IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-635

Filed: 18 December 2018

Greene County, No. 13E70

IN RE: ESTATE OF ANNE M. TOULOUSE, DECEASED

GEORGES GILBERT, Petitioner,

v.

MICHAEL GILBERT, TERRY GILBERT, ALAIN LACHANCE, SUZANNE DROUIN, LYNDA LACHANCE, MANON MORIN, MAUDE GILBERT, SHAWN BROOKS, Administrator C.T.A. of the Estate of Anne M. Toulouse; SHAWN BROOKS, AMANDA BROOKS, MORGAN BROOKS, SHELLY McGARRY, KAREN EVANS, CYNTHIA BROOKS, GREGORY K. JAMES, Guardian ad Litem appointed to represent potential unknown heirs of Jacqueline Rancourt Boscarino, and potential unknown heirs of Anne M. Toulouse, Respondents.

Appeal by Respondents from order entered 18 December 2017 by Judge Imelda J. Pate in Greene County Superior Court. Heard in the Court of Appeals 14 November 2018.

Christopher P. Edwards, for Georges Gilbert, petitioner-appellee.

John M. Kirby, for Michael Gilbert, Terry Gilbert, Alain Lachance, Suzanne Drouin, Lynda Lachance, Manon Morin, Maude Gilbert, Shawn Brooks, Amanda Brooks, Morgan Brooks, Shelly McGarry, Karen Evans, Cynthia Brooks, and Gregory K. James, respondents-appellants.

HUNTER, JR., ROBERT N., Judge.

Michael Gilbert, Terry Gilbert, Alain Lachance, Suzanne Drouin, Lynda Lachance, Manon Morin, Maude Gilbert, Shawn Brooks, Amanda Brooks, Morgan Brooks, Shelly McGarry, Karen Evans, Cynthia Brooks, and Gregory K. James (collectively "Respondents"), appeal from an order entered on 18 December 2017 denying Respondents' Rule 60(b)(6) motion. We affirm.

I. Factual and Procedural History

On 28 March 2013, Anne M. Toulouse ("Decedent") and her passenger, Jacqueline Rancourt Boscarino ("Ms. Boscarino") died in a motor vehicle accident. The Greene County Clerk of Superior Court (the "Clerk") issued a probate certificate on 8 May 2013 for Decedent's estate. Based on Article X of Decedent's Last Will and Testament (the "Will") executed on 26 January 2009, Georges Gilbert ("Petitioner") filed a petition on 22 April 2014 to determine the heirs of Decedent's estate. Petitioner alleged Article X's language was unclear, and as Decedent's sole surviving sibling, he was entitled to a 1/4th share in her residual estate, while her nieces and nephews, Michael Gilbert, Terry Gilbert, Alain Lachance, Suzanne Drouin, Lynda Lachance, Manon Morin, and Maude Gilbert, were entitled to a 3/28th share each. Article X of the Will reads as follows:

> All of the residue of the property which I may own at the time of my death, real or personal, tangible and intangible, of whatsoever nature and wheresoever situated, including all property which I may acquire or become entitled to after the execution of this Will, I bequeath and devise in fee to my sister, JACQUELINE RANCOURT BOSCARINO

> presently of 683 Artis Cemetery Road, Grifton, NC. My sister may, if she so desires, pay, give, and/or deliver all or any of the residue of my property to my nieces and nephews. However, this is in entirely in [sic] her sole discretion.

Petitioner contended despite Decedent's characterization of Ms. Boscarino as her "sister," they were not related by blood or marriage, and therefore, the devise lapsed under N.C. Gen. Stat. § 31-42(b), and was subject to the North Carolina Intestate Succession Act. The Clerk heard Petitioner's and Respondents' arguments and evidence. On 30 July 2015, the Clerk entered an order ruling Decedent was equitably adopted by Ms. Boscarino's family, and therefore, Ms. Boscarino's devise did not lapse, and thus, passed to Ms. Boscarino's issue. On 14 August 2015, Petitioner appealed the Clerk's order to Greene County Superior Court, and the trial court reversed the Clerk's order, holding the anti-lapse statute does not apply to Ms. Boscarino, and no language in the Will prevents a lapse in Decedent's residuary estate. The trial court further held elements of equitable adoption as stated in *Lankford v. Wright*, 347 N.C. 115, 489 S.E.2d 604 (1997) were not met and the doctrine does not apply. The trial court concluded Decedent's residuary estate be divided, with Petitioner receiving 1/4th share, and each Respondent equally receiving a 3/28th share.

On 29 June 2016, Respondents appealed the trial court's order to this Court. Because Respondents did not timely perfect their appeal, Petitioner filed a motion to

dismiss on 20 January 2017. On 6 February 2017, the trial court granted Petitioner's motion and dismissed Respondent's appeal. On 24 August 2017, Respondents filed a Rule 60(b) motion, requesting the trial court (1) conduct a new hearing; (2) grant Respondent's motion; (3) enter an order determining Ms. Boscarino's devise does not lapse; (4) keep Decedent's estate open pending a ruling on said motion; and, (5) grant other just and appropriate relief. Respondent's Rule 60(b) motion alleged the following:

> 4. Following the entry of the aforementioned Orders, Respondents have diligently continued their investigation into whether there was a familial relationship between [Decedent] and Jacqueline Boscarino.
>
> 5. Said investigation has been difficult due to some of the core historical documents being in Canada and being written in French, and further because many records pertaining to adoption are protected from disclosure under Canadian law.
>
> 6. In her Last Will and Testament, [Decedent] specifically referred to Jacqueline Boscarino as her "sister."
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> 7. Further, Respondents have located a genealogical book describing the family tree of the Boucher family.
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> 8. Said book was found among the possessions of Jacqueline Boscarino.
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> 9. Juliette Boucher was the adoptive mother of Jacqueline Boscarino, and was married to Georges Rancourt (adoptive father of Jacqueline Boscarino).
>
> 10. This genealogical book reflects that Juilette Boucher and Georges Rancourt had two children, consisting of

> [Decedent] and [Ms. Boscarino]; a true and accurate copy of this page from the genealogical book is attached as Exhibit 1.
>
> 11. Further, said genealogical book reflects that Yvonne Boucher (sister to Juliette Boucher) married Albert Gilbert, who was the uncle of [Decedent]; a true and accurate copy of this page from the genealogical book is attached as Exhibit II.
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> 12. Respondents have, based upon this evidence, therefore disclosed evidence that [Decedent] and Jacqueline Boscarino were in fact related.
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> 13. Respondents' investigation of this issue is ongoing and Respondents shall supplement this Motion at the hearing with additional evidence pertinent to this motion.
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> 14. The assets of the Estate have not been distributed and therefore granting reconsideration does not prejudice any party to this action.
>
> 15. Respondents have a meritorious claim that the devise to Jacqueline Boscarino does not lapse.

On 7 December 2017, Shawn Brooks, a Respondent and Administrator of Decedent's estate, filed an affidavit, repeating the Rule 60(b) motion and stating further investigation of the genealogical book tended to show overlapping names of relatives of both families were the same, and thus, related to each other. In addition to the affidavit, Respondents filed documentary evidence tending to show privacy laws in Canada and a family tree for illustrative purposes.

On 12 December 2017, the trial court held a hearing on Respondents' Rule 60(b) motion, and arguments from both parties. Respondents argued based on the

genealogical book and other exhibits, evidence tended to show Decedent and Ms. Boscarino were related and the anti-lapse statute applied, and did not attempt to re-argue equitable adoption applied to Decedent. Respondents contended their motion was a proper Rule 60(b)(6) motion because it relied on legal arguments not presented fully at the underlying hearing before the trial court, and not ruled on previously by the Clerk. Petitioner argued Respondents were barred from bringing their Rule 60(b) motion because it was based on newly discovered evidence under Rule 60(b)(2), which has a one-year statute of limitation, and Respondents did not bring forward evidence in due diligence. In the alternative, Petitioner argued the evidence was not official documentation and its reliability was poor as to whether Decedent was related to Ms. Boscarino.

On 18 December 2017, the trial court entered an order denying Respondents' motion under Rule 60(b)(6), and Respondents timely appealed.

II. Standard of Review

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975) (citation omitted). "Abuse of discretion is shown when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the

result of a reasoned decision." *Brown v. Foremost Affiliated Ins. Servs., Inc.*, 158 N.C. App. 727, 732, 582 S.E.2d 335, 339 (2003) (citation and quotation marks omitted).

III. Analysis

Respondents argue the trial court erred by denying their Rule 60(b)(6) motion because "it failed to specifically address the procedural and substantive issues presented." By not making particular findings of fact in the order on appeal, Respondents contend the trial court abused its discretion by not explaining the reason it denied the motion, thus not allowing any meaningful review. We disagree.

Rule 60(b) reads as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
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> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
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> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
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> (4) The judgment is void;
>
> (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; or

> (6) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation.

N.C. Gen. Stat. § 1A-1, Rule 60(b)(1)-(6) (2017).

"Timing under Rule 60(b)(6) requires the motion to be made within a reasonable time. What constitutes a reasonable time depends on the circumstances of the individual case." *McGinnis v. Robinson*, 43 N.C. App. 1, 8, 258 S.E.2d 84, 88 (1979) (citation omitted). "An application to the court for an order shall be by motion which, . . . shall state with particularity the grounds therefor, and shall set forth the relief or order sought." N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2017).

In Respondents' motion, they specified Rule 60(b)(6), and argue the same on appeal. Respondents present multiple arguments in their motion including (1) the application of the anti-lapse statute, (2) inaccurate factual statements from Petitioner's counsel at the original hearing, (3) additional documentary evidence from further investigation, and (4) Decedent's intent stated in her Last Will and Testament. Despite Petitioner's argument Respondents' motion should be considered under Rule 60(b)(2), and therefore untimely, we cannot determine this mixture of arguments fall within the definition of "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule

59(b)." N.C. Gen. Stat. § 1A-1, Rule 60(b)(2). Accordingly, from the motion's text and hearing transcript, we treat Respondents' motion as made under Subsection (b)(6), and hold it was filed within a reasonable time.[1]

"The purpose of Rule 60(b) is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments. Generally, the rule is liberally construed." *Carter v. Clowers*, 102 N.C. App. 247, 254, 401 S.E.2d 662, 666 (1991) (citations omitted). The trial court should only set aside a judgment under Rule 60(b)(6) when "(i) extraordinary circumstances exist and (ii) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist." *State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 448, 400 S.E.2d 107, 117 (1991) (citations omitted). "In addition to these requirements, the movant must also show that he has a meritorious defense." *Id.* at 448, 400 S.E.2d at 117 (citations omitted). However, "[w]hile this rule gives the court ample power to vacate a judgment whenever that action is appropriate to accomplish justice, nevertheless, we hold that a judge cannot do so without a showing based on competent evidence that justice requires it." *Highfill v. Williamson*, 19 N.C. App. 523, 533, 199 S.E.2d 469, 475 (1973); *see also* 2 G. Gray Wilson, *North Carolina Civil Procedure* § 60-2 at 60-9 (2018).

[1] In the alternative, if Respondents' motion was a Rule 60(b)(2) motion, it would not be timely, and barred by the one-year statute of limitation stated in N.C. Gen. Stat. § 1A-1, Rule 60(b).

"Rule 60(b)(6) is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought." *Envir. Mgmt. Comm.*, 101 N.C. at 448, 400 S.E.2d at 117 (citation and quotation marks omitted). "[T]his Court cannot substitute what it considers to be its own better judgment for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it probably amounted to a substantial miscarriage of justice." *Id.* at 448, 400 S.E.2d at 117 (citations, quotation marks, and brackets omitted). "However, a Rule 60(b) order without findings of fact must be reversed unless there is evidence in the record sustaining findings which the trial court *could* have made to support such order." *Gibson v. Mena*, 144 N.C. App. 125, 128, 548 S.E.2d 745, 747 (2001) (citation omitted) (emphasis added).

In the instant case, the trial court held a hearing where both parties presented arguments regarding Respondents' Rule 60(b) motion. Respondents attached several exhibits to their motion for the trial court's consideration. The exhibits tended to show (1) Decedent was related to Ms. Boscarino through marriage on records labeled, "Généalogie: Lignée directe de la famille," from Quebec, Canada; (2) an affidavit from Shawn Brooks, a named respondent and administrator of Decedent's estate, stating he "found a genealogical book describing the family tree of the Boucher family" showing proof of relation; (3) the 2 May 2016 hearing transcript regarding the Appeal

of Determination of Heirs; (4) an obituary showing possible relation; and (5) adoption and orphanage records.

Respondents argued because the previous hearing to determine heirs was primarily centered on applying an equitable adoption theory to preserve Respondents' inheritance rights, a Rule 60(b) motion was the most appropriate vehicle to raise new arguments of actual relation supported by varying types of documentary evidence. Both parties presented arguments to the trial court at length concerning the motion, and had the opportunity to provide the trial court with all evidence gathered over a three year period. Neither Petitioner nor Respondents argue they were deprived from presenting material evidence.

Respondents contend the lack of findings in the trial court's order is "simply insufficient upon which to conduct meaningful appellate review." We disagree.

"The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error." *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985) (citations omitted). The burden is on Respondents to show reversible error in the trial court's order, and they have failed to do so here. Respondents have not overcome the burden demonstrating the trial court abused its discretion in denying their Rule 60(b) motion to disturb a final judgment.

Further, the trial court heard, received, and considered all evidence and arguments necessary to deny, in its discretion, Respondent's Rule 60(b)(6) motion. *See Mena*, 144 N.C. App. at 128, 548 S.E.2d at 747. The trial court received (1) the genealogical book tending to show familial relations between Decedent and Ms. Boscarino, (2) Canadian privacy laws explaining the delay in recovery of information; (3) the underlying transcript of the original hearing granting Petitioner's motion; (4) an obituary mentioning Decedent as a daughter of the Rancourt family; and (5) Decedent's Will. In this case, the documentary evidence presented *could* support a finding that the movants had not met their burden, accordingly supporting the trial court's decretal order denying Respondents' Rule 60(b)(6) motion. *See id*. at 128, 548 S.E.2d at 747.

It is not this Court's role to weigh such evidence, and we decline to do so here. *See Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) ("The trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him." (citation omitted)). We are not persuaded in the instant case to "substitute what [we] consider[ ] . . . better judgment for a discretionary ruling of a trial court," and Respondents have failed to show the denial was "a substantial miscarriage of justice," an abuse of discretion, or that an extraordinary circumstance exists in this case. *Envir. Mgmt. Comm.*, 101 N.C. at

448, 400 S.E.2d at 117 (citations omitted). Accordingly, we affirm the trial court's order.

IV. Conclusion

For the foregoing reasons, the trial court did not abuse its discretion in denying Respondents' Rule 60(b)(6) motion for reconsideration.

AFFIRMED.

Judges DAVIS and BERGER concur.

Report per Rule 30(e).