STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Rodney Mills, Petitioner

vs.) No. 11-0254 (Berkeley County 09-C-982)

Dan Ryan Builders, Inc., a Maryland corporation; Raymond and Jacquelyn Enright, Respondents

FILED
October 22, 2012
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Richard G. Gay for Petitioner.

Tracey A. Rohrbaugh for Respondent.

MEMORANDUM DECISION

Petitioner Rodney Mills appeals the Judgment Order and Order Granting Permanent Injunction entered January 10, 2011, in the Circuit Court of Berkeley County, following a jury trial on damages. Petitioner further appeals the October 5, 2010, order denying his Motion to Set Aside Summary Judgment, which had been previously granted in favor of Respondents Dan Ryan Builders, Raymond Enright, and Jacquelyn Enright on the issue of liability.

This Court has considered the parties' briefs and the record on appeal. Following oral argument of the parties, consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On or about November 20, 2009, Respondents filed a Petition for Preliminary and Permanent Injunctive Relief and Damages against Petitioner, alleging interference with contractual relations, trespass and nuisance. At all times relevant, Respondents separately owned real property which was subject to a fifty-foot non-exclusive easement granted to Petitioner and his wife by deed dated July 31, 2003. Respondent Dan Ryan Builders, a real estate developer, acquired its property in 2004, for the purpose of developing and then reselling it. Respondents Raymond and Jacquelyn Enright reside on their property, which they purchased from Dan Ryan in 2009.

It is Respondents' contention that Petitioner interfered with Respondent Dan Ryan Builders' contractual relations with potential buyers by threatening them with regard to where

their vehicles were parked on the easement while they were on Dan Ryan property. Respondents further alleged that Petitioner trespassed upon their property by intentionally damaging newly-laid sod which was placed both inside the easement (next to the gravel shoulder) and outside the easement and by intentionally damaging flower planters belonging to Respondents Mr. and Mrs. Enright and located on their property. Finally, Respondents alleged that the aforementioned conduct amounted to nuisance because it substantially and unreasonably interfered with Respondents' quiet use and enjoyment of their property.

Petitioner filed a Response to Petition for Injunction and Counter-Complaint, in which he alleged that Respondents blocked his means of ingress and egress on the easement; that Respondent Dan Ryan Builders presented inaccurate and falsified documents to county agencies reflecting that the proposed residence was farther from the subject easement than it actually was; that Respondents Mr. and Mrs. Enright placed sod, rocks and flower pots inside the easement boundaries thereby infringing upon Petitioner's contractual rights; that Respondent Dan Ryan Builders diverted water onto the easement causing it to erode; and that Respondent Dan Ryan Builders damaged a dam located near the easement.

On February 12, 2010, Respondents filed Plaintiffs' First Combined Discovery Requests to the Defendant, which were properly served upon Petitioner at his counsel's last known address by United States mail. Included therewith were nineteen Requests for Admissions specifically stating material facts underlying Respondents' claims of interference with contractual relations, trespass and nuisance against Petitioner.

Petitioner contends that his counsel never received the Discovery Requests and Requests for Admissions, explaining that his counsel was transitioning from one office location to another during that time. However, it is undisputed that the Discovery Requests (which included the Requests for Admissions) were never returned to Respondents' counsel by the postal service as "undeliverable."

On March 29, 2010, Respondents filed Plaintiffs' Motion to Compel, requesting an order compelling discovery upon Petitioner. According to the motion's Certificate of Service, this motion was served upon Petitioner's counsel by hand delivery to his last known address.

Thereafter, the circuit court entered a scheduling order directing, inter alia, that Petitioner file a written response to Respondents' motion to compel and a proposed order within 15 days. It is undisputed that Petitioner failed to comply with the circuit court's April 23, 2010, scheduling order.

By order entered June 2, 2010, the circuit court granted Respondents' motion to compel in which it ordered Petitioner to answer within 30 days the interrogatories and requests for production of documents served upon Petitioner on February 12, 2010. However, the order further stated that Petitioner "need not answer the Requests for Admissions, which were served on the [Petitioner] with the interrogatories and requests for production, as those are deemed

admitted as a matter of law, due to the fact that they were not answered in a timely fashion. *See* Rule 36, W.V. R. Civ. P.; *Checker Leasing, Inc. v. Sorbello*, 181 W.Va. 199, 382 S.E.2d 36 (1989)."[1]

On July 7, 2010, Respondents filed a Motion for Summary Judgment on the ground that no genuine issues of material fact exist with regard to Respondents' claims and Petitioner's counter-claims. Respondents' motion was properly served, by United States mail, upon Petitioner at his counsel's last known address. However, the motion was returned as "undeliverable." Consequently, Petitioner failed to respond to Respondents' motion for summary judgment.

By order entered July 27, 2010, the circuit court entered an order granting summary judgment in favor of Respondents. The circuit court determined that by failing to respond to Respondents' Requests for Admissions, Petitioner has admitted that there is no genuine issue of material fact and that any issue that may have been disputed regarding Respondents' claims of interference with contractual relations, trespass and nuisance have been admitted as true by Petitioner.

The circuit court's July 27, 2010, order granting summary judgment was returned to the circuit clerk's office as "undeliverable."

On August 26, 2010, Petitioner filed a Motion to Set Aside Summary Judgment. The circuit court denied the motion by order entered October 5, 2010.

A jury trial on the issue of damages was conducted on December 14, 15, and 16, 2010. Upon the conclusion thereof, the jury awarded compensatory damages to Respondents Raymond and Jacquelyn Enright in the amount of $20,472.00, and punitive damages in the amount of $25,000.00. The jury awarded compensatory damages to Respondent Dan Ryan Builders in the amount of $22,590.00, and $15,090.00 in punitive damages. The circuit court further granted the permanent injunction previously requested by Respondents. This appeal followed.

On appeal, Petitioner's first argument is that the circuit court should have granted his Motion

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[1]Rule 36(a) of the West Virginia Rules of Civil Procedure provides, in relevant part, that

> [a] party may serve upon any other party a written request for the admission...of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request....The matter is admitted unless, within 30 days after service of the request...the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter....The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.

to Set Aside Summary Judgment because there was no lack of good faith on his part in failing to answer the Requests for Admissions and no resulting prejudice to Respondents.

As a threshold matter, we note that Petitioner's Motion to Set Aside Summary Judgment was filed approximately thirty days after the summary judgment order was entered. Given this fact, this Court will consider Petitioner's motion before the circuit court as one filed pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure. *See Savage v. Booth*, 196 W.Va. 65, 68 n.5, 468 S.E.2d 318, 321 n.5 (1996) (stating that "a motion served more than ten days after a final judgment is a Rule 60(b) motion."). *See also* Syl. Pt. 2, in part, *Powderidge Unit Owners Ass'n. v. Highland Props., Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996) (holding that if such a motion "is filed within ten days of the circuit court's entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(e). If the motion is filed outside the ten-day limit, it can only be addressed under Rule 60(b).") Accordingly, our review of the circuit court's order denying Petitioner's Rule 60(b) motion is conducted under an abuse of discretion standard. "'A motion to vacate a judgment made pursuant to Rule 60(b), W.Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.' Syllabus Point 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974)." Syl. Pt. 1, *Builders' Service and Supply Co. v. Dempsey*, 224 W.Va. 80, 680 S.E.2d 95 (2009). Finally, "'[a]n appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order.' Syllabus Point 3, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974)." Syl. Pt. 2, *Dempsey*, 224 W.Va. 80, 680 S.E.2d 95.

In its order denying Petitioner's Motion to Set Aside Summary Judgment, the circuit court determined that summary judgment was properly granted because there were no genuine issues of material fact in light of the fact that Petitioner failed to deny any of the Requests for Admissions previously and properly served upon him. The circuit court concluded that, pursuant to Rule 36 of the West Virginia Rules of Civil Procedure, Petitioner "has already admitted...the facts necessary to support the [Respondents'] claims and to defeat his own counterclaim. Those matters are now conclusively established and, therefore, there is no remaining issue to be tried."

In his motion to set aside, Petitioner argued that, under *Dingess-Rum Coal Co. v. Lewis*, 170 W.Va. 534, 295 S.E.2d 25 (1982), this Court acknowledged that untimely responses to requests for admissions may be excused if the delay was not caused by lack of good faith and will not prejudice the opposing party. In this case, the circuit court was not persuaded by Petitioner's argument that there was no lack of good faith on his part because his counsel failed to advise the circuit clerk's office of his updated address; failed to provide a formal change of address with either the West Virginia State Bar office or the United States Postal Service; and failed to meet deadlines set forth in the court's Scheduling Order. Furthermore, we note that during the course of the hearing conducted on August 30, 2010, Petitioner made abundantly clear to the court his personal concerns and frustrations with his counsel's errors and omissions which had occurred throughout the course of this matter. However, Petitioner elected not to replace his counsel or to proceed pro se even though the circuit court clearly advised him of these options and even though the trial on damages

was not to occur for another four months. Accordingly, this Court finds that the circuit court did not abuse its discretion in denying Petitioner's motion to set aside its summary judgment order.[2]

Other assignments of error raised by Petitioner involve evidentiary rulings made by the circuit court during the course of the trial on damages. On appeal, Petitioner argues that he should have been permitted to introduce documents alleged by Petitioner to be fraudulent and which were submitted by Respondent Dan Ryan Builders to the Berkeley County Planning Commission and to cross-examine a witness regarding these documents. The circuit court refused the admission of the foregoing evidence based upon the statement in the Requests for Admissions – which was not denied by Petitioner – that "Dan Ryan did not present inaccurate and falsified documents to the Berkeley County Engineering Department." Petitioner also argues that he should have been permitted to call as a witness a local realtor who had no personal knowledge or involvement with the properties owned by Respondents but who intended to testify regarding the "proper values" thereof. The circuit court refused the admission of this testimony because Petitioner failed to disclose the witness as an expert prior to trial even though the purpose of her testimony was to offer an opinion based upon her particular knowledge and experience as a realtor and her market research. *See* W.Va. R. Civ. P. 26(b)(4)

It is axiomatic that evidentiary rulings are reviewed on appeal under an abuse of discretion standard. *See* Syl. Pt. 1, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995). Indeed, "[a] party challenging a circuit court's evidentiary rulings has an onerous burden because a reviewing court gives special deference to the evidentiary rulings of a circuit court." *Gentry v. Mangum*, 195 W.Va. 512, 518, 466 S.E.2d 171, 177 (1995). Having carefully reviewed the appellate record as submitted by the parties, including the circuit court's rulings regarding the admissibility of the evidence as described above, this Court concludes that the circuit court in no way abused its discretion.[3]

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[2]We note that by order entered March 29, 2012, the license to practice law in West Virginia of Petitioner's trial counsel, Kenneth J. Ford, was annulled. Petitioner subsequently obtained new counsel, who filed with this Court a Notice of Entry of Appearance on or about April 30, 2012, and who participated in oral argument of this matter on September 26, 2012.

[3]In a similar vein, Petitioner argues that the circuit court committed error in permitting Respondents' counsel to state to the jury that Petitioner had personally intimidated potential buyers "when all evidence presented was contrary to that statement." Respondents counter that, in fact, such conduct by Petitioner was previously deemed to be admitted when he failed to deny the Requests for Admissions that he "entered upon Dan Ryan's lot and directed potential buyers of Dan Ryan's lot in a threatening way to move their vehicles off of the easement[,]" and that he "acted wantonly, willfully and maliciously, and caused damage to the [Respondents'] property." Thus, Respondents contend, Petitioner's argument on appeal that the evidence at the trial on damages did not prove that Petitioner intimidated potential buyers is without merit. In any event, we find that, in his brief to this Court, Petitioner fails to make any specific reference to the record where he objected to statements by Respondents' counsel regarding Petitioner's conduct in this regard. Accordingly,

Finally, Petitioner contends that the circuit court should have granted his motion to disqualify Respondents' counsel in this matter because the Deed of Easement and Exchange for the subject easement was previously prepared by a member of her law firm. Petitioner argues Respondents' counsel has a conflict of interest because Respondents' claims are "directly adverse" to the creation of the easement. The circuit court denied the motion to disqualify on the grounds that the Deed of Easement and Exchange was executed between Petitioner and a third party in no way involved in the present action and was prepared at the direction of that third party. Thus, the circuit court concluded, there was no attorney-client relationship between Petitioner and Respondents' law firm. The court further determined that the Deed of Easement and Exchange clearly provides Petitioner with a fifty-foot right-of-way for ingress and egress and that Respondents' tort claims herein do not challenge the existence of the easement or whether it was properly created. Upon careful review of that portion of the record addressing Petitioner's motion to disqualify, and the circuit court's ruling thereon, we find that the circuit court committed no error in denying the motion.

For the foregoing reasons, we affirm the circuit court's order.

Affirmed.

ISSUED: October 22, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

"[i]n the absence of supporting authority, we decline further to review this alleged error because it has not been adequately briefed." *State v. Allen*, 208 W.Va. 144, 162, 539 S.E.2d 87, 105 (1999). As we stated in *State, Dept. of Health v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995), "'[j]udges are not like pigs, hunting for truffles buried in briefs.'" (*Quoting United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). *See* Rule10(c)(7) of the Rules of Appellate Procedure (requiring argument in Petitioner's brief to "contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.")