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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
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| COUNTY OF FLORENCE | ) | C/A No.: 2018-CP-21-03002 |
| Dennis Robert Mitton, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | ORDER |
| v. | ) | |
| | ) | |
| Danny James, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |



## INTRODUCTION

This matter came before the Court for a hearing on August 19, 2020 on Defendant's Rule 60(b) Motion for Relief from Default Judgment (hereinafter, "Motion for Relief") and Defendant's Motion to Stay. Defendant's attorney Murrell Smith argued in favor of the motions. Plaintiff's attorney Bert Utsey argued against the motions.

For the reasons set forth below, I hereby deny the Motion for Relief and decline to rule on the Motion to Stay.

## BACKGROUND

On August 30, 2019, I issued an Order granting Plaintiff a judgment by default against Defendant. On November 19, 2019, I granted Defendant relief from the judgment.

Upon learning of additional information, I issued an Order on April 21, 2020 (hereinafter, the "Order") which vacated my November 19, 2019 Order and reinstated the August 30, 2019 judgment by default. By Order and Rule to Show Cause dated May 14, 2020, I referred all matters related to execution and satisfaction of the judgment to a Special Referee.

Defendant appealed the Order to the South Carolina Court of Appeals on May 28, 2020.

On July 27, 2020, Defendant filed his Motion for Relief from the Order[1] and Motion to Stay execution of the Order. Plaintiff filed memoranda in opposition to both motions on August 12, 2020.

MOTION TO STAY

The Motion to Stay seeks a supersedeas to stay execution of the money judgment against Defendant. Because of my Order and Rule to Show Cause dated May 14, 2020, the Special Referee has the power and authority over all matters related to execution of the judgment, including the Motion to Stay. *See* Rule 53(c), SCRCP.

Therefore, I decline to hear the Motion to Stay. Instead, it should be heard by the Special Referee.

MOTION FOR RELIEF

Defendant's Motion for Relief is filed pursuant to Rule 60(b)(2), SCRCP, and is based upon alleged "newly discovered evidence" in the form of an affidavit by his former attorney, Louis D. Nettles.

A party seeking relief under Rule 60(b) has the burden of presenting sufficient evidence to entitle him to be relieved from the judgment. *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011). While the Court has discretion as to whether to grant relief, *see, e.g., Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992), the moving party must nevertheless satisfy the legal requirements imposed by the rule to trigger the Court's discretionary analysis.

Specifically, a party filing a motion under Rule 60(b)(2) has the burden of presenting "newly discovered evidence" and establishing that that evidence: (1) will probably change the

[1] On August 14, 2020, the Court of Appeals granted leave for this Court to hear the Motion for Relief.

result if relief from the judgment is granted and the matter reheard; (2) was discovered since the hearing resulting in the judgment; (3) could not have been discovered before the hearing; (4) is material to the issue; and (5) is not merely cumulative. *Stoney v. Stoney*, 425 S.C. 47, 67, 819 S.E.2d 201, 212 (Ct. App. 2018). Stated differently, "[r]elief under the rule depends upon the post-trial discovery of previously unknown, outcome-changing facts the moving party could not have, with due diligence, unearthed before [the hearing]." *Morin v. Innegrity, LLC*, 424 S.C. 559, 578, 819 S.E.2d 131, 141 (Ct. App. 2018).

A Rule 60(b)(2) motion must be made "within a reasonable time" and cannot be made "more than one year after the judgment, order or proceeding was entered or taken."

The first inquiry under a Rule 60(b)(2) motion is to determine whether the evidence offered in support is indeed "newly discovered evidence." "Evidence is not 'newly discovered' if it is known to the party at [the hearing] and in the party's possession." *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 637, 670 S.E.2d 680, 688 (Ct App. 2008), *citing Lanier v. Lanier,* 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005). Information possessed by a party's agent such as his attorney are considered within the party's possession for purposes of this analysis. *Lanier,* 364 S.C. at 218, 612 S.E.2d at 459*, citing Lans v. Gateway 2000, Inc.,* 110 F. Supp. 2d 1 (D.D.C. 2000).

Defendant's evidence does not constitute "newly discovered evidence." All information contained in Mr. Nettles' affidavit is evidence that was within Defendant's possession at the time of the previous hearings because Mr. Nettles was Defendant's attorney. Paragraphs 1-10, 15-17, and 19-21 of the affidavit (and the attached documents to which they refer) relate to events that preceded the March 27, 2020 hearing and were available and known at the time of that hearing. Paragraphs 13, 14, and 18 do not contain additional evidence but simply summarize the Court's

earlier findings and Mr. Nettles' desire to address them. The remaining paragraphs (11-12) describe Mr. Nettles' unilateral offer to rescind the release he previously obtained from Defendant, something Defendant and Mr. Nettles could have done prior to the March 27, 2020 hearing inasmuch as they had sole and complete control over the release agreement, including any rescission thereof. Because of their possession and control over this evidence, it cannot be deemed "newly discovered" after the March 27, 2020 hearing.

Even if this evidence were considered "newly discovered" it would not be sufficient to carry Defendant's burden on the Motion for Relief. Mr. Nettles' offer to nullify the effects of the release does not change the fact he obtained the release and failed to disclose it to the Court[2] – evidence that not only affected his credibility but was also tantamount to an admission that he had acted without due diligence in response to the present lawsuit. My findings in the Order regarding the release and its effects on this situation remain unchanged despite Mr. Nettles' affidavit.

Similarly, the supplemental – but not new – information related to Mr. Nettles' family obligations does not change my findings in the Order.

Additionally, the information now relied upon by Defendant was discoverable previously via the exercise of due diligence.

> Rule 60(b)(2) allows the court to grant a new trial only if the newly discovered evidence could not have been discovered by due diligence prior to trial. *Black's Law Dictionary* defines "due diligence" as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Id.* at 468 (7th ed. 1999). "Diligence looks not to what the litigant actually discovered, but what he or she *could* have discovered." 12 *Moore's Federal Practice* § 60.42[5] (Matthew Bender 3rd ed.).

*Lanier,* 364 S.C. at 220, 612 S.E.2d at 460 (emphasis in original).

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[2] There is no evidence Defendant's current attorney Murrell Smith knew about the release when he argued in favor of Defendant's Rule 59(e) Motion to Alter or Amend on October 2, 2019. Moreover, Plaintiff does not claim Mr. Smith had that knowledge at that time.

As discussed above, Defendant and his attorneys controlled the factual matters relating the release; thus, they could have "discovered" the evidence related to it (that is, rescinded the release) prior to the earlier hearing. The records attached to Mr. Nettles' affidavit clearly show the supplemental evidence on the "family obligations" issue existed before this Court's earlier rulings and there is no explanation why Defendant did not offer that evidence earlier.

In addition, insofar as the newly offered evidence relates to proof of facts that were already in issue at the previous hearings, it is cumulative and outside the scope of the rule. *See Johnston v. Belk-McKnight Co. of Newberry,* 188 S.C. 149, 198 S.E. 395, 399 (1938). Finally, because Defendant introduced the issue of Mr. Nettles' family obligations in support of his efforts to obtain relief from the default judgment as early as April 4, 2019, when it filed Mr. Nettles' first affidavit discussing that topic, I find that his roughly sixteen-month delay in providing the factual information on that topic contained in Mr. Nettles' current affidavit fails to satisfy Rule 60(b)'s requirement of filing within a reasonable time.

CONCLUSION AND ORDER

IT IS THEREFORE ORDERED that the Special Referee shall hear and resolve Defendant's Motion to Stay.

IT IS THEREFORE FURTHER ORDERED that Defendant's Rule 60(b) Motion for Relief from Default Judgment is hereby denied.

Florence Common Pleas

**Case Caption:** Dennis Robert Mitton VS Danny James

**Case Number:** 2018CP2103002

**Type:** Master/Order/Other

So Ordered

s/ The Honorable Michael G. Nettles #2140