

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

| | | |
|--------------------------------------|---|---------------------|
| HOWARD M. JOHNSON |) | |
| |) | CIVIL ACTION NUMBER |
| Plaintiff |) | |
| v. |) | 00C-06-110-JOH |
| |) | |
| KELLY SERVICES IRELAND, LTD., |) | |
| and XEROX CORPORATION |) | |
| |) | |
| Defendants |) | |

Submitted: January 21, 2003

Decided: February 6, 2003

MEMORANDUM OPINION

Upon Motion of Defendants for Reargument - DENIED

Edward T. Ciconte, Esquire, Ciconte Roseman & Wasserman, Wilmington, Delaware,
attorney for plaintiff

Colleen D. Shields, Esquire, Elzufon Austin Reardon Tarlov & Mondell, P.A.,
Wilmington, Delaware, attorney for defendants

HERLIHY, Judge

Defendants Kelly Services, Ltd., and Xerox Corporation move to reargue this Court's earlier decision denying their motion for a set-off. They sought a set-off of a pretrial payment from a third defendant to the plaintiff Howard Johnson. This Court held that the agreement signed with that defendant was a joint tort-feasor release but that these defendants' motion was untimely.¹

Briefly restated, Johnson was driving his vehicle when a Kenneth Ard struck him. Ard was driving his personal car but was on business for Kelly and Xerox. Prior to a damages only trial, Johnson settled with Ard and his personal carrier for \$16,666.67. Johnson signed an "agreement" with Ard which was written in an attempt to avoid the consequences of the statute governing joint tort-feasors.²

The trial proceeded against Kelly and Xerox only. A jury awarded Johnson \$25,000 on July 16, 2002. Kelly and Xerox, however, did not file their motion for set-off until September 18, 2002. Over Johnson's objection, this Court held the "agreement" was, despite lawyer-like efforts to avoid it, a joint tort-feasor release. But since the motion for set-off was filed two months later, this Court held it to be untimely.

In reaching that conclusion, the Court held the motion to be one to alter or amend a judgment as provided in Superior Court Civil Rule 59(d). That Rule requires that such motions must be filed within ten days of the entry of judgment.

¹ *Johnson v. Kelly Services Ireland, Ltd.*, Del. Super. C.A. No. 00C-06-115, Herlihy, J. (January 8, 2003).

² 10 *Del.C.* §6304.

Kelly and Xerox now argue that this Court used the incorrect rule. Instead, they argue, the Court should have utilized Civil Rule 60(b)(5).³ They offer several reasons for their position. First, Rule 59(d) does not cover their situation. Second, to enforce Rule 59(d)'s time limit puts a joint tort-feasor seeking credit/set-off in an untenable position. Third, Rule 60(b)(5) has no time limit and avoids the straight jacket of Rule 59(d). As such, they contend, utilizing Rule 60(b)(5) is more consistent with giving protection to joint tort-feasors such as themselves which they assert the law provides.

The points which Kelly and Xerox offer in reargument raise nothing new. Reconsideration of issues already presented and decided rarely serves the parties' interests or the public's interest.⁴ To be successful, the movant must demonstrate that "the Court has overlooked a decision or principle of law that would have a controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected."⁵

The original motion for set-off does not and did not fit within the provisions of Rule

³ Rule 60. Relief from judgment or order. *Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the reasons... (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application...

⁴ *Mainiero v. Microbyx Corp.*, 699 A.2d 320, 321 (Del. Ch. 1996).

⁵ *Stein v. Orloff*, Del. Ch., C.A. No. 7276-NC, Hartnett, V.C. (September 26, 1985) at 3, 1985 Del. Ch. LEXIS 540 at *5.

60(b)(5). It meets none of the conditions for the relief it sought. Nor can the actions of anyone fit within the preconditions of the italicized part of Rule 60(b) even though that list is not exclusive. Rule 60(b)(5) is to be used only in “extraordinary circumstances.”⁶

The case of *Saienni v. Anderson*⁷ provides some guidance. There, by a post-trial motion for remittitur, a claimed joint tort-feasor sought credit for pretrial payments made to another party in the case. The Supreme Court affirmed this Court’s ruling that that payment was not tort-based and that there was to be no joint tort-feasor credit.

The instructive nature of *Saienni* is that the motion was one for remittitur, which is a motion governed by Rule 59(d). Whether it is or is not was not an issue in *Saienni*, but Rule 59(d) is the vehicle used in this Court for such motions. Kelly and Xerox did not seek remittitur, but their motion was as close as one can get to it. The result, if granted, would have been to reduce Johnson’s \$25,000 verdict by \$16, 666.67.

The straight-jacket-timing argument is unavailing, too. Kelly and Xerox knew of Johnson’s settlement with Ard. Whether they knew prior to trial or before the jury’s verdict, they could easily have moved for set-off prior to the expiration of ten days. The amount, even if unknown when they filed such a motion, would have to be made known to them and the verdict adjusted accordingly.

⁶ *Dixon v. Delaware Olds, Inc.*, 405 A.2d 117, 119 (Del. 1977)(“To allow relief under 60(b) in these circumstances would encourage parties to disregard the procedures and time limits provided for elsewhere in the Superior Court Rules.... Relief under Rule 60(b) is an extraordinary remedy and requires a showing of ‘extraordinary circumstances.’”).

⁷ 669 A.2d 23 (Del. 1995).

Conclusion

For the reasons stated herein the motion for reargument of defendants Kelly Services Ireland, Ltd., and Xerox Corporation is **DENIED**.

IT IS SO ORDERED.

J.