

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: Mitchell J. & Tammie J. Parkhurst
Notice of Violation No. C90-0165

DECISION AND ORDER ON RESPONDENT'S MOTION TO VACATE
PARTIAL SUMMARY JUDGMENT

This matter came before Hearing Officer McMahon for oral argument on January 12, 1993 pursuant to the Motion to Vacate Partial Summary Judgment filed by Respondent on November 16, 1992. Said Motion requested that the Decision on Division's Motion for Partial Summary Judgment, entered as a final agency order on July 20, 1992, be vacated on the grounds of excusable neglect and misrepresentation pursuant to Rule 60(b) of the Superior Court Rules of Civil Procedure.

The Division of Freshwater Wetlands ("Division") has objected.

Background

A prehearing conference on this matter was held on June 4, 1992. The Prehearing Conference Record indicates that Respondents did not dispute the allegations set forth in the Notice of Violation ("NOV") but did contest the administrative penalty.

As Respondents' Counsel did not file a written Prehearing Memorandum on or before the prehearing conference, Hearing Officer Byrnes required such to be provided to the Division and to the Hearing Officer by June 19, 1992. Counsel managed to comply on November 16, 1992.

Mitchell J. & Tammie J. Parkhurst
Notice of Violation No. C90-0165
Page 2

On July 2, 1992 the Division filed its Motion for Partial Summary Judgment with the Administrative Adjudication Division ("AAD"). Said Motion represented that no genuine issue as to any material fact relating to liability or restoration existed and therefore sought partial summary judgment as to those issues, leaving only the administrative penalty matter outstanding. In its memorandum supporting the motion, the Division argued, in part, that as a matter of law it was entitled to complete restoration if it could prove the allegations set forth in the NOV. In the instant matter, the Division continued, all the relevant facts supporting the NOV had been agreed upon and therefore "it is axiomatic that the Department is entitled to full restoration of the affected wetlands." Department's Memorandum of Law in Support of Department's Motion for Partial Summary Judgment, p. 7.

Respondent did not object and this Hearing Officer issued a decision granting summary judgment as to Respondents' liability for altering freshwater wetlands without approval of the Division and as to the Order of Restoration; a hearing would be scheduled as to the matter of administrative penalty. The Decision on Division's Motion for Partial Summary Judgment was adopted by the Director as a final agency order on July 20, 1992.

The next event to take place was the issuance of the Notice of Administrative Hearing by the AAD Clerk on November 13, 1992. Three days later, on November 16, 1992, Respondent filed the Motion to Vacate Partial Summary Judgment with its supporting affidavit, and the long-awaited Pre-Hearing Memorandum.

The Division of Freshwater Wetlands filed a timely objection.

Arguments

Respondent's Motion and Affidavit seeks to have Partial Summary Judgment vacated on the grounds of excusable neglect and misrepresentation pursuant to Rule 60(b) of the Superior Court Rules of Civil Procedure. For "excusable neglect", Respondents' Counsel presents the following argument: that at the prehearing conference he conveyed to Division counsel and to Hearing Officer Byrnes that an issue to be considered at the hearing was whether the Parkhursts would be required to restore the altered wetlands given their intended laches defense; that on that basis he failed to read the Division's Motion for Partial Summary Judgment, assuming that it only dealt with the issue of liability to which he had no objection.

Counsel's argument on misrepresentation rests on the Division's statement on page 7 of its Memorandum of Law in Support of Department's Motion for Partial Summary Judgment that

Mitchell J. & Tammie J. Parkhurst
Notice of Violation No. C90-0165
Page 4

"all relevant facts supporting the Department's issuance of the NOVAO are agreed upon . . .", when the Division knew he intended to present a laches defense to restoration.

Division's Counsel has responded that the Parkhursts' attorney's "failure to read" the Motion for Partial Summary Judgment is not a basis for a finding of excusable neglect. Further, the Division denies any misrepresentation and points to the Parkhursts' counsel's statement in paragraph 10 of his affidavit supporting his Motion to Vacate: "That the stipulations agreed to at the prehearing conference may certainly stand as they are the embodiment of the facts which the two parties have agreed to of which I am intimately familiar."

DECISION AND ORDER

Section 8.00 of the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules") provides that parties in contested matters before the AAD may make such motions "which are permissible under these Rules and the R. I. Superior Court Civil Rules of Procedure (sic)" ("Court Rules"). Court Rule 60, which governs motions for relief from a final judgment, provides in pertinent part:

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final

judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . .

In interpreting this Rule, the Rhode Island Supreme Court has repeatedly held that relief from judgment is left to the sound discretion of the trial justice. Graham Architectural Products Corp. v. M & J, 492 A.2d 150 (RI 1985). It has defined excusable neglect that would qualify for relief from judgment as "generally that course of conduct which a reasonably prudent person would take under similar circumstances." Pari v. Pari, 558 A.2d 632 (RI 1989).

The Supreme Court has, on numerous occasions, stated what is not excusable neglect: "unexplained neglect, standing alone and without more." King v. Brown, 103 RI 154, 157 (1967); Vitale v. Elliott, 120 RI 328, 331, 387 A.2d 1379, 1381 (1978); Graham Architectural Products Corp. v. M & J, 492 A.2d at 151 (1985); Pari v. Pari, 558 A.2d at 635 (1989).

Case law has been much less specific, however, in setting forth what constitutes excusable neglect under Superior Court Rule 60(b).

Respondents' counsel has been quite clear in establishing his neglect and in explaining it: he thought he knew what the Motion--and later the Decision--said, and therefore he did not

Mitchell J. & Tammie J. Parkhurst
Notice of Violation No. C90-0165
Page 6

read them. He does not paint a particularly sympathetic (nor compelling) picture and, under such circumstances, would not meet the definition set forth in Pari. It is not, however, the "unexplained neglect, standing alone and without more" as also set forth in Pari, as well as in King, Vitale, Graham Architectural Products Corp., and others.

As for Respondents' argument of Division misrepresentation, a clear reading of the Division's Motion for Partial Summary Judgment indicates that it never represented any stipulation of fact for restoration, rather it presented the legal argument that liability had been established and, therefore, the Division was entitled to the full restoration remedy set forth in the NOV. The Division had argued that restoration involved no genuine issues of material fact which would prevent summary judgment, and had concluded that it was entitled to full restoration as a matter of law. Department's Memorandum of Law in Support of Department's Motion for Partial Summary Judgment, pp. 6-8. If Respondent had managed to read the motion, he could have objected and presented an argument that there were facts which could conceivably affect a full restoration order, or that as a matter of law, for some reason the Division was not entitled to summary judgment on the restoration issue. He did neither.

While counsel has not presented a particularly persuasive argument to re-open the restoration matter, it should also be considered that the Court has generally held that relief from default judgments should be given liberally in order to avoid denying litigants their day in court. Greco v. Safeco Ins. Co., 107 RI 195, 197, 266 A.2d 50 (1970). This matter is still pending before the AAD with respect to the administrative penalty assessment; there is no evidence that to also allow testimony on the restoration issue would prejudice the Division in any manner.

Taking all factors under consideration, I find that Respondents' counsel has made a marginal showing of excusable neglect and therefore the Decision on Division's Motion for Partial Summary Judgment should be vacated as to the matter of restoration. Summary judgment as to liability shall stand; hearing will be scheduled as to the now remaining issues of restoration and penalty.

Wherefore, it is hereby

ORDERED

1. The Motion to Vacate Summary Judgment is granted in part, as to the matter of restoration only.
2. The Order granting Division's Motion for Partial Summary Judgment as to Respondents' liability for altering freshwater wetlands without approval of the Division, which was adopted as a final agency order on July 20, 1992, remains in full force and effect.

Mitchell J. & Tammie J. Parkhurst
Notice of Violation No. C90-0165
Page 8

3. A hearing will be scheduled as to the remaining issues of restoration and administrative penalty.

Entered as an Administrative Order this 5th day of
February, 1993.

Mary F. McMahon

Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, RI 02908

L.O. Hand
Entered as a Final Agency Order this 3rd day of
February, 1993.

Louise Durfee

Louise Durfee
Director
Department of Environmental Management
9 Hayes Street
Providence, RI 02908

Mitchell J. & Tammie J. Parkhurst
Notice of Violation No. C90-0165
Page 9

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded via regular mail, postage prepaid to John F. Pellizzari, Esq., Oster & Groff, Smithfield Avenue, Lincoln, RI 02865-0087 and via interoffice mail to Patricia C. Solomon, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 4th day of ~~February~~, 1993. *March*

Josephine J. Ballard