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United States Court of Appeals
Tenth Circuit

May 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSEPH SCHAUFF; PEGGY SCHAUFF,

Plaintiffs - Appellees,

v.

SUSHAMA TRIPATHI; LLOYD GLICK,

Defendants - Appellants.

No. 22-2066
(D.C. No. 1:20-CV-00590-MIS-JHR)
(D. N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **PHILLIPS**, Circuit Judges.

Sushama Tripathi and Lloyd Glick, appearing pro se, appeal the district court's final judgment entering default judgment against them and awarding damages to plaintiffs. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Plaintiffs Joseph and Peggy Schauff filed an action alleging defendants had engaged in manipulative and deceptive acts and omissions with respect to plaintiffs'

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

investment in two companies called Ostara Technology Company, Inc., which are referred to as "Ostara NM" and "Ostara DE," and another company called Venturioum, LLC. In the operative Amended Complaint, plaintiffs alleged that at all times material to their action, defendants were co-founders, material shareholders, and 25% shareholders of each company, and defendants held various managerial positions in each company. Plaintiffs asserted a claim under a provision of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and claims for negligent misrepresentation, breach of fiduciary duty, breach of contract and the implied covenant of good faith and fair dealing, and violations of the New Mexico Uniform Securities Act and the New Mexico Unfair Practices Act. These claims involved defendants' alleged actions in connection with Venturioum's 2014 acquisition of equity securities of Orion System Integrators, LLC (Orion) and Venturioum's 2018 sale of those securities (Orion Units). Those actions allegedly diluted plaintiffs' ownership interest in Venturioum and, consequently, the payout they received upon sale of the Orion Units. Plaintiffs sought damages, attorney fees, and interest.

Defendants were served, and they made a number of pro se filings, including motions to dismiss and challenges to service, all of which were unsuccessful. Ultimately, the district court granted plaintiffs' motions for default judgment against each defendant as to liability based on its view that neither defendant had filed a responsive pleading despite multiple extensions of time to do so. The district court then held a hearing to determine damages. Tripathi appeared at the hearing; Glick did not. Joseph Schauff (Schauff) testified, and Tripathi cross-examined him. The

district court entered a final judgment awarding plaintiffs $158,264.04. Tripathi and Glick appeal.[1]

II. DISCUSSION

A. Glick's Issues

Glick raises two issues: (1) the district court should have construed one of his filings as his answer and (2) the district court should have granted his motion to set aside the default judgment.

1. First Issue: Glick's Response

Glick contends the district court should have construed his "Response to Plaintiffs' First Amended Complaint and . . . Motion to Dismiss" (Response) as his answer. In an October 1, 2020, order, the district court noted that the Response was "unintelligible," "disorganized, scattered and largely incomprehensible." R., Vol. I at 126. The court struck the Response for several reasons: (1) it appeared to be "part responsive pleading; part motion to dismiss; and part Answer," *id.*; (2) it sought "relief on several matters for adjudication in a single document, in violation of [the district] court's Administrative Order 92-88," *id.* at 127; and (3) Glick purported to "speak for Tripathi," and as the court had previously warned him, he was not permitted to represent her, *id.* The court informed Glick that short of obtaining counsel, he ought to familiarize himself with the rules of procedure.

[1] We construe appellants' pro se filings liberally, but we may not act as their advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

We review the order striking the Response for an abuse of discretion. *See Garza v. Davis*, 596 F.3d 1198, 1205 (10th Cir. 2010) ("District courts generally are afforded great discretion regarding . . . control of the docket and parties[], and their decisions are reviewed only for abuse of discretion." (internal quotation marks omitted)). The district court accurately assessed the mixed nature of the Response, so we cannot say the court abused its discretion in striking it for the reasons the court gave. Moreover, Glick had ample time prior to entry of the default judgment on liability (some 433 days when measured from a January 14, 2021, order denying the last of his three motions to dismiss) in which he could have filed a proper answer or a responsive pleading. And when the court entered the default judgment, Glick filed a motion to set it aside and attached a proposed answer, the quality of which suggests he was capable of filing an adequate and timely answer pro se. Moreover, the relevant allegations he denies on appeal concern matters within his personal knowledge, such as that he ceased being a member in any of the companies in 2014, before the 2018 sale of the Orion Units; that he never had any direct communications with plaintiffs; and that another person, David Silver, ran the companies, entered agreements, and made distributions.

2. Second Issue: Motion to Set Aside Default Judgment

Glick filed a motion to set aside the default judgment on liability and for an extension of time to file a proposed answer he attached to the motion. To show good cause to grant the motion, Glick pointed to the ongoing Covid-19 pandemic, his advanced age of 83, his serious health issues, his diligent but unsuccessful attempts

to find New Mexico counsel (Glick lives in New Jersey), and his presentation of meritorious defenses in his proposed answer.

The district court construed the motion as seeking reconsideration of the default judgment on liability under Fed. R. Civ. P. 54(b). Rule 54(b) provides that interlocutory rulings may be "revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." The court denied the motion because the proposed answer was Glick's "first attempt in *455 days* to file a responsive pleading after his Motion to Dismiss was denied on January 14, 2021," and waiting that long, "and until *after* the Court ha[d] granted default judgment on liability, [was] unfortunately too long." R., Vol. I at 342.

Glick argues the district court should have considered his motion to set aside the default judgment under Federal Rule of Civil Procedure 55(c)'s good-cause standard. Rule 55(c), however, provides that the good-cause standard applies to setting aside an entry of default and that Rule 60(b)'s standard applies to setting aside a final default judgment: "The court may set aside an entry of default for good cause, and it may set aside a *final* default judgment under Rule 60(b)." Fed. R. Civ. P. 55(c) (emphasis added). The district court explained that it applied Rule 54(b) instead of "the more stringent standard" under Rule 60(b) because its default judgment involved only liability, not damages, and therefore no final default judgment had been entered. R., Vol. I at 341 & n.2.

The district court correctly applied Rule 54(b) rather than Rule 55(c) or Rule 60(b). The default judgment as to liability was not a final judgment because the

damages issue remained. *See Albright v. UNUM Life Ins. Co. of Am.*, 59 F.3d 1089, 1092 (10th Cir. 1995) (noting "the general and well-established rule that an order that determines liability but leaves damages to be calculated is not final" (internal quotation marks omitted)). And "[u]ntil final judgment is entered, *Rule 54(b)* allows revision of [a nonfinal] default judgment at any time"; "Rule 60(b) appl[ies] only in seeking relief from a final judgment." Fed. R. Civ. P. 55 advisory committee note to 2015 amendment (emphasis added).[2]

Glick's argument does not persuade us otherwise. He relies on *Hinson v. Webster Industries*, where an Alabama district court applied Rule 55(c)'s good-cause standard to a motion to set aside an order granting default judgment as to liability only. *See* 240 F.R.D. 687, 689–92 (M.D. Ala. 2007). *Hinson*, however, predates the 2015 amendment to Rule 55, which "insert[ed] the word 'final' before 'default judgment.'" 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2692 (4th ed.), Westlaw (database updated Apr. 2023). The purpose of that change was "'to make plain the interplay between Rules 54(b), 55(c), and 60(b)' by emphasizing that until a final judgment is entered disposing of all the claims among all the parties, a default judgment may be revised at any time under Rule 54(b) without satisfying the demanding standards of Rule 60(b)." *Id.* (quoting Fed. R. Civ. P. 55 advisory committee note to 2015 amendment). Thus, Rule 55(c)'s

[2] Although Advisory Committee Notes are not binding on this court, they "are nearly universally accorded great weight in interpreting federal rules." *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005) (internal quotation marks omitted). We find the note to the 2015 amendment is entitled to great weight.

good-cause standard has no apparent role in considering a motion to set aside a non-final default judgment; nor do Rule 60(b)'s standards.[3]

Substantively, Glick repeats the reasons to set aside the default judgment he advanced in his motion. He also fleshes out defenses he apparently would have raised if he was permitted to file an answer, including that plaintiffs failed to allege he acted with scienter, as required for violation of securities laws, and his lack of connection to any of the companies involved during the relevant time period. But district courts have discretion in deciding whether to reconsider a prior interlocutory order. *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1225 (10th Cir. 2007). And Glick's arguments fall short of showing the district court abused its discretion. As with his first issue, the quality of his proposed answer, which was filed only one month after the default judgment, shows that despite the pandemic, his age, and his health conditions, he had sufficient legal acumen to avoid the default judgment by timely filing an adequate answer or responsive pleading at some point between the January 14, 2021, denial of his third motion to dismiss and the March 23, 2022, entry of default judgment on liability. The district court therefore did not abuse its discretion in concluding that notwithstanding extensions of time to obtain counsel, Glick had simply waited too long to try to file an answer without counsel.

[3] *But see Martinez v. Dart Trans, Inc.*, 547 F. Supp. 3d 1153, 1182 n.7 (D.N.M. 2021) (applying Rule 55(c)'s good-cause standard in similar procedural circumstances but without consideration of the Advisory Committee's Note to the 2015 Amendment).

B. Tripathi's Issues

We discern four issues in Tripathi's opening brief: (1) the district court should have granted her Rule 60(b) relief; (2) when calculating damages, the district court failed to determine if the admitted factual allegations stated a claim for a violation of federal securities law; (3) the damages calculation was based only on Schauff's testimony, not any "hard evidence," Tripathi's Opening Br. at 34; and (4) the district court improperly limited her response to plaintiffs' memorandum of law on damages to five pages.

1. First Issue: Rule 60(b) Motion

Tripathi contends the district court should have granted her Rule 60(b) motion based on new evidence that plaintiffs, acting in concert with their attorneys, engaged in fraud, misrepresentation, or misconduct when they alleged in their Amended Complaint that Tripathi had owned and managed the companies. The new evidence was an agreement that one of plaintiffs' attorneys drafted in October 2018 (some 20 months before filing this action) stating that David Silver was the sole owner and member-manager of Venturioum. The district court denied the motion in a text-only order, ruling that Tripathi's new evidence did "not establish fraud," and the court could "discern no reason it could not have been discovered and presented earlier with reasonable diligence. Defendant Tripathi had ample opportunities to defend against the allegations in Plaintiffs' Amended Complaint but failed to do so." R., Vol. I at 9 (ECF No. 82).

Tripathi argues the district court did not adequately explain its finding that there had been no fraud. She also points to statements Schauff made on cross-examination at the damages hearing that he never met with or communicated with Tripathi in any way and that he did not know whether she was a member or manager of any of the three entities.

We review the denial of Rule 60(b) relief only for "an abuse of discretion, keeping in mind that Rule 60(b) relief is extraordinary and may only be granted in exceptional circumstances." *Lebahn v. Owens*, 813 F.3d 1300, 1306 (10th Cir. 2016) (internal quotation marks omitted). "[A] Rule 60(b) motion is not an appropriate vehicle to advance new arguments or supporting facts that were available but not raised at the time of the original argument." *Id.*

Tripathi has not explained why she could not have advanced her fraud argument or alleged the relevant facts in the district court prior to entry of the default judgment on liability or the final judgment. The alleged fraud and the supporting factual allegations—that Tripathi was not an owner or member-manager of Venturioum—were within Tripathi's personal knowledge, so she had no need to discover the 2018 agreement or elicit Schauff's testimony in order to raise the fraud issue. Thus, Rule 60(b) was an inappropriate vehicle for presenting the argument, and the district court did not abuse its discretion in denying the motion.

2. Second Issue: Cause of Action for Violation of Securities Law

Tripathi argues that although well-pleaded facts are deemed true after a default judgment issues, the district court failed to determine which facts stated a cause of

action under the Securities Exchange Act and met the standards of the Private Securities Litigation Reform Act. As best we understand her argument, Tripathi maintains that as alleged in the Amended Complaint, plaintiffs' damages are tied to the payouts from the sale of the Orion Units, but there are no allegations that those payouts violated any securities laws. Instead, according to Tripathi, plaintiffs alleged the securities violation occurred earlier—when they acquired their Ostara NM shares.

We fail to see where Tripathi raised this theory in the district court other than in a footnote in her Rule 60(b) motion. *See* Suppl. R., Vol. I at 14 n.2. And there, the argument is conclusory and without citation to any supporting legal authority. Moreover, it was not the proper subject of a post-judgment motion. Thus, she never properly raised this theory in the district court, and she has not asked for plain-error review here, so she has waived appellate review. *See Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1246 n.3 (10th Cir. 2012) (explaining that failure to raise issue at appropriate time in the district court waives appellate review); *see also United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (distinguishing between forfeiture and waiver in district court and explaining that this court treats a forfeited argument as waived on appeal when a litigant fails to argue for plain-error review).

3. Third Issue: Evidence of Damages

The district court calculated plaintiffs' actual damages based on Schauff's testimony. Schauff testified that he and his wife owned 3.58% of Venturioum but had transferred 80,000 of their 323,000 shares to their children. The district court

found the transfer left them with 243,000 shares of Venturioum's nine million outstanding shares, which amounted to a 2.7% ownership interest. The court then calculated that plaintiffs should have received 2.7% of the $4.23 million Venturioum received for selling its Orion Units,[4] which was $114,210, and reduced that by $20,000 plaintiffs actually received from that sale, arriving at an award of $94,210 in actual damages. *See* Suppl. R., Vol. I at 5.

Tripathi argues the damages calculation was based only on Schauff's testimony, which merely recited what was in the Amended Complaint, not on any "hard evidence." Tripathi's Opening Br. at 34. However, Schauff's sworn testimony as to the amount of damages as he understood it is evidence. *See Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("Testimony . . . is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." (brackets and internal quotation marks omitted)). And the district court relied on that testimony, finding that although not the "best evidence" to support a damages award, the testimony was "credible" and "sufficient to establish damages" given plaintiffs' inability to conduct discovery because of defendants' default. Suppl. R., Vol. I at 5 n.2.

In its written order on damages, the court did not expressly address any of the three exhibits Tripathi introduced at the hearing. On appeal, Tripathi discusses two

[4] The district court referred to these units as Venturioum shares, which, as Tripathi notes, was incorrect. But for our purposes, this is a distinction without a difference.

of those: (1) Silver's affidavit and (2) the signature page of a Subscription Agreement dated August 2014 showing plaintiffs purchased 40,000 shares of Venturioum and asked that 30,000 of those shares be issued to others.[5] We turn to these documents, beginning with the signature page.

The signature page apparently is relevant to Schauff's testimony that at some point plaintiffs transferred 80,000 Venturioum shares to their children. But the district court accounted for that transfer by reducing plaintiffs' percent ownership and, accordingly, the amount of damages. Tripathi does not argue that the reduction was incorrect; to the contrary, she credits the exhibit as causing the district court to reduce plaintiffs' claimed ownership from 3.58% to 2.7%. The signature page, therefore, does not require reversal.

As for Silver's affidavit, Tripathi relies on statements supporting her allegation that she was not a member or manager of Venturioum. It is unclear whether the district court admitted the affidavit. At the hearing, when plaintiffs objected to its admission on grounds of timeliness and hearsay, the district court provisionally admitted it into evidence but never made a final ruling. That need not detain us because even if we treat it as admitted into evidence, the statements Tripathi relies

[5] These exhibits are not part of the record on appeal, but Tripathi has filed a motion to supplement the record with them. The Clerk of Court informed her that the district court cannot locate these documents. Plaintiffs have not responded to her motion. We therefore assume the exhibits are the same as those Tripathi provided at the hearing, and we will grant her motion to supplement the record with them, which are attached to the motion as Exhibits B and D.

only call into question contrary factual allegations in the Amended Complaint. And "[a]fter a default judgment is handed down, a defendant admits to a complaint's well-pleaded facts and forfeits his or her ability to contest those facts." *Tripodi v. Welch*, 810 F.3d 761, 764 (10th Cir. 2016); *see also* Fed. R. Civ. P. 8(b)(6) ("An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied."). Thus, Tripathi has not shown that Silver's affidavit requires reversal.

4. Fourth Issue: Page Limit

Tripathi argues that although the district court placed no limitations on the length of plaintiffs' memorandum of law concerning damages, the court limited her to a five-page response to that memorandum, and she was effectively limited to three pages because her supporting affidavit was two pages. She claims this "severely handicapped" her, Tripathi's Opening Br. at 15, but she does not say what she would have added if given more pages. And although at the hearing she explained that due to the page limit, she did not submit Silver's affidavit by the deadline the court had set, the court provisionally accepted the affidavit, and we have considered Tripathi's argument based on the affidavit. She therefore has failed to demonstrate any prejudice from the page limitation.

III. CONCLUSION

We affirm the district court's judgment. We grant Tripathi's motion to supplement the record in part and direct the Clerk of the Court to supplement the record with Exhibits B and D to her motion.

Entered for the Court

Gregory A. Phillips
Circuit Judge