An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-895

Filed: 17 April 2018

Iredell County, No. 16 CVD 2131

TIMOTHY B. LEONARD, Plaintiff,

v.

JOSE TOJEIRO, Defendant.

Appeal by defendant from order entered 4 April 2017 by Judge H. Thomas Church in Iredell County District Court. Heard in the Court of Appeals 12 April 2018.

Gottholm, Ralston & Benton, PLLC, by Matthew L. Benton, for plaintiff-appellee.

Homesley, Gaines, Dudley, & Clodfelter, LLP, by Leah Gains Messick and Christina E. Clodfelter, for defendant-appellant.

ZACHARY, Judge.

Defendant Jose Tojeiro appeals from an order denying his motion to set aside a default judgment under Rule 60 of the North Carolina Rules of Civil Procedure. Defendant has not shown the excusable neglect necessary to set aside the default judgment. We affirm the trial court's order denying his motion.

Plaintiff Timothy B. Leonard filed a complaint on 2 September 2016 alleging defendant had defaulted on a $35,000 promissory note executed on 25 August 2014.

A summons was issued that same day and served on defendant on 7 September 2016. Defendant did not file an answer to the complaint, and on 13 October 2016, plaintiff filed a motion for entry of default and motion for default judgment. The Assistant Clerk of Superior Court for Iredell County filed Entry of Default on 17 October 2016.

Defendant appeared *pro se* at the 7 November 2016 hearing in Iredell County District Court on the motion for default judgment and argued that he responded to the complaint by sending a letter to plaintiff's attorney refuting the allegations. Defendant admitted, however, that he only mailed his response to plaintiff's attorney and did not submit anything to the Clerk's Office. The trial court found plaintiff was entitled to a default judgment and entered judgment on 7 November 2016, awarding plaintiff $35,000 plus interest.

Defendant subsequently retained counsel and, on 17 November 2016, filed a motion to set aside the entry of default and the default judgment under Rules 55(d) and 60(b)(1) of the North Carolina Rules of Civil Procedure, on the grounds of good cause and excusable neglect. In support of his motion, defendant filed an affidavit in which he averred that he never signed a promissory note to plaintiff in the amount of $35,000. Defendant further averred that due to his busy work schedule, he and his long-term live-in girlfriend, Jessenia Perez, agreed that she would take care of preparing a response to the complaint and that they both "thought that it would suffice to mail the response to the [p]laintiff's attorney." Defendant also stated that

he "did not have an attorney as [he] had successfully defended previous claims [plaintiff] had filed against [him] without the services of an attorney." Although Ms. Perez prepared a response for defendant, he does not allege that she is an attorney at law. Ms. Perez executed an affidavit in support of defendant's motion that corroborated defendant's statements.

Defendant's motion to set aside the entry of default and the default judgment was heard on 13 January 2017. On 4 April 2017, the trial court entered an order denying defendant's motion after concluding defendant had not shown any excusable neglect to warrant setting aside the default judgment under Rule 60. Defendant filed notice of appeal from the trial court's order on 6 April 2017.

Defendant now argues that the trial court erred in denying his motion to set aside the entry of defendant and the default judgment. Defendant contends that he established excusable neglect in his failure to file a response to the complaint, because he relied on the assurances of Ms. Perez, with whom he had a spouse-like relationship. *See Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 426, 349 S.E.2d 552, 555 (1986) ("[U]nder the circumstances surrounding this case it was not unreasonable for [defendant] to rely on her husband's assurance that the matter had been taken care of and thus . . . her actions constitute excusable neglect."); *see also Hickory White Trucks, Inc. v. Greene*, 34 N.C. App. 279, 281-82, 237 S.E.2d 862, 864 (1977) (holding "[e]xcusable neglect was shown by the fact that [the defendant] relied

upon her husband's assurances that he would take care of the matter"). Defendant is mistaken.

"Although the decision to set aside a judgment under Rule 60(b)(1) is a matter within the trial court's discretion, what constitutes 'excusable neglect' is a question of law which is fully reviewable on appeal." *In re Hall*, 89 N.C. App. 685, 687, 366 S.E.2d 882, 884 (citations omitted), *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988). This Court has further held that "[w]hether neglect is 'excusable' or 'inexcusable' is a question of law which depends upon what, under all the surrounding circumstances, may be reasonably expected of a party to litigation." *Anderson Trucking Serv., Inc. v. Key Way Transp., Inc.*, 94 N.C. App. 36, 41, 379 S.E.2d 665, 668 (1989) (citation and quotation marks omitted). "However, the trial court's decision is final if there is competent evidence to support its findings and those findings support its conclusion. Whether the movant has shown excusable neglect must be determined by his actions at or before entry of judgment." *Hall*, 89 N.C. App. at 687, 366 S.E.2d at 884 (citations omitted).

In denying defendant's motion to set aside the default judgment, the trial court found in part:

> 11. Defendant has failed to meet his burden as to excusable neglect. He was not diligent in his pursuit of the matter; he disregarded the summons and its instructions, relied on others to prepare his response and deliver it, he did not consult an attorney . . . .

> 12. [Defendant] failed to give his defense the attention a person of ordinary prudence would give important business, and in doing so, negated his claim of excusable neglect.

These findings are supported by competent evidence before the trial court.

Defendant and Ms. Perez admit that they agreed she would prepare the response. Defendant and Ms. Perez also admit they both thought it would suffice to mail the response to the plaintiff's attorney, even though the form summons stated on its face that: (1) defendant was required to serve his answer on plaintiff's counsel; (2) defendant was required to file the original copy of his answer with the Iredell County Clerk of Superior Court; and (3) if defendant failed to answer the complaint, the plaintiff would apply to the Court for the relief demanded in the complaint. Defendant further averred that he had experience in navigating the procedural pitfalls of a civil lawsuit as he "had successfully defended previous claims [plaintiff] had filed against [him] without the services of an attorney." The complaint and summons were served on defendant on 7 September 2016, and he knew his answer to the complaint was due by 7 October 2016. *See* N.C. Gen. Stat. § 1A-1, Rule 5(d), 12(a) (2017). Ms. Perez presented defendant with her proposed response "[a]round the end of September" and informed defendant that she mailed it to plaintiff's attorney "[a] day or two later," at which time defendant "believed we had done what we legally needed to do with regards to the lawsuit."

Contrary to defendant's assertions on appeal, his averments establish that he did not rely on any assurances of Ms. Perez that she would handle the response to plaintiff's complaint. Ms. Perez is not alleged to be an attorney. Moreover, defendant was not only aware of the procedural requirements for responding to the complaint, he knew of and agreed with the actions taken to respond to the complaint. We hold that as a party to litigation, defendant's actions were wholly unreasonable and thus agree with the trial court that, as a matter of law, defendant's actions do not constitute excusable neglect. Accordingly, we affirm the trial court's order denying defendant's motion to set aside the default judgment.

AFFIRMED.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).