SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: Paul G. Bryant v. George W. ("Tripp") Way, III, Gina Way, George Way, Kathryn Way, and Emory Hill Real Estate Services, Inc.
C.A. No. 11C-01-164 RRC

Submitted: July 17, 2012
Decided: September 14, 2012

Upon Consideration of Defendants' Motion to Modify Judgment.
DENIED.

Dear Counsel:

Defendants seek to partially modify the Court's June 29, 2012 judgment which effectuated the Court's disposition of the parties' cross motions for summary judgment. Defendants contend that the judgment requires modification because it was based upon a mistake of material fact and because justice requires modification. Defendants' Motion is **DENIED** because the motion is procedurally barred.

I. FACTUAL HISTORY

Plaintiff Paul G. Bryant ("Bryant") and Defendants George W. ("Tripp") Way, III, Gina Way, George Way, and Kathryn Way ("Defendants") cross moved for summary judgment to resolve claims arising from a former partnership's deterioration. The parties stipulated to facts and proffered that no material facts

were disputed. As discussed below, this stipulation proves important. Plaintiff's complaint asserted two distinct claims: (1) "Emory Hill" claims regarding commissions between the former partners Bryant and Tripp Way and; (2) "Iron Hill" claims regarding funds provided by Defendants to Bryant, and whether those finances constituted a loan or an investment. The Court issued an opinion, dated April 17, 2012 ("Opinion"), granting and denying both parties claims in part. Defendants' present Motion to Modify the Judgment only addresses the Iron Hill claims.

On the Iron Hill claims, the parties cross moved for summary judgment to determine whether approximately $78,000 given to Plaintiff by Defendants constituted a personal loan or an equity investment in Iron Hill Properties, LLC. ("Iron Hill") Plaintiff sought a declaratory judgment and alleged that Defendants had failed to fulfill additional capital calls in addition to the $78,000 provided. Specifically, Plaintiff alleged that Defendants had failed to satisfy a $8,666.66 proportionate capital contribution share. Defendants contended that the money provided was not a joint investment, but rather was a loan repayable to Defendants.

The Court determined in its opinion that the funds were a joint equity investment and not personal loans. The Court further held that the Defendants are "responsible for not fulfilling the further capital contributions."[1] The opinion did not specify the manner by which the Defendants would be responsible for the capital contributions. The Court reasoned, in pertinent part:

> Initially, the Court notes that the parties' business disputes occurred without the timely advice of legal counsel and are replete with personal and professional dispute. Through this lawsuit, the Court is essentially asked to rescue business savvy parties from circumstances marred by sloppy document draftsmanship and extreme casualness. The Court is tasked with untangling unresolved contract inconsistencies and urged to restore parties financially from their informal business transactions. The involvement of counsel with the initial transactions may well have prevented the entire quarrel. Conversely, the Court notes that since their inclusion, counsel for both parties have performed admirably and with utmost professionalism as they deal with a difficult factual record.[2]
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> . . . .

[1] *Bryant v. Way*, 2012 WL 1415529, at *14 (Del. Super. Apr. 17, 2012).
[2] *Id*. at 2 n.1.

On cross motions for summary judgment, summary judgment is appropriate when there is no genuine issue of material fact that requires a trial and a party is entitled to judgment as a matter of law. Under Superior Court Civil Rule 56(h), "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions" and "will grant summary judgment to one of the moving parties."[3]

. . . .

The unique procedural posture of this case dictates that the Court's discretion regarding the parties' Iron Hill arrangement is limited. The Court has been asked by the parties to determine whether the transaction was a loan or an investment. The parties have stipulated that the Iron Hill arrangement was not a gift. The parties have argued that this Court should find that the Iron Hill payments were either a loan or an investment; no party has suggested that the Court, in the particular framework of this case, could theoretically find that the evidence is insufficient to find the existence of either an investment or a loan.

Cross motions for summary judgment are treated as a stipulation for a decision, and the Court must grant one of the cross motions and deny the other. The parties have stipulated that no material facts are in dispute. Therefore, the Court must balance the parties' competing claims as stated, to find one arrangement over the other. In so proceeding, the parties have waived any possibility for the Court to find the evidence requires a finding that neither a loan nor an investment exists.[4]

. . . .

The conclusion upholding an investment and therefore granting summary judgment for Plaintiff on the Iron Hill claims is caused in part by the unique posture of this case. Furthermore, in reaching that conclusion that posture ***requires*** that the Court grant summary judgment in favor of Plaintiff's claim that Defendants are responsible for not fulfilling the further capital contributions.[5]

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[3] *Id.* at *9 (citing *Wygant v. Geico Gen.*, 27 A. 3d 553 (Del. 2011) (TABLE)).
[4] *Id*. at *13.
[5] *Id*. at *14 (emphasis added).

The Court closed its Opinion by noting its awareness that the Court "does not and cannot answer any unresolved questions regarding the terms and scope of the Iron Hill investment arrangement."[6]

II. PROCEDURAL HISTORY

Plaintiff filed suit in January 2011. Counts I through III of the complaint addressed the Emory Hill claims, while Counts IV through VI involved the Iron Hill claims. In Count IV, Plaintiff sought a declaratory judgment that the 2007 Iron Hill payments were not loans, but joint investments in Iron Hill. Counts V and VI sought damages from the Defendants for their failure to provide additional Iron Hill capital contributions. In March 2011, Defendants answered the complaint and asserted counterclaims for damages arising from the Iron Hill transactions. Plaintiff answered the counterclaims. Defendants moved to sever Counts IV through VI under Superior Court Civil Rule 21.[7] The Court denied the motion to sever in May 2011.[8]

In October 2011, in anticipation of a November 2011 trial date, the Court scheduled a pretrial conference. However, at that time counsel advised the Court that the parties no longer wished to proceed with trial, but rather that the parties wished to attempt mediation, and if unable to settle the case, file dispositive cross motions for summary judgment. The parties agreed to jointly stipulate to the facts underlying both motions and the trial date was removed from the Court's trial calendar.

The case did not settle. In November 2011, the parties submitted their joint stipulation of facts. Briefing was completed on the cross motions for summary judgment in February 2012 and the Court issued a letter opinion on April 17, 2012. Through letters in May 2012, the parties notified the Court of their disagreement regarding the form of judgment to accompany the Court's opinion. After conferring and unsuccessfully attempting to agree on an order, Plaintiff proposed an order on May 22, 2012, and on defense counsel's behalf, advised the Court that Defendants objected. No details were provided by either party regarding the basis of Defendants' objections.

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[6] *Id.* at *14 n.48.
[7] Super Ct. Civ. R. 21.
[8] *Bryant v. Way*, 2011 WL 2163606 (Del. Super. May 25, 2011).

On June 13, 2012, the Court initially entered the order submitted by Plaintiff's counsel, after hearing no substantive objection beyond the general averment in Plaintiff's May 22, 2012 letter. On June 29, 2012 the Court filed an Amended Order for Entry of Judgment. (the "Judgment") vacating and substituting a new order because the June 13 order did not comply with Prothonotary requirements as to form. The judgment awarded Plaintiff $9,455.70, of which $8,666.66 represented the unpaid principal, plus interest for the Iron Hill claims. On July 2, Defendants Moved to Modify the Judgment pursuant to Superior Court Civil Rule 60(b)(1) and (6). Oral argument was held July 17, 2012.

III. THE PARTIES' PRESENT CONTENTIONS

A. Defendants' Contentions

Defendants contend that the "facts essential to the holding—namely, the amount of the capital calls, or whether Iron Hill even made such capital calls—were not stipulated."[9] Defendants argue that the judgment should be modified because (1) the judgment is premised upon a mistake of material fact that is at odds with Iron Hill's operating agreement and (2) the interests of justice require modification because Plaintiff benefits beyond his bargain and receives an unjust windfall at Defendants' detriment. Defendants also assert the opinion did not specify how Defendants would be responsible for their capital contribution portion.

The Iron Hill operating agreement provides that if a member fails to make a capital call, that member's interest is proportionally redistributed to the other members.[10] Defendants contend that while the operating agreement is "not strictly controlling . . . the Operating Agreement is the most logical and instructive source for determining the implementation of the Capital Contribution award."[11] Defendants stress that they are not contesting responsibility for the capital calls. Rather, they simply contest the method in which Defendants ought to be held responsible for the capital calls.

[9] Def's M. to Partially Modify Judgment at ¶ 3.
[10] Iron Hill Operating Agreement at §4.2
[11] Def's M. to Partially Modify Judgment at ¶ 6.

B. Plaintiff's Contentions

Plaintiff argues that Defendants' current Motion lacks merit because Defendants have repeatedly sat on their rights. First, Plaintiff argues that the instant 60(b) Motion is essentially an untimely motion for reargument.[12] Defendants failed to file such a motion within the time period set forth in Superior Court Civil Rule 59(e) and Plaintiff asserts it is now time barred. Second, Plaintiff argues that Defendants even requested the interpleaded funds be immediately released on May 1, 2012, without referencing the present claims. Third, when the Court requested a joint order on May 22, 2012, Defendants objected generally (through Plaintiff's counsel) to the proposed order, but did not separately provide any basis. Finally, Defendants did not object to the original judgment, which was later amended. Plaintiff argues that, on this fifth opportunity, Defendants object under a motion for relief from judgment, which Plaintiff says is being used improperly as a substitute for reargument or appeal. Plaintiff argues that all of Defendants present claims were adjudicated in the Court's prior opinion.

IV. <u>STANDARD OF REVIEW</u>

Rule 60(b) provides that this Court may relieve a party from a final order on the grounds of mistake, newly discovered evidence, fraud, or "any other reason justifying relief."[13] Rule 60(b) "requires a showing of "extraordinary circumstances."[14] When deciding whether to reopen a judgment, a court must look at the type of judgment which is sought to be reopened.[15] A decision on a motion to reopen pursuant to Superior Court Civil Rule 60(b) will be set aside only for an abuse of discretion.[16]

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[12] *See* Super Ct. Civ. R. 59(e).
[13] Super. Ct. Civ. R. 60(b).
[14] *Dixon v. Delaware Olds, Inc.,* 405 A.2d 117, 119 (Del. 1979) (citations omitted).
[15] *See, e.g. Keystone Fuel Oil Co. v. Del-Way Petroleum, Inc.,* 364 A.2d 826, 829 (Del. Super. 1976).
[16] *Cf. Wife B. v. Husband B.,* 395 A.2d 358, 359 (Del. 1978) (holding that a motion to reopen under Superior Court Rule 60 is addressed in the trial court's sound discretion) (citing 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §§ 2857, 2872 (1969)); *Battaglia v. Wilmington Sav. Fund Soc'y,* 379 A.2d 1132, 1135 (Del. 1977) (reviewing a trial court's ruling on a motion to open a default judgment pursuant to Rule 60(b)(1) and (6) by applying an abuse of discretion standard).

Importantly, Rule 60(b) "should not be used … as a substitute for a motion for reargument and an appeal."[17] The "realm of extraordinary circumstances" that would justify relief under Rule 60 only encompasses that which could not have been addressed using other procedural methods.[18] Rule 60(b) cannot be used to enlarge the Superior Court's jurisdiction.[19]

V. THE PROCEDURAL POSTURE PREVENTS RELIEF

Defendants have failed to meet their burden justifying relief from judgment. It bears repeating that the parties originally created both the factual and procedural quandary the Court continues to navigate. This case proceeded normally until the parties untimely requested to resolve the case with cross motions for summary judgment, rather than resolve the case by a trial.

The parties stipulated to facts and submitted cross motions for summary judgment. The parties requested that the Court grant or deny one party's motion on each set of claims. On the Iron Hill claims, the Court was asked by the parties whether the transaction was a loan or an investment. Notably, the parties had stipulated that the transfer of funds was not a gift. The Court noted in the opinion that neither party had proved its assertions with absolute certainty.[20] Rather, the Court found that "the evidence supporting a joint investment [rather than a loan] is the more convincing."[21]

By determining that the agreement was an investment and not a loan, it followed that the Court should grant Plaintiff's declaratory judgment that the funds transfer was an investment. The Court was not asked by either party to grant Plaintiff's declaratory judgment action without contemporaneously granting judgment in Plaintiff's favor in the amount sought for unpaid capital contributions.

Defendant presently seeks the Court to modify the judgment and determine that the capital call judgment is inappropriate, in part because the capital call details were not stipulated to. At no time in the joint stipulation of facts, Defendants' Opening Brief, or in Defendants' Reply Brief did Defendants ever argue that all pertinent facts

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[17] *Dixon*, 405 A.2d at 119 (Del. 1979).
[18] *Wolf v. Triangle Broadcasting Co.*, 2005 WL 1713071, at *1 (Del. Ch. July 18, 2005).
[19] *Star Publishing Co. v. Martin*, 95 A.2d 82 (Del. 1953).
[20] *Bryant v. Way*, 2012 WL 1415529, at *13 (Del. Super. Apr. 17, 2012) ("Defendants proffer scant proof that the funds delivered to Plaintiff represented personal loans. . . . Similarly, Plaintiff proffers [only] somewhat more evidence suggesting the parties' had a joint investment.)
[21] Id.

were not stipulated. In fact, on cross motions for summary judgment submitted without an argument "that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits ***based on the record submitted*** with the motions."[22] The record submitted on the cross motions consisted entirely of the joint stipulation and its exhibits. That the Court relied solely upon the joint stipulation and did not consider facts not stipulated was not error, in fact it was required by the Court rules. This falls well short of constituting an "abuse of discretion" as Rule 60(b) requires.[23]

Defendants are estopped from presently arguing that certain material facts attendant to the Iron Hill transaction are disputed in light of Defendants' prior assertion that there were not. If Defendants contemplated that material facts were disputed or realized that the stipulated facts were incomplete in order for this Court to resolve the case on cross motions for summary judgment, the parties never should have so stipulated.

The Court need not reach Defendants arguments that the judgment was based upon a factual mistake or that justice requires modification. Even assuming *arguendo* that the Court's order was based upon a factual mistake, Defendants are procedurally barred for failing to raise the present judgment challenge properly. A motion to modify judgment "should not be used … as a substitute for a motion for reargument and an appeal."[24] In essence, Defendants are seeking to assert material fact disputes or oversights that should have been raised during the summary judgment stage. Such an attempt falls squarely under the purview of Superior Court Rule 59(e). Although the 60(b) motion was filed only three days after the amended judgment was entered, the Court is reluctant to substantively reach the present claims.

Theoretically, Rule 60(b) allows the filing of a motion several months, if not years later, although the passage of time may diminish the argument.[25] Allowing

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[22] Super Ct. Civ. R. 56(h) (emphasis added).

[23] *Cf. Wife B. v. Husband B.,* 395 A.2d 358, 359 (Del. 1978) (holding that a motion to reopen under Superior Court Rule 60 is addressed in the trial court's sound discretion) (citing 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §§ 2857, 2872 (1969)); *Battaglia v. Wilmington Sav. Fund Soc'y,* 379 A.2d 1132, 1135 (Del. 1977) (reviewing a trial court's ruling on a motion to open a default judgment pursuant to Rule 60(b)(1) and (6) by applying an abuse of discretion standard).

[24] *Dixon v. Delaware Olds, Inc*., 405 A.2d 117, 119 (Del. 1979).

[25] *See Robins v. Garvine,* 136 A.2d 549 (Del. 1957) (right of defendant to attack judgment by motion under 60(b) has no time limit); *But see Schremp v. Marvel,* 405 A.2d 119 (Del. 1949) (holding that while rule 60(b) provides no time limit for moving to vacate a default judgment, a party may not unreasonably delay a motion requesting relief from judgment).

Defendants to indefinitely challenge the underlying motion's precepts is improper under Rule 60(b). It bears repeating that Rule 60(b) cannot be substituted for reargument.[26] Moreover, to the extent Defendants' motion seeks to clarify the Court's prior orders, such clarification is also most appropriately addressed under Rule 59(e).[27]

The Court reiterates that it "does not and cannot answer any unresolved questions regarding the terms and scope of the Iron Hill investment arrangement."[28] However, the procedural posture of cross motions for summary judgment paired with a jointly stipulated factual record compelled the judgment entered on June 29, 2012. The Court's April 17, 2012 opinion and subsequent judgment, if contested, should have been appropriately challenged by a timely Rule 59(e) motion for reargument.

The original sloppiness of the parties' interactions continues to burden this case. The parties' dealings before seeking counsel have significantly complicated this case. Combined with the parties' apparent animosity and unwillingness to compromise, the Court was left with little discretion but to clean up the parties' messy dispute in a manner with which neither party can possibly be satisfied completely. As stated in the Court's prior opinion counsel's involvement during the initial transactions may well have prevented the entire quarrel.

Defendant's Motion to Modify Judgment is **DENIED.**

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

cc: Prothonotary

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[26] *Dixon,* 405 A.2d at 119.
[27] *Mukasa v. Balick and Balick*, 2002 WL 31230813 (D. Del. Sept. 26, 2002) (federal court treats a party's motion for clarification or reargument identically pursuant to Fed R. Civ. P. 59(e)).
[28] *Bryant v. Way*, 2012 WL 1415529,*14 n.48.