

SUPREME COURT OF COLORADO

Sebastian v. Douglas County

366 P.3d 601 (Colo. 2016) · Decided February 29, 2016

OPINION

Sebastian v. Douglas County 366 P.3d 601

EID, J.

JUSTICE EID

delivered the Opinion of the Court. {1 Petitioner Fabian Sebastian filed an action under 42 U.S.C. § 1983 (2014) against respondents Douglas County, Colorado, the Douglas County Sheriff's Office, Douglas County Sheriff David A. Weaver, and Sheriff's Deputy Greg A. Black ("the County"), alleging that his Fourth Amendment right to be free from unreasonable Seizures was violated when he was attacked by a K-9 police dog. More specifically, he alleged that an intentional seizure occurred when the dog, released by the deputy to seize two suspects who had fled a vehicle and climbed over a fence, ran back to the vehicle and attacked him while he was sitting with his hands up in the back seat. 12 After Sebastian failed to respond to the County's motion to dismiss within the time limit, the trial court dismissed his claim. Sebastian then moved to set aside the judgment under C.R.C.P. 60(b)(1), alleging excusable neglect. Under *Goodman Assocs., LLC v. Mountain Properties LLC*, a trial court must consider three factors when determining whether to grant a Rule 60(b)(1) motion for excusable neglect: "(1) whether the neglect that resulted in entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious claim or defense; and (3) whether relief from the challenged order would be consistent with considerations of equity." 222 P.3d 310, 319 (Colo. 2010) (citing *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112, 1116 (Colo.1986)). The trial court denied Sebastian's motion on the ground that he had failed to demonstrate excusable neglect under the first factor. 13 In the initial appeal of the case, the court of appeals determined that although the trial court properly concluded that there was no excusable neglect under the first factor, it had failed to conduct a full three-factor analysis under *Goodman*; accordingly, the appellate court reversed and remanded the case for such an analysis. On remand, the trial court once again denied the motion, determining that Sebastian failed to demonstrate a meritorious claim under the second factor; and failed to show that the equities weighed in his favor under the third factor. This time the court of appeals affirmed the trial court, reiterating its earlier conclusion that Sebastian failed to show excusable neglect under the first factor, and further concluding that the trial court properly determined that Sebastian failed to plead a meritorious claim. + 4 Relevant here, the appellate court concluded that Sebastian failed to plead an intentional seizure as required by *Brower v. Cty. of Inyo*, 489 U.S. 593, 596-97, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). The court held that while an

intentional seizure occurs when a K-9 is released and attacks anyone in the surrounding "space," Sebastian was not in that "space" because the K-9 had to turn around and run back to the vehicle. Sebastian v. Douglas Cty., 2013 COA 132, ¶ 28, - P.3d - . The court concluded that because Sebastian failed to meet the first and second Goodman factors, the trial court properly denied his Rule 60(b)(1). motion. Id. at ¶ 36. We granted Sebastian's certiorari petition to consider the court of appeals' conclusion that he did not allege a meritorious claim, "[5 We affirm the court of appeals, but on narrower grounds. We decline to adopt the appellate court's "space" analysis, and instead hold that Sebastian failed to allege a meritorious claim because his allegations regarding an intentional seizure consist of only legal conclusions. We remand this case for further proceedings consistent with this opinion. e ~4. 1 6 According to Sebastian's complaint, he was a passenger in the back seat of a car as it pulled into a parking lot adjoining, James G. Toepfer Park in Douglas County. The driver of the car picked up two boys from the parking lot. Because of a disturbance in the park, the driver maneuvered the car off the parking lot and proceeded southbound on *604Venneford Ranch Road. The group was stopped by several deputies from the Douglas County Sheriff's Department, including Deputy Greg Black, 'The car pulled over to the curb, and the passengers were ordered to put their hands in the air. Sebastian complied with this order. T7 At this point, the two boys who had recently become passengers in the vehicle ran from the vehicle and jumped over a fence approximately ten feet to the right of the vehicle. Deputy Black released a "find and bite" K-9 police dog, and directed the K-9 to chase the two boys running away. The K-9 ran to the fence, but reached it only after the two had escaped over the fence. The K-9 then turned around, ran back to the vehicle, and attacked Sebastian, who was still seated in the back seat with his hands up. Deputy Black and. two other deputies had to pull the K-9 off Sebastian,. Sebastian suffered injuries to his left upper arm, elbow, and forearm. [8 Sebastian first filed a complaint in June 2009, and amended his complaint on October 7, 2009. The County filed a motion to dismiss pursuant to C.R.C.P. 12(b)(5) on November 20, 2009, claiming that (1) Sebastian had not set out facts which would warrant relief 'under section 1983, (2) Sebastian's claims were barred by qualified immunity, and (8) Sebastian's state law claims of negligence and outrageous conduct were barred by. the Colorado Governmental Immunity Act, §§ 24-10-101 to -120, C.R.S. (2015). T9 Sebastian filed a motion for extension of time on December 14, 2009. In this motion, Sebastian asked for a two-week extension, but requested the due date be moved to December 22, 2009, only one week after the initial deadline for a motion to dismiss. Sebastian failed to respond within either period, and filed his response to Douglas County's motion on January 3, 2010-after the district court had already dismissed his complaint under C.R.C.P. 121, § 1-15(8) for failing to file a responsive brief, and thereby confessing to Douglas County's motion. ' 10 On January 26, 2010, Sebastian filed a motion under C.R.C.P. 60(b)(1), stating that (1) his counsel had missed the filing deadline due to the paralegal in the counsel's office making an excusable mistake¹ in drafting the order, and that the three-day rule of C.R.C.P. 6(e) 2 extended the deadline to Monday, January 4; (2) although his state law claims should be

dismissed, his complaint adequately alleged a violation of his Fourth and Fourteenth Amendment rights by Deputy Black under section 1983; and (8) there would be no prejudice to Deputy Black if relief was granted to Sebastian under Rule 60(b)(1). Sebastian also argued that he would be prejudiced if he were unable to pursue his claim. 11 The trial court denied Sebastian's motion on March 10, 2010, finding that *Industrial Claim Appeals Office v. Zarlingo*, 57 P.3d 736, 737-38 (Colo. 2002), barred Sebastian's argument that Rule 6(e) extended the due date to January 4, that equitable considerations did not weigh in favor of Sebastian, and that Sebastian had been "dilatory" in pursuing the matter. The trial court did not consider any other factors. 12 The court of appeals reversed, finding that the trial court did not complete a full analysis of the three-factor inquiry of Rule 60(b)(1) under *Goodman*, which requires a trial court to analyze "(1) whether the neglect that resulted in the entry of the judgment was excusable; (2) whether the moving party has alleged a meritorious claim or defense; and (8) whether relief from the challenged judgment would be consistent with considerations of equity." *Sebastian v. Douglas Cty.*, No. 10CA0660, slip op. at 6, 2011 WL 1420290 (Colo.App. Apr. 14, 2011) *605(citing 222 P.3d at 319, 321). The court of appeals concluded that although the trial court was within its discretion to find that the cause of the neglect-counsel's misinterpretation of the three-day rule of Rule 6(e)-was not excusable, "whether excusable neglect ultimately justifies setting aside a judgment is a fundamentally broader, equity-based determination." *Id.* at 7-8. Thus, the court of appeals remanded the case to "reconsider plaintiff's Rule 60(b) motion and to enter new findings and conclusions in conformity with the requirements of *Goodman*." *Id.* at 11. T 18 On remand, the trial court again denied Sebastian's Rule 60(b)(1) motion. As to the first factor, the trial court again found that Sebastian failed to establish excusable neglect, - Regarding the second factor, whether the moving party has alleged a meritorious claim, the district court found that Sebastian had failed to state a claim under section 1983. Taking the allegations as true, the trial court found that Sebastian did not allege a meritorious claim under the Fourth Amendment, as he was not seized through a "governmental termination: of freedom of movement through means intentionally applied" under *Brower*, 489 U.S. at 597, 109 S.Ct. 1378. According to the trial court, Sebastian's amended complaint alleged only the K-9's "failure to distinguish" between the fleeing suspects and the victim-an allegation of negligence, not of intentional seizure. Finally, the trial court found that relief from the order would be inconsistent with notions of equity on the grounds that Sebastian's failure to follow deadlines impaired the court's ability to manage its docket, and the long period of delay after the incident would cause prejudice to the defendant. {14 The court of appeals affirmed the district court's judgment. It began by reiterating its earlier conclusion regarding the first *Goodman* factor-namely, that Sebastian's neglect in not filing a responsive brief in time was "not excusable." *Sebastian*, ¶ 15. The court of appeals then went on to analyze the second prong of *Goodman*, and found that Sebastian had not asserted a meritorious section 1983 claim because he had not asserted an actionable intentional seizure. *Id.* at ¶ 29. The court held that to plead a violation, of his Fourth Amendment right against unreasonable searches and seizures,

Sebastian needed to plead that he had "been seiz{ed] by means intentionally applied by a government actor." Id. at ¶ 21 (alteration in original) (quoting *Brower*, 489 U.S. at 596-97, 109 S.Ct. 1378). Relying on *Rodriguez v. City of Fresno*, 819 F.Supp.2d 937, 947 (E.D. Cal. 2011), *Vathekan v. Prince George's Cty.*, 154 F.3d 173, 176, 178 (4th Cir. 1998), and *Brown v. Whitman*, 651 F.Supp.2d 1216, 1225 (D.Colo. 2009), the court adopted a rule that an officer who releases a dog intends to seize anyone in the "space" in which the dog was released, Id. at ¶¶ 25-27. The court concluded, however, that because Sebastian's amended complaint alleged that the dog had to turn back to focus on him once the two boys had fled over the fence, he "was not in the direction (or 'space') to which the dog had been released," 'and therefore an intentional seizure had not been alleged. Id. at ¶¶ 28, 29. Accordingly, Sebastian failed to allege a meritorious claim. Id. at ¶ 36. [15 Finally, the court of appeals analyzed the third Goodman factor, whether relief from the challenged order would be consistent with considerations of equity, The court noted that the district court did not comply as fully as it might have with its previous mandate regarding the making of findings as to this factor. Id. at ¶ 34. However, the court noted that because the first and second factors weighed against granting relief, it could not "conclude. that the district court's decision refusing to vacate the judgment of dismissal was manifestly arbitrary, unreasonable, or unfair, and, thus, an abuse of discretion." Id. at ¶ 36. . 116 Sebastian petitioned this court to review the issue of whether the court of appeals erroneously concluded that he had not been seized for purposes of the Fourth Amendment.³ . *606IL. . 117 Three factors guide a trial court's consideration of a motion to set aside a default judgment for "excusable neglect" under Rule 60(b) (1); "(1) whether the neglect that resulted in entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious claim or defense; and (8) whether relief from the challenged order: would be consistent with considerations of equity." *Goodman*, 222 P.3d at 319 (citing *Buckmiller*, 727 P.2d at 1116). All three factors must "be weighed and considered together as a part of the question whether excusable neglect exists." Id. at 320. However, the "failure to satisfy just one of these factors [may be] so significant that it requires denial of the motion." Id. at 321. This weighing process is a matter within the trial court's discretion, and thus we review the denial of relief under Rule 60(b)(1) for an abuse of discretion, Id. at 314. Even if an appellate court might disagree with the trial court's disposition of a motion, it must respect the decision unless the movant proves that the trial court's judgment was "manifestly arbitrary, unreasonable, or unfair," Id. ~ {19 This case comes before us in an unusual procedural posture. As the court of appeals concluded, in an aspect of the case not challenged here, Sebastian's failure to respond to Douglas County's motion to dismiss under Rule 12(b)(5) cannot be deemed "excusable" under the first factor. Sebastian, ¶ 15. As to the third factor, the court of appeals decided not to consider his argument that equity weighed in his favor because it concluded that he failed to state a meritorious claim, the second factor, Id. at ¶ 36. Before us, Sebastian does not argue that the equities favor him, presumably believing that consideration of the trial court's treatment of the third factor would be for the court of appeals on remand if he is successful in his

challenge regarding the meritorious claim factor. Therefore, the only issue before us is the trial court's consideration of the meritorious claim factor. { 20 Given this unusual procedural posture, the parties disagree with regard to what standard of review should apply to our consideration of the trial court's application of the second factor. The County argues that we should apply an abuse of discretion standard, relying on the standard of review, discussed above, that applies to a trial court's ultimate conclusion to deny the movant's Rule 60(b)(1) motion. Sebastian, on the other hand, argues that we should apply a de novo standard of review, reasoning that consideration of whether a plaintiff has alleged a meritorious claim is a legal issue. - Neither side draws our attention to any precedent that answers this particular question, We need not resolve this question in this case, however, because we conclude that the trial court, under any standard of review, properly determined that Sebastian has not alleged a meritorious claim. 1 21 In determining whether a mov-ant has alleged a meritorious claim, we look to the pleadings. *Craig v. Rider*, 651 P.2d 397, 403 (Colo.1982) ("[F]actual support [of the meritorious claim] should be in the form of a tendered pleading."). We examine the factual allegations contained in the pleadings, not their "legal conclusions." *Goodman*, 222 P.3d at 319. Here, we examine the allegations made in Sebastian's amended complaint. - , 122 Sebastian alleged that Deputy Black "directed the K-9 to give chase" after the two boys who had fled the vehicle, The boys, however, climbed over a fence that was about ten feet away. At that point, the K-9 "made no effort to get over the structure and find the boys but turned and saw [Sebastian] seated in the back seat of his friend's car with his hands up." Next, "having failed to apprehend the boys who were running away, [the K-9] turned its attention to [Sebastian] . and attacked [him]." In his first claim for relief alleging excessive force, Sebastian states that by "directing the dog to subdue the occupants of the car without distinguishing those fleeing from those remaining in the vehicle Defendant Deputy Black intentionally *607. seized [Sebastian's] person" in violation of his Fourth Amendment rights, 128 In *Brower*, the U.S. Supreme Court held that under the Fourth Amendment, a section 1983 plaintiff must show, as a threshold matter, that he has been "seiz[ed]" by "means intentionally applied" by the government. 489 U.S. at 596-97, 109 S.Ct. 1378. The Court further elaborated that "q seizure occurs even when an unintended person or thing is the object of the detention or taking, see *Hill v. California*, 401 U.S. 797, 802-05, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971), cf. *Maryland v. Garrison*, 480 U.S. 79, 85-89, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987), but the detention or taking itself must be willful." *Id.* at 596, 109 S.Ct. 1378 (citations shortened). According to the Court, the "Fourth Amendment addresses misuse of power ... not the accidental effects of otherwise lawful government conduct." *Id.* (noting further that the writs of assistance to which the Fourth Amendment was directed "did not involve unintended consequences of government action"). In such a situation, it is "likely that a tort has occurred, but not a violation of the Fourth Amendment." *Id.*; see also *Apodaca v. Rio Arriba Cty. Sheriff's Dep't*, 905 F.2d 1445, 1447 (10th Cir.1990) ("[O]ne seized unintentionally does not have a constitutional complaint."). As applied here, the question is whether Sebastian's amended complaint sufficiently alleged an intentional

seizure, We find that it did not. 124 Sebastian alleged only that Deputy Black "directed the K-9 to give chase" after the fleeing boys. The remainder of the allegations focus on the K-9's conduct—for example, the allegation that "[the dog, having failed to apprehend the boys who were running away, turned its attention to" Sebastian. Sebastian's single allegation regarding Deputy Black does not amount to an allegation that the seizure here was the product of "means intentionally applied" under Brower. ¶ 25 Sebastian's first claim for relief—that "by directing the dog to subdue the occupants of the car without distinguishing those fleeing from those remaining in the vehicle," Deputy Black intentionally seized him—provides no further assistance. This allegation is a "legal conclusion," which we are to disregard. Goodman, 222 P.3d at 319. We also note that such a conclusion is belied by the factual allegations. As the trial court observed, it was the K-9 who "failed to distinguish" between those fleeing and those in the car, not Deputy Black, who, as alleged by Sebastian, "directed the K-9 to give chase" after the fleeing boys. Sebastian, in his brief to us, adopts the same interpretation, alleging "that Deputy Black "did not demonstrate [an appropriate] level of care in deploying his K-9, which was unable to discriminate between suspects and innocent parties." 11 26 Because Sebastian asserts only a legal conclusion regarding an intentional seizure, we hold that he failed to allege a meritorious claim under the Fourth Amendment for purposes of Rule 60(b)(1). 127 Sebastian argues that his allegation that Deputy Black intentionally released the K-9 to seize the fleeing boys describes sufficiently "willful" conduct to be a meritorious intentional seizure claim. According to Sebastian, because a K-9, once deployed, cannot distinguish between suspects and non-suspects, anyone bitten within the "space" in which the K-9 is released is subject to an intentional seizure. He argues that because he alleged that the fence was ten feet from the vehicle, he has adequately alleged that the K-9 was released within the relevant "space." The court of appeals essentially adopted this underlying reasoning, but concluded that, because the dog was deployed away from the vehicle and had to turn back to focus on Sebastian, Sebastian was not within the "space" of the dog's release. Sebastian, ¶ 28. "We decline to adopt this rationale. ¶28 The "space" terminology comes from *Rodriguez v. City of Fresno*, 819 F.Supp.2d 937, 947 (E.D. Cal. 2011), which determined that "when officers intentionally deploy a dog, which is incapable of discriminating suspects from bystanders and is trained to bite whoever it encounters, the officers effectively intend to seize anyone in the space where the dog was deployed." Importantly, however, *Rodriguez* involved a police bullet that hit a bystander, not a K-9, and the court held that the plaintiff failed to allege an intentional seizure because the plaintiffs "use of the word 'intentional' [was] conclusory in light of the facts proffered" in that case, *Id.* at 948. 229 Moreover, the primary case upon which *Rodriguez* relied for the "space" terminology addressed a situation not at issue here—that is, a case of mistaken identity. In *Vathekan v. Prince George's Cty.*, 154 F.3d 173, 178 (4th Cir. 1998), a police officer released a K-9 into a home in search of a burglar, giving the command, "Find him!" The court observed that it was "undisputed that once that command was given, the dog would bite anyone it found. In other words, a police dog cannot discriminate between a criminal and an

innocent person." *Id.* But the court went further to examine the officer's intent in releasing the K-9. As the court described it, the officer "knew there was a 'human presence' behind the interior door ... [and] believed at that time that the person behind that door might have been a burglar," *Id.* Thus, "(b)ly allowing the dog to pass through the interior door, [the officer] intended that the dog find and bite that person." *Id.* This situation constituted an intentional seizure under *Brower*, the court concluded, as the officer "intended the dog to seize [the plaintiff] because he thought she might be a burglar ... éven though she turned out to be innocent." *Id.* Indeed, the *Brower* Court cited *Hill* for its example of a "willful" seizure, a case that involved the intentional arrest of a man who turned out to be someone other than the suspect. *Id.* (citing *Hill*, 401 U.S. at 802-05, 91 S.Ct. 1106); 4 see also *Brown*, 651 F.Supp.2d at 1225 (finding an intentional seizure where officer released dog into the plaintiff's backyard "to locate any suspects hiding there"). €80 At most, then, *Vathekan* stands for the proposition that an intentional seizure occurs when a police officer intentionally releases a K-9 to apprehend a suspect, even when that person turns out to be an innocent bystander. It does not stand for the proposition that Sebastian advances, namely, that an intentional seizure occurs whenever an officer intentionally releages a K-9 in a particular "space" and the K-9 eventually apprehends someone in that "space." 131 We also note that cases such as this one are highly fact intensive and do not lend themselves to a general rule. In this case, however, there has been no factual development of any kind regarding Deputy Black's intention, the physical location of the incident, the K-9's training, the behavior of K-98 in general, or, for that matter, any issue raised in this case. Instead, we are left to examine the amended complaint, which, as noted above, includes nothing but a legal conclusion regarding an intentional seizure. Accordingly, we hold that, based on his amended complaint, Sebastian failed to allege an intentional seizure and therefore failed to allege a meritorious claim under *Goodman*. On this narrow ground, we affirm the court of appeals

III

32 For the reasons stated above, we affirm the court of appeals' decision. JUSTICE HOOD dissents, and JUSTICE MARQUEZ joins in the dissent. JUSTICE GABRIEL does not participate. . Although Sebastian's motion and notice of appeal (May 24, 2012) phrased his failure to respond as both "excusable neglect" and "mistake 'or inadvertence," it has been treated throughout this litigation as an allegation of "excusable neglect," or occasionally "excusable error" under Rule 60(b)(1), rather than "mistake." . At the time, Rule 6(e) provided that "[u]nless otherwise specifically ordered, whenever a party must or may act within a prescribed period after service is made under C.R.C.P. 5(b)(2)(B), (C), or (D), three calendar days shall be added after the prescribed period would expire under the rule that defines the length of the prescrxbed period." CRCP. 6 (2010). That rule has since been repealed, See C.R.C.P. 6 (2016). . We granted certiorari on the following question: Whether the government's willful use of a police dog that turned and attacked a nearby non-resisting untargeted suspect was a "sei*606zure" achieved "through means intentionally applied." . The *Brower* Court also included a of. cite to *Garrison*; which involved a

warrant that, seen "[w]ith the benefit of hindsight," described the place to be searched in terms "broader than appropriate." 480 U.S. at 85, 107 S.Ct. 1013.

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