Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-402

MARCH TERM, 2002

Craig Kissell v. Brattleboro Memorial Hospital and Mount Snow, Ltd.	}	APPEALED FROM: Windham Superior Court DOCKET NO. 7-1-00 Wmcv Trial Judge: John P. Wesley

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals a summary judgment order dismissing his claim for damages against Mt. Snow, Ltd. for failing to produce certain documents during the pendency of a prior medical malpractice action against Mt. Snow and others after a 1993 skiing accident at Mt. Snow. We reverse and remand for further proceedings.

We employ the same summary judgment standard as the trial court when reviewing summary judgment orders on appeal. O'Donnell v. Bank of Vermont, 166 Vt. 221, 224 (1997). If no genuine issue of material fact exists and any party is entitled to judgment as a matter of law, summary judgment is appropriate. V.R.C.P. 56(c)(3); O'Donnell, 166 Vt. at 224. We resolve all doubts regarding the facts in favor of the party opposing summary judgment when determining whether a genuine issue of material fact exists for trial. O'Donnell, 166 Vt. at 224.

We set forth many of the facts in this matter in our entry order in plaintiff's prior case against Mt. Snow, two physicians, and Brattleboro Memorial Hospital. See Kissell v. Haroutunian, No. 99-447 (Vt. Sept. 7, 2000) (mem.). In that order, we explained that plaintiff skied into a tree in the early afternoon of January 9, 1993. He did not lose consciousness and chose to continue skiing after speaking with members of the area's ski patrol. He arrived at the base first aid station a short time later complaining that he felt ill. Plaintiff was taken to a mountainside clinic where two physicians examined him. He was eventually transported by ambulance to Brattleboro Memorial Hospital, and then to Dartmouth-Hitchcock Medical Center, where neurosurgeons relieved the pressure on his brain caused by his injury. Permanent brain damage had already occurred by that time, however.

In August 1993, plaintiff sent a written request addressed to "Mount Snow Medical Records" seeking "any and all documents and information pertinent to [plaintiff's] physical condition and treatment in January 1993." Mt. Snow's Skier Education Supervisor, Steve Goldfarb, responded to plaintiff's request and provided an incident report and a field report relating to the accident. Goldfarb stated that the two forms were the only ones Mt. Snow possessed with plaintiff's medical information.

In January 1994, plaintiff sued the two doctors who treated him at the mountainside clinic, as well as Mt. Snow and Brattleboro Memorial Hospital. Approximately one year later, plaintiff agreed to dismiss Mt. Snow from the suit prior to trial.[(1)] Although defendant alleges that plaintiff did not conduct any discovery from Mt. Snow between the initiation of his lawsuit and the voluntary dismissal, the record on this point is subject to dispute. A letter from Mt. Snow's Risk

Manager to plaintiff indicates that plaintiff may have sought additional documents during the discovery period in that prior suit. Plaintiff settled the case against the two doctors after the jury deadlocked following trial. On January 28, 1998, the court entered judgment in favor of defendants pursuant to the parties' stipulation.

In September 1998, plaintiff moved for relief from the judgment in favor of the two doctors under V.R.C.P. 60(b) after discovering a hospital document which was not produced in discovery. This motion did not mention Mt. Snow. While the motion was pending, and after the judgment had been final for a little over one year, plaintiff discovered two additional documents from Mt. Snow that Mt. Snow did not provide previously. Plaintiff supplemented his motion with additional facts relating to the Mt. Snow documents, which consisted of a report by a member of Mt. Snow's ski patrol and a witness statement from plaintiff's friend taken at the clinic. The court denied plaintiff's motion. On appeal, we affirmed the court's decision, concluding that there was little likelihood the documents would have affected the outcome of the trial against the doctors. Kissell v. Haroutunian, No. 99-447, at 3.

On January 5, 2000, while plaintiff's appeal in Kissell v. Haroutunian was pending, plaintiff filed the present action against Mt. Snow and Brattleboro Memorial Hospital. Plaintiff alleged that the hospital and Mt. Snow negligently or deliberately failed to produce documents during the prior lawsuit depriving him of a fair and just adjudication of the claims he asserted in that action. The complaint further contended that defendants' alleged misconduct caused him to dismiss his claims against the hospital and Mt. Snow and led him to settle with the two doctors for a small fraction of the value of his case against them. Plaintiff asserted that "[h]ad the Defendants produced the documents which they negligently or deliberately concealed, Plaintiff would have won a jury verdict against all defendants for damages reflecting the full consequence of the malpractice of Doctors Haroutunian and Guinand."

The parties commenced discovery in the new matter in March 2000. In July, they jointly asked the court to stay discovery pending the outcome of plaintiff's appeal in Kissell v. Haroutunian, which the court granted. In late October 2000, both the hospital and Mt. Snow moved for summary judgment. Mt. Snow argued that plaintiff could not maintain an independent action to obtain relief from the prior judgment. The court granted the motion for summary judgment assuming, but not deciding, that plaintiff could maintain an independent action. According to the trial court, summary judgment was proper because collateral estoppel prevented plaintiff from relitigating whether the defendants' failure to produce documents caused his failure to obtain a judgment against the doctors because that issue was conclusively decided in the prior action. Regarding plaintiff's claim that he would not have settled with defendants had he obtained the newly discovered documents during the prior action, the court concluded that he could have raised that claim in his Rule 60(b) motion and was therefore precluded by the doctrine of res judicata from asserting that claim in this case. Plaintiff appealed the court's order with respect to Mt. Snow only to this Court.

Once a judgment is final, a party must look to V.R.C.P. 60(b) for relief from that judgment. V.R.C.P. 60(b); Godin v. Godin, 168 Vt. 514, 517 (1998). The rule authorizes the court to relieve a party from a judgment on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)" or for an adverse party's misrepresentation, fraud or other misconduct. V.R.C.P. 60(b)(2) & (3). Motions for relief on both grounds must be made within one year of the judgment. V.R.C.P. 60(b); Godin, 168 Vt. at 517.

In this case, the court erroneously concluded that plaintiff could have raised his claim against Mt. Snow in his prior Rule 60 motion. The previous motion did not seek to reopen the judgment in favor of the Mt. Snow. On the basis of the record before the trial court, it was apparent that the facts giving rise to plaintiff's claim against Mt. Snow came after the one-year limit for such motions on the grounds of newly discovered evidence, fraud, misrepresentation, or other misconduct. Absent additional facts, the record does not support the trial court's conclusion that plaintiff could have raised his claim within the one-year limit. It was, therefore, error for the court to conclude that res judicata applied to his claim against Mt. Snow.

We turn now to the main dispute between the parties - whether plaintiff may bring an independent action to be relieved from the prior judgment in favor of Mt. Snow. Plaintiff correctly points out that Rule 60(b) does not limit the court's authority to "entertain an independent action to relieve a party from a judgment . . . or to set aside a judgment for fraud upon the court." V.R.C.P. 60(b). The court's power to set aside judgments, even in the context of an independent action, must be exercised cautiously because it necessarily involves "an inevitable clash of two competing principles of judicial administration: the principle of finality and repose of judgments, which is so fundamental to our system of justice, and

the ultimate principle that justice must be done unto the parties." Levinsky v. State, 146 Vt. 316, 318 (1985). Thus, to maintain an independent action as contemplated by Rule 60, plaintiff must establish the following elements: (1) the existence of a judgment which should not, in equity and good conscience, be enforced; (2) plaintiff had a cognizable cause of action against defendant in the prior action; (3) fraud, accident or mistake prevented plaintiff from obtaining relief in the prior action; (4) the judgment in favor of defendant was not due to plaintiff's fault or negligence; and (5) the absence of any adequate remedy at law. See Godin, 168 Vt. at 521 (setting forth elements of an independent cause of action where a defendant seeks relief from a prior judgment) (quoting Levinsky, 146 Vt. at 319).

Defendant contends that plaintiff's failure to serve formal discovery on Mt. Snow during the prior suit should prevent plaintiff from obtaining any further relief. As we noted previously, the extent of plaintiff's discovery efforts, whether formal or informal, are subject to genuine dispute based on the record before us. The record shows that plaintiff asked Mt. Snow repeatedly for documents related to his accident both before and after the suit against Mt. Snow was filed and dismissed. One of Mt. Snow's own documents suggests that plaintiff inquired about his records during the discovery phase of the prior case. This genuine dispute about the extent of plaintiff's efforts to discover relevant information renders summary judgment inappropriate.

We are further persuaded by plaintiff's claim that he was entitled to additional discovery in this matter prior to the court's entry of summary judgment. The record shows that the parties engaged in some preliminary discovery, but jointly requested a stay of the schedule pending the outcome of plaintiff's appeal in the prior case. Within days of our final disposition of that matter, defendant moved for summary judgment. No further discovery is apparent from the record. The only clear matter in the record before us is that the material facts regarding Mt. Snow's alleged withholding of the documents and plaintiff's efforts to obtain them have not yet emerged. Summary judgment is appropriate only after plaintiff has had an adequate time to discover information relevant to establish the elements of an independent action under Rule 60. Cf. Bushey v. Allstate Ins. Co., 164 Vt. 399, 405 (1995) (Rule 56 does not require the court to wait for parties to complete discovery before entering summary judgment where discovery had produced a substantial amount of information and party's additional discovery was related to an element the trial court did not need to address).

Reversed and remanded for further proceedings.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

1. Plaintiff later dismissed Brattleboro Memorial Hospital as well.