STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Leonidas M. Schwartz,
Defendant Below, Petitioner

vs.) No. 11-0986 (Pendleton County 98-C-2)

Donald B. Moore Jr.,
Plaintiff Below, Respondent

FILED
October 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Leonidas M. Schwartz appeals the November 17, 2010, order of the Circuit Court of Pendleton County reaffirming the court's previous order of August 19, 1999, that Donald B. Moore Jr. has a valid right of way over petitioner's real estate, which runs with the land and shall not be interfered with by petitioner. Even though the circuit court reaffirmed its previous order, the court declined to hold petitioner in contempt of that order. Respondent Donald B. Moore Jr., by Jeffrey S. Bowers, his attorney, filed a response.

This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on November 7, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. For the reasons expressed below, petitioner's appeal should be dismissed as untimely filed. In so holding, this Court finds that this case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In Civil Action No. 98-C-2, the circuit court entered the following order:

> . . . It is, accordingly **ADJUDGED** and **ORDERED** as follows:
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> 1. That [respondent] has a valid right of way or easement over [petitioner]'s real estate containing 217.5 acres, lying and being situated in Sugar Grove District, Pendleton County, West Virginia, which shall run and be for the benefit of [respondent]'s 12 acre tract,
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> the location of which is shown on [respondent]'s Exhibit 20 and 20A, being a 1937 aerial photo.

* * *

In 2010, respondent filed a petition for contempt, alleging that petitioner had violated the circuit court's August 19, 1999, order by denying access to the right of way. More specifically, respondent alleged that petitioner had failed to provide him with a key to a chain on a fence gate on the property despite repeated requests and failed to maintain his portion of a fence.

At a hearing on October 18, 2010, petitioner argued that he should not be found in contempt because the circuit court's August 19, 1999, order constituted nothing more than a mere declaration of rights, not an enforceable decree. Petitioner argued that he had, by adverse possession, extinguished respondent's right of way over his 217.5 acre tract.[1] Petitioner argued that the circuit court's August 19, 1999, order required him only to maintain the fence, not to build a new one. Petitioner asserted that respondent had failed to maintain his portion of the fence as well.

In an order entered on November 17, 2010, the circuit court held that its order of August 19, 1999, was clear in that "[it] was a Decree and Order of the Court and not merely a Declaration of the rights of the parties." The circuit court ruled, however, that "the Court will give [petitioner] benefit of all doubt and accordingly not find him in Contempt of Court." The circuit court ordered petitioner, within twenty-four hours, to provide a key to respondent or that respondent shall be permitted to cut the chain and put on its own lock on the relevant gate. The circuit court gave petitioner the option, in lieu of providing respondent a key, to unlock his lock to allow respondent to utilize his own separate lock by locking the two locks together. The circuit court also ordered the parties to meet "to assure to the parties's satisfaction that the steep mountain side portion of [respondent]'s fence is not worthy or necessary of additional fencing." The circuit court gave each party the right to go on the other's side of the fence to make repairs to the extent as reasonably necessary. Lastly, the circuit court noted that "[petitioner] did move the Court to stay the enforcement of said order" but that the court denied his motion for a stay. The circuit court preserved the objections and exceptions of both parties.

On December 6, 2010, petitioner filed a motion for a new trial. The circuit court considered the motion under Rule 60(b) of the West Virginia Rules of Civil Procedure, finding that "[petitioner] filed his Motion more than 10 days after the entry of the [November 17, 2010] judgment." The circuit court concluded that petitioner was not entitled to relief from judgment under Rule 60(b) and denied the motion. The circuit court entered its order denying petitioner's motion for a new trial on February 10, 2011.

Petitioner has appealed to this Court, filing a petition for appeal on June 13, 2011, with the Circuit Clerk. Petitioner states that he is appealing the circuit court's November 17, 2010, order, which reaffirmed that respondent has a valid right of way over petitioner's real estate. On November

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[1] Petitioner also argued that respondent's right of way had been extinguished in the 1999 proceedings, which argument the circuit court did not accept, citing *Moyer v. Martin*, 101 W.Va. 19, 131 S.E.2d 859 (1926) (holding that an easement by grant cannot be extinguished through mere non-use).

7, 2011, the Court, on its own motion, ordered that petitioner's appeal shall be considered under the Revised Rules of Appellate Procedure,[2] and that respondent should address the timeliness of petitioner's appeal and whether petitioner's motion for a new trial came under Rule 59 or Rule 60(b) of the Rules of Civil Procedure. Respondent filed his response brief on December 12, 2011. Petitioner did not file a reply brief.

On appeal, petitioner argues that the circuit court should have allowed him to present evidence that his acts of adverse possession taken subsequent to the court's August 19, 1999, order extinguished respondent's right of way over his real estate. Petitioner also argues that he filed his motion for a new trial within the ten day time frame to have the motion considered under Rule 59(b), asserting that he had an additional three days to file his motion pursuant to Rule 6(e) of the Rules of Civil Procedure. As for the timeliness of his appeal, petitioner asserts that he did not know that the Rules of Appellate Procedure had been revised and has filed a motion for leave to appeal out of time.

Respondent argues that petitioner misinterprets Rule 6(e). Respondent asserts that petitioner was already aware of the circuit court's ruling and judgment, and service of the November 17, 2010, order upon petitioner was not necessary to provide him with notice; thus, Rule 6(e) does not apply. Respondent argues that the circuit court properly considered and denied petitioner's motion for a new trial under Rule 60(b). Respondent also argues that regardless of whether petitioner appeals from the order of November 17, 2010, or the order of February 10, 2011, petitioner's appeal is untimely.

Rule 6(e) provides that "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period." Federal courts interpreting this "mailbox rule" have held it inapplicable to motions filed under federal Rule 59 because the time periods Rule 59 sets forth "begin[ ] to run from 'entry of judgment' rather than from receipt of notice."[3] *Cavaliere v. Allstate Insurance Company*, 996 F.2d 1111, 1113-14 (11th Cir. 1993) (Internal quotations and citations omitted.); *see also* Syl. Pt. 1, *Boggs v. Settle*, 150 W.Va. 330, 145 S.E.2d 446 (1965) ("The requirement of Rule 59(b) of the [West Virginia] Rules of Civil Procedure that a motion for a new trial shall be served not later than ten days *after entry of the judgment* is mandatory and jurisdictional.") (Emphasis added.). However, even if it is assumed *arguendo* that petitioner timely filed his motion for a new trial under Rule 59(b), petitioner's appeal itself is untimely.

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[2] The Revised Rules ordinarily do not govern appeals "from orders entered prior to the effective date [of December 1, 2010]." Rev. R.A.P. 1(d).

[3] In the Federal Rules of Civil Procedure, the "mailbox rule" has been re-designated Rule 6(d).

"A motion made pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure and filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for an appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion." Syl. Pt. 4, *McCormick v. Allstate Insurance Company*, 194 W.Va. 82, 459 S.E.2d 359 (1995). The circuit court, however, converted petitioner's motion to one filed pursuant to West Virginia Rule of Civil Procedure 60(b), finding that petitioner "filed his Motion more than 10 days after the entry of the [November 17, 2010] judgment." The circuit court properly considered petitioner's late-filed motion as one filed pursuant to West Virginia Rule of Civil Procedure 60(b). *See Savage v. Booth*, 196 W.Va. 65, 68 n. 5, 468 S.E.2d 318, 321 n. 5 (1996) ("[A] motion served more than ten days after a final judgment is a Rule 60(b) motion."); *see also* Syl. Pt. 2, *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996). Significant to this case is that a motion made pursuant to West Virginia Rule of Civil Procedure 60(b) does not toll the running of the statutory appeal period. *See Toler v. Shelton*, 157 W.Va. 778, 784, 204 S.E.2d 85, 89 (1974) (holding that "[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.")

Petitioner maintains that he is appealing the circuit court's November 17, 2010, order. The deadline for appealing this order regarding respondents's valid right of way over petitioner's real estate was four months from the entry of the order. *See* W.Va. Rev. R.A.P. 5. Yet, petitioner did not file a petition for appeal in this case until June 13, 2011, or approximately seven months after the order was entered. Petitioner's motion for a new trial did not toll the appeal period from running given the circuit court's proper determination that the motion was not filed within ten days from the entry of the November 17, 2010, order. *See id.* Further, regarding the circuit court's denial of petitioner's motion for a new trial that was entered on February 11, 2011, the only issue petitioner could properly appeal from that order was the denial of the motion, not the substance supporting the underlying judgment nor the final judgment order. *See id.* Again, more than four months lapsed from the entry of the February 10, 2011, order as well. Therefore, after careful consideration, this Court dismisses petitioner's appeal as untimely filed.

Dismissed as Untimely Filed.

ISSUED: October 19, 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