

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No. 2017-002270

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, Special Circuit Court Judge
Trial Court Case No. 2014-CP-07-00943

Joseph C. Sun,

Appellant,

v.

Bryan Norberg, Angela Tubbs,
Joseph Babkiewicz, Claudia Hebda,
Jeffrey Dickson, and Christian Gonzales,

Respondents.

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SC Court of Appeals

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUE ON APPEAL

- I. Did the Circuit Court properly deny the Appellant's Motion to Vacate and Set Aside Judgment?

STATEMENT OF THE CASE

This action arises out of Appellant's various arrests by the Town of Bluffton's above-named officers, the Respondents in this action. The Appellant alleged in his Complaint that the Respondents arrested him without probable cause, and he raised claims of Malicious Prosecution and civil rights violations under §1983. On December 7, 2016, Judge Dukes, Beaufort County's Special Circuit Court Judge, granted the Respondents' summary judgment motion on the matter. On December 22, 2016, the Appellant filed a motion for reconsideration, which Judge Dukes denied on May 24, 2017. On June 16, 2017, the Appellant filed a Motion to Vacate and Set Aside Judgment alleging fraud upon the court, which Judge Dukes denied on August 29, 2017. (R. p.). The Appellant served a Notice of Appeal on counsel for the Respondents on October 19, 2017, seeking to appeal various orders of the circuit court.

The Appellant's Initial Brief states issues on appeal that are not before the Court. After Appellant served his Notice of Appeal upon counsel for the Respondents as to numerous orders from the Circuit Court in this matter, Respondents promptly filed a Motion to Dismiss based on Appellant's untimely Notice of Appeal of the orders. (Notice of Appeal, No. 2017-002270 (Oct. 19, 2017); Motion to Dismiss, No. 2017-002270 (Nov. 29, 2017)). The Court of Appeals, in ruling on the Respondents' Motion, held that the Appellant's appeal from the Circuit Court's Order on Appellant's Motion to Vacate and Set Aside Judgment shall proceed, but that "Appellant has failed to timely serve and file an appeal from any other order," and that "[b]ecause Appellant has failed to timely serve a notice of appeal from any other order listed in

Appellant’s notice of appeal, these appeals are dismissed.” (Ct. App. Order, No. 2017-002270 (Jan 26, 2018). Accordingly, Respondents address Appellant’s Issue number 7 only, as this is the only matter currently before the Court.

STANDARD OF REVIEW

“Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge.” *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 17–18, 594 S.E.2d 478, 482 (2004). Therefore, the Court of Appeals review of such decisions will be “limited to determining whether there was an abuse of discretion.” *Id.*

ARGUMENT

I. The circuit court properly held that the Appellant did not present grounds for relief under Rule 60(b)(3) of the South Carolina Rules of Civil Procedure.

Rule 60(b)(3) of the South Carolina Rules of Civil Procedure states that:

[O]n 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: ... (3) fraud, misrepresentation, or other misconduct of an adverse party.

Rule 60(b)(3), S.C. R. Civ. P. “Fraud upon the court is a narrow and invidious species of fraud that ‘subvert[s] the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.’” *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504–05 (Ct. App. 2003) (citing *Chewning v. Ford Motor Co.*, 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003)). It “requires a showing that one has acted with an intent to deceive or defraud the court,” and “must be accompanied by particularized allegations.” *Chewning*, 354 S.C. at 78 & 86, 579 S.E.2d 605 at 609 & 613. In determining whether relief from a final judgment is appropriate, a court must balance “the interest of finality against the need to provide a fair and just resolution of the dispute.” *Raby Const., L.L.P.*, 358 S.C. at 20, 594 S.E.2d at 483

(Ct. App. 2004) (*citing Chewning* to reiterate the appellate court's "policy towards final judgments" and stating that there are "important benefits achieved by the preservation of final judgments").

Here, Appellant filed his Motion to Vacate Judgment pursuant to Rule 60(b)(3) alone. (R. p.). Judge Dukes denied Appellant's motion because he found that the record did not support grounds "for the exceptional relief requested by the Plaintiff under Rule 60(b)(3)." (R. p.). In the Appellant's Motion to Vacate and Set Aside Judgment, the Appellant did nothing more than reiterate his allegations against the Respondents, and he set forth specific acts by Respondents to "show... all other perjury and fraud committed by the Defendants." (R. p.). In his Amendment to his Motion to Vacate, the Appellant merely stated that "Defendant counsels [sic] committed extrinsic fraud," but produces no evidence to support this statement. (R. p.). Based on the foregoing, and based on the complete lack of evidence presented by the Plaintiff that the Respondents' counsel committed fraud upon the court, Judge Dukes denied Appellant's motion.

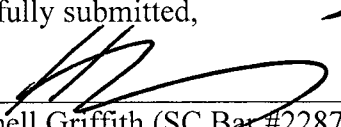
On appeal, the Appellant urges that the fraud in this lawsuit is similar to that committed in *Chewning v. Ford Motor Co.*, 346 S.C. 28, 550 S.E.2d 584 (2001). In *Chewning*, the South Carolina Supreme Court held that an attorney's perjury and/or intentional concealment of documents were extrinsic fraud supporting a grant of a Rule 60(b) motion. *Chewning*, 346 S.C. at 83, 550 S.E.2d at 611. On the other hand, the *Chewning* court reiterated that "perjury by a party or witness is intrinsic fraud," and that this type of fraud is not a ground for equitable interference with a final judgment under Rule 60(b). *Id.* at 81. Here, there is no allegation or evidence that Respondents' counsel committed perjury or concealed documents. Instead, the only allegation made by the Appellant is that the Respondents, the parties to this action,

committed and used perjury “to fabricate ‘probable cause.’” (Appellant’s Initial Brief at 14). Accordingly, this alleged “intrinsic fraud” is not grounds for relief under Rule 60(b)(3) of the South Carolina Rules of Civil Procedure. The record on Appeal lacks evidence of the fraud required to overturn the circuit court’s final judgment pursuant to Rule 60(b), and this issue was properly denied by Judge Dukes.

CONCLUSION

For the reasons stated, Judge Dukes properly denied the Appellant’s Motion to Vacate and Set Aside Judgment and properly held that the Appellant failed to present grounds for relief pursuant to Rule 60(b)(3) of the South Carolina Rules of Civil Procedure. There is no evidence presented on appeal of an abuse of discretion by the circuit court judge. Accordingly, Respondents respectfully ask the Court to affirm the circuit court’s order denying Appellant’s Motion to Vacate and Set Aside Judgment. Pursuant to Rule 220(c), SCACR, the Respondents ask the Court to affirm on any ground appearing in the Record on Appeal.

Respectfully submitted,



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May 18, 2018

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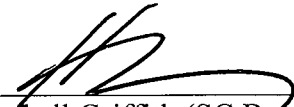
SC Court of Appeals

PROOF OF SERVICE

I certify that on May _____, 2018, I served *Initial Brief of Respondents and Respondents' Designation of Matter* on the following by depositing a copy in the United States Mail with postage prepaid and addressed as follows:

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Pro Se Appellant
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Bluffton, SC 29910

May 18, 2018


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May 18, 2018

The Honorable Jenny Abbott Kitchings
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RE: Joseph C. Sun v. Bryan Norberg, et al.
Civil Action No: 2014-CP-07-00943
GF&L File No: 1011-080

Dear Madam Clerk:

Please find enclosed the original and one copy each of of *Initial Brief of Respondents*, *Respondents' Designation of Matter*, and *Proof of Service* in this case. I would appreciate you filing the originals and returning the clocked copies to me in the enclosed envelope.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

With kindest regards, I remain

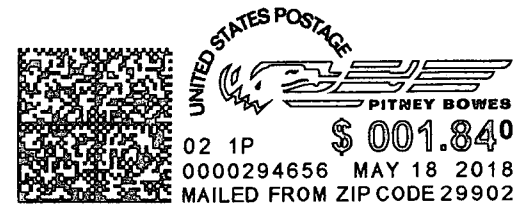
Very truly yours,

Hillary G. Meyer

HGM/lds

Enclosures

cc: Joseph C. Sun (w/encl.)



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