

ARKANSAS COURT OF APPEALS

D I V I S I O N III

No. CA10-1114

BILLY JOHNSON and D&G BAIL
BONDS, LLC

APPELLANTS

V.

ARKANSAS PROFESSIONAL BAIL
BOND CO. and PROFESSIONAL BAIL
BONDSMAN LICENSING BOARD

APPELLEES

Opinion Delivered JUNE 15, 2011

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SIXTEENTH DIVISION
[NO. CV-09-7517]

HONORABLE ELLEN B. BRANTLEY,
JUDGE

AFFIRMED

LARRY D. VAUGHT, Chief Judge

Appellant Billy Johnson argues that the circuit court erred in its finding that his administrative appeal from a decision of the Arkansas Professional Bail Bond Company and Professional Bail Bondsman Licensing Board was untimely. We see no abuse of discretion and affirm the circuit court's order of dismissal with prejudice.

Johnson held a professional bail bondsman license and was employed by D & G Bail Bonds. In June 2009, a complaint was filed against him with the Board. On October 9, 2009, a hearing was conducted to consider the complaint. Johnson appeared and was represented by Roy C. Lewellen. After the hearing, the Board concluded that Johnson's acts demonstrated "incompetency or untrustworthiness to act as a licensee," and the Board revoked his license.

After the hearing, Johnson was advised of his right to petition for judicial review of the administrative decision in accordance with the appellate provisions of the Administrative Procedure Act. A paragraph specifically outlining this right was included in the written revocation order that was signed, entered, and mailed to Johnson on October 23, 2009. According to the Act, a petition seeking judicial review must be filed within thirty days after service of the Board's final decision. Ark. Code Ann. § 25-15-212 (Repl. 2006). However, Johnson did not file his circuit-court-review petition until December 3, 2009, which was beyond the thirty-day limit for filing an appeal.

On December 22, 2009, the Board filed and served on appellant a motion to dismiss the petition for judicial review, noting that Rule 60(c) provides "any party opposing a motion shall serve a response within ten days after service of the motion." Johnson did not respond to the motion within ten days.

On January 6, 2010, appellee mailed a letter to the court asking for a dismissal with prejudice. Again, Johnson did not respond. On January 19, 2010, twenty-eight days after the motion was filed, the circuit court dismissed the case with prejudice. Johnson responded to the motion to dismiss on February 19, 2010, fifty-nine days after the initial motion was filed. Then on May 10, 2010, Johnson filed an amended response to the motion to dismiss and a motion for relief from judgment pursuant to Rule 60 of Arkansas Rules of Civil Procedure ("Rule 60"). In his motion, Johnson argued that his petition was mailed to the Pulaski County Circuit Clerk's Office on November 20, 2009, via "Priority Mail," and as such, the untimely filing was due to error on the part of the clerk.

The circuit court heard argument on July 15, 2010, and found that Johnson had the burden of proving his untimely filing was due to an error on the clerk's part and not an error on his own part. The court entered an order finding that he did not meet his burden, and his requested relief under Rule 60 was denied. It is from this order that he now appeals.

The circuit court has full discretion to determine whether it is appropriate to set aside judgment under Rule 60. *New Holland Credit Co. v. Hill*, 362 Ark. 329, 331, 208 S.W.3d 191, 193 (2005). And, we will not reverse a circuit court's determination of a Rule 60 motion absent an abuse of discretion. *First Nat'l Bank of Lewisville v. Mayberry*, 366 Ark. 39, 42, 233 S.W.3d 152, 155 (2006).

In his appeal, Johnson highlights three potential paths under Rule 60 whereby relief from judgments, decrees, and orders may be granted. Subsection (a) of Rule 60 provides, that in order to "correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or decree on motion of the court or any party, with prior notice to all parties, within ninety (90) days of its having been filed with the clerk." Under Rule 60(b), "at any time," the court may "correct clerical mistakes in judgments, decrees, orders or other parts of the record and errors therein arising from oversight or omission." Finally, under Rule 60(c), judgments can also be set aside "after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order" for "misprisions of the clerk."

In this case, it is undisputed that the trial court lost jurisdiction to grant relief under Rule 60(a) on April 19, 2010, because Johnson filed nothing within this first ninety-day

period from the court's order to dismiss. Therefore, that path of Rule 60 relief was closed to Johnson at the outset. However, Johnson alternatively argues that he was entitled to relief, despite seeking it beyond the ninety-day period, based on either a clerical error or misprisions of the clerk—specifically, that he did in fact tender a timely petition seeking judicial review by priority mail (two-day delivery) and it was not properly filed due to the clerk's error or omission.

However, assuming *arguendo* that this factual predicate that Johnson posits—if true—could be construed as the type of “clerical error” or “misprisions” contemplated by Rule 60 (b) and (c), the fact remains that at the hearing Johnson failed to produce sufficient evidence that a timely mailing took place, a seemingly straight-forward task. An affidavit from Mr. Steve Sipes, a Pulaski County Court Administrator, was the extent of “proof” submitted by Johnson to support his contention that he filed a timely appeal motion. However, the affidavit was primarily a recitation of the timeline associated with the case and a recollection of several conversations between Sipes and Johnson's counsel. Sipes did not accept any responsibility for the untimely filing of the petition for review. Because of Johnson's failure to show any clerical error or misprisions of the clerk in this case, there is no evidence to support relief under Rule 60(b) or (c).

Furthermore, even had a misprision occurred, because Johnson was not diligent in protecting his own interest, he would not be entitled to relief under Rule 60 (c)(3). *Jones-Blair Co. v. Hammett*, 326 Ark. 74, 80, 930 S.W.2d 335, 338 (1996). In explaining his failure to

respond to the motion to dismiss (of which the record established that he had notice) filed on December 22, 2009, Johnson's counsel noted that "we do close our office through the Christmas holiday and New Year, and Martin Luther [King] comes up the next week so everybody takes [a] long holiday. We . . . didn't know the motion had been filed." Therefore, even if a misprision did occur (which was not established), his appeal still fails because the act of closing a law office for an extended time period while time-sensitive matters are pending is a per se failure to diligently protect one's interest.

Because Johnson's argument under Rule 60(a) is untimely, and under Rule 60(b) and Rule 60(c)(3) is not supported by the evidence contained in the record, the decision of the circuit court is supported by substantial evidence and was not an abuse of discretion. Accordingly, we affirm.

Affirmed.

PITTMAN and WYNNE, JJ., agree.