An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1366

Filed: 19 June 2018

Lincoln County, No. 16 CVD 1442

SHERRY WOLFE, Plaintiff,

v.

JOHN POINDEXTER, Defendant.

Appeal by defendant from order entered 24 July 2017 by Judge Jeannette R. Reeves in Lincoln County District Court. Heard in the Court of Appeals 15 May 2018.

No brief filed for plaintiff-appellee.

Law Office of Blair E. Cody, III PLLC, by Blair E. Cody, III, for defendant-appellant.

ARROWOOD, Judge.

John Poindexter ("defendant") appeals from an order denying his Rule 60(b) motion for relief from judgment. For the following reasons, we reverse.

I. Background

On 25 December 2016, Sherry Wolfe ("plaintiff") verified a complaint and motion for domestic violence protective order against defendant. A magistrate allowed her motion, and entered an ex parte domestic violence order of protection

that same day. The magistrate noticed the matter for hearing before the trial court for 28 December 2016. The original summons does not appear in the record.

On 28 December 2016, the case came on for hearing before the Honorable Larry J. Wilson in Lincoln County District Court. The trial court continued the ex parte domestic violence order of protection, and set the date for the hearing of plaintiff's complaint for 3 January 2017. Although the trial court specified that defendant lived in both Hickory, North Carolina, and also in Charleston, South Carolina, the court only issued notice to defendant's North Carolina address.

On 3 January 2017, the matter came for hearing before the Honorable K. Dean Black. Defendant had not been located for service, and did not attend the hearing. The trial court continued the ex parte domestic violence order of protection and hearing to 30 January 2017. On that same day the clerk issued an alias and pluries summons and a notice of hearing to defendant.

Defendant did not attend the 30 January 2017 hearing, and the trial court found he remained unserved in the matter. The trial court continued the ex parte domestic violence order of protection, and set the date for the hearing of plaintiff's complaint for 20 February 2017.

Subsequently, the court received a return of service on 7 February 2017 that showed defendant had been served with "the notice of hearing on domestic violence protective order, ex parte domestic violence order of protection, notice of ex parte

hearing, complaint and motion[.]" The service occurred on 26 January 2017 at 6:55 p.m. in South Carolina by a sheriff "delivering to the defendant . . . a copy of [the] Notice of Hearing and a copy of the Complaint[.]" However, there is no indication that the alias and pluries summons was served. In the record, the summons is blank where it should show a return of service. Nothing in the record indicates that defendant was served with a summons prior to the 30 January 2017 hearing.

On 20 February 2017, the matter came on for hearing before the Honorable Jeannette R. Reeves in Lincoln County District Court. There is no indication in the record that any effort was made to notify defendant of this hearing, and defendant did not attend. Nonetheless, Judge Reeves entered a domestic violence order of protection against defendant, set to expire on 20 February 2018. Neither the court nor plaintiff ever served defendant with the 20 February 2018 Order.

On 5 June 2017, defendant filed a motion for relief from the 20 February 2017 Order. He requested the court determine whether the trial court had subject matter jurisdiction over the matters alleged in plaintiff's complaint and personal jurisdiction over defendant when it entered the domestic violence order of protection against defendant on 20 February 2017. Judge Reeves heard the Rule 60 motion on 26 June 2017. After review of the court file, arguments of counsel, and an affidavit submitted by defendant, the trial court found, in pertinent part:

> 9. The Defendant has not shown to the Court by preponderance of the evidence that he was not served

> with the documents listed on the Affidavit of Service for the Court date of January 30, 2017.
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> 10. The Defendant was not served with any Notice of Hearing or Ex Parte Domestic Violence Order of Protection issued on January 30, 2017 for the hearing on February 20, 2017, said hearing to be on the merits of the Plaintiff's Complaint.
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> 11. There is no indication in the file that any effort was made by the Plaintiff or the Clerk of Court to notify the Defendant of the February 20, 2017 hearing.
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> . . . .
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> 13. The Defendant was not served with the February 20, 2017 Order. Said Order was mailed to the Defendant by the Lincoln County Clerk of Court and was returned to the Clerk of Court and is currently present in the file in the envelope indicating that it be "return(ed) to sender-insufficient address, unable to forward". Said Order was mailed to 650 Enterprise Blvd., Charleston, SC. That address does not include the Defendant's apartment number and as a result, was likely returned for this reason.
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> 14. Had the Defendant been present on January 30, 2017, after having been served with the Ex Parte Order which was in effect until January 30, 2017, and the other documents listed in the Affidavit of Service, the Defendant would have known and would have been aware of the February 20, 2017 hearing date on the Plaintiff's Complaint.

Based on these findings, the trial court refused to set aside the 20 February 2017 order.

Defendant appeals from the order on his Rule 60 Motion.

II. Discussion

On appeal, defendant argues his due process rights were violated when the permanent domestic violence order of protection was entered against him because he had no notice of the 20 February 2017 hearing. He also argues that the trial court erred when it denied relief from the domestic violence order of protection under Rule 60 of the North Carolina Rules of Civil Procedure.

However, defendant only filed notice of appeal from the denial of his Rule 60(b) motion for relief, and, therefore, we do not have jurisdiction to review the underlying judgment entered 20 February 2017. *See Milton M. Croom Charitable Remainder Unitrust v. Hedrick*, 188 N.C. App. 262, 270, 654 S.E.2d 716, 722 (2008) ("[N]otice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review.") (quoting *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990)). Accordingly, we confine our review to whether the trial court abused its discretion when it denied defendant's Rule 60(b) motion. *See id.* at 266, 270, 654 S.E.2d at 719, 722.

Defendant argues the trial court erred when it denied him relief from the domestic violence order of protection under Rule 60 because the trial court lacked jurisdiction to enter the 20 February 2017 order. We agree because defendant was never served with a summons.

A summons must be issued and served on any defendant in an action for a domestic violence protection order. N.C. Gen. Stat. § 50B-2 (2017); *accord* N.C. Gen. Stat. § 1A-1, Rule 4 (2017). Unless waived, service of summons is a jurisdictional requirement. *Latham v. Cherry*, 111 N.C. App. 871, 873, 433 S.E.2d 478, 480 (1993) ("The summons constitutes the means of obtaining jurisdiction over the defendant[.]") (citation omitted); *see Hale v. Hale,* 73 N.C. App. 639, 641, 327 S.E.2d 252, 253 (1985) (citation omitted). A court order made without personal jurisdiction is void. *Freeman v. Freeman,* 155 N.C. App. 603, 606-607, 573 S.E.2d 708, 711 (2002), *disc. review denied,* 357 N.C. 250, 582 S.E.2d 32 (2003). Rule 60(b)(4) provides movants relief from orders that are void for lack of jurisdiction. N.C. Gen. Stat. § 1A-1, Rule 60(b)(4); *see Allred v. Tucci,* 85 N.C. App. 138, 142, 354 S.E.2d 291, 294, *disc. review denied,* 320 N.C. 166, 358 S.E.2d 47 (1987).

In this case, defendant was never served with a summons. Thus, because defendant did not otherwise waive service of process, the trial court lacked jurisdiction over defendant when it issued the 20 February 2017 domestic violence protection order. *See* N.C. Gen. Stat. § 1-75.7 (2017); *Grimsley v. Nelson*, 342 N.C. 542, 546, 467 S.E.2d 92, 94 (1996) (citation omitted). As a result, the order was void, and the trial court abused its discretion when it did not provide defendant relief from the order under Rule 60(b)(4).

REVERSED.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).