

DISTRICT OF COLUMBIA COURT OF APPEALS

**District of Columbia v. Fraternal Order of Police Metropolitan Police
Labor Committee**

33 A.3d 332 (D.C. 2011) · No. 09-CV-255, 09-CV-256, 09-CV-257, 09-CV-737 · Decided December 22, 2011

OPINION

PER CURIAM.

PER CURIAM: This appeal arises from a complaint to enforce a request for documents that the Fraternal Order of Police/Metropolitan Police Labor Committee (“FOP”) submitted to the District of Columbia Metropolitan Police Department (“MPD”) pursuant to the District of Columbia Freedom of Information ACT (“FOIA”).¹ At the outset, the case presents the question whether, and if so to what extent, the trial court in a civil case — once its final order is on appeal— has authority to entertain a motion by the appellant for relief from that order under Superior Court Civil Rule 60(b)(6) based on allegedly “changed circumstances.” We conclude that the trial court correctly determined that it could not enter a ruling on the Rule 60(b) motion that would have the effect of altering the order on appeal, but misunderstood that it had intermediate authority to consider the merits of the motion and indicate whether it would grant relief if the case were returned to it.

We, therefore, remand the case so that the trial court may consider the motion on the merits in light of the changed circumstances the District has presented. Judge Ruiz’s concurrence addresses substantive FOIA and related issues to be decided on remand. Judge Ferren’s concurrence discusses various considerations applicable in delineating the authority of the trial and appellate courts with respect to post-appeal motions for relief from judgment.

I. On February 4, 2009, the trial court entered a final order imposing on the District of Columbia a schedule for “full production” of all documents — redacted to satisfy protected privacy interests — responsive to two of five FOIA requests by the FOP, for police trial board records and EEO investigation files.² The same day the court entered another order awarding attorney’s fees against the District, although in an amount substantially less than FOP had asked for.

The District appealed both orders; FOP cross-appealed the second one. The next month, on March 23, the District filed a Rule 60(b)(6) motion to “amend or clarify” the February 4 order, arguing that the FOIA requests “should be dismissed and judgment entered for the District” because: 1. “the request does not reasonably describe the records subject to disclosure”; *3342. “the records sought are exempt from disclosure,” as disclosure would “constitute a clearly unwarranted invasion of personal privacy”; and 8. “even if the documents sought are subject to disclosure, the

production is overly burdensome and causes an undue hardship on the [Metropolitan Police] Department”; or 4. “In the alternative, the Final Order should be amended... to clarify the scope of the request and documents sought... [and] to minimize the burden on the Department and the risk of violating officers’ privacy....

[The court should] allow the Department to produce a summary of each file[;]... or if the entire file is subject to production, the FOP should be ordered to pay a private vendor to redact and copy the records.” The trial court does not appear to have addressed the District’s first argument, and the District does not question that omission here.

However, at a hearing on June 12, 2009, the court rejected the District’s second and third arguments — the claimed “privacy exemption” and “undue hardship” — because the February 4 order was on appeal, under this court’s exclusive jurisdiction.

The judge said, “I’m certain that I could not amend or clarify... without so changing my final order and so challenging the appealed order as to affect the issues that [the] Court of Appeals must address in this case.” The trial judge characterized the fourth, alternative argument as the proffer of “new circumstances” reflecting the “bur-densomeness of production” that justified “changing the manner and timing and cost of production.” The judge said that she was “inclined to consider that claim” and “inclined to grant relief of some sort,” although she hadn’t “fully explored how.” She concluded, nonetheless, that “even that relief requires a remand of the case from the Court of Appeals,” because a change in “that piece of the order” would be “directly challenging the appealed order[,] and that I cannot do... unless the District seeks a remand of the case for that purpose.” The judge accordingly denied the Rule 60(b) motion in full on June 12, 2009, and the District appealed.

In response to the trial court’s June 12 order denying its motion, the District filed a motion in this court to stay the February 4 production order pending resolution of the District’s appeal. In the alternative, if this court were unwilling to grant a stay, the District cited the trial judge’s inclination to grant partial relief under Rule 60(b) and asked for a remand under *Smith v. Pollin*³ so that the trial court “will have jurisdiction to modify the terms of its production order.” This court granted the stay on July 23 and thus denied the motion for remand “as moot.” At that point attention to the jurisdictional issue under Rule 60(b) abated until we addressed it here on appeal of the trial court’s June 12, 2009 order.

II. In *Smith v. Pollin*, a case on which this court has long relied,⁴ the court had to determine the procedure to follow when a party in a civil case, after an appeal is pending, files in the trial court a Rule 60(b) motion to vacate the court’s judgment.

The D.C. Circuit Court of Appeals answered: *335It is clear that the District Court could not grant a motion for a new trial in a case which is pending in this court upon appeal. Jurisdiction of the

case is in this court while the appeal is pending....

We are of [the] opinion, therefore, that, when an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in this court for a remand of the case in order that the District Court may grant the motion for a new trial.[5] The court made clear that this Rule 60(b) analysis is not limited to motions alleging newly discovered evidence.⁶ By acknowledging with respect to the District's fourth argument that she was "inclined to consider... manner and timing and cost of production" and grant "relief of some sort," the trial judge came a long way toward announcing that she "will grant the motion,"⁷ at least in part, upon a remand.

One therefore might have expected the District to respond in a followup pleading (we put it colloquially): "Thank you, judge; if you'll go further to say that you're all but certain you'll grant us relief, we'll represent that to the Court of Appeals and ask for a remand under *Smith v. Pollin*." Or, even better, to make an assuredly clear-cut presentation to this court, the District's attorneys should have informed the trial judge that, under the express language of *Smith v. Pollin*, a remand would be available only if the trial court were to state, definitively, that the 60(b) motion "will" be granted; and that if she was merely "inclined" but not yet certain that she would grant "some relief," she should hold an evidentiary hearing to answer unequivocally, yes or no, so that the appellate court would know, to a certainty, whether it should remand under *Smith* (after a "yes") or retain the case (after a "no") for resolution of both the Rule 60(b) denial (assuming its appeal) and the appeal of the underlying February 4th order.

There was no jurisdictional bar to the trial court's conducting such a hearing.⁸ Indeed, in many if not most instances, such a hearing would be required before the trial court could determine, and an appellant could represent to this court, that the trial court "will" grant the relief requested if the case is remanded. At the time that it filed its 60(b) motion papers, however, the District apparently believed that the trial court could rule definitively without a remand.

Although the first footnote in the motion referenced *Smith v. Pollin* and ensuing cases in this court,⁹ the motion papers did not ask the trial court to help facilitate a *Smith* remand. Focusing on "changed circumstances" allegedly experienced during the District's efforts to comply with the February 4 order, the District instead expressed its belief that the *Smith* line of cases left jurisdictional room for the trial court to grant complete relief under 60(b) without a remand.

FOP attacked that contention in its opposition to the motion. It stressed the *336very reason for denying the District's motion which the trial court had identified, namely, that the motion "directly challenge^] the appealed order"¹⁰ and thus would improperly lodge simultaneous jurisdiction over the same order in two courts.

In its reply to FOP's opposition, the District recognized, in the words of our Carter decision, "the confusion and waste of time that might flow from having two courts deal with a single case at the same time."¹¹ But, citing the need for "common-sense flexibility,"¹² the District pressed on for a definitive ruling on the motion, asking for a trial court amendment to the February 4 order that "would either moot the appeal or at the very least narrow the issues for appeal." After the trial court denied the motion, the District asked this court for a remand under *Smith v. Pollin* only in the event that we were to deny the requested stay of the underlying order pending appeal.

Clearly, therefore, the District never asked the trial court, or this court, for the remand it seeks now on appeal of the 60(b) denial. Implicit in the District's position has been a perception that the trial court would rule favorably on the 60(b) motion first, followed by appellate court consideration of a pared-down, if not withdrawn, final order — a smoothly sequential, not simultaneous, dealing with the trial court's February ruling.

Conceivably, apart from what *Smith v. Pollin* requires, that sequence might be the practical reality in some cases, but one should not assume that the two courts would not be working on the February 4 order at the same time, particularly if the trial court required an extended evidentiary hearing on the motion to consider the changed circumstances. This is not a case, such as an ongoing proceeding in family court where a custody determination is on appeal but the trial court is asked to rule, while the appeal is pending, on other sundry matters involving the child, or on a material change in circumstances as specifically contemplated by statute.¹³ Here, rather, if the trial court could grant relief under Rule 60(b) while the appeal of the February 4 order remained lodged on this court's docket, it is entirely possible that both courts would be simultaneously reviewing allegations concerning the appealed order.¹⁴ That is exactly the situation which a *Smith v. Pollin* remand is intended to forestall.

In sum, without a remand, the District was not entitled to 60(b) relief, but it was entitled to court consideration of the merits of its motion. We are therefore left with a trial court failure to address the District's 60(b) motion, other than to deny it, among other reasons, because of a seeming misapprehension that the court lacked jurisdiction even to conduct a hearing on the merits of the motion until it received the power, by *337 way of a remand, to grant relief.

On the other hand, based on its own misunderstanding of the precise requirements of the law, the District did not press the trial court to examine its jurisdictional premise, so that the District could obtain a definitive expression from the trial court on how it would decide the 60(b) motion as the predicate necessary for seeking a *Smith* remand. Due to these mistaken assumptions about what the court could and could not do with respect to the 60(b) motion once the underlying order had been appealed, the trial court denied the motion without substantive consideration of the District's new argument and proffered evidence.

In the first footnote to its motion, the District did cite *Smith v. Pollin* and three subsequent cases from this court that discussed remand procedure in the context relevant here. The District construed them one way, erroneously contending that a remand was not required for trial court jurisdiction to grant relief, while FOP correctly maintained, and the trial court agreed, that the motion challenged the order on appeal and thus required a remand before relief could be granted.

Neither the parties nor the trial court, however, recognized that the court had intermediate authority to entertain the motion pending appeal, without a remand, limited only by the jurisdictional requirement that the actual grant of the announced relief had to await the mandate from this court returning the case to the trial court.¹⁵ Although the trial court's reason for denying the motion was technically correct, it was not fully informed, as it should have been, by consideration of the merits of the District's motion because of a lack of proper understanding by all involved of the court's authority to consider the new arguments made and evidence proffered in the District's motion.

See *Johnson v. United States*, 398 A.2d 354, 364 (D.C.1979) (noting that an informed choice must be drawn from a "firm factual foundation"). The confusion evident in these proceedings reflects the fact that our cases have not spoken with sufficient specificity on this issue. Given the primacy of protecting the privacy interests of third parties in this FOIA case,¹⁶ the proper course is to require the parties and the trial court to address the 60(b) motion anew with respect to the three issues the District has raised on appeal (see paragraphs 2, 3, and 4 *supra*).

We, therefore, reverse and remand the trial court's June 12, 2009 order denying the 60(b) motion. We also remand the underlying production and attorney's fee orders of February 4, 2009 for further proceedings consistent with this opinion (and thereby remove the four interrelated appeals in this case from our docket.).¹⁷ Case Remanded.. D.C.Code §§ 2-531 et seq.

(2001).. The FOIA requests and the nature of the documents requested are described in Judge Ruiz's concurrence.. 194 F.2d 349 (D.C.Cir.1952).. See, e.g., *In re M.O.R.*, 851 A.2d 503, 508 n. 3 (D.C.2004); *Umana v. Swidler & Berlin, Chartered*, 745 A.2d 334, 337 (D.C.2000); *Carter v. Cathedral Ave. Co-op., Inc.*, 532 A.2d 681, 684 (D.C.1987).. *Smith*, *supra* note 3, 194 F.2d at 350..

See *id.* (referring to "Rule 60(b), which treats of motions for new trials, upon newly discovered evidence among other things") (emphasis added).. *Id.* See *Carter*, *supra* note 4, 532 A.2d at 684 (noting that although "the filing of the notice of appeal indeed does divest the trial court of jurisdiction," that filing "does not divest the trial court of all power to act upon the motion")..

See *supra* note 4.. *M.O.R.*, *supra* note 4, 851 A.2d at 508 n. 3.. *Carter*, *supra* note 4, 532 A.2d at 684 n. 7.. *Id.* See *Sampson v. Johnson*, 846 A.2d 278, 279 n. 1 (D.C.2004) ("The pendency of the father's appeal... did not undermine the trial court's authority to entertain... motions... based on a material change of circumstances."); *In re S.C.M.*, 653 A.2d 398, 403 (D.C.1995) (characterizing

custody order on appeal as "an interim, experimental measure," "in the nature of a preliminary injunction," that did not preclude trial court from addressing other issues, including modification of custody because of changed circumstances)..

See *In re M.O.R.*, supra note 4, 851 A.2d at 508 n. 3 (D.C.2004) (noting that "the trial court is always free to consider and decide motions that are directed to changed circumstances and that do not directly challenge the appealed order ") (emphasis added).. See cases cited supra note 4.. See *Piper v. U.S. Dep't of Justice*, 374 F.Supp.2d at 78 (D.C.C.2005)..

The denial of the 60(b) motion was appealed in No. 09-CV-737. The parties also appealed the trial court's two orders issued February 4, 2009, one ordering that the District produce the documents and another awarding attorney's fees to FOP. These orders were appealed by the District in Nos. 09-CV-255 and -256, and cross-appealed by the FOP in 09-CV-257.