An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-887

Filed: 17 April 2018

Yancey County, No. 16 CVS 222

QUIET REFLECTIONS RETREAT, INC., Plaintiff,

v.

THE BANK OF NEW YORK MELLON, as Trustee for the Certificate holders of the CWALT, Inc., Alternative Loan Trust 2006-5T2 Mortgage Pass-Through Certificates, Series 2006-5T2, Defendant.

Appeal by Defendant from orders entered 24 April 2017 and 17 May 2017 by Judge Marvin P. Pope in Yancey County Superior Court. Heard in the Court of Appeals 21 March 2018.

Deutsch & Gottschalk, P.A., by Tikkun A.S. Gottschalk, for Plaintiff-Appellee.

Horack, Talley, Pharr & Lowndes, P.A., by Phillip E. Lewis and Amy P. Hunt, for Defendant-Appellant.

INMAN, Judge.

A plaintiff who made a good-faith effort to serve a corporate defendant by certified mail but who failed to address the summons to an officer, director, or agent of the defendant as required by the North Carolina Rules of Civil Procedure did not achieve sufficient service of process, so that the trial court's order entering default

judgment and denying a motion to set aside the clerk's entry of default must be vacated in part and reversed in part.

The Bank of New York Mellon ("Defendant") appeals from orders entered on 24 April 2017 and 17 May 2017 denying its Motion to Set Aside Entry of Default and its Motion for Relief, respectively. Defendant argues that entry of default and entry of the default judgment were improper because Quiet Reflections Retreat, Inc. ("Plaintiff") failed to comply with Rule 4(j)(6) of the North Carolina Rules of Civil Procedure for process for serving a corporation, and therefore the trial court did not have personal jurisdiction over Defendant. Defendant also contends, assuming personal jurisdiction was established, that the trial court abused its discretion by denying its Motion to Set Aside Entry of Default.

After careful review, we hold that Plaintiff's service of process was deficient and therefore the trial court lacked personal jurisdiction over Defendant; accordingly, we vacate the trial court's entry of default judgment and reverse and remand to the trial court with instruction to vacate the clerk's entry of default. In light of this ruling, we dismiss Plaintiff's appeal from the trial court's second order as moot.

Factual and Procedural History

This case arises out of a dispute involving easement rights over real property owned by Plaintiff in Yancey County, North Carolina (the "Plaintiff's Property"). Plaintiff owns two plats of adjacent land in Yancey County, the above mentioned

Plaintiff's Property, and a second property to which Defendant is the holder and beneficiary of an approximately $757,800 deed of trust (the "Foreclosed Property"). The Foreclosed Property is inaccessible except by a private road running over Plaintiff's Property.

In 2016, Defendant instituted a foreclosure action against the Foreclosed Property. In a "Notice of Hearing on Foreclosure of Deed of Trust" dated 1 February 2016, Defendant's address is listed as "4708 Mercantile Drive, Fort Worth, Texas 76137." However, the listed address was that of Residential Credit Solutions ("RCS"), retained by Defendant to service the loan. In March 2016, Defendant transferred the servicing of the loan from RCS to Ditech Financial, LLC ("Ditech"). The result of this transfer was that after March 2016, RCS was no longer authorized to accept service of process for Defendant at the 4708 Mercantile Drive address. Additionally, on 23 May 2016, RCS moved to 4500 Mercantile Plaza Drive, Suite 311, Fort Worth, Texas 76137.

Following the transfer of the loan servicing from RCS to Ditech, on or about 15 March 2016, Ditech sent out a "Welcome Letter" to all of the borrowers which provided a new address for correspondence. The Welcome Letter included an address to which payments due on or after 1 March 2016 should be sent: "Ditech Financial LLC, PO Box 7169, Pasadena, CA 91109-7169." The letter also provided an address

to which questions related to the transfer may be sent: "Ditech Customer Service, 1-800-643-0202, PO Box 6172, Rapid City, SD 57709-6172."

In an attempt to settle the Foreclosed Property's easement rights with respect to Plaintiff's Property, Plaintiff sought a declaratory judgment. Plaintiff filed a complaint (the "Complaint") on 19 September 2016, asking the trial court to determine the Foreclosed Property's rights to use Plaintiff's Property for ingress, egress, water, utility service, and any other purpose. The Complaint listed "THE BANK OF NEW YORK MELLON, as Trustee for the Certificate holders of the CWALT, Inc., Alternative Loan Trust 2006-5T2 Mortgage Pass-Through Certificates, Series 2006-5T2" as the defendant.

Plaintiff's attorney sent the Complaint and Summons—which was addressed to "THE BANK OF NEW YORK MELLON, 4708 Mercantile Drive, Fort Worth, TX 76137"—through certified mail with a return receipt requested. The return receipt was signed by an unknown recipient, and Plaintiff's attorney filed an affidavit of service on 3 October 2016 with the returned receipt attached. Plaintiff's attorney chose the address based upon the address listed for Defendant in the Foreclosure Action pleading filed in February 2016.

By 10 November 2016, Defendant had not filed a responsive pleading in the action. So Plaintiff obtained an entry of default against Defendant by the Yancey County Clerk of Superior Court.

On 31 January 2017, Defendant filed a Motion to Set Aside Entry of Default, and a hearing was set for 3 April 2017. The trial court denied Defendant's motion and entered a default judgment against Defendant. Defendant filed a Motion for Relief and to Stay the Judgment, which the trial court denied on 17 May 2017. Defendant timely appealed.

Analysis

Defendant argues that deficiencies in the service of process precluded the trial court from having personal jurisdiction over Defendant and that the trial court's default judgment should therefore be vacated. We agree.

Rule 4(j)(6) of the North Carolina Rules of Civil Procedure provides that service upon a domestic or foreign corporation may be done by one of the following ways:

> a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.
>
> b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, *addressed to the officer, director or agent to be served as specified in paragraphs a and b*.
>
> d. By depositing with a designated delivery service

> authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(6) (2015) (emphasis added). In addition to Rule 4(j)(6), N.C. Gen. Stat. § 1-75.10(4) provides that proof of service on a defendant in cases of service by registered or certified mail may be demonstrated with an affidavit of the serving party averring:

> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
>
> b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
>
> c. That the genuine receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10(4) (2015).

Our Court has held that a failure to comply with the "clear requirements of [Rule 4(j)(6)]" may be grounds for dismissal. *Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App. 180, 187, 609 S.E.2d 456, 460 (2005) ("A review of the summons demonstrates that [the] plaintiffs failed to designate *any* person authorized by Rule 4(j)(6) to be served on behalf of the corporate defendant . . . ." (emphasis in original)). In *Lane*, the plaintiffs' summons named "Winn-Dixie Charlotte, Inc. as [the]

defendant, and was addressed to 2401 Nevada Boulevard, Charlotte, North Carolina 28273." *Id.* at 181, 609 S.E.2d at 457. The summons, however, "failed to designate any person authorized to be served on behalf of the corporation[,]" and the signed postal receipt—which was filed along with an affidavit—indicated that a mailroom employee signed for the summons on 18 November 2002. *Id.* at 181, 609 S.E.2d at 457. Our Court, affirming the trial court's dismissal of the action pursuant to Rules 12(b)(4) (insufficiency of process) and 12(b)(5) (insufficiency of service of process), explained that "as the summons was defective on its face, a presumption of service would not exist even upon a showing that the item was received by registered mail." *Id.* at 187, 609 S.E.2d at 460.

Here, Plaintiff's Complaint and Summons are as facially defective as in *Lane*, because they list the defendant as "THE BANK OF NEW YORK MELLON" without addressing an officer, director, or agent authorized to be served on the corporation's behalf. *Lane*, 169 N.C. App. at 187, 609 S.E.2d at 460; *see also* N.C. Gen. Stat. § 1A-1, Rule 4(j)(6). This defect thus prevents the presumption of valid service from arising. Moreover, affidavits from RCS and Ditech suggest that the address to which Plaintiff mailed the Summons and Complaint was no longer affiliated with Defendant and Defendant's Motion for Relief identifies a specific address for service in Delaware. Accordingly, we hold that Plaintiff's failure to comply with Rule 4(j)(6) of the North

Carolina Rules of Civil Procedure resulted in the trial court's lack of personal jurisdiction over Defendant.

We recognize that Plaintiff's attorney made several good-faith attempts to serve Defendant through Defendant's counsel in the Foreclosure Action. However, our Court has held that "[a]n attorney who generally handles the legal affairs for an individual is not an agent of that person for the service of process *unless* he makes an appearance in the lawsuit for him." *Beck v. Beck*, 64 N.C. App. 89, 93, 306 S.E.2d 580, 583 (1983) (emphasis in original). Here, there is no evidence that Defendant's counsel in the Foreclosure Action had made any appearance in the matter before us at the time of the attempted service. And, with regard to any actual notice that may have resulted from notice to Defendant's counsel in the Foreclosure Action, "our Courts have repeatedly held that actual notice is not a valid substitute for service when that service does not comply with the statute." *Stack v. Union Reg'l Mem'l Med. Ctr., Inc.*, 171 N.C. App. 322, 328, 614 S.E.2d 378, 382 (2005) (citations omitted).

Conclusion

For the foregoing reasons, we vacate the default judgment, reverse the trial court's order denying Defendant's motion to set aside the clerk's entry of default, and dismiss as moot Defendant's appeal from the trial court's order denying the motion for relief from default judgment.

VACATED IN PART; REVERSED AND REMANDED IN PART; AND DISMISSED IN PART.

Judges ELMORE and BERGER concur.

Report per Rule 30(e).