19-8556

No.

ORIGINAL

IN THE UNITED STATES SUPREME COURT

KEHINDE ADEYEMI ELEBUTE,

Petitioner,

v.

VILLAGE CAPITAL & INVESTMENT, L.L.C.,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

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Questions Presented

1. Whether a successor to a judge that retired may refuse to consider a Rule 60(b)(1) motion on the grounds that he does not reconsider orders entered by a prior judge.

2. Whether a Rule 60(b)(1) petition may be filed within a year after the judgment is entered, as stated in the rule, or within 14 days as stated by the judge before whom the motion for reconsideration was made.

3. Whether the judgment below should be summarily reversed due to its clear conflict with settled rules of law.

4. Whether the underlying action was a non-core proceeding, thus precluding the bankruptcy judge from entering a final determination, and requiring her to submit findings of fact and conclusions of law to the district court for entry of judgment.

List of Parties and Related Cases

The parties are listed in the caption. There are no related cases.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A of the Petition and is unreported.

The opinion of the United States district court appears at Appendix B of the Petition and is unreported.

The opinion of the United States bankruptcy court on the Rule 60(b)(1) motion appears at Appendix C of the Petition and is unreported.

The opinion of the United States bankruptcy court on the motion for summary judgment appears at Appendix D of the Petition and is unreported.

Jurisdiction

The United States Court of Appeals for the Fifth Circuit decided the case on February 28, 2019. By virtue of an administrative order, on March 19, 2020, the Court extended the deadline to file petitions for writs of certiorari in all cases due on or after the date of that order to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 60:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > (1) mistake, inadvertence, surprise, or excusable neglect;
> >
> > (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> >
> > (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> >
> > (4) the judgment is void;
> >
> > (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> >
> > (6) any other reason that justifies relief.
>
> © Timing and Effect of the Motion.
>
> > (1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

Federal Rules of Bankruptcy Procedure 9024:

> Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(c), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by §727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by §1144, §1230, or §1330. In

some circumstances, Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.

Statement of the Case

Petitioner was a debtor in a bankruptcy case before Respondent Village Capital conducted a non-judicial foreclosure on his property located at 15302 Ruppstock Drive, Missouri City, Texas 77489 (the "Property"). The Property was the homestead of Petitioner's deceased brother, Taiwo Elebute. Petitioner was his brother's only surviving heir. A Small Estate Affidavit on the Property was executed, and as his brother's sole heir the Property was transferred to Petitioner. (ROA 167).

Upon the commencement of the underlying bankruptcy case the Property became a property of the bankruptcy estate, so Petitioner then brought an adversary proceeding in the nature of a wrongful foreclosure action against Respondent, alleging wrongful ownership, defects in foreclosure proceedings and inadequate sales price. (ROA 1, 167).

The Bankruptcy Court granted summary judgement in favor of Respondent in which it considered inadmissible evidence and was silent on the defects in foreclosure proceeding. The Bankruptcy Judge did not recommend her findings to the district court for final judgement (ROA.176-179).

Petitioner filed an appeal, but it was dismissed by District Judge. Appellant then filed motion for reconsideration in the Bankruptcy court under Rule 60(b)(1).

In that motion, Petitioner contended that the court erred in concluding that

there was a Sale Agreement between Village Capital and Everbank under which Village Capital allegedly retained servicing of the loan sold to Everbank and erroneously concluded that Petitioner was unable to prove a causal link between the defect and the grossly inadequate selling price that the Court had admittedly so found.

The Court had concluded that there was a Sale Agreement between Village Capital and Everbank under which Village Capital allegedly retained servicing of the loan sold to Everbank. However, the alleged Sale Agreement attached to Village Capital's motion for summary judgment is unsigned by any party. There is neither an electronic or hand-written signature from any designated party for either entity.

Considering the alleged Sale Agreement is unsigned, Petitioner maintained that the court erroneously concluded that the Sale Agreement attached Village Capital's Motion for Summary Judgment was a valid agreement between the parties.

Actually, Village Capital sent a letter to Petitioner dated July 27, 2016, which clearly states that Village Capital was neither the owner of the mortgage loan, nor the servicer of the mortgage loan at the time the foreclosure sale was conducted.

The fact that Village Capital was neither the owner of the mortgage loan, nor the servicer of the mortgage loan at the time the foreclosure sale was conducted, is the defect. The defect is not only that the Plaintiff failed to receive notice of the foreclosure twenty-one (21) days before the foreclosure sale but that neither the

owner nor the servicer of the mortgage loan conducted the foreclosure sale. Since the bankruptcy judge who issued the original decision retired, the motion was referred to another judge.

That judge denied the motion *without consideration of its merits.* He held that the motion was untimely, concluding that the motion had to be made within 14 days of the entry of the prior order granting summary judgment and that he does not grant reconsideration of orders entered by other judges.

On appeal to the district court, that order was affirmed. The Fifth Circuit affirmed, as well, simply stating, the "bankruptcy court denied th[e Rule 60(b)(1)] motion, and the district court affirmed that denial. Seeing no abuse of discretion in the bankruptcy court's refusal to reopen the case, we also AFFIRM . . . ."

REASONS FOR GRANTING THE PETITION

The petition should be granted, the determination of the Fifth Circuit summarily reversed and the matter remanded to that Court for consideration of the merits. Summary reversal is appropriate when, as here, the law is settled and the decision below is plainly wrong. See *Pennsylvania v. Bruder*, 488 U.S. 9 (1988) (per curiam). Such is the case here.

It is true that courts review a Rule 60(b)(1) decision for abuse of discretion, see, e.g., *Orie v. Dist. Attorney Allegheny Cnty.*, 942 F.3d 151, 155 (3d Cir. 2019); *In re Peralta*, 317 B.R. 381, 385 (B.A.P. 9th Cir. 2004), but a court "by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996); *cf. Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354 (7th Cir. 1997) (court's conclusion that it lacked discretion was error of law constituting an abuse of discretion). "A bankruptcy court abuses its discretion when it 'applies the wrong principle of law or makes clearly erroneous findings of fact.'" *Kulakowski v. Walton (In re Kulakowski)*, 735 F.3d 1296, 1299 (11th Cir. 2013) (quoting *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253, 1271 (11th Cir. 2013)); *Blaise v. Wolinsky (In re Blaise)*, 219 B.R. 946, 950 (2d Cir. B.A.P. 1998) ("A bankruptcy court abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings," or commits a "clear error of judgment . . . based on all the appropriate factors.")

The bankruptcy court and perforce the district court and the court of appeals

made two determinations at variance with the decisions of sister circuits.

First, by its very terms, Fed. R. Bankr. P.9024 explicitly incorporates the one year provision contained in Fed. R. Civ. P. 60(b)(1). See *In re Veg Liquidation, Inc.*, 583 B.R. 203, 212 (B.A.P. 8th Cir. 2018); *In re Slomnicki*, 243 B.R. 644, 648 (Bankr. W.D. Pa. 2000). The motion was thus timely and the successor bankruptcy judge erroneously concluded that a 14 day rule applied.

Second, there can be little doubt that, once a judge retires, a successor judge may entertain a Rule 60(b) motion. See *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 860 (5th Cir. 1970), abrogated on other grounds by *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994); *Lewis v. Hoffner*, CASE NO. 2:15-cv-10766 (E.D. Mich. 2015). As the Third Circuit put it in *United States Gypsum Co. v. Schiavo Bros.*, 668 F.2d 172, 176 (3d Cir.1981), a successor judge is empowered to reconsider legal issues "to the same extent that his or her predecessor could have." Indeed, a successor judge's "reconsideration of errors may be especially appropriate where the predecessor judge cannot perform the task himself." *Thompson v. Sawyer*, 678 F.2d 257, 270 (D.C.Cir.1982).

In construing Fed. R. Civ. P. 63, the District of Columbia Circuit stated the rule precisely:

> By refusing to consider the post-trial motions, the successor judge failed to comply with Rule 63. After all, the original judge could not have refused to consider them. Although district courts enjoy wide discretion to grant or deny post-trial motions, see *Hutchinson v. Stuckey*, 952 F.2d 1418, 1420 (D.C.Cir.1992), they cannot refuse to exercise that discretion. See 11 CHARLES A. WRIGHT, ARTHUR R.

> MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2818, at 194 (2d ed.1995) ("If the trial judge has failed to exercise discretion at all, as when he is under the mistaken apprehension that he has no power to grant the relief sought, the appellate court can review that decision and can order the judge to exercise his discretion."); 12 MOORE'S FEDERAL PRACTICE § 59.54 (Matthew Bender 3d ed.1998); cf. *In re Green*, 669 F.2d 779, 786 (D.C.Cir.1981) (district court violated in forma pauperis statute by refusing to exercise discretion regarding whether to waive filing fee). Since Rule 63 requires a successor judge to stand in the shoes of the original judge, the successor judge in this case assumed the original judge's obligation to exercise his discretion with respect to the contractors' post-trial motions. It would be unfair to "deny a litigant's right to try to persuade the court that it has erred simply because the judge who rendered the original decision is unavailable and cannot be called on to reconsider the matter." 12 MOORE'S FEDERAL PRACTICE § 63.05.

Mergentime Corp. v. Wash. Metro. Area Transit Auth., 166 F.3d 1257, 1263-64 (D.C. Cir. 1999); accord *Patelco Credit Union v. Sahni*, 262 F.3d 897, 906 (9th Cir.2001).

Finally, there is a fundamental defect in the proceeding. The original bankruptcy judge did not submit findings of fact and conclusions of law to the district court, but entered judgment on her own. This was a pure state law proceeding and thus non-core. See *Stern v. Marshall*, 564 U. S. 462 (2011); *Halper v. Halper*, 164 F.3d 830 (3d Cir. 1999). With respect to non-core claims, the bankruptcy court must submit proposed findings of fact and conclusions of law to the district court under 28 U.S.C. § 157(c)(1) and Fed. R. Bankr. P. 9033(a). See *Wellness International Network, Limited v. Sharif*, 575 U.S. 665 (2015)

Conclusion

The decision of the Fifth Circuit cannot be squared with settled precedent and conflicts with that of other Circuits. The successor bankruptcy judge erred in concluding that the motion was untimely and that he had no discretion to entertain it.

In such an instance, where the successor has failed to exercise discretion at all, as when he is under the mistaken apprehension that he has no power to grant the relief sought, the petition for a writ of certiorari should be granted and the matter returned to the Fifth Circuit so it can review the merits or order the judge to exercise his discretion,

Dated: May 18, 2020

Respectfully submitted,

/s/ KEHINDE ADEYEMI ELEBUTE