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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1382

Filed: 7 August 2018

Avery County, No. 15-CVS-298

ALBERT GERSING, Plaintiff,

v.

REAL VISION, INC., Defendant.

Appeal by Defendant from order entered 28 August 2017 by Judge R. Gregory Horne in Avery County Superior Court. Heard in the Court of Appeals 3 May 2018.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for plaintiff-appellee.

Gerald R. McKinney, P.A., by Gerald R. McKinney, for defendant-appellant.

MURPHY, Judge.

While intended as a safeguard, Rule 60(b) will not prompt judicial intervention where a party has neglected its case or failed to fully cultivate an argument. Defendant, Real Vision, Inc., defaulted on a purchase money promissory note secured by a Deed of Trust. After the default, Plaintiff, Albert Gersing, the holder of the promissory note, foreclosed on the property and sought a deficiency judgment for the remaining balance. Nine months after the trial court entered summary judgment for

Plaintiff on the deficiency action, Defendant filed a Rule 60(b) motion to set aside the judgment. After denial of its motion, Defendant appealed. Defendant's appeal centers on its former attorney's failure to either allege or inform Defendant of a potential affirmative defense under N.C.G.S. § 45-21.38, which prohibits deficiency judgments on purchase money promissory notes secured by land. Defendant alleges judicial intervention is necessary because its former attorney's actions constitute excusable neglect under Rule 60(b)(1), or otherwise fall under the discretionary purview of Rule 60(b)(6). We are unpersuaded by Defendant's arguments and affirm the trial court's denial of Defendant's Rule 60(b) motion.

BACKGROUND

Defendant purchased land from Woodland Holdings, Inc. ("Woodland") on 5 January 2007. Defendant financed the acquisition through a promissory note and Deed of Trust for the entirety of the purchase price of $305,000.00, naming Woodland as beneficiary. On 30 June 2015, Woodland assigned its interest in the promissory note to Plaintiff, the President of Woodland. Defendant defaulted on the promissory note, and Plaintiff initiated foreclosure proceedings under the Deed of Trust.

At the foreclosure auction on 30 July 2015, Plaintiff was the highest bidder at $125,00.00. On 14 December 2015, Plaintiff filed a complaint to initiate a deficiency judgment for the remaining balance of the promissory note, $182,889.91. On 5 July 2016, after Plaintiff filed a motion for summary judgment, Defendant's attorney

withdrew from the case due to a conflict of interest. As a result, the trial court rescheduled the hearing on the motion and subsequently entered summary judgment in favor of Plaintiff. Defendant did not appeal the entry of summary judgment.

Nine months after the entry of summary judgment, Defendant filed a Rule 60(b) motion to set aside the judgment. Defendant alleged its former attorney's actions constituted either excusable neglect under Rule 60(b)(1) or "[another] reason justifying relief from the operation of the judgment" under Rule 60(b)(6), therefore meriting the setting aside of the trial court's summary judgment. N.C.G.S. § 1A-1, Rule 60(b) (2017). The trial court denied Defendant's Rule 60(b) motion. Defendant timely appealed.

ANALYSIS

Defendant's appeal of its denied Rule 60(b) motion centers on its former counsel's failure to either allege or otherwise inform Defendant of the affirmative defense available under N.C.G.S. § 45-21.38, prohibiting deficiency judgments on purchase money promissory notes secured by land, such as the one executed between Defendant and Woodland. *Ingle v. McCurry*, 243 N.C. 65, 89 S.E.2d 745 (1955) (stating that N.C.G.S. § 45-21.38 may be used as an affirmative defense to deficiency judgments on purchase money promissory notes); N.C.G.S. § 45-21.38 (2017).

Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C.G.S. § 1A-1, Rule 60(b).

"The decision whether to grant relief under Rule 60(b) rests firmly within the trial court's discretion and absent an abuse of that discretion, we will not disturb its judgment." *Chandak v. Electronic Interconnect Corp.*, 144 N.C. App. 258, 262, 550 S.E.2d 25, 28 (2001). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

A. Rule 60(b)(1)

A successful Rule 60(b)(1) motion requires proof of "[m]istake, inadvertence, surprise, or excusable neglect." N.C.G.S. § 1A-1, Rule 60(b). "Excusable neglect is something which must have occurred at or before entry of the judgment, and which *caused* it to be entered." *Norton v. Sawyer*, 30 N.C. App. 420, 424, 227 S.E.2d 148, 152 (1976) (emphasis added) (citing *Lumber Co. v. Cottingham*, 173 N.C. 323, 327, 92 S.E. 9, 11 (1917)). Therefore, excusable neglect on the part of an attorney occurs only when the attorney's actions were the cause of the entry of judgment. *Id.*

Here, it was not an abuse of discretion for the trial court to determine that the previous attorney's actions were not the cause of the entry of summary judgment. *See Briley*, 348 N.C. at 547, 501 S.E.2d at 656; *Norton*, 30 N.C. App. at 424, 227 S.E.2d at 152. After Defendant's attorney withdrew from the case, Defendant failed to retain new counsel before the hearing on the motion for summary judgment occurring approximately three weeks later. Further, Defendant failed to argue the affirmative defense of the Anti-Deficiency Statute at the summary judgment hearing, or to even appear at the hearing.[1] *Ingle*, 243 N.C. 65, 89 S.E.2d 745; *see The News & Observer Publ'g Co. v. McCrory*, __ N.C. App. __, __, 795 S.E.2d 243, 250 (2016) (stating that an affirmative defense may be raised for the first time during a hearing on a motion for summary judgment). It was neither arbitrary nor unreasoned for the trial court to find that the actions of Defendant's previous attorney were not the cause of the entry of summary judgment for Plaintiff and to therefore deny the Rule 60(b)(1) motion. *Briley,* 348 N.C. at 547, 501 S.E.2d at 656. The trial court's denial of Defendant's Rule 60(b)(1) motion was therefore not an abuse of discretion.

B. Rule 60(b)(6)

Additionally, Defendant challenges the trial court's denial of its Rule 60(b)(6) motion to set aside judgment. Rule 60(b)(6) "empowers the court to set aside or

[1] It should be noted that without a new attorney, Defendant was barred from making any arguments at the summary judgment hearing because typically "in North Carolina a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se* . . . ." *Lexis-Nexis v. Travishan Corp.*, 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002).

modify a final judgment, order or proceeding whenever such action is necessary to do justice under the circumstances." *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987) (citation omitted). "The test for whether a judgment . . . should be modified or set aside under Rule 60(b)(6) is two pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted." *Id.* (citation omitted). Defendant contends that the trial court erred in its failure to find that extraordinary circumstances existed. We disagree.

Defendant presents only one claim of extraordinary circumstances with possible merit, an argument concerning the former attorney's lack of knowledge regarding the Anti-Deficiency Statute.[2] Regardless of this contention, it was not wholly without reason or logic for the trial court to determine that the failure of Defendant's counsel to inform Defendant of a potential defense did not rise to the level of an "extraordinary circumstance," necessitating the power of judicial intervention. "The facts of this case do not show that the judicial system or the [plaintiff] prevented [defendant] from presenting [its] claim but rather that [its] own inattention to [its] affairs caused the [judgment] to be entered." *Equipment Co. v.*

[2] In addition, Defendant perfunctorily argued in its brief, without evidence or further explanation, that extraordinary circumstances existed because Plaintiff "violat[ed] his fiduciary duty to [Defendant]," "the defense under the Anti-deficiency status is substantial and complete which is apparent on the face of *Plaintiff's* complaint," and that "it has long the [sic] public policy of this State that a seller of real property may not finance the sale thereof, take the same back through foreclosure and collect additional money from the debtor." (emphasis added). However, Defendant's brief fails to present any legal support or further reasoning to support these assertions. As such, these arguments are dismissed because "[i]t is not the role of this Court to . . . flush out incomplete arguments." *Estate of Hurst v. Jones*, 230 N.C. App. 162, 178, 750 S.E.2d 14, 25 (2013); N.C. R. App. P. 28(b)(6).

Albertson, 35 N.C. App. 144, 147, 240 S.E.2d 499, 502 (1978) (stating that a party's "[f]ailure to retain counsel promptly" and "keep himself informed" regarding his case does not merit Rule 60(b)(6) judicial intervention). As previously discussed, other means existed to rectify the attorney's lack of knowledge, lessening the need for involvement by the court.

Though often considered "a vast reservoir of equitable power," Rule 60(b)(6) is limited by the necessity of extraordinary circumstances and remains within the trial court's discretion. *Thacker v. Thacker*, 107 N.C. App. 479, 481, 420 S.E.2d 479, 480 (1992). As such, the trial court did not abuse its discretion in denying the Rule 60(b)(6) motion, and the entry of summary judgment in favor of Plaintiff on the deficiency judgment action is affirmed.

CONCLUSION

The trial court's decision to deny Defendant's Rule 60 motion was not an abuse of discretion.

AFFIRMED.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).