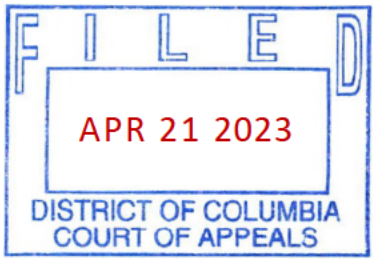
District of Columbia Court of Appeals



Nos. 21-CV-0122 & 22-CV-0058

JONATHAN HAWKES RAYNER,

Appellant,

v. **2020-CA-004077-R(RP)**

YALE STEAM LAUNDRY CONDOMINIUM ASSOCIATION,

Appellee.

BEFORE: Blackburne-Rigsby, Chief Judge, and AliKhan, Associate Judge, and Ferren, Senior Judge.

O R D E R

(FILED— April 21, 2023)

Appellant Jonathan Rayner asks us to reconsider the trial court's denial of his motion to vacate the order of dismissal and to reinstate his case under Superior Court Civil Rule 60(b). We acknowledge our error in interpreting Rule 60(b)(2) as applying only to "cases in which a trial has occurred." Op. at 30. However, this ground and others raised in Rayner's petition do not merit rehearing.

First, Rayner appeals our denial of his Rule 60(b)(2) motion to amend the complaint based on "newly discovered evidence," meaning "evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Super. Ct. Civ. R. 60(b)(2). He thus challenges our conclusion (sustaining the trial court) that "Rule 60(b)(2)'s text limits it to cases in which a party

can 'move for a new trial,' i.e., those cases in which a trial has occurred. No trial occurred here, so Rayner could not seek relief under Rule 60(b)(2)."[1] Op. at 30.

An amicus brief filed by the Legal Aid Society of the District of Columbia "supporting limited rehearing" also questions that ruling. It stresses that "Rule 60(b)(2) can and does apply to some orders and judgments issued without a trial," citing our decision in *Wilson v. Halley Gardens Associates*, 738 A.2d 265, 268 (D.C. 1999). Legal Aid observes that, in *Wilson*, "this Court treated a Rule 59(e) motion as a Rule 60(b)(2) motion, held that the motion should have been granted, and reversed in a case involving summary judgment that was never tried." Furthermore, several federal courts interpret Federal Rule of Civil Procedure 60(b)(2) as applying to cases that have not gone to trial. *See, e.g.*, *Canady v. Erbe Elektromedizin GmbH*, 99 F. Supp. 2d 37, 44 (D.D.C. 2000) (summary judgment); *Metzler Inv. Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133, 146 (2d Cir. 2020) (dismissal pursuant to Rule 12(b)(6)). The federal Rule 60(b)(2) is "identical" to Superior Court Civil Rule 60(b)(2). *See* Super. Ct. Civ. R. 60 cmt. to 2017 amends. This suggests that, like the federal rule, our Rule 60(b)(2) should extend to cases that have not reached trial. In light of *Wilson* and the federal courts' interpretation of the federal rule, we retract our Rule 60(b)(2) analysis in Rayner's case.

Nonetheless, the trial court concluded, and we agree, that even if Rule 60(b)(2) were applicable, Rayner's "proffered factual amendments," when relying in part on "newly discovered evidence," did not state a claim for which relief could be granted, Op. at 28-31, and thus would not have changed the trial court's ruling had these amendments been before the court when it granted the motion to dismiss. A successful Rule 60(b)(2) motion must present "newly discovered evidence" that could change the outcome of the challenged order or proceeding. *Merrell Dow Pharms. v. Oxendine*, 649 A.2d 825, 832 (D.C. 1994). The trial court's findings suggest that Rayner did not meet that bar. We agree and therefore affirm the trial court's conclusion that "providing [Rayner] a *third* opportunity to amend his complaint" would have been "futile." Op. at 29.

[1] The trial court dismissed Rayner's case pursuant to Super. Ct. Civ. R. 12(b)(6). Op. at 2.

Rayner's second alleged ground for rehearing is based on a contention that the fine the Association levied was "unreasonable" because (1) the condo Association allocated $500 of the $1,100 fine to Rayner's older dog who had manifested no capability of harming others, and (2) allegedly the Association enforced its Pet Policy inconsistently. The trial court twice rejected arguments that the fine was unreasonable. The first was in connection with the retaliation claim in Rayner's amended complaint, which failed for lack of a statutory basis. Op. at 21-22. Second, the trial court denied as futile Rayner's attempts to frame both the older dog's physical limitations and the Association's alleged uneven enforcement practices as evidence of a breach of contract in his Rule 60(b) motion. We reiterate our affirmance of both trial court decisions; the record provides no reason to hold otherwise.

Finally, Rayner questions our conclusion that the Association President did not have a disqualifying conflict of interest. Op. at 17. He relies on a handful of facts about his relationship with the President. But these facts were not presented in, or in support of, his amended complaint, so the trial court could not consider them in deciding the motion to dismiss. *See Wetzel v. Cap. City Real Est., LLC*, 73 A.3d 1000, 1006 n.5 (D.C. 2013). Likewise, we cannot consider them on appeal of the grant of that motion. *Id.* And even considering this evidence as part of Rayner's Rule 60(b) motion, the trial court concluded, Op. at 29, that it would not suffice to state a claim against the Association. We agreed with that conclusion in affirming the trial court's denial of Rayner's Rule 60(b) motion. Op. at 30-31.

For the reasons explained above, Rayner's petition for rehearing is denied.

PER CURIAM