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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1654**

Rose L. Osbourne,
f/k/a Rose Osbourne, individually,
and as shareholder of RM Michaels Construction, Inc.,
and as sole shareholder of Midwest Development, Inc.,
Appellant,

vs.

Zack Dyab, et al.,
Respondents.

**Filed April 30, 2012
Affirmed
Randall, Judge***

Hennepin County District Court
File No. 27-CV-03-017490

Rose Osbourne, Walker, Minnesota (pro se appellant)

William R. Skolnick, Rolin L. Cargill III, Skolnick & Shiff, P.A., Minneapolis,
Minnesota (for respondents)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and
Randall, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RANDALL, Judge

Pro se appellant Rose Osbourne, formerly known as Rose About, challenges the district court's denial of her motion for vacation of judgment and a new trial. Osbourne contends that facts revealed by respondent Zack Dyab's guilty plea to charges of federal mortgage fraud warrant new-trial relief because they demonstrate that Dyab committed fraud and fraud on the court. We affirm.

FACTS

Osbourne and Dyab conducted a home-remodeling and construction business through RM Michaels Construction Inc. (RMMC), which was incorporated in May 2001. In October 2003, Osbourne sued Dyab and several of his businesses, including American Choice Lending Inc., alleging that she was defrauded into transferring property to RMMC, asserting claims of fraud, misrepresentation, and breach of fiduciary duty on behalf of RMMC, and requesting its supervised dissolution.

The district court issued a temporary restraining order (TRO) and appointed a receiver to handle the wind-down of RMMC. Osbourne asserted that Dyab acted in contemptuous conduct by transferring RMMC properties in violation of the court's receivership order, but the district court did not find him in contempt.

A jury trial was held in September 2005. The jury found for Osbourne on claims of breach of fiduciary duty, fraud, and misrepresentation, and awarded damages in the amount of \$175,000. On April 11, 2006, the district court granted Dyab's motion for a new trial on the grounds that the damages awarded by the jury were unsupported by the

evidence, given under the influence of passion or prejudice, and affected by violations of court orders. This court affirmed the district court's order granting a new trial. *Aboud v. Dyab*, A06-1937, 2008 WL 313624, at *1 (Minn. App. Feb. 5, 2008).

In August 2008, a second jury trial was held. The jury found that Osbourne was not a shareholder of RMMC. The jury also found that Dyab had not breached any fiduciary duties owed to Osbourne as an officer or shareholder of RMMC, nor engaged in fraud or misrepresentation against Osbourne in connection with the business operations of RMMC, and did not engage in a fraudulent transfer of corporate assets. Thus, the jury awarded no damages. The district court awarded Dyab costs in the amount of \$17,382.90 and attorney fees and sanctions in the amount of \$2,000 due to Osbourne's failure to comply with court orders. Judgment in the amount of \$19,389.27 was entered against Osbourne on January 20, 2009 and docketed on March 20, 2009. Osbourne appealed a second time and sought review on numerous grounds. This court affirmed. *Aboud v. Dyab*, A09-0481, 2010 WL 1189829, at *1 (Minn. App. Mar. 30, 2010), *review denied* (Minn. June 15, 2010).

In October 2010, Dyab pleaded guilty to federal mortgage fraud in the United States District Court for the District of Minnesota. The charges arose out of 24 mortgage transactions in which American Choice Lending, a mortgage-broker corporation owned by Dyab, falsified loan application documents and submitted them to lenders. When the lenders approved the loans, Dyab received illegal kickbacks and otherwise profited from the sellers' proceeds.

On March 15, 2011, Osbourne filed a motion for relief from judgment under Minn. R. Civ. P. 60.02 on the grounds of fraud and fraud on the court. She contended that the judgment against her should be vacated and a new trial granted based on facts disclosed in Dyab’s guilty plea. At the motion hearing, Osbourne conceded that her civil suit was not about the “same housing fraud scheme,” but she argued that “proceeds from [RMMC] projects and . . . this judicial process [were] used to gain proceeds in order to further the criminal enterprise” and that the facts of the mortgage fraud would have affected the jury’s assessment of Dyab’s credibility. The district court denied the motion, and Osbourne filed a notice of appeal. The judgment against her was subsequently discharged in a bankruptcy proceeding, but Osbourne elected to proceed with the appeal on her denied request for a new trial.

D E C I S I O N

Osbourne asserts that the district court abused its discretion in denying her motion for a new trial under Minn. R. Civ. P. 60.02(c) and (f). Whether to vacate a judgment for fraud, misrepresentation, or other misconduct of an adverse party rests largely within the district court’s discretion. *Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006-OA 1*, 775 N.W.2d 168, 173 (Minn. App. 2009), *review denied* (Minn. Jan. 27, 2010). This court will not reverse a district court’s denial of a motion to vacate a judgment under Minn. R. Civ. P. 60.02 unless the district court abused its discretion. *Charson v. Temple Israel*, 419 N.W.2d 488, 490 (Minn. 1988). The moving party bears the burden of proof. *City of Barnum v. Sabri*, 657 N.W.2d 201, 205 (Minn. App. 2003).

Minn. R. Civ. P. 60.02(c) allows relief from a final judgment upon a showing of fraud, misrepresentation, or other misconduct of an adverse party. The rule provides that the motion must be made “not more than one year after the judgment . . . was entered.” Minn. R. Civ. P. 60.02. The district court determined that Osbourne’s motion to vacate under rule 60.02(c) was untimely. We agree. Osbourne’s motion was filed more than two years after the entry of judgment. On the timeliness ground alone, we conclude the district court did not abuse its discretion in denying relief under rule 60.02(c).

Moreover, “[t]o prevail, the moving party must establish by clear and convincing evidence that the adverse party engaged in fraud or other misconduct which prevented [the moving party] from fully and fairly presenting its case.” *Regents of Univ. of Minn. v. Med. Inc.*, 405 N.W.2d 474, 480 (Minn. App. 1987), *review denied* (Minn. July 15, 1987). And the misconduct must “have gone to the ultimate issue of the case.” *Id.* In *Regents*, this court held that the district court did not err in denying the appellant’s rule 60.02 motion because, although the newly discovered fact that the respondent’s witness committed theft and perjury was “strong impeachment evidence, . . . [it] lend[ed] little to resolution of the substantive issues.” *Id.* at 481.

Here, Osbourne admits that the facts of Dyab’s guilty plea are relevant only as to impeachment. And Osbourne fails to establish that Dyab prevented her from fairly and fully presenting her case, or that the facts of the guilty plea are material to the ultimate issues at trial. The evidence presented establishes that Dyab defrauded mortgage lenders. These facts do not demonstrate that Dyab defrauded Osbourne, nor do they demonstrate that Osbourne was a shareholder of RMMC, the threshold issue on which her claims on

behalf of RMMC depended. On this record, we conclude that the district court's denial of Osbourne's new-trial motion under rule 60.02(c) was proper.

Minn. R. Civ. P. 60.02(f) provides that the district court may order a new trial for "[a]ny other reason justifying relief from the operation of the judgment." A motion under this provision must be made within a "reasonable time," and is not limited to one year. Relief under rule 60.02(f) requires a showing of "extraordinary circumstances" and the court should balance the need for finality with the need to do justice in a particular case. *Regents of Univ. of Minn.*, 405 N.W.2d at 481. Generally, relief may not be granted under rule 60.02(f) if the grounds properly fall within the enumerated clauses (a) through (e). *Chapman v. Special Sch. Dist. No. 1*, 454 N.W.2d 921, 924 (Minn. 1990) ("Clause (f) has been designated as a residual clause, designed only to afford relief in those circumstances exclusive of the specific areas addressed by clauses (a) through (e).").

Osbourne's claims are premised on fraud. Because fraud is an enumerated ground under clause (c), reliance on clause (f) to avoid the one-year limitation is improper. Even if the district court had concluded that extraordinary circumstances were present, this is not the case in which the need to do justice outweighs the interests of finality.

Osbourne also asserts that the district court abused its discretion in denying her new-trial motion because Dyab committed fraud on the court. *See* Minn. R. Civ. P. 60.02 ("This rule does not limit the power of a court to . . . set aside a judgment for fraud upon the court."). A motion to vacate based on fraud on the court is not subject to the one-year time restriction under rule 60.02(c). *Maranda v. Maranda*, 449 N.W.2d 158, 165 (Minn. 1989). We note that a finding of fraud on the court requires more than ordinary fraud; the

moving party must demonstrate egregious conduct involving an integral aspect of the judicial process or a judicial officer. *Id.* This court has stated that fraud on the court occurs when “a court is misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair.” *In re Welfare of C.R.B.*, 384 N.W.2d 576, 579 (Minn. App. 1986) (quoting *Halloran v. Blue & White Liberty Cab Co.*, 253 Minn. 436, 442, 92 N.W.2d 794, 798 (1958)), *review denied* (Minn. May 29, 1986).

Osbourne appears to contend that the following actions establish fraud on the court: (1) Dyab’s transfer of RMMC properties and a letter of indemnification drafted by Dyab’s counsel, which were allegedly in violation of the receivership order or facilitated violation of the receivership order; (2) Dyab’s in-court statements that certain transactions were legitimate and involved bona fide purchasers; and (3) the fact that several of the properties Dyab fraudulently sold were previously owned by RMMC. None of these allegations establishes fraud on the court.

This court has previously affirmed the district court’s denial of relief to Osbourne based on alleged violation of the receivership order. *Aboud*, 2010 WL 1189829 at *2-4 (holding that the district court did not abuse its discretion in denying Osbourne’s contempt motion regarding violation of the TRO and receivership order). Osbourne presents no evidence that Dyab’s mortgage fraud was material to the receivership issue.

As to Dyab’s alleged in-court statements about bona fide purchasers, Osbourne fails to cite to the record or indicate which transactions she is referring to, and does not indicate how those transactions were material to her substantive claims at trial. Error

“must be made to appear affirmatively before there can be reversal,” and “the burden of showing error rests upon the one who relies upon it.” *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949). Generally, failure by one party to disclose information pertinent to a proceeding is not fraud on the court. *Angier v. Angier*, 415 N.W.2d 53, 56 (Minn. App. 1987). Even if Dyab perjured himself, his testimony may not have constituted fraud upon the court. See 2A David F. Herr & Roger S. Haydock, *Minnesota Practice* § 60.28 (4th ed. 2005) (“Cases of perjured evidence probably do not fall within fraud upon the court unless they directly involve an attorney or judicial officer.”).

The district court rejected Osbourne’s allegations of fraud on the court by Dyab’s counsel, concluding that, after going “through two trials and having intimate familiarity of all the motions that I heard . . . [t]here isn’t any basis whatsoever in the record to say Mr. Skolnick or any of his colleagues . . . have ever committed a fraud on the Court.” Osbourne presents no evidence from which we could conclude that the district court’s assessment of the record was an abuse of discretion.

We conclude the district court judge carefully evaluated Osbourne’s arguments in light of his familiarity with the case. Because the rule 60.02 motion was untimely, and because Osbourne failed to demonstrate that the facts of Dyab’s plea establish fraud or fraud on the court material to her substantive claims at trial, the district court did not abuse its discretion in denying new-trial relief.

Affirmed.