Zorn v. Smith, No. 571-9-00 Rdcv (Eaton, J., Sept. 15, 2008)

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STATE OF VERMONT
RUTLAND COUNTY

Robert Zorn,	)	
Plaintiff,	)	Rutland Superior Court
	)	Docket No. 571-9-00 Rdcv
v.	)	
	)	
S. Scott Smith,	)	
Defendant.	)	

Decision re: Disqualification

The undersigned was designated by the Administrative Judge pursuant to Rule 40(e)(3) to consider disqualification of Judge Mary Teachout following the filing of numerous documents by Mr. Zorn that contain numerous unsupported allegations against her. Mr. Zorn has not expressly requested disqualification; however, the request is implied by the nature of the allegations against Judge Teachout.

To understand the disqualification issue, it is necessary to unravel the unusual posture of the current filings. Mr. Zorn, represented by counsel, initiated this case alleging that S. Scott Smith, a Vermont attorney alleged to have previously represented Mr. Zorn, had neglected to file a complaint within the limitations period and thus rendered Mr. Zorn unable to establish the underlying defendant's liability. Attorney Smith filed an answer in this case, but has filed little thereafter. Still represented, Mr. Zorn filed a summary judgment motion to establish Attorney Smith's liability. After Attorney Smith failed to object, the court granted the summary judgment motion. Then, Mr. Zorn filed a summary judgment motion to establish damages. Again, Attorney Smith failed to object, and the court granted the motion. The court entered final judgment for $26,108.00 in Mr. Zorn's favor on August 17, 2001. Neither party appealed.

According to the docket sheet, Mr. Zorn became pro se on January 3, 2002, and on the same day filed a motion for trustee process against earnings. What happened thereafter, until the present, is not entirely clear. Evidently, post-judgment proceedings continued for a time and, according to the docket sheet, Mr. Zorn and Attorney Smith arrived at some kind of agreement on April 23, 2002. The docket sheet reflects no more post-judgment activity until December 2006, when Mr. Zorn filed a motion for writ of execution. It appears the writ was issued, but it does not appear that there was ever any levy of execution, although the record is not clear on this.

In September 2007, Mr. Zorn filed a "motion for criminal contempt," apparently seeking to have Attorney Smith jailed for having neither satisfied the judgment nor adequately providing "financial disclosure," evidently in response to Mr. Zorn's several requests for financial disclosure, a small claims process, V.R.S.C.P. 7, rather than post-judgment discovery, V.R.C.P. 69.

Judge Teachout denied the motion for criminal contempt on November 9, 2007, explaining, "The prerequisites for a Motion for Contempt have not been met. Vermont Rules of Civil Proceedings Rule 37. In any event, only civil, not criminal, contempt is available under the Rules." This appears to have been Judge Teachout's first contact with this case.

Since Judge Teachout's decision on the motion for criminal contempt, Mr. Zorn has filed numerous documents. These, at least nominally, include the following: a motion for contempt against Defendant Smith; a "Motion for Renewal of Judgment Pursuant to Rule 50," an "Ancillary, Amended Complaint" that, among other things, apparently seeks to add Judge Teachout as a defendant, and a motion for summary judgment. No rulings have been issued on these filings.

In the larger context of the history of this case, it is apparent that Mr. Zorn is extremely frustrated to have a final judgment awarding damages and yet he has been unable to make substantial progress in having the judgment satisfied. Otherwise, the pending documents are of such a confused nature that it is not clear what Mr. Zorn hoped to achieve by filing them. For instance, in one motion, he purports to seek to renew the judgment pursuant to Rule 50. Rule 50(b) speaks of the renewal of a *motion for judgment*, not a motion for *renewal of judgment*. There is no purpose to a Rule 50(b) motion in this case. On the other hand, if the judgment is about to expire, Mr. Zorn might need to renew it. The Vermont Supreme Court, however, has recently clarified that renewal cannot be done by motion. It must be sought in a separate action altogether. See generally *Nelson v. Russo*, 2008 VT 66, 2008 WL 2174416.

In any event, the motion for renewal, and much more so the "Ancillary, Amended Complaint," include various allegations against Defendant Smith and Judge Teachout of a serious, if fantastic, nature. Mr. Zorn generally accuses Defendant Smith of intentionally evading his post-judgment efforts aimed at satisfaction of the judgment. He describes those acts as, among other things, abuse of process, but there are no specific allegations of any process that he claims was abused. Indeed, it is not clear what process Attorney Smith possibly could have abused because he has filed almost nothing in this case. Giving the most liberal reading of his pleadings, Mr. Zorn alleges, in very vague terms, that Judge Teachout has, independently or in concert with Attorney Smith, intentionally thwarted his attempts to collect on the judgment. Again, there are no facts alleged other, perhaps, than Judge Teachout's ruling on the motion for criminal contempt.

Judge Teachout is not a defendant in this case and has not become one by Mr. Zorn's attempted "Ancillary, Amended Complaint." A complaint cannot be amended after the answer has been filed without the court's permission (or without written consent of the opposing party). See V.R.C.P. 15(a). There is no written consent in the record, and the court has not previously

granted a request to amend. To that extent, the "Ancillary, Amended Complaint," which contains the bulk of the allegations against Judge Teachout, is a nullity; it has no effect on the current post-judgment proceedings.

Generally, a complaint cannot be amended after the judgment becomes final absent relief from judgment. See 6 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1489, at 692–94. Mr. Zorn has not sought relief from judgment under either Rule 59 or Rule 60(b), and he is long out of time to seek relief under Rule 59.

Even if Mr. Zorn had filed a Rule 60(b) motion seeking relief from judgment to allow him to file a motion to amend the complaint as described in the "Ancillary, Amended Complaint," it is clear that he would not be entitled to relief. Rule 60(b) motions based on mistake, newly discovered evidence, or fraud must be filed within one year of the judgment. Mr. Zorn is long out of time on those grounds even if they were supportable. Considering that Mr. Zorn would have no interest in arguing that the judgment is void or satisfied, he would be left to argue that there is "any other reason," Rule 60(b)(6), for relief. It is highly unlikely that such a motion filed at this late date would be considered filed within a reasonable time as is required for relief Rule 60(b)(6).

In any event, the only apparent basis for relief under Rule 60(b)(6) would be so Mr. Zorn could pursue an abuse of process claim against Attorney Smith based on conduct that occurred after the judgment and to enable Mr. Zorn to pursue his myriad of claims against Judge Teachout. However, claims against Judge Teachout must be based on conduct that is alleged to have occurred many years after judgment as her first contact with this case was six years after judgment was entered. Nothing in the allegations or claims reflects any basis for disturbing the August 2001 judgment.

This analysis reveals the "Ancillary, Amended Complaint" as a nullity insofar as it is intended to amend the complaint. Its only potentially cognizable effect is as an implied motion to disqualify Judge Teachout. To the extent that other filings include similar allegations against Judge Teachout, their only relevance is with regard to the null claims of the "Ancillary, Amended Complaint" or the implied motion to disqualify. Those allegations have no bearing on the post-judgment proceedings whatsoever and are a nullity except insofar as they contribute to the disqualification issue.

The court thus must address whether the record shows that Judge Teachout should be disqualified from this case. Other than the unsupported general accusation that Judge Teachout has entered into a conspiracy with Attorney Smith to thwart Mr. Zorn's collections efforts, which has no basis in any record evidence, the only other conceivable basis for disqualification would be bias shown by Judge Teachout's conduct.

The standard applicable to the evaluation of a disqualification motion founded on alleged bias or generalized partiality is well settled. A trial judge should recuse herself "whenever a doubt of impartiality would exist in the mind of a reasonable, disinterested observer." *Ball v. Melsur Corp.*, 161 Vt. 35, 39 (1993) (citations omitted). If the trial judge declines recusal, disqualification rests with the sound discretion of a disinterested judge. *State v. Putnam*, 164 Vt.

558, 561 (1996). In exercising that discretion, the court accords the judge subject to the disqualification motion "a presumption of honesty and integrity . . . ." *Id.* at 561. To warrant disqualification, the party seeking it "must make a clear and affirmative showing of bias or prejudice" sufficient to raise a reasonable doubt as to the judge's ability to be impartial. *Luce v. Cushing*, 2004 VT 117, ¶ 22, 177 Vt. 600.

The only conduct by Judge Teachout relating to this case that is evident in the record was her denial of Mr. Zorn's motion for criminal sanctions. That motion and Mr. Zorn's other post-judgment filings reflect that he does not understand post-judgment procedures. Nothing about Judge Teachout's decision, or any other conduct evident in the record, suggests any judicial bias against Mr. Zorn.

That Mr. Zorn may disagree with Judge Teachout's ruling does not show bias. "[A]dverse rulings, no matter how erroneous or numerous," simply do not indicate bias. *Luce v. Cushing*, 2004 VT 117, ¶ 23 (quoting *Gallipo v. City of Rutland*, 163 Vt. 83, 96 (1994)); accord *Liteky v. United States*, 510 U.S. 540, 555 (1994) (decided under identical disqualification language in 28 U.S.C. § 455(a)). To show bias, Mr. Zorn must show that an adverse ruling was improperly motivated. *In re Margaret Susan P.*, 169 Vt. 252, 257 (1999). That is, Mr. Zorn must show not the adversity of the ruling, but that the adversity resulted from the trial judge's personal ill will or favoritism of a party. See Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.04, at 113 (3d ed. 2000). There is no such evidence here.

ORDER

For the foregoing reasons:

(1) Mr. Zorn's "Ancillary, Amended Complaint" is a nullity.

(2) The implied motion to disqualify Judge Teachout is **DENIED**.

(3) The motion to renew and the motion for summary judgment, to the extent that they address matters not resolved herein, remain pending.

Dated at Woodstock this 11th day of September, 2008.

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Harold E. Eaton, Jr.
Superior Court Judge