

IN THE UTAH COURT OF APPEALS

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Centennial Pointe Property)	MEMORANDUM DECISION
Owners' Association; and)	(Not For Official Publication)
LEBR Associates, LLC,)	
)	Case No. 20100454-CA
Plaintiffs,)	
)	
v.)	F I L E D
)	(September 10, 2010)
)	
Myriam Onyeabor,)	
)	2010 UT App 251
Defendant, Third-party)	
Plaintiff, and Appellant,)	
)	
v.)	
)	
Donald Sanborn,)	
)	
Third-party Defendant and)	
Appellee.)	

Third District, Salt Lake Department, 040918762
The Honorable Paul G. Maughan

Attorneys: Myriam Onyeabor, Salt Lake City, Appellant Pro Se
George A. Hunt and Mark R. Anderson, Salt Lake City,
for Appellee

Before Judges Orme, Voros, and Christiansen.

PER CURIAM:

Appellant Myriam Onyeabor appeals the denial of her motion for an extension of time to appeal the dismissal of the Third-Party Complaint against Donald R. Sanborn. This appeal is before the court on Appellee's Motion for Summary Disposition and on Appellant's Counter-Motion for Summary Disposition.

We previously affirmed a judgment in the underlying case that was certified as final for purposes of appeal pursuant to rule 54(b) of the Utah Rules of Civil Procedure. See Centennial Pointe Owners' Ass'n v. Onyeabor, 2009 UT App 325U (mem.). That

judgment resolved all claims and counterclaims between Plaintiffs Centennial Pointe Owners' Association and LEBR Associates and Onyeabor, as well as Onyeabor's third-party claims against Bruce Raile and Jennifer Clarke. This appeal concerns only the dismissal of Third-Party Defendant Sanborn.

Sanborn filed a renewed motion to dismiss alleging that the issues regarding Onyeabor's claims of lack of notice of the Restated Covenants, Conditions & Restrictions (CC&Rs) had been resolved in the judgment that was later affirmed by this court on appeal. The district court ruled that the primary allegations of the third-party complaint alleging fraud by Sanborn "were that Ms. Onyeabor could not recall signing the Restated [CC&Rs] and was not aware of their existence." Noting that Sanborn's initial motion to dismiss was neither granted nor denied, the court ruled that "the end result was that through other rulings of this court, which have been affirmed by the Utah Court of Appeals, Ms. Onyeabor's claims against Mr. Sanborn were effectively vitiated because of findings that Ms. Onyeabor had both actual and constructive notice of the Restated CC&Rs and had actually ratified them." Based on "the law of the case," the district court dismissed Onyeabor's third-party claims against Sanborn.

The district court entered its dismissal order on February 11, 2010. On February 18, 2010, Onyeabor sought an extension of time "to petition for rehearing on judgment granting Sanborn's renewed motion to dismiss." The district court did not rule on this motion. Nevertheless, on March 24, 2010, Onyeabor filed a "motion for rehearing on judgment granting Sanborn's renewed motion to dismiss." On March 30, 2010, Onyeabor filed a motion seeking an extension of the time to appeal from the February 11, 2010 order granting Sanborn's motion to dismiss pursuant to rule 4(e) of the Utah Rules of Appellate Procedure. She stated that she believed that her filing of a motion seeking an extension of time to file a rule 59 motion would also result in an extension of the appeal time. In an April 27, 2010 order, the district court ruled that Onyeabor did not "articulate any genuine basis for finding excusable neglect," and that "[t]he Court is not persuaded that Ms. Onyeabor's mistaken belief that 'she was covered' provides the 'excusable neglect or good cause' required under Rule 4(e) to justify an extension of the time to appeal."

The only issue properly before us is whether the district court abused its discretion in denying the motion to extend the time for appeal under rule 4(e). See Reisbeck v. HCA Health Servs., 2000 UT 48, ¶ 6, 2 P.3d 447 ("The trial court's discretion to grant to deny a rule 4(e) motion is very broad."). Rule 4(e)

permits a trial court to extend the time for filing a notice of appeal based on two general categories of justification: (1) excusable neglect, which is an admittedly neglectful delay that is nevertheless excused by special circumstances; or (2) good cause, which pertains to special circumstances that are essentially beyond a party's control.

Id. ¶ 13 (emphases in original). "The discretion of the trial court to grant or deny a Rule 4(e) motion is very broad, highly fact dependent, and fundamentally equitable in nature." Serrato v. Utah Transit Auth., 2000 UT App 299, ¶ 6, 13 P.3d 618.

We agree with the district court that Onyeabor's mistaken belief that a motion made in the district court for an extension of time to seek rehearing of the February 11, 2010 order dismissing Sanborn from the case would "cover" an extension of the time to appeal does not constitute excusable neglect. Furthermore, Onyeabor neither alleged nor demonstrated in the district court that there were circumstances beyond her control that prevented her from filing a timely notice of appeal. Her subsequent assertion that she was busy preparing a petition for certiorari in connection with her earlier appeal was not presented to the district court. In any event, voluntarily undertaking a petition for certiorari is a circumstance within her control. Moreover, "[a] notice of appeal is not a complex document." Id. ¶ 6, n.2. Onyeabor's cursory motion seeking an extension under rule 4(e) did not present the district court with the arguments and analysis that she presents for the first time in this court. We do not consider arguments presented for the first time on appeal. See Ong Int'l v. 11th Ave. Corp., 850 P.2d 447, 455 n.1 (Utah 1993) (declining to consider arguments not first presented to trial court).

Onyeabor's counter-motion for summary disposition is styled as a motion made directly in this court under rule 60(b) of the Utah Rules of Civil Procedure and seeking to set aside the order dismissing the third-party complaint filed against Sanborn. A rule 60(b) motion is not within the jurisdiction of this court and cannot be used to circumvent the procedures for direct appeal of a final, appealable judgment. Because Onyeabor did not file a timely notice of appeal from the final judgment dismissing Sanborn from the underlying case and she was not granted an extension of the time in which to initiate an appeal, we lack jurisdiction to consider what is essentially an effort to obtain review of that final judgment in another way.

Accordingly, we deny Onyeabor's motion, grant Sanborn's motion, and affirm the district court's denial of the motion for

an extension of the time to appeal from the February 11, 2010 order.

Gregory K. Orme, Judge

J. Frederic Voros Jr., Judge

Michele M. Christiansen, Judge