

FILEDUnited States Court of Appeals
Tenth Circuit

JUN 26 1990

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**ROBERT L. HOECKER**
Clerk

CLAIRE C. GORST,)
)
Plaintiff-Appellant,)
)
v.)
)
DR. ROY TROUTT, President,)
University of Science and Arts of)
Oklahoma; KATHRYN EMPIE; GARY)
BRYANT; FREELAND CUDJOE; KEN)
JOHNSTON; MIKE LEWIS; SCOTT OUSLEY;)
TRUMAN HARRIS, Board of Regents of)
University of Science and Arts of)
Oklahoma; DR. ROY TROUTT, Presi-)
dent, University of Science and)
Arts of Oklahoma; DR. CLYDE)
SPRUELL, Vice President, University)
of Science and Arts of Oklahoma;)
TROY FOSTER, Supervisor, University)
of Science and Arts of Oklahoma,)
)
Defendants-Appellees.)

No. 89-6335
(D.C. No. CIV-85-2040-R)
(W.D. Okla.)

CLAIRE C. GORST,)
)
Plaintiff-Appellant,)
)
v.)
)
W. DAVID PARDUE; WILLIAM BRETT;)
BILL SMITH; KATHRYN EMPIE; USAO)
BOARD OF REGENTS; ROY TROUTT;)
CLYDE SPRUELL; TROY FOSTER; and)
DOROTHY CORSAUT,)
)
Defendants-Appellees.)

No. 89-6431
(D.C. CIV-89-1016-R)
(W.D. Okla.)

ORDER AND JUDGMENT*

* This order and judgment has no precedential value and shall

Before McKAY, MOORE, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

This case involves appeals from two cases filed by plaintiff Gorst. Because the underlying facts of both cases are identical, we have consolidated the cases for adjudication on appeal.

I. Facts

In case number 89-6335 (the first federal suit), plaintiff initially sought to recover for alleged employment retaliation which occurred following plaintiff's exercise of his first amendment rights. A jury returned a verdict denying plaintiff's claims on September 17, 1988. Instead of appealing the jury's verdict, plaintiff filed a Motion for a New Trial and a Motion for Relief From Judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Plaintiff now appeals the district court's September 6, 1989 denial of his Rule 60(b) motion.

not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

On June 12, 1989, plaintiff filed his second federal suit, case number 89-6431, against all of the defendants named in the first suit and five additional individuals. Defendants filed several motions to dismiss the case. After hearing oral argument from the parties, the district court granted the defendants' motions to dismiss on November 20, 1989. Plaintiff now appeals the district court's dismissal of his second federal suit.

II. Plaintiff's Claims

In his first federal suit, plaintiff now claims that he is entitled to a new trial and to relief from judgment because defendants, by engaging in a variety of conduct, created unfair surprise at trial, defrauded defendant, and imposed a fraud upon the court. The district court dismissed the Rule 60(b) motion primarily because "[p]laintiff [was] attempting to relitigate a case which ha[d] already been appropriately decided." Order, September 6, 1989, at 1.

In his second federal case, plaintiff essentially asserted the same claims that he asserted in the first federal case. However, plaintiff included five new defendants, all in privity with the defendants in the first case. In the second case, plaintiff claimed that all the defendants had engaged in a conspiracy to deny plaintiff his rights. This denial of rights began with plaintiff's employment problems. Plaintiff claims that the conspiracy continued to grow and that it continues today. Defendants moved to dismiss the second suit based on the adjudication of the

first case. The district court's minute sheet recording the dismissal of the second case does not contain reasons for its dismissal. However, in the record of the one-hour hearing on the case, the district court explained that it believed the plaintiff was merely trying to relitigate issues already adjudicated in the first suit.

III. Standard for Review

The district court's decision on a new trial motion is reviewed under an abuse of discretion standard. Patty Precision Prods., Co. v. Brown & Sharpe Mfg., Co., 846 F.2d 1247, 1251 (10th Cir. 1988); Brown v. McGraw-Edison Co., 736 F.2d 609, 616 (10th Cir. 1984). We also review a district court's ruling on a Rule 60(b) motion under an abuse of discretion standard. Republic Resources Corp. v. ISI Petroleum West Caddo Drilling Program 1981, 836 F.2d 462, 465 (10th Cir. 1987); Cessna Finance Corp. v. Bielenberg Masonry Contracting, Inc., 715 F.2d 1442, 1445 (10th Cir. 1983). "Under the abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. When we apply the 'abuse of discretion' standard, we defer to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value." United States v. Ortiz, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986).

There is some confusion over whether the district court treated defendants' motion in the second case as a Rule 12(b)(6) motion for dismissal or as a Rule 56 motion for summary judgment. We believe that the trial court inadvertently orally referred to the motion as a motion for summary judgment during the hearing and that the court's minute sheet correctly states the court's view that it was ruling on defendants' motion to dismiss. Nevertheless, the standard of review for a motion to dismiss under Rule 12(b)(6) and a motion for summary judgment under Rule 56 are fairly similar. A motion to dismiss for failure to state a claim under Rule 12(b)(6) raises a question of law which we review de novo. Accordingly, we apply the same scrutiny to the complaint as did the trial court. Morgan v. City of Rawlins, 792 F.2d 975, 978 (10th Cir. 1986). "Dismissal of a case pursuant to Fed. R. Civ. P. 12(b)(6) requires the legal determination that the plaintiff can prove no set of facts in support of his claim to entitle him to relief." Id.

"In reviewing a summary judgment order, the appellate court applies the same standard employed by the trial court under Rule 56(c) of the Federal Rules of Civil Procedure." Osgood v. State Farm Mut. Auto. Ins. Co., 848 F.2d 141, 143 (10th Cir. 1988). The rule directs that summary judgment "shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

IV. Conclusion

We conclude that the trial court did not abuse its discretion in denying the Rule 60(b) motion for a new trial and relief from judgment. All of the matters recited are arguably either not newly discovered, inadequate to establish the fraud or other misconduct claimed, fully litigated at trial, or merely cumulative. Since we defer to the discretion of the district court, we must affirm if there is arguable support for its action. We therefore affirm the district court's order denying the plaintiff's Rule 60(b) motion in his first federal case.

We also affirm the district court's dismissal of plaintiff's second federal case. We have reviewed the plaintiff's complaint; and we are in agreement with the district court's conclusion--voiced in the hearing on the second case--that plaintiff is merely trying to relitigate the same issues already litigated in the first case. Thus, his claims are res judicata as to the defendants in the original suit. Plaintiff is also collaterally estopped from asserting the same claims against the new defendants (who are in privity with the defendants in the prior suit) in the second action. Plaintiff had a full and fair opportunity to litigate these claims in the first federal case, and he is bound by the court's order. Therefore, we conclude that plaintiff can prove no set of facts in support of his claim for relief, and we affirm the trial court's dismissal. Alternatively, we hold that there is no genuine issue of material fact and that the

district court correctly applied the law.

The decisions of the district court in both cases are
AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Monroe G. McKay
Circuit Judge