the Court has granted. Now – almost a year after she filed her notice of appeal and in the fifth year of this litigation without her having provided any basic discovery responses – Gersten seeks to further delay this action with a Rule 60 motion and a stay of this appeal. She has not promptly sought relief – she did not timely file a motion with the Circuit Court, and she has waited nearly a year before seeking leave from this Court. Her Motion should be denied on this basis.

As explained above and in the Circuit Court's Order, Gersten's storied history of drawing out this case has already prejudiced Carter. (August 22, 2022 Circuit Court Order). It would compound this prejudice to allow her to further draw out this case by returning to the Circuit Court to file a Rule 60(b) motion and then returning here when that motion is denied. As the Circuit Court properly found, Gersten's repeated delay and failure to comply with court rules and orders has already infringed Carter's procedural due process rights. (*Id.* at p. 5). Therefore, her Motion for Leave should also be denied on this basis.

C. Appellant's Motion should be denied because it does not set forth a prima facie showing of a meritorious defense.

In order to obtain relief under Rule 60(b), not only must the movant make a proper showing she is entitled to relief based upon one of the Rule's specified grounds, but she must also make "a prima facie showing of a meritorious defense." *McClurg v. Deaton*, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to

relief....Such evidence is usually provided through affidavits.” *Bowers v. Bowers*, 304 S.C. 65, 67–68, 403 S.E.2d 127, 129 (Ct. App. 1991). In her Motion, Appellant does not even argue that she has a meritorious defense to the Circuit Court’s dismissal of her case, much less present admissible evidence to support the same. *See* (Appellant’s Mot.). To the extent that Appellant would rely on her disability as a justification for her failure to comply with numerous court rules, orders, and deadlines in the Circuit Court, the Circuit Court gave her numerous accommodations over the last five (5) years, including postponing the hearing on the Motion to Dismiss. The hearing was originally scheduled to take place on July 28, 2022. However, on the eve of the hearing, Appellant moved for a continuance based on her health issues. The Circuit Court granted that request and moved the hearing to September 5, 2022.

As both this Court found with its dismissal of her prior appeal and the Circuit Court found in its August 22, 2022 Order, there comes a point when no further extensions are proper and dismissal is the appropriate remedy. Appellant notes in her newest Motion that she is currently litigating other matters in other states. (Appellant’s Mot. p. 7, ¶ 31). She notes filing and service deadlines in those cases, but she has disregarded her obligations to participate in basic discovery in this case for years. Thus, Appellant’s Motion for Leave should also be denied because it does not set forth a prima facie showing of a meritorious defense. *See Bowers*, 304 S.C. at 67, 403 S.E.2d at 129 (affirming denial of Rule 60(b) motion based solely on the movant's failure to present a meritorious defense); *Richardson v. P.V., Inc.*, 383 S.C. 610, 619, 682 S.E.2d 263, 267 (2009) (affirming denial of Rule 60(b) motion where moving parties “have not asserted a meritorious defense”).

D. Appellant’s Motion should be denied because she has already chosen to pursue these issues on appeal.

“A party may not invoke this rule [Rule 60(b)] where it could have pursued the issue on appeal.” *Tench v. S.C. Dep’t of Educ.*, 347 S.C. 117, 121, 553 S.E.2d 451, 453 (2001). Appellant obviously believes she can pursue her issues on appeal since she herself filed this appeal and she filed her Initial Brief contemporaneously with this Motion. Moreover, her Motion implies that she intends to pursue the same issues in the Circuit Court that she is raising in this appeal. *See* (Appellant’s Mot., p. 11 (“There is a strong possibility that the issues raised in this appeal can be resolved in the lower trial court.”)). Therefore, she should not now be allowed to go back to the Circuit Court for additional rulings, ping-ponging back and forth between the two courts at her whim.

II. Appellant’s Petition to Lift the Automatic Stay should be denied.

Pursuant to Rule 241 of the South Carolina Appellate Court Rules, a petition to lift an automatic stay “shall contain...the grounds for the petition, and legal arguments with supporting points and authority.” Rule 241(d)(4)(B). Appellant’s Petition does not contain any grounds for her petition to lift the automatic stay or contain any legal arguments, supporting points, or supporting authority. *See* (Appellant’s Pet.). Her Petition merely restates part of the Rule. (*Id.* at pp. 10-11). Therefore, her Petition should be denied.

III. Appellant’s Petition to stay this appeal should be denied.

For the reasons set forth above, Appellant should not be granted leave to file a Rule 60(b) motion with the Circuit Court. Consequently, there is no need for a stay of this appeal. Due to Appellant’s “drawn-out history of dilatory proceeding,” this case has been ongoing for over five (5) years. *See* (August 22, 2022 Circuit Court Order). The resolution of this case should not be further delayed by a stay of this appeal.

CONCLUSION

For the above-stated reasons, Appellant's Motion for Leave to file a Rule 60(b) motion should be denied. Appellant's Motion should be denied because it: (1) fails to set forth any applicable ground for relief under Rule 60(b); and (2) fails to set forth a prima facie showing of a meritorious defense. Moreover, it should be denied because Appellant did not promptly seek Rule 59(e) or 60(b) relief before filing this appeal. Instead, Appellant chose to file this appeal almost a year ago. Allowing this five-year-old case to be further delayed by a return to the Circuit Court would prejudice Carter.

Appellant's Petition to Lift the Automatic Stay should also be denied. Appellant fails to comply with Rule 241's requirement that her Petition contain the grounds for the petition and legal arguments with supporting points and authority. For the same reasons, Appellant's Petition to Stay this appeal should be denied. Therefore, Respondent respectfully requests that the Court deny all the relief requested in Appellant's Motion/Petition filed on July 31, 2023.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

s/Wesley B. Sawyer

Wesley B. Sawyer, Esquire

S.C. Bar # 100229

Post Office Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for Respondent Kevin Carter

Columbia, South Carolina
August 8, 2023

RECEIVED

Aug 08 2023

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2022-001312

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten is theAppellant,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Insurance Company,
Interinsurance Exchange of the Automobile Club, John Ammendola, Trustgard
Insurance Company, SC Department of Public Safety, Chevrolet, GMC, Unknown
John Does, Defendants,

Of whom Kevin Carter is theRespondent.

PROOF OF SERVICE

I certify that I have served one copy of the Respondent’s Return on Appellant by email only to opposing counsel and by depositing a copy of it in the United States Mail, postage prepaid to Heidi Gersten, on August 8, 2023.

s/Wesley B. Sawyer
Wesley B. Sawyer, Esquire (SC Bar # 100229)
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
wsawyer@murphygrantland.com
Attorney for Respondent Kevin Carter

Heidi Gersten
1438 W. Lantana Rd., #330
Lantana, FL 33462
(323) 245-6142
Appellant

Other Counsel of Record:
Pamela J. Larson, Esquire
Womble Bond Dickinson, LLP
5 Exchange St.
Charleston, SC 29401-2948
(Attorney for Nationwide Mutual Ins. Co.)
(Attorney for Joseph Tirbovich)
(843) 720-4630
pamela.larson@wbd-us.com

Reynolds Williams, Esquire
P. O. Box 1909
Florence, SC 29503-1909
(Attorney for Defendant Interinsurance
Exchange of the Automobile Club)
(843) 662-3258

William H. Davidson, II, Esquire
Davidson, Wren & DeMasters
P. O. Box 8568
Columbia, SC 29202
wddavidson@dml-law.com
(Attorneys for SC Dept. of Public Safety)
(803) 806-8222

Shelley S. Montague, Esquire
Jessica W. Laffitte, Esquire
Gallivan, White & Boyd, P.A.
P. O. Box 7368
Columbia, SC 29202
smontague@gwblawfirm.com
jlaffitte@gwblawfirm.com
(Attorneys for Respondent Trustguard
Insurance Company)
(Attorneys for John Ammendola)