

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-312

MARCH TERM, 2008

Amy Stevens-Russo	}	APPEALED FROM:
	}	
v.	}	Windham Family Court
	}	
Vito Russo	}	DOCKET NO. 24-1-06 Wmdm

Trial Judge: Karen R. Carroll

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

Defendant, Vito Russo, appeals the trial court's order denying his motion to reopen the evidence or for relief from judgment. We affirm and remand.

Following a hearing, the family court entered a degree of nullity on the parties' marriage on October 23, 2006 based on its finding that defendant was already legally married to another woman when the parties wed. See 15 V.S.A. § 511 (marriage is void if either party has a spouse who is living). In the same order, the family court granted defendant, who is incarcerated out-of-state, parent-child contact through letters and also by phone, if defendant first established a debit card phone system with the prison. On appeal, we affirmed this decision. Russo v. Russo, No. 2006-471 (Vt. June 6, 2007) (unpublished mem.). On July 20, 2007, defendant filed a motion to reopen the evidence and for a new hearing or, in the alternative, for relief from judgment under Vermont Rule of Civil Procedure 60(b), claiming that the evidence presented at the final hearing was incorrect and fraudulent. The court denied the motion, stating simply that there were no grounds to reopen the evidence. Defendant appealed.

On appeal, defendant raises numerous arguments as to why the court erred in denying his request to reopen the evidence and to hold another evidentiary hearing. Defendant reasserts the claims he raised in his direct appeal. We conclude that the trial court did not abuse its discretion in denying defendant's request. First, defendant's motion to reopen the evidence was untimely. A motion for a new trial or to alter and amend a judgment must be filed within ten days after entry of judgment. See V.R.C.P. 59(b), (e); V.R.F.P. 4(a)(1) (civil rules generally apply in annulment proceedings); (j), (i) (Vermont Rules of Civil Procedure 59 and 60 apply to annulment proceedings). Defendant's motion was filed almost nine months after the court entered judgment. See Pella Prods., Inc. v. Krutak, 150 Vt. 81, 83 (1988).

Second, as to defendant's request for relief under Rule 60(b), we find no grounds to disturb the trial court's denial. See Courtyard Partners v. Tanner, 157 Vt. 638, 639 (1991) (mem.) (holding that trial court's ruling on a motion under Rule 60(b) is discretionary and will not be overturned unless that discretion was withheld or abused). Although defendant seeks to reopen the evidence, defendant does not allege that the evidence he wishes to present is "newly discovered." V.R.C.P. 60(b)(2); see Stalb v. Stalb, 168 Vt. 235, 248 (1998) (no abuse of discretion in denying wife's post-judgment motion to reopen evidence where wife did not show why her evidence could not have been presented at trial). Even if we construe defendant's request as a motion under Rule 60(b)(6), we conclude there are no grounds for relief. Rule 60(b)(6) may be used to reopen final judgments only in "extraordinary situations." Riehle v. Tudhope, 171 Vt. 626, 627 (2000) (mem.). Defendant's choice not to appear the final hearing and his unsuccessful direct appeal do not constitute such a situation. See Kellner v. Kellner, 2004 VT 1, ¶ 12, 176 Vt. 571 (mem.).

Defendant's motion and his brief also contain several allegations that he is not receiving parent-child contact. He contends that plaintiff has denied him contact with his child by refusing to give the child defendant's letters, and that despite establishing a debit system, he has been unable to telephone his child.* We construe defendant's claims as a motion to enforce the parent-child contact order allowing him contact with his child through letters and by phone if a debit system were established. Because the court did not address the motion to enforce, we remand for this purpose.

Denial of defendant's motion to reopen is affirmed and the case is remanded for consideration of defendant's motion to enforce the court's parent-child contact order.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

* Given defendant's notification at oral argument that he is no longer incarcerated in Kentucky, a debit system may no longer be necessary for defendant to telephone his child.