SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Domestic Violence Unit

CAROLYN MISCHE-HOEGES **Petitioner** **v.** **MATTHEW LEFANDE** **Respondent**	**Case No:** **2010 CPO 002080** **Judge Jose M. Lopez** **Courtroom 114**

MOTION FOR RECONSIDERATION TO CORRECT ERROR OF LAW

In accordance with this Court's Civil Rule 59(e), the Respondent hereby moves for the Court to amend its April 19, 2011 Order as it is premised upon an error of law. Those cases cited by the Court in its decision do not speak to motions under Civil Rule 60(b). Instead, under Rule 60(b), there is a specific procedure as recognized by the Federal judiciary (for the analogous Federal Rule) for a Trial Court to seek a remand so it may address those issues within the Rule 60(b) that it finds meritorious.

"[W]hen a Rule 60(b) motion is filed while a judgment is on appeal, the district court has jurisdiction to entertain the motion, and should do so promptly." Fobian v. Storage Tech. Corp., 164 F.3d 887, 891 (4th Cir. 1999).

> Undeniably, appeal from an underlying judgment complicates the district court's role with respect to a Rule 60(b) motion to revise that judgment. This complication stems from the well-established principle that an appeal divests a trial court of jurisdiction over "those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); *see also* In re Grand Jury Proceedings Under Seal, 947 F.2d 1188, 1190 (4th Cir. 1991). This principle, however, is not without exceptions. Of most interest here, the district court retains jurisdiction over matters "in aid of the appeal." Grand Jury Proceedings, 947 F.2d at 1190. Thus, the question becomes whether a district court's consideration of a Rule 60(b) motion while an appeal from the underlying judgment is pending is "in aid of the appeal."

> We believe that it is. *See* Travelers Ins. Co. v. Liljeberg Enter., Inc., 38 F.3d 1404, 1408 n.3 (5th Cir. 1994); Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39, 41-42 (1st Cir. 1979). If we were to hold, as the Company urges and as two of our sister circuits have held, that an appeal divests a district court of all jurisdiction to entertain such motions, *see* Pittock v. Otis Elevator Co., 8 F.3d 325, 327 (6th Cir. 1993); Scott v. Younger, 739 F.2d 1464, 1466 (9th Cir. 1984), the initial review of a Rule 60(b) motion would have to be made at the appellate level; an appellate court would have to consider the motion and determine if it should even be entertained by the district court. This procedure flies in the face of the reality that the district court, which has lived with a case and knows it well, is far better situated than an appellate court to determine quickly and easily the possible merit of a Rule 60(b) motion. *See* Standard Oil Co. of California v. United States, 429 U.S. 17, 19 (1976) ("the trial court is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)."); *see also* [Puerto Rico v. S.S. Zoe Colocotroni, 601 F.2d 39, 41 (1st Cir. 1979)] (circuit court's "tentative screening decision would be neither binding on the district court, to whom, after all, the motion is addressed, nor particularly instructive to it").
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> If a Rule 60(b) motion is frivolous, a district court can promptly deny it without disturbing appellate jurisdiction over the underlying judgment. Swift denial of a Rule 60(b) motion permits an appeal from that denial to be consolidated with the underlying appeal. *See* Smith v. Reddy, 101 F.3d 351, 353 (4th Cir. 1996) (reviewing both the denial of a Rule 60(b) motion and the underlying judgment in one proceeding); 11 Charles Alan Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 2873 (2d ed. 1995). Such a procedure preserves judicial resources and eliminates unnecessary expense and delay, and therefore is surely in "aid of the appeal."

Id. at 890 [parallel citations omitted]. *Accord* Hoai v. Vo, 935 F.2d 308, 312 (D.C. Cir. 1991) (citing Reuber v. United States, 750 F.2d 1039, 1051 n.16 (D.C. Cir. 1984) (as amended Jan. 23, 1985); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 280 n.22 (D.C. Cir. 1971) *cert. denied* 406 U.S. 950 (1972)); Ingraham v. United States, 808 F.2d 1075, 1080-1081 (5th Cir. 1987); National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1076 n.5 (D.C. Cir. 1983).

> The competing concerns arising when a district court is inclined to grant a Rule 60(b) motion during the pendency of an appeal can be reconciled by requiring the district court to indicate its inclination to grant the motion in writing; a litigant, armed with this positive signal from the district court, can then seek limited remand from the appellate court to permit the district court to grant the Rule 60(b) motion. Efficiency counsels for this initial determination by the district court, while the necessity to avoid overlapping jurisdiction mandates limited remand by the appellate court before such action can be taken. This procedure both assists the parties and aids the appeal.

Fobian, 164 F.3d at 891. *See also* Hoai, 935 F.2d at 312 ("the District Court has not indicated any willingness to grant the appellants' motion, and remand is thus unwarranted").

As the District of Columbia Court of Appeals has repeatedly instructed that interpretation of this Court's Civil Rules is "aided by authorities which have interpreted the federal rule", Moore v. Moore, 391 A.2d 762, 768 (D.C. 1978), these federal decisions certainly afford this Court the latitude, if not the specific obligation, to consider the Respondent's present Rule 60(b) motion. *See also* Epps v. Howes, 573 F. Supp. 2d 180, 184 n. 4 (D.D.C. 2008); Lans v. Gateway 2000, Inc., 110 F. Supp. 2d 1, 3 (D.D.C. 2000) (following Fobian). Should the Court find the motion to have merit, then it should state such in writing so that the Respondent may seek a limited remand for the purpose of obtaining a vacation of the September 21, 2011 Consent Order and render the appeal moot. If the Court finds the motion to be without merit, it should deny the motion so that the issues therein may be then consolidated with the present appeal.

> By saving judicial resources and avoiding expense and delay, this procedure accords with the overarching mandate in the Federal Rules of Civil Procedure that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

Fobian, 164 F.3d at 891 (quoting FED. R. CIV. P. 1).

CONCLUSION

For these reasons, and for such other reasons as the Court finds to be good and sufficient cause, the Court should amend its April 19, 2011 Order and decide upon the merits of the Respondent's Motion to Vacate Void Consent Order.

Respectfully submitted, this 29th day of April, 2011,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion was served via United States Postal Service First Class Mail, postage prepaid, to the Petitioner's counsel of record at the following address, this 29th day of April, 2011.

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Matthew LeFande