

No. 35559

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

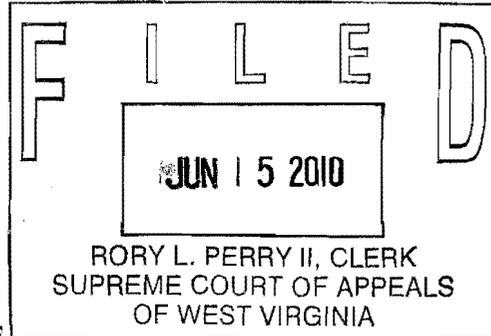
CACV OF COLORADO, LLC,

Appellant,

v.

INA HAYNES,

Appellee.



*Appeal from the Circuit Court of
Kanawha, West Virginia
Case No. 00-C-3022*

APPELLANT'S BRIEF

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COMES NOW, the Appellant, CACV of Colorado, LLC (hereinafter "CACV"), by and through its counsel, Walter M. Jones, III, Christopher R. Moore, Laurel K. Lackey, and Martin & Seibert, L.C., pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, and presents its Appellant's Brief respectfully requesting the March 9, 2009, Orders of the Circuit Court of Kanawha County be reversed.

I. NATURE OF PROCEEDINGS AND RULINGS BELOW

CACV seeks reversal of the Orders denying CACV's Motions to Set Aside Order Releasing Judgment issued by the Circuit Court of Kanawha County in Civil Action Nos. 00-C-3022 and 01-C-2085. CACV was awarded judgments against Ms. Haynes in both actions in August and November, 2001, respectively. Ms. Haynes made partial payments on the judgment debts and, on October 1, 2007, the CACV and Ms. Haynes reached a settlement agreement intended to result in the eventual satisfaction of both judgment debts following an agreed-upon payment plan.

Prior to Ms. Haynes' fulfillment of the settlement agreement, Attorney Daniel T. Booth, who had not appeared in either action but who represented a different plaintiff in a separate action in which Ms. Haynes was also a defendant and in which judgment had also been awarded against Ms. Haynes, requested that the Kanawha County Circuit Court set a status conference regarding the payments made by Ms. Haynes. Following that hearing, at which CACV was not present, the Circuit Court issued the Orders Releasing Judgment which relied upon the testimony of Mr. Booth. CACV contends that it did not receive adequate

notice of the status hearing and was therefore not afforded the opportunity to protect its interests. CACV also contends that the Circuit Court abused its discretion in setting aside the unsatisfied judgments, in holding a hearing to resolve common questions of law or fact when the requirements for such a hearing were not met, and in denying CACV's Motion for Relief from the Orders Releasing Judgment.

II. STATEMENT OF FACTS

On or around August 31, 2001, the Circuit Court of Kanawha County entered judgment in favor of the CACV and against Ms. Haynes in the amount of \$7,344.80 in Civil Action No. 00-C-3022, in which Judge Herman Canady presided. Following Judge Canady's departure from the bench, the matter was assigned to Judge Jennifer Walker. On or around November 19, 2001, the Circuit Court of Kanawha County entered judgment in favor of CACV and against Ms. Haynes in the amount of \$7,882.19 in Civil Action No. 01-C-2085, in which Judge Louis Bloom presided. Abstracts of Judgment attached hereto as **Exhibit A**.

On or around October 1, 2007, the parties reached an agreement under which CACV agreed to accept \$9,600.00, in monthly payments of \$250.00, in satisfaction of both judgments. See Correspondence of October 1, 2007, attached hereto as **Exhibit B**, and included as Exhibit B to CACV's Motion to Set Aside Order Releasing Judgment.

Prior to the settlement agreement, Ms. Haynes made a total of \$3,895.08 in payments on the two judgments. After the settlement agreement, Ms. Haynes

made payments totaling \$4250.00 under the agreed upon settlement. Thus, a balance of \$5350.00 remains due on the settlement agreement. Account statements included as Exhibit C in CACV's Motion to Set Aside Order Releasing Judgment are attached hereto as **Exhibit C**.

On February 12, 2009, the Circuit Court issued an Order for Status Hearing on Issue of Proper Application of Payments to Judgments and for Stay of Further Judgment Executions, attached hereto as **Exhibit D**. The Order was issued by Judge Charles King in Civil Action No. 02-C-2435, *Portfolio Recovery Associates, LLC v. Ina Haynes*. CACV was not a party to that action. The Order included the civil actions upon which the present appeal is based in an extended caption, though the matters were never consolidated. The Order was prepared by Attorney Daniel T. Booth, who had never appeared in either of the actions subject to this appeal.

The status conference was held on March 3, 2009, and attended by Attorney Daniel Booth, representing Portfolio Recovery Associates in Civil Action No. 02-C-2435,¹ and Ms. Haynes. Counsel for CACV did not receive notice of the hearing until the day of the hearing and was, therefore, unable to attend. The Order of February 12, 2009, states that it was sent to Kristin P. Halkias, an attorney previously employed by CACV's Counsel, Martin & Seibert, L.C. Furthermore, the Order of February 12, 2009, is invalid in that it purports to set a hearing to determine common questions of law or fact in separate actions when the requirements of the procedural rules governing such a hearing were not met.

¹ CACV's counsel, Martin & Seibert, L.C., previously represented Portfolio Recovery Associates, LLC, in Civil Action No. 02-C-2435. That representation ceased in 2006, and Attorney Booth now represents Portfolio Recovery Associates, LLC.

Immediately upon receiving late notice of the status conference, CACV's counsel attempted to contact the Circuit Court regarding the failure to attend the hearing. CACV then filed its Response of CACV of Colorado, LLC to Order of February 12, 2009 on March 3, 2009. In that response, CACV asserted that it was not a party to Civil Action No. 02-C-2435, and that Civil Action Nos. 01-C2085 and 00-C-3022, having not been consolidated, are separate and distinct actions.

On March 11, 2009, the Circuit Court of Kanawha County issued an Order Releasing Judgment whereby the Court released the judgments in both of the matters subject to this appeal (Orders Releasing Judgment attached hereto as **Exhibit E**). CACV was unable to defend its interests at the status hearing, as its current counsel did not receive notice until the day of the hearing. CACV's failure to appear by counsel therefore amounts to excusable neglect, inadvertence, and unavoidable cause. CACV therefore moved the Circuit Court of Kanawha County to set aside the Order Releasing Judgment pursuant to Rule 60. CACV's motion was denied in the Circuit Court's Order of November 5, 2009 (attached hereto as **Exhibit F**), and CACV now seeks reversal of the decision of the Circuit Court of Kanawha County.

III. ASSIGNMENT OF ERROR

The Circuit Court of Kanawha County erred when it ordered the release of judgments which have not been satisfied and denied CACV's motion to set aside the erroneous Orders Releasing Judgment. The Circuit Court further erred in

relying upon the testimony of an uninvolved attorney with no first-hand knowledge of the relevant events in its Order Releasing Judgment and subsequent denial of CACV's Motion to Set Aside the Order Releasing Judgment. The Circuit Court further erred in treating as consolidated multiple cases which had not been consolidated under the requirements of the West Virginia Rules of Civil Procedure.

IV. STANDARD FOR REVIEW

"An order denying a motion under Rule 60(b), W.Va. R.C.P. is appealable." *State ex rel. Miller v. Sencindiver*, 170 W.Va. 288, 291, 294 S.E.2d 90, 94 (1982), quoting Syl. Pt. 2, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974). "In ruling on a 60(b) motion, the trial court must be guided by the principle that the rule is to be liberally construed to accomplish justice." *Id.*, quoting 157 W.Va. at Syl. Pt. 6. A circuit court's ruling on a Rule 60(b) motion is reviewed for abuse of discretion. *Strobridge v. Alger*, 184 W.Va. 192, 195, 399 S.E.2d 903, 906 (1990).

V. POINTS AND AUTHORITIES

A. The Circuit Court abused its discretion by failing to abide by the Rules of Procedure when consolidating multiple civil actions.

In issuing its Order Releasing Judgment, the Circuit Court relied upon findings made at a status conference set in Civil Action No. 02-C-2435, in which CACV was not a party. At that hearing, the Circuit Court sought to "determine the

current status of collection efforts on judgments entered against the defendant in each of the cases.” Order Releasing Judgment, Exhibit E at Paragraph 1. The Court noted at the February 5, 2009, hearing that “what we have here are three civil actions . . .” Transcript from Status Conferences, at 7. Thus, the Circuit Court sought to consolidate the three civil actions for the purpose of resolving common questions of fact or law.

Rule 42(a) of the West Virginia Rules of Civil Procedure permits a trial court to “order a joint hearing or trial . . . when actions involving a common question of law or fact are pending before the court.” In the present situation, a joint hearing was improper under Rule 42(a) because the three consolidated matters were not “pending before the court.” “The pendency of a suit is traditionally defined as beginning when the petition or complaint is filed and concluding when a final order is entered disposing of the suit.” Syllabus Point 2, *Baldwin v. Moses*, 182 W.Va. 120, 386 S.E.2d 487 (1989). “Generally, an order qualifies as a final order when it ‘ends the litigation on the merits and leaves nothing for the court but the execution of the judgment.’” *Durm v. Heck's Inc.*, 184 W.Va. 562, 566, 401 S.E.2d 908, 912 (1991) quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). Both of the civil actions upon which the present appeal is based were rendered to judgment in 2001, with nothing left to the court but the execution of the judgment. Thus, the actions were no longer pending before the Circuit Court, and a consolidated hearing under Rule 42(a) was improper. The Circuit Court itself questioned “how did I acquire jurisdiction of these old cases?” at the October 21, 2009, hearing (Transcript from

Status Conferences, at 25), while noting that “as far as I know, the other cases aren’t assigned to me, are they?” Transcript from Status Conferences, at 26.

In *Nunley v. Salyer*, 203 W.Va. 431, 508 S.E.2d 368, (1998), this Court addressed the issue of whether two civil actions (“*Nunley I*” and “*Nunley II*”) could be consolidated when a final judgment order had been issued in one of the actions. Noting that a final judgment order had been entered in *Nunley I* on March 15, 1996, prior to the attempted consolidation, the Court stated that “under the traditional understanding of the meaning of ‘pendency’ in this state, *Nunley I* was not still pending before the circuit court as of July 18, 1997. As it was not still pending, it was therefore improper to consolidate it with *Nunley II* for any purpose whatsoever.” *Id.*, at 373. As with *Nunley*, the present actions were not pending before the Circuit Court; therefore, it was improper to consolidate those cases “for any purpose whatsoever.” *Id.*

B. The Circuit Court abused its discretion in failing to hold a factual hearing on CACV’s Motion to Set Aside Orders Releasing Judgment when a conflict existed as to the facts.

“[W]here there is a conflict of facts alleged in a Rule 60(b) motion, the circuit court should hold a hearing to resolve them.” *Strobridge v. Alger*, 184 W.Va. 192, 195, 399 S.E. 2d 903, 906 (1990), citing *Meadows v. Daniels*, 269 W.Va. 237, 286 S.E.2d 423 (1982).

In the present matter, the November 5, 2009 Order, which denied CACV’s Rule 60(b) Motion to Set Aside Order Releasing Judgment, was issued without resolving the conflicts of fact alleged in CACV’s motion or making any findings of fact relevant thereto. The hearing of October 21, 2009, was set in order to

address CACV's Motion to Set Aside Order Releasing Judgment; however, the Court denied CACV the opportunity to present evidence regarding the factual conflict as required by *Meadows*.

The Motion to Set Aside the Order Releasing Judgment disputed the factual contentions made by Ms. Haynes and Attorney Daniel Booth at the March 3, 2009, hearing and relied upon by the Circuit Court in its Order Releasing Judgment. The Order notes that Ms. Hayes stated that she "was close to satisfying the judgments at issue, if she had not already done so" and that Mr. Booth stated that Ms. Haynes "had indeed made payments in his case, but that various counsel for [CACV] did not maintain accurate accounting of these payments." It is unclear how Mr. Booth would have any knowledge as to the accounting records of CACV's counsel; however, it is clear that the Circuit Court relied upon that questionable representation in its Order Releasing Judgment.

Rule 60(b) permits a party to bring a motion for relief from an order based upon "mistake, inadvertence, surprise, excusable neglect or unavoidable cause." In the present cases, the Orders Releasing Judgment were mistaken in that, while Ms. Haynes did make some payments on the judgments at issue, she has not paid the entire amounts due under the judgments or the agreed-upon amounts under the settlement agreement. Furthermore, CACV was unable to protect its interest at the hearings held on February 5 and March 3, 2009 because it was not provided notice of the hearings until the actual day of the hearings, and its failure to attend resulted from surprise, inadvertence, excusable neglect and/or unavoidable cause.

Contrary to the contentions of Ms. Haynes and Mr. Booth, the record in this matter and the attached account information show that CACV obtained two judgments against Ms. Haynes totaling \$15,226.99 plus court costs and post-judgment interest, that the parties reached an agreement under which the CACV agreed to accept a reduced sum in satisfaction of the two judgments, that Ms. Haynes paid some – but not all – of the agreed-upon amount, and that a balance of \$5350.00 remained due on the settlement as agreed-upon by the parties at the time the judgments were released.

CACV's motion disputed Ms. Haynes' contention that the judgments had been paid and attached accounting records to refute Mr. Booth's contention that the accounting records of its counsel were inaccurate. Nevertheless, the Circuit Court denied the motion without holding a hearing on the disputed facts or making any findings relative to the disputed facts as required by *Meadows v. Daniels*, 169 W.Va. 237, 286 S.E.2d 423 (1982). Instead, the Circuit Court determined not "to get in that can of worms again." Transcript of Status Conferences, at 28.

C. The Circuit Court abused its discretion by failing to set aside an order releasing a judgment which had not been satisfied.

A party contending that a judgment has been paid has the burden of proof. 47 Am. Jur. 2d Judgments § 812, citing *Broyles v. Iowa Dept. of Social Services*, 305 N.W. 2d 718 (Iowa 1981). The Circuit Court released the judgments in question without requiring Ms. Haynes to meet that burden. Instead, the Circuit Court relied upon Ms. Haynes' uncertain, self-serving statements, which were not

supported by any other evidence, and the testimony of Attorney Daniel Booth, who was in no way involved in either of the civil actions involved in this appeal and had no knowledge regarding either.

Even assuming that the accounting presented by Ms. Haynes at the February 5, 2009 hearing (Transcript of Status Conferences, at 6) was entirely accurate, which it was not, a balance would still remain due on the judgments and settlement agreement. Regardless, rather than permitting Ms. Haynes to present her records and requiring her to meet her burden of proof, the Circuit Court instructed her that "You're winning, keep your mouth shut." Transcript of Status Conferences, at 20.

The proper mechanism to seek relief from a judgment which "has been satisfied, released, or discharged" is a motion for relief under Rule 60(b)(5). As set forth in Rule 60, "the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." At no time did Ms. Haynes bring such a motion or independent action. Instead, the Circuit Court released the judgments on its own initiative without requiring Ms. Haynes to meet the burden of proving the judgment had been paid and without affording CACV a hearing on the disputed facts to which it was entitled under *Meadows*.

Ms. Haynes offered no evidence in support of her contention that the judgments in question had been paid, other than her self-serving and inexact testimony. In its Motion to Set Aside Orders Releasing Judgment, CACV offered accounting statements as proof that the judgments had not been paid in full. In

denying the CACV's motion, the Circuit Court abused its discretion by failing to consider the evidence offered by CACV and in upholding the release of both judgments when the record clearly shows that neither had been paid.

VI. CONCLUSION

CACV obtained two legal judgments against Ms. Haynes. Several years after those judgments were obtained, CACV and Ms. Haynes entered into a payment plan under which CACV agreed to accept a reduced sum in satisfaction of the judgments provided that all the agreed-upon payments were timely made. Ms. Haynes made some, but not all of the payments.

The Circuit Court then held a Status Hearing on Issue of Proper Application of Payments to Judgments and for Stay of Further Judgment Executions. That hearing purported to make common findings of fact relevant to three civil actions in which judgments had been awarded against Ms. Haynes, one of which did not involve CACV. Because none of the cases were "pending before the court" as the phrase is defined under West Virginia jurisprudence, consolidation of the cases for a single hearing violated Rule 42(a). Furthermore, CACV did not receive notice of the hearing until the day of the hearing and was therefore unable to protect its interests.

Relying upon the self-serving testimony of Ms. Haynes and Attorney Daniel Booth, who has no first-hand knowledge of the relevant facts, the Circuit Court released both of the judgments the court had granted in favor of CACV against Ms. Haynes. When CACV brought a motion under Rule 60(b) to restore

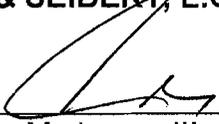
the judgments, the Circuit Court erred in failing to hold a hearing on the conflict between the facts set forth in CACV's motion and the testimony offered by Ms. Haynes and Attorney Booth at the status hearing. By so doing, the Circuit Court abused its discretion through its failure to hold Ms. Haynes to the burden of proving the judgments had been paid and in disallowing CACV to present its evidence that contradicted Ms. Haynes' contention. Furthermore, Rule 60 provides that the mechanism for seeking relief from a judgment is to bring a motion under the Rules of Civil Procedure or via an independent action. In that Ms. Haynes failed to request relief under either avenue, the Circuit Court abused its discretion by failing to set aside its Orders Releasing Judgment, as the procedures for requesting such relief were never instituted.

WHEREFORE, the Appellant, CACV of Colorado, LLC, respectfully requests that this Court reverse the Orders of the Circuit Court of Kanawha County.

Respectfully submitted,

CACV of Colorado, LLC
BY COUNSEL

MARTIN & SEIBERT, L.C.

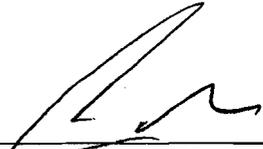
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CERTIFICATE OF SERVICE

This is to certify that I, Christopher R. Moore, Counsel for the Appellant, served the foregoing ***Appellant's Brief*** upon the following individuals by United States Mail, first class, postage prepaid on this the 11 day of June, 2010:

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Christopher R. Moore

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE