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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1230

Filed: 5 June 2018

Pitt County, No. 16 CVS 1967

CARLA MIDGETTE, By Geico, Subrogee, Plaintiff,

v.

ARNEL M. CONCEPCION, Defendant.

Appeal by plaintiff from orders entered 8 May 2017 and 25 August 2017 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 4 April 2018.

Chaplin & Gonet, by Malik Dixon, for plaintiff-appellant.

Ennis, Baynard, Morton, Medlin & Brown P.A., by Ron D. Medlin, Jr., for defendant-appellee.

DIETZ, Judge.

Plaintiff Carla Midgette appeals the trial court's orders dismissing her personal injury claims against Defendant Arnel Concepcion for insufficient service of process. Midgette also appeals the denial of her Rule 52(b) motion for additional findings of fact.

As explained below, we reject Midgette's arguments. The trial court's findings are supported by competent evidence in the record and those findings, in turn, support the court's conclusions of law. We therefore affirm the trial court's order dismissing Midgette's claims. Because the trial court's findings were sufficient to permit this Court to engage in a meaningful appellate review, we likewise reject Midgette's argument that the trial court erred by denying her Rule 52(b) motion to amend the order to include additional findings.

Facts and Procedural History

On 5 October 2013, Plaintiff Carla Midgette and Defendant Arnel Concepcion were involved in a motor vehicle collision in Carteret County. Midgette's insurance company compensated Midgette for her injuries and damages under her underinsured motorist coverage. After the accident, in March 2014, Concepcion left his home in Pensacola, Florida and moved back to the Philippines.

On 7 March 2017, Midgette attempted to locate Concepcion's address through DMV records. The DMV records indicated that Concepcion's address was 6228 Bienville Drive in Pensacola, Florida and that Concepcion had an active driver's license tied to that address.

On 24 August 2016, Midgette's insurance company, acting on her behalf, filed a subrogation action against Concepcion, seeking to recover the amounts it paid to Midgette under her underinsured motorist coverage. The complaint alleged that

Concepcion was operating his motor vehicle in a negligent manner on 5 October 2013 and, as a result, Concepcion's vehicle struck Midgette's vehicle causing Midgette to sustain bodily injury and monetary damages.

Midgette attempted to serve the summons and complaint on Concepcion by FedEx delivery to the 6228 Bienville Drive address. On 6 September 2016, FedEx delivered the summons and complaint to the 6228 Bienville Drive address and Elsa Concepcion, Concepcion's wife, signed for the delivery.

The statute of limitations period for filing an action relating to the 2013 collision expired on 5 October 2016. On 6 October 2016, counsel representing Concepcion contacted Midgette's counsel and inquired about the manner of service. Midgette's counsel informed Concepcion's counsel that service was completed via FedEx delivery to the 6228 Bienville Drive address on 6 September 2016. Concepcion's counsel again contacted Midgette's counsel on 17 October 2016 and stated that service was not proper because, at the time of the FedEx delivery, Concepcion no longer resided in Florida and had moved to the Philippines more than two years earlier. Midgette obtained an alias and pluries summons from the clerk of court on 18 November 2016, but did not attempt to serve it and it expired on 17 February 2017.

On 29 December 2016, Concepcion moved to dismiss Midgette's action against him for lack of personal jurisdiction and insufficient service of process. In support of

his motion to dismiss, Concepcion filed an affidavit stating that he "moved to the Philippines in March, 2014" and "has been a continuous resident of the Philippines since March, 2014." The affidavit further stated that the summons and complaint were never served on him. Concepcion also filed an affidavit from his wife, Elsa Concepcion, stating that Concepcion does not live with her, "moved out of 6228 Bienville Drive, Pensacola, Florida 32505 in March, 2014 and has not lived there since." The affidavit further stated that Concepcion "was not a resident, did not live nor was domiciled at 6228 Bienville Drive, Pensacola FL 32505" at the time Elsa Concepcion received the FedEx delivery and that the summons and complaint "has at no time been given" to Concepcion.

In response, Midgette filed an affidavit detailing efforts to obtain Concepcion's address and the information linking Concepcion to the 6228 Bienville Drive address. The affidavit stated that Concepcion's name was on the deed for the property, that Concepcion had an active voter registration in the county, that Concepcion was engaged in the business of renting property in Florida and had used the Escambia County court to obtain a landlord judgment, and that Concepcion had sold property in Florida in 2017.

After a hearing, the trial court dismissed the case with prejudice for insufficient service of process. The court found that, based on the affidavits of Concepcion and his wife, "on or about March 2014, the Defendant moved out of 6228

Bienville Drive, Pensacola, Florida and moved to the Philippines and since that time, 6228 Bienville Drive, Pensacola Florida has not been the Defendant's dwelling, house, or usual place of abode." The trial court further found that Concepcion's wife was not designated as an agent to receive service of process for Concepcion and that Concepcion "had not been a resident of 6228 Bienville Drive for over two years. He had not designated any individual as his agent to accept service of process and 6228 Bienville Drive was not his usual place of abode nor dwelling house." Based on these findings, the trial court concluded that delivery via FedEx to Elsa Concepcion at 6228 Bienville Drive was "not valid service on Arnel Concepcion pursuant to Rule 4." Because service was not valid and because the statute of limitations had expired, the trial court dismissed the action with prejudice.

On 18 May 2017, Concepcion served Midgette with the dismissal order. On 30 May 2017, Midgette filed a motion to correct the order and a Rule 52 motion for additional findings of fact. Midgette also filed notice of appeal from the dismissal order on 5 June 2017.

The trial court heard Midgette's motions on 28 July 2017 and made the requested correction to the dismissal order, changing the finding that "there have been no Alias and Pluries summons issued" to indicate that an alias and pluries summons was issued in November 2016. The court denied the motion for additional

fact findings as untimely. On 25 August 2017, Midgette filed notice of appeal from the denial of her Rule 52 motion.

Analysis

I. Dismissal with prejudice for insufficient service of process

Midgette first argues that the trial court erred in granting Concepcion's motion to dismiss for insufficient service of process. She contends that the trial court incorrectly applied the law governing service and that the court's decision was not supported by the evidence. As explained below, we reject these arguments.

The standard of review for a trial court's dismissal for insufficient service of process is *de novo*. *Locklear v. Cummings*, __ N.C. App. __, __, 801 S.E.2d 346, 348 (2017). "The trial court's factual determinations are binding on this court if supported by competent evidence." *New Hanover Cty. Child Support Enf't ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012). "We review *de novo* questions of law implicated by the denial [or grant] of a motion to dismiss for insufficiency of service of process." *Id.* "If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005).

Under Rule 4 of the North Carolina Rules of Civil Procedure, service may be effected by delivering process to the address of the party to be served, where it is

received either by the party to be served or by "a person of reasonable age and discretion." *Smith v. Am. Radiator & Standard Sanitary Corp.*, 38 N.C. App. 457, 459, 248 S.E.2d 462, 464 (1978), *overruled on other grounds by Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982). Delivery of a summons and complaint to a person at the residence of the party to be served who is not the addressee "raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the addressee's house or usual place of abode." N.C. R. Civ. P. 4(j2)(2).

"When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based." *N. State Fin. Co. v. Leonard*, 263 N.C. 167, 170, 139 S.E.2d 356, 358 (1964). "Although a return of service showing service on its face constitutes *prima facie* evidence of service, such showing can be rebutted by the affidavits of more than one person showing unequivocally that proper service was not made upon the person of the defendant." *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996). "The burden is on Defendant to rebut this presumption by clear and unequivocal evidence that consists of more than a single contradictory affidavit or the contradictory testimony of one witness." *Gibby v. Lindsey*, 149 N.C. App. 470,

473, 560 S.E.2d 589, 592 (2002).

Our Supreme Court has held that an action was properly dismissed for lack of service where "[t]he affidavits of defendant [], his son, and his former wife, which were before the trial court, show that [defendant's] son was the person who was served with summons and complaint . . . and that defendant [] has never been served with summons and complaint as required by the Rules of Civil Procedure." *Grimsley*, 342 N.C. at 545–46, 467 S.E.2d at 94. In contrast, this Court found that the defendant failed to rebut the presumption of valid service where the defendant's mother accepted service at her home and the defendant's mother testified that "her home was Defendant's primary residence" at the time she accepted service. *Gibby*, 149 N.C. App. at 473–74, 560 S.E.2d at 592. We held that "the evidence failed to establish that Defendant had assumed a new dwelling house or usual place of abode" by the time of service. *Id.* Additionally, this Court has found that service received by a defendant's wife was sufficient under Rule 4 where "certified mail which included the summons and complaint was addressed to the defendant at his law office and was received and signed for by defendant's wife [], an employee of the law firm who regularly received, opened, and distributed the daily mail within the office." *Fender v. Deaton*, 130 N.C. App. 657, 658, 503 S.E.2d 707, 707 (1998). In that case, the defendant's wife "placed [the summons and complaint] into the defendant's secretary's box who in turn placed it on defendant's desk" and the defendant admitted that he received it. *Id.*

Here, the affidavits of both Concepcion and his wife unequivocally stated that (1) Concepcion was never served with the summons and complaint; (2) that his wife never gave him the summons and complaint; (3) that Concepcion never received the summons and complaint; and (4) that Concepcion has not lived at the 6228 Bienville Drive address in Pensacola since he moved to the Philippines in March 2014.

Based on the affidavits, the trial court made findings of fact that Concepcion lived at 6228 Bienville Drive at the time of the accident in October 2013, but that "on or about March 2014, the Defendant moved out of 6228 Bienville Drive, Pensacola, Florida and moved to the Philippines and since that time, 6228 Bienville Drive, Pensacola, Florida has not been the Defendant's dwelling, house or usual place of abode."

The trial court further found that the summons and complaint were delivered to 6228 Bienville Drive by FedEx on 6 September 2016, addressed to Concepcion, and Elsa Concepcion received and signed for the delivery. And on "October 17, 2016, counsel for the Defendant informed counsel for the Plaintiff that the service of process, by FedEx, on Elsa Concepcion at 6228 Bienville Drive, Pensacola, Florida was not sufficient service for Arnel Concepcion." The trial court found that "[a]t no time was Elsa Concepcion designated as the agent to receive service of process for the named Defendant" and "[p]ursuant to the affidavits submitted by Arnel and Elsa Concepcion, on September 6, 2016, the Defendant had not been a resident of 6228

Bienville Drive for over two years" and "6228 Bienville Drive was not his usual place of abode or dwelling house."

These findings support the trial court's conclusion that "[t]he FedEx delivery of the summons and complaint on Elsa Concepcion at 6228 Bienville Drive, Pensacola, Florida was not valid service on Arnel Concepcion pursuant to Rule 4." The trial court properly determined that the presumption of valid service established by the FedEx delivery was "rebutted by the affidavits of more than one person showing unequivocally that proper service was not made upon the person of the defendant." *Grimsley*, 342 N.C. at 545, 467 S.E.2d at 94. The affidavits support the trial court's findings that Concepcion "had not designated any individual as his agent to accept service of process and 6228 Bienville Drive was not his usual place of abode nor dwelling house."

To be sure, Midgette presented some contrary evidence linking Concepcion to the Florida address after 2014. But "[t]he findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if, *arguendo,* there is evidence to the contrary." *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983). Here, the trial court's findings were supported by competent evidence from the affidavits of Concepcion and his wife. Thus, notwithstanding Midgette's competing evidence, we are bound by the trial court's findings. Those findings, in turn, support the trial court's legal conclusion

that the presumption of service was rebutted and the only attempt at service before the expiration of the statute of limitations was ineffective. Accordingly, the trial court did not err in dismissing Midgette's action for insufficient service of process.

II. Denial of Rule 52 motion for additional findings of fact

Midgette next argues that the trial court erred in denying her Rule 52(b) motion for additional findings of fact. Midgette contends that the trial court erroneously concluded that the motion was untimely. As explained below, we reject this argument because, even if the trial court had addressed the Rule 52(b) motion, Midgette has not shown that the court's additional findings would have affected the result.

A trial court's ruling on a Rule 52(b) motion for additional findings of fact is reviewed for abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "The primary purpose of a Rule 52(b) motion is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court. If a trial court has omitted certain essential findings, a motion under Rule 52(b) can correct this oversight and avoid remand by the appellate court for further findings." *Branch Banking & Tr. Co. v. Home Fed. Sav. & Loan,* 85 N.C. App. 187, 198–99, 354 S.E.2d 541, 548 (1987).

Here, Midgette moved for additional findings under Rule 52(b) concerning the court's determination that Concepcion overcame the rebuttable presumption of

service under Rule 4 and, specifically, requested additional findings to support Findings of Fact 7 and 11, in which the court determined that Concepcion's wife was not designated as an agent to receive service on behalf of Concepcion.

As explained above, the trial court's findings on this issue are supported by competent evidence, and those findings are sufficient to support the trial court's conclusions of law. Thus, we find no error in the trial court's denial of the Rule 52(b) motion because additional findings on this issue would not have impacted our appellate review of this issue. To the extent Midgette was not seeking to supplement the existing findings with additional findings, but instead to alter or amend those findings because Midgette believed they were erroneous, the proper vehicle for relief was a motion to alter or amend the judgment, not a motion for additional findings of fact.

Conclusion

For the reasons discussed above, we affirm the trial court's orders.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).