STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Carson Anderson Jr.,
Defendant Below, Petitioner

vs.) No. 11-0864 (Berkeley County 09-C-504)

Discover Bank, Plaintiff Below,
Respondent

FILED
July 3, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Carson Anderson Jr., pro se, appeals the March 18, 2011, order of the Circuit Court of Berkeley County denying his motion for a new trial or amendment of judgment following a February 23, 2011, bench trial, when he did not appear. Discover Bank, by Andrew S. Lerner, its attorney, filed a summary response.

The Court has considered the parties' briefs and the record on appeal. 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. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Discover Bank sued petitioner on a credit card debt in the amount of $10,392.93. The circuit court entered a scheduling order on December 11, 2009, in which the court advised the parties, *inter alia*, that "the Court may impose the full spectrum of sanctions authorized by the [West Virginia Rules of Civil Procedure] if a party or party's counsel fails to obey this order or other orders of this Court including . . . granting of default for failure to comply," citing Rule 16(f).

On October 12, 2010, petitioner failed to appear for a pretrial hearing. Petitioner attempted to inform the circuit court that he would not be at the hearing by "attach[ing] a letter to the front door of the Courthouse during non-business hours." The letter stated that petitioner had to be out of town. The circuit court found that "[t]his letter was received on the day of the hearing." The circuit court noted that Discover Bank's attorney appeared for the hearing, "having traveled [sic] from Gaithersburg, Maryland."

The pretrial hearing and the trial date were continued, and petitioner and Discover Bank were ordered to participate in mediation. On December 14, 2010, petitioner wrote the circuit court that he would not participate in mediation unless he would not have to pay anything and that the only

outcome he would accept was the dismissal of Discover Bank's suit. The circuit court cancelled mediation and scheduled a bench trial for February 23, 2011.

Discover Bank's counsel appeared for the February 23, 2011, bench trial, "[again] having traveled [sic] from Gaithersburg, Maryland." Petitioner failed to appear for the bench trial. The circuit court entered judgment against petitioner "based on [his] non-appearance and [Discover Bank]'s affidavit of debt." The circuit court "received a letter five days after the scheduled Bench Trial in which the Court granted judgment, as to why [petitioner] could not appear." The judgment order was entered on February 28, 2011, and awarded Discover Bank $10,392.93 plus court costs and post-judgment interest at the legal rate.

Petitioner filed a motion for a new trial or amendment of judgment on March 14, 2011. The circuit court considered petitioner's motion under Rule 60(b) of the West Virginia Rules of Civil Procedure because the court found it had been filed outside of the ten day time frame for motions for a new trial under Rule 59(a). The circuit court denied the motion on March 18, 2011, finding there had been no "mistake" or "unavoidable cause" under Rule 60(b)(1). The circuit court noted the following:

> The Court advised the parties in the scheduling order dated December 11, 2009, that it may impose sanctions as authorized by the West Virginia Rules of Civil Procedure if a party or party's counsel fails to obey any order of this Court including default for failure to comply.

Petitioner now appeals the circuit court's denial of his motion for a new trial or amendment of judgment.

TIMELINESS OF PETITIONER'S MOTION

On appeal, petitioner asserts that he acted within the time fame as calculated and allowed by the West Virginia Rules of Civil Procedure to file his motion for a new trial or amendment of judgment under Rule 59(a). Discover Bank argues that even if petitioner's motion should have been treated as timely under Rule 59(a), there is still no reason to grant him relief.

The circuit court entered its judgment order on February 28, 2011, and petitioner filed his motion for a new trial or amendment of judgment on March 14, 2011. Under Rule 6(a) of the West Virginia Rules of Civil Procedure, the date of judgment "shall not be included," so the time for petitioner had to file his motion began to run on March 1, 2011. Rule 59(b) provides for ten days to file a motion for a new trial under 59(a), but "intermediate Saturdays, Sundays, and legal holidays [are] excluded in the computation" of the ten day period. Rule 6(a), W.V.C.P. (providing that certain days are excluded from the computation when the prescribed time period is fewer than eleven days). Excluding those days from the computation, there were nine days between March 1, 2011, and March 14, 2011. Therefore, this Court concludes that petitioner is correct that he timely filed his motion under Rule 59(a).

HARMLESS ERROR ANALYSIS AND DISPOSITION OF PETITIONER'S APPEAL

The circuit court's decision to evaluate petitioner's motion for a new trial or amendment of judgment under Rule 60(b) constitutes harmless error because it did not affect his substantial rights. *See* Rule 61, W.V.C.P. ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). Petitioner's motion would still have been denied under the broader review pursuant to Rule 59(a).[1]

As to the merits of his motion, petitioner noted that he had been desperately seeking work when and where he can and that his mother had been seriously ill. Consequently, according to petitioner, he had been in the Berkeley County area to get his mail only one week out of four.[2] Petitioner further asserted that he had been experiencing undue hardship and persecution as a result of this civil action bought by Discover Bank. Discover Bank noted that petitioner chose not to appear at trial and asserts that the circuit court's default judgment in its favor should not be reversed simply because petitioner disagrees with it. Discover Bank argued that petitioner's decision not to attend scheduled hearings and trial dates to handle other personal and work responsibilities do not constitute grounds for disturbing a judgment under either Rule 59(a) or Rule 60(b).

In the case at bar, the circuit court entered a scheduling order "[to] generally guid[e] the parties toward a prompt, fair and cost-effective resolution of the case." Syl. Pt. 2, *Caruso v. Pearce*, 223 W.Va. 544, 547, 678 S.E.2d 50, 53 (2009) (reversing the dismissal of a case for inactivity pursuant to Rule 41(b), in part, because of the absence of a scheduling order). In the scheduling order, the circuit court advised the parties, *inter alia*, "the Court may impose the full spectrum of sanctions authorized by the [West Virginia Rules of Civil Procedure] if a party or party's counsel fails to obey this order or other orders of this Court including . . . granting of default for failure to comply." In both instances when petitioner failed to appear, his method of notification to the circuit court could be considered inadequate. This contrasts with the situation in *Kailie v. Barlow*, No. 101284 (W.Va. Supreme Court, November 10, 2011) (memorandum decision) (reversing a dismissal due to a failure to appear), where the pro se party had failed to appear for a bench trial but had notified the court within thirty minutes that he was caught in traffic. Therefore, after careful consideration, this Court concludes that the circuit court did not err in denying petitioner's motion for a new trial or amendment of judgment.

For the foregoing reasons, we find no error in the decision of the circuit court and its March

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[1] *See See* Syl. Pt. 3 *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974) ("An 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.").

[2] Petitioner does not allege that he did not timely receive notice of the October 12, 2010, pretrial hearing or the February 23, 2011, trial date.

18, 2011, order denying petitioner's motion for a new trial or amendment of judgment, and its February 28, 2011, judgment order, are affirmed.

Affirmed.

ISSUED: July 3, 2012

CONCURRED IN BY:

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

NOT PARTICIPATING:
Justice Brent D. Benjamin