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Civil Procedure - Appealability of an Order Granting or Denying a Rule 60 (b) Motion in Colorado - Trial Court Abused Its Discretion in Refusing to Set Aside a Default Judgment - Coerber v. Rath, 435 P.2d 228 (Colo. 1967)

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Civil Procedure - Appealability of an Order Granting or Denying a Rule 60 (b) Motion in Colorado - Trial Court Abused Its Discretion in Refusing to Set Aside a Default Judgment - Coerber v. Rath, 435 P.2d 228 (Colo. 1967)

COMMENTS

CIVIL PROCEDURE — APPEALABILITY OF AN ORDER GRANTING OR DENYING A RULE 60 (b) MOTION IN COLORADO — TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SET ASIDE A DEFAULT JUDGMENT. — *Coerber v. Rath,* 435 P.2d 228 (Colo. 1967).

Plaintiff Rath obtained a default judgment against the defendants on a claim arising out of the alleged tortious conduct of the defendant Charles Coerber, an employee of defendant Carl Coerber, while Charles was in the act of repossessing plaintiff's automobile. The default judgment was entered for failure of the defendants to answer certain interrogatories submitted by the plaintiffs. The trial court refused to vacate the default judgment, and defendants filed a writ of error in the Colorado Supreme Court. On review of the district court's refusal to set aside the default judgment, *held,* reversed and remanded; in view of the gross neglect of defendants' counsel, the trial court abused its discretion.[1]

The general policy of the law is to permit an appeal only from a final decision or judgment.[2] It is the purpose of this Comment to determine whether or not an order by a Colorado district court setting aside, or refusing to set aside, a judgment pursuant to rule 60(b), Colorado Rules of Civil Procedure,[3] is itself a final judgment and reviewable.

The decisions of the federal courts — "if the plaintiff's motion is within the ambit of rule 60(b) [Federal Rules of Civil Procedure], the denial of the motion is a final appealable judgment"[4] — reflects the disposition of the majority of jurisdictions in the United States.[5] Contrary to this position, Colorado decisions since *Green v. Thatcher*[6] and prior to *Coerber* have consistently held that an order granting or denying relief from a default judgment is *not* in itself a final judgment,[7] and that a "writ of error will not lie from a ruling subse-

[1] Coerber v. Rath, 435 P.2d 228 (Colo. 1967).

[2] 4 Am. Jur. 2d *Appeal and Error* § 50 (1962).

[3] Rule 60(b) provides in part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . ."

[4] Woodham v. American Cystoscope Co., 335 F.2d 551, 554 (5th Cir. 1964); *accord,* Greear v. Greear, 288 F.2d 466, 467 (9th Cir. 1961). *See* 6 J. MOORE, FEDERAL PRACTICE ¶ 55.09 (2d ed. 1966).

[5] *See* Annot., 8 A.L.R. 3d 1272 (1966).

[6] 31 Colo. 363, 72 P. 1078 (1903).

[7] Emanuel v. Fielding, 31 Colo. 440, 441, 72 P. 1079 (1903).

quently entered refusing to modify or change the final decree."[8] The significance of the *Coerber* decision is that the Colorado Supreme Court accepted defendants' petition for writ of error to an order of the district court denying the defendants' motion to vacate the default judgment.

Two recent Colorado Supreme Court decisions are helpful in interpreting the court's inconsistent action in *Coerber.* In *General Aluminum Corp. v. Arapahoe County District Court,*[9] the district court issued an order *granting* the defendant's motion to vacate a default judgment. The supreme court, refusing to review the lower court's order, held that "the only proper procedure to secure review of a trial court's order *granting* an application to set aside a default judgment is by writ of error *after final judgment.*"[10] The language of the court indicates that the *granting* of a motion to set aside a default judgment is not a final judgment in Colorado and is not subject to review.

The district court in *Henritze v. Borden Company,* [11] denied a rule 60(b) motion to set aside a judgment. Although the supreme court refused to reverse the decision of the lower court, because of the failure of Henritze to show a meritorious defense, it is significant that the court did review the record and particularly Henritze's motion to vacate.[12]

A possible explanation for the court's decision in *Henritze* is that the judgment itself and not the refusal of the district court to set the judgment aside was at issue. This explanation is not possible in *Coerber.*

In Colorado, a writ of error may be issued to any final judgment, provided that it is issued within 3 months of the entry of the judgment. [13] The writ of error in *Henritze* was timely with respect to the judgment entered by the district court and also with respect to that court's denial of the defendant's motion to have the judgment set aside. In *Coerber,* the default judgment was entered August 24, 1966, the denial of the motion to set aside the default judgment was entered October 7, 1966, and the writ of error was issued December 9, 1966.[14] Although the writ of error was issued more than 3 months after entry of the default judgment, it was issued within 3 months of the court's

[8] McMullin v. Denver, 133 Colo. 297, 300, 294 P.2d 918, 919 (1956); *accord,* First Nat'l Bank v. Follett, 46 Colo. 452, 457, 104 P. 954, 956 (1909); Green v. Thatcher, 31 Colo. 363, 364, 72 P. 1078 (1903).

[9] 439 P.2d 340 (Colo. 1968).

[10] *Id.* at 341 (emphasis added).

[11] 432 P.2d 2 (Colo. 1967).

[12] *Id.*

[13] COLO. R. CIV. P. 111(b).

[14] Record, vol. 3, Coerber v. Rath, 435 P.2d 228 (Colo. 1967).

denial of the Coerbers' 60(b) motion. Since rule 6(b) prohibits the Colorado Supreme Court from extending the period in which a writ of error may be sued out,[15] the court's ruling in *Coerber* must have concerned the district court's denial of the defendants' 60(b) motion.

In *Coerber,* the court's language referring to the gross neglect of defendants' counsel — "unusual, shameful and difficult situation . . . [h]opefully . . . one that will never be repeated"[16] — may indicate that the case was decided on an ad hoc basis. More than one-third of the opinion discussed in detail the gross neglect of the Coerbers' attorney. The holding of the court was that, under the circumstances, the trial court had abused its discretion in refusing to set aside the default judgment. However, when considered with *Henritze,* it becomes doubtful that the decision in *Coerber* was reached only to avoid injustice in one particular case. The language in *Henritze* — "we have reviewed the record and particularly Henritze's motion to vacate"[17] — lends strong support to the assertion that the supreme court would have reversed the district court's denial of the 60(b) motion had Henritze shown as meritorious a defense as did the defendants in *Coerber.*

The most logical interpretation of the *Coerber* decision is that the supreme court, in modifying the *Thatcher* line of decisions, ruled that an order by a lower court *denying* a motion to set aside a judgment pursuant to rule 60(b) is a final judgment and subject to review. However, the court in *Henritze* and *Coerber* has not abandoned its attitude that the lower court's decision "will not be disturbed on review unless there has been a clear abuse of discretion."[18] The holdings of the court in the two cases indicate that such clear abuse of discretion will be found where (1) the defendant alleges a meritorious defense, (2) the plaintiff will not be thereby prejudiced, (3) a writ of error can no longer be filed to the final judgment, and (4) substantial justice will be done by reversing the lower court's order.[19]

The results of a ruling that an order denying a 60(b) motion is a final reviewable judgment are dichotomous. This divergence necessarily results from a clash of the two principles that litigation must terminate within a reasonable time, but that justice must be accorded the parties.[20] Rule 60(b) provides for operation of relief

[15] COLO. R. CIV. P. 6(b).

[16] 435 P.2d at 228.

[17] 432 P.2d at 2.

[18] 4 V. DITTMAN, COLORADO PRACTICE § 60.5 (1966).

[19] Coerber v. Rath, 435 P.2d 228, 232 (Colo. 1967); Henritze v. Borden Co., 432 P.2d 2 (Colo. 1967).

[20] *See* Moore & Rogers, *Federal Relief From Civil Judgments,* 55 YALE L.J. 623 (1946).

where there is "any . . . reason justifying relief from the operation of the [final] judgment" provided that the motion is made within a reasonable time or, in some cases, within 6 months after final judgment.[21] Since a writ of error must be issued within 3 months of final judgment,[22] it is apparent that, prior to *Coerber,* after 3 months had expired, the right to review was lost, even though relief in the trial court under 60(b) was not yet foreclosed. By adopting the federal interpretation concerning reviewability of an order denying relief from a default judgment, *Coerber* has extended the period within which litigation will terminate. However, by deciding that the lower court's order denying a rule 60(b) motion is a final reviewable judgment as defined by the Colorado rules,[23] the supreme court has afforded a party who has a meritorious defense the opportunity to obtain substantial justice when it is obvious that the trial court has abused its discretion in denying the motion to set aside the judgment.

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CRIMINAL PROCEDURE — TAX FRAUD — APPLICABILITY OF MIRANDA SAFEGUARDS TO A CRIMINAL TAX SUSPECT. — *Mathis v. United States,* 391 U.S. 1 (1968).

Defendant Mathis was serving a prison sentence in the Florida State Prison for a conviction unrelated to tax charges. While a prisoner, a regular agent[1] of the Internal Revenue Service elicited from Mathis documents and oral statements concerning tax returns previously made by Mathis. Mathis was not advised "that any evidence he gave the Government could be used against him, and that he had a right to remain silent if he desired as well as a right to the presence of counsel and that if he was unable to afford counsel one would be appointed for him."[2] Suspecting fraud, the regular agent referred the case to the Intelligence Division of the Internal Revenue Service. When agents of the Intelligence Division contacted Mathis, he was advised of his rights. At his trial, Mathis, relying solely on *Miranda v. Arizona,*[3] sought to suppress the documents and statements arguing (1) that throughout the investigation there was a possibility

[21] COLO. R. CIV. P. 60(b).

[22] *Id.* rule 111(b).

[23] *Id.* rule 111(a)(1).

[1] A regular agent is an Internal Revenue Service agent concerned with civil tax audits as opposed to a special agent of the Intelligence Division of the Internal Revenue Service concerned primarily with criminal investigations of tax fraud and evasion. *See* H. BALTER, TAX FRAUD AND EVASION §§ 3.3, 3.3-1, 3.3-2 (3d ed. 1963).

[2] Mathis v. United States, 391 U.S. 1, 2-3 (1968).

[3] 384 U.S. 436 (1966).