

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
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April 7, 2010
STATE OF NORTH DAKOTA

Edward J. Tarnavsky,)
)
Plaintiff/Appellant,)
)
vs.)
)
Ron Rankin, Sheriff of McKenzie)
County, personally and in his)
professional capacity,)
)
Defendant/Appellee.)

Supreme Court No. 20100035
McKenzie County No. 27-08-C-071

APPEAL FROM ORDER
DENYING MOTION FOR N.D.R.CIV.P. 60(b) RELIEF

MCKENZIE COUNTY DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT
THE HONORABLE DAVID W. NELSON PRESIDING

BRIEF OF APPELLEE

Scott K. Porsborg #04904
David R. Phillips #06116
SMITH BAKKE PORSBORG SCHWEIGERT
116 North Second Street
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendant and Appellee

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1.

STATEMENT OF THE ISSUES

- I. Whether the district court erred in denying plaintiff/appellant Edward J. Tarnavsky's Motion for North Dakota Rule of Civil Procedure 60(b) relief?
- II. Whether the Court should award double costs, including reasonable attorney's fees for defendant/appellee Ron Rankin's defense of this appeal?

I. STATEMENT OF THE CASE

2. This case stems from two sheriff's sales of plaintiff/appellant Edward Tarnavsky's (hereinafter "Tarnavsky") real and personal property, which were conducted by Ron Rankin (hereinafter "Rankin"), Sheriff of McKenzie County. Tarnavsky alleges Rankin improperly conducted the sheriff's sales by allegedly failing to honor claimed exemptions. Rankin filed a motion for summary judgment, which the district court granted, dismissing this case with prejudice. The North Dakota Supreme Court affirmed summary judgment in Tarnavsky v. Rankin, 2009 ND 149, 771 N.W.2d 578. Tarnavsky then filed a Rule 60(b) motion in the district court, seeking relief from the judgment in favor of Rankin, which was already affirmed by the North Dakota Supreme Court. App at 22–23. The district court denied Tarnavsky's motion and warned Tarnavsky that his motion bordered on frivolous and further actions by Tarnavsky could result in sanctions by the court. App. at 19. Rankin asserts Tarnavsky is merely attempting to relitigate issues that have already been decided in favor of Rankin. Rankin requests the Court uphold the district court's denial of the Rule 60(b) motion. Rankin further requests the Court award double costs, including reasonable attorney's fees for Rankin's defense of this appeal, which Rankin asserts is frivolous.

II. STATEMENT OF FACTS

A. Underlying Facts And Allegations

3. The underlying facts in this case are discussed in this Court's prior unanimous opinion in this case, Tarnavsky v. Rankin, 2009 ND 149, 771 N.W.2d

578. Tarnavsky's complaint relates to two sheriff's sales of Tarnavsky's real and personal property. Id. at ¶ 1. The sheriff's sales were the result of prior litigation between Tarnavsky, his brother, and Union Bank. Id. at ¶ 2 (citing Tarnavsky v. Tarnavsky, 2008 ND 179, 756 N.W.2d 548; Tarnavsky v. Tarnavsky, 2006 ND 124, 717 N.W.2d 534; Tarnavsky v. Tarnavsky, 2003 ND 110, 666 N.W.2d 444). Following the sheriff's sales, Tarnavsky sued Rankin, Sheriff of McKenzie County, personally and in his professional capacity, alleging that Rankin sold the real and personal property without honoring Tarnavsky's claimed exemptions. Id. at ¶ 2.

4. With respect to the first sheriff's sale, which occurred on June 5, 2007, the district court had issued a writ of special execution directing Rankin to sell Tarnavsky's real property to satisfy a judgment of Union Bank against Tarnavsky. Id. at ¶ 3. Rankin served the writ of special execution on Tarnavsky, after which Tarnavsky provided an affidavit of exemptions to Rankin, claiming various exemptions. Id. At the sheriff's sale on June 5, 2007, Tarnavsky provided Rankin another document claiming various exemptions. Id. at ¶ 4. Rankin sold the real property at the sheriff's sale. Id.
5. With respect to the second sheriff's sale, which occurred on August 3, 2007, the district court had issued a writ of execution, directing Rankin to sell Tarnavsky's personal property to satisfy a judgment held by Tarnavsky's brother. Id. at ¶ 5. Rankin served notice of levy on Tarnavsky, after which Tarnavsky provided an affidavit of exemptions, claiming various exemptions. Id. Rankin sold Tarnavsky's personal property at the sheriff's sale to Tarnavsky's brother.

6. Tarnavsky alleged that Rankin ignored the claimed exemptions at the two sheriff's sales, failed to account for the surplus from the sale of real property, the sheriff's sale of personal property was allegedly without jurisdiction of the court, and that Rankin was liable pursuant to the Racketeer Influenced And Corrupt Organizations (RICO) act. Id. at ¶ 6.

B. Procedural History

7. Rankin filed a motion for summary judgment, which the district court granted, dismissing Tarnavsky's claims with prejudice. Id. Rankin appealed the summary judgment and a discovery order to the North Dakota Supreme Court. This Court explained Tarnavsky's appeal as follows:

Tarnavsky argues the district court erred in granting Rankin summary judgment because Rankin sold Tarnavsky's property after ignoring Tarnavsky's claimed exemptions and the assignment of rents and leases. Tarnavsky claims the district court did not confirm the sheriff's sales as required by law and Rankin transferred the property without authority. Tarnavsky also asserts he was denied discovery before the district court ruled on the summary judgment motion and he had a legitimate civil claim against Rankin under the provisions of N.D.C.C. ch. 12.1-06.1, Racketeer Influenced and Corrupt Organizations ("RICO"). Tarnavsky essentially claims the sheriff's sales were not conducted according to law and Rankin's conduct constituted theft, which gave rise to the RICO claim.

Id. at ¶ 9.

8. This Court found, "Tarnavsky has not demonstrated there is a genuine issue of material fact that Rankin violated any statutory duties for sheriffs' sales." Id. at ¶ 10. With respect to the sheriff's sale of real property, this Court concluded:

Although Tarnavsky asserts the sale of the real property violated his homestead exemption, Tarnavsky waived any homestead

exemption under N.D.C.C. § 47-18-05.1(1). See N.D.C.C. § 47-18-04. Tarnavsky's other claimed exemptions were for personal property and are not applicable to the sheriff's sale of land on June 5, 2007. Tarnavsky contends Rankin should have postponed the June 5 sale, but he has not cited any authority for a sheriff to postpone the sale without a court order. Tarnavsky also asserts Rankin did not account for the \$1,006.09 surplus from the sheriff's sale, but Rankin's affidavit says the surplus was turned over to the clerk of court, and other than conclusory assertions, Tarnavsky has not provided any evidence, by affidavit or otherwise, to contradict Rankin's affidavit.

Id. at ¶ 11.

9. With respect to the sheriff's sale of personal property, this Court concluded:

Tarnavsky's "malfeasance" claims relate to the August 3, 2007, sheriff's sale of his personal property. Rankin claims Tarnavsky's general claim of exemptions failed to specifically identify any personal property that was exempt from the sale and Rankin did not sell any exempt property at the August 3 sale. Tarnavsky has not specifically identified any exempt property that was sold at the August 3 sale, and the items listed as sold at the August 3 sale are not exempt property under N.D.C.C. § 28-22-02(1)-(7) and (9)-(10).

Id. at ¶ 12.

10. The Court also rejected Tarnavsky's arguments that the writ of execution for the sale of personal property expired before the August 3, 2007 sale (id. at ¶¶ 13-17), that the sales were not confirmed by the court under N.D.C.C. § 28-23-13 (id. at ¶ 18), that the district court erred in denying Tarnavsky's discovery requests (id. at ¶ 19), and that Rankin's alleged conduct violated RICO (id. at ¶ 20). This Court affirmed summary judgment in favor of Rankin. Id. at ¶ 21.

11. Following this Court's affirmation of summary judgment, Tarnavsky filed a Petition For Rehearing on September 1, 2009, which this Court denied on September 16, 2009.

12. On October 19, 2009, Tarnavsky filed in the district court a Motion For N.D.R.Civ.P. 60(b) Relief, seeking the following:

1. Allow Amendment to conform to the evidence as per NDRCvP 15(b);
2. If necessary, allow supplemental pleadings;
3. Return title to Ed's Real Property, free and clear;
4. Adjudicate the Assignment of Rents and Leases of April 19, 2007 under NDCC 32-26;
5. Return the personal property, since it is clear there exists a superior judgment lien against it in favor of the Union Bank;
6. Assess and award the damages to Ed's property, business and reputation incurred from these sales as contained in the original complaint.

App. at 22-23.

13. Tarnavsky's rambling brief to the district court in support of his motion for Rule 60(b) relief is not easily understood but appears to make many of the same arguments already made to this Court in Tarnavsky v. Rankin, 2009 ND 149, 771 N.W.2d 578, in which this Court rejected Tarnavsky's arguments and upheld summary judgment. App. at 24-28. Tarnavsky provided no legal authority granting the district court the power to overturn a decision of the North Dakota Supreme Court.

14. Rankin responded to Tarnavsky's motion with a brief arguing Tarnavsky's motion was frivolous and requesting an award of attorney's fees incurred responding to Tarnavsky's frivolous motion. Supp. App. at 1-2. The district court denied Tarnavsky's motion, stating in its order, "[t]he Defendant makes a good point in his brief that this motion now borders on frivolous, and the Plaintiff is cautioned that if this continues, costs and fees may be assessed." App. at 19. Tarnavsky then filed in the district court an objection to the order denying the Rule 60(b) motion (app. at 31) along with a lengthy affidavit of Tarnavsky (app. at 32-34), making the same arguments, to which Rankin responded with a response brief (supp. app. at 3-4). Rankin argued:

In its December 1, 2009 Order, the Court clearly warned Tarnavsky that further frivolous filings in this case may result in the assessment of costs and fees. In response to the Court's clear warning, Tarnavsky filed another document making the same arguments. What previously "border[ed] on frivolous" is now clearly frivolous. In the event Tarnavsky files any additional documents with the Court in this case, defendant will request the Court sanction Tarnavsky and require Tarnavsky to pay defendant's attorney's fees and costs incurred responding to this current "objection" and any other future frivolous filings.

Supp. App. at 3-4.

15. Shortly thereafter, Tarnavsky filed a Notice of Appeal to this Court of the order denying Tarnavsky's motion for Rule 60(b) relief.

III. ARGUMENT

A. Tarnavsky's Arguments Are Without Merit

16. North Dakota Rule of Civil Procedure 60(b), which permits the district court under certain circumstances to relieve a party from a final judgment or order, states as follows:

(b) Mistakes-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 or order in any action or proceeding for the following reasons: (i) mistake, inadvertence, surprise, or excusable neglect; (ii) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (iii) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (iv) the judgment is void; (v) the judgment has been satisfied, released, or discharged, or a previous 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 (vi) any other reason justifying relief from the operation of the judgment. The motion must be made within a reasonable time, and for reasons (i), (ii), and (iii) not more than one year after notice that the judgment or order was entered in the action or proceeding if the opposing party appeared, but not more than one year after a judgment by default has been entered. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from any appellate court except while an appeal from the judgment is actually pending before that court. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Rule 4(e)(7), or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment must be by motion as prescribed in these rules or by an independent action.

Id. (emphasis in original).

17. With regard to 60(b), this Court has held:

A district court's decision on a N.D.R.Civ.P. 60(b) motion for relief from the judgment is within the court's sound discretion and will not be reversed on appeal absent an abuse of discretion. Olander Contracting Co. v. Gail Wachter Invs., 2003 ND 100, ¶ 8, 663 N.W.2d 204. An abuse of discretion exists only when the district court acts in an arbitrary, unconscionable, or unreasonable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination. Follman v. Upper Valley Special Educ. Unit, 2000 ND 72, ¶ 10, 609 N.W.2d 90.

The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the judgment, and relief should be granted only in exceptional circumstances. Id.

Laib v. Laib, 2008 ND 129, ¶ 16, 751 N.W.2d 228.

18. Tarnavsky has wholly failed to identify what portion of Rule 60(b) he is relying on and failed to identify any “reason justifying relief from the operation of the judgment.” N.D.R.Civ.P. 60(b)(vi). Tarnavsky’s motion and his second appeal to this Court are transparent attempts to relitigate issues he already lost on summary judgment.
19. To the extent the Brief Of The Appellant can be understood, Tarnavsky appears to be making three arguments: 1) discussion during oral arguments in the prior appeal to this Court, Tarnavsky v. Rankin, 2009 ND 149, 771 N.W.2d 578, allegedly constitutes an admission by Rankin that the sheriff’s deed issued to Tarnavsky’s brother on redemption following the sale of real property is void, 2) the district court exhibited the appearance of impropriety because of a ruling by the district court in a different lawsuit, and because the district court’s order indicating the motion “borders on frivolous” is allegedly non-specific and “invokes an air of hostility and prejudice to the Plaintiff/Appellant”, and 3) the district court did not hold a hearing on Tarnavsky’s Rule 60(b) motion. Tarnavsky’s arguments are entirely without merit and his continuing attempts to relitigate a case that has already been disposed of by this Court is an extreme abuse of the court system.
20. With respect to the sheriff’s deed regarding the sheriff’s sale of real property, Rankin denies any admissions were made in briefing or oral argument in

the first appeal. In any event, Tarnavsky argued at length to this Court in the first appeal regarding the sheriff's deed and other documents relating to the sheriff's sales. This Court explicitly rejected Tarnavsky's arguments that Rankin violated any duty relating to the sheriff's sales. Specifically, the Court stated, "this record reflects Rankin conducted the sheriff's sales according to statutory requirements."

Tarnavsky v. Rankin, 2009 ND 149, 771 N.W.2d 578 at ¶ 20. Further, this Court concluded:

We hold Tarnavsky has failed to present competent admissible evidence to raise a genuine issue of material fact on his claims that Rankin failed to conduct the sheriff's sales according to law, and Tarnavsky has failed to explain the connection between his factual assertions and his legal theories. We affirm the summary judgment.

Id. at ¶ 21.

21. Any issues discussed in briefs and/or at oral argument in the first appeal have already been considered and decided by the Court in Rankin's favor. Subsequent arguments by Tarnavsky based on oral argument in an appeal that has already been decided are patently frivolous.
22. With respect to the alleged appearance of impropriety of the district court judge, the honorable David W. Nelson, this allegation is apparently based on an order by Judge Nelson in an action entitled Morris Tarnavsky v. Edward Tarnavsky and Janet L. Bishop, venued in McKenzie County District Court, Civil No. 2001-C-085. App. at 32-42, Plaintiff Exhibit no. 41. Tarnavsky's arguments in this regard are virtually indecipherable as they relate to details in a separate legal action, for which there are no facts in the record in the current case. Needless to say, Tarnavsky's allegations in which he literally accuses Judge

Nelson of covering up felonies and intentionally prejudicing Tarnavsky (app. at 33) are both unfounded and outlandish. Tarnavsky's conspiracy theories involving Judge Nelson are no basis for relief from this Court's prior order affirming summary judgment.

23. Finally, with respect to Tarnavsky's claim he was denied a hearing on his motion for Rule 60(b) relief, Rule 3.2(a)(3) of the North Dakota Rules of Court, entitled Requesting oral argument, states:

If any party who has timely served and filed a brief requests oral argument, the request must be granted. A timely request for oral argument must be granted even if the movant has previously served notice indicating that the motion is to be decided on briefs. **The party requesting oral argument shall secure a time for the argument and serve notice upon all other parties.** Requests for oral argument or the taking of testimony must be made not later than five days after expiration of the time for filing the answer brief.

Id. (emphasis added).

24. In this case, Tarnavsky sent a letter to the district court judge, dated November 17, 2009, enclosing proposed findings of fact, conclusions of law, and an order for judgment on the Rule 60(b) motion. App. at 49. In the letter, Tarnavsky states, "[d]ue to the defendant's meritless response to this motion, should there be serious objection to this document please have the scheduling clerk contact me with the earliest available date for which a hearing can be had."

Id. The record does not reveal Tarnavsky made any attempt to secure a time for oral argument other than requesting the judge to have the scheduling clerk contact Tarnavsky. Further, Tarnavsky did not serve a notice of hearing.

25. Citing this Court, the Court of Appeals of North Dakota has explained:

The rule places the burden on the moving party to secure a time for the hearing and to serve notice thereof to opposing parties. *See* N.D.R.Ct. 3.2(a). If a party does not attempt to secure a time for oral argument, the request for oral argument is deemed incomplete. *See Syvertson*, 2000 ND 185, ¶¶ 10-11, 620 N.W.2d 362; *J.S.P.L.*, 532 N.W.2d at 657; *Huber v. Oliver County*, 529 N.W.2d 179, 183 (N.D. 1995).

Gosbee v. Martinson, 2005 ND APP 10, ¶ 9, 701 N.W.2d 411. Rule 3.2(a) places the burden to secure a hearing date and time on Tarnavsky, not the district judge to request the scheduling clerk to contact Tarnavsky. Tarnavsky's request for a hearing was incomplete and does not support Tarnavsky's appeal.

B. The Court Should Award Rankin Double Costs, Including Reasonable Attorney's Fees For Rankin's Defense Of This Appeal Because Tarnavsky's Appeal Is Frivolous.

26. According to North Dakota Rule of Appellate Procedure 38, “[i]f the court determines that an appeal is frivolous, or that any party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs, including reasonable attorney's fees.” *Id.* “An appeal is frivolous under Rule 38, N.D.R.App.P., if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith.” *Riemers v. Peters-Riemers*, 2004 ND 153, ¶ 38, 684 N.W.2d 619 (quoting *Riemers v. O'Halloran*, 2004 ND 79, ¶ 16, 678 N.W.2d 547)). Rankin respectfully requests the Court award double costs, including reasonable attorney's fees for Rankin's defense of this frivolous appeal.

27. Tarnavsky's arguments in his Rule 60(b) motion and this second appeal are patently without merit and “demonstrate persistence in the course of litigation that could be seen as evidence of bad faith.” *Id.* Tarnavsky continues to make the

same arguments he made before this Court in the first appeal, which this Court rejected. Rankin prevailed on summary judgment before this Court and should not be forced to continue to incur legal fees to defend himself when this Court has already determined he did not violate his statutory duties relating to the sheriff's sales at issue. Tarnavsky's continued attempts to litigate this case are nothing short of harassment of Rankin and an abuse of the court system.

28. Since this Court's opinion in the initial appeal upholding the dismissal of this case with prejudice, Tarnavsky has filed a petition for rehearing to this Court, a motion for Rule 60(b) relief in the district court (app. at 22-23), an objection to the district court's order on the Rule 60(b) motion with supporting affidavit (app. at 31-34), and another appeal to this Court (app. at 20). Tarnavsky cannot persist in forcing Rankin to incur attorney's fees to respond to motions, filings and appeals in a case that Tarnavsky has already lost, when there is clearly no basis for further court review of this case.

29. Tarnavsky is particularly litigious, as is evident from the numerous prior appeals to this Court in which Edward Tarnavsky was the appellant: Tarnavsky v. Rankin, 2009 ND 149, 771 N.W.2d 578; Tarnavsky v. Tarnavsky, 2008 ND 179, 756 N.W.2d 548; Tarnavsky v. Tarnavsky, 2007 ND 183, 742 N.W.2d 840; Tarnavsky v. Tarnavsky, 2006 ND 124, 717 N.W.2d 534; Tarnavsky v. Tarnavsky, 2003 ND 110, 666 N.W.2d 444; Tarnavsky v. McKenzie Co. Grazing Association, 2003 ND 117, 665 N.W.2d 18. Tarnavsky was clearly warned by the district court in the current case after the motion for Rule 60(b) relief that further actions on his part could result in sanctions by the court. Despite this warning,

Tarnavsky persists in the course of litigation without any justification whatsoever.

30. An award of double costs, including reasonable attorney's fees for Rankin's defense of this appeal, is appropriate in this case given Tarnavsky's unjustified persistence in litigation despite the district court's warning. Rankin, whose conduct has been declared by this Court to comply with the law, should not be forced to continually defend himself from Tarnavsky's unfounded claims.

IV. CONCLUSION

31. Rankin respectfully requests the Court uphold the district court's denial of Tarnavsky's Rule 60(b) motion and award Rankin double costs, including reasonable attorney's fees for Rankin's defense of this appeal.

Dated this 7th day of April, 2010.

SMITH BAKKE PORSBORG SCHWEIGERT

By /s/ Scott K. Porsborg
Scott K. Porsborg #04904
David R. Phillips #06116
116 North 2nd Street
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendant/Appellee

CERTIFICATE OF COMPLIANCE

32. The undersigned, as attorneys for the defendant/appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the

above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 3,631.

Dated this 7th day of April, 2010.

SMITH BAKKE PORSBORG SCHWEIGERT

By /S/ Scott K. Porsborg

Scott K. Porsborg #04904
David R. Phillips #06116
116 North 2nd Street
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

33. I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was on the 7th day of April, 2010, mailed to the following:

DEFENDANT/APPELLANT:

Edward J. Tarnavsky, pro se
12951 8th St. NW
Grassy Butte, ND 58634

By /S/ Scott K. Porsborg

SCOTT K. PORSBORG