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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1024

Filed: 16 April 2019

Buncombe County, No. 17-CVD-5275

EVERETT S. SCROGGS, Plaintiff,

v.

TRACTORS ON THE CREEK, LLC, Defendant.

Appeal by Defendant from order entered 15 May 2018 by Judge J. Calvin Hill in Buncombe County District Court. Heard in the Court of Appeals 27 February 2019.

Hylar & Lopez, P.A., by Stephen P. Agan, for Plaintiff-Appellee.

Donald H. Barton, P.C., by Donald H. Barton, for Defendant-Appellant.

COLLINS, Judge.

Defendant Tractors on the Creek, LLC, appeals from an order denying its Rule 59 motion for a new trial and Rule 60 motion for relief from judgment entered by default in connection with Plaintiff's amended complaint alleging breach of contract and violation of the North Carolina Motor Vehicle Repair Act. Defendant contends that the trial court erred by (1) making certain findings of fact unsupported by the evidence or the law, (2) making conclusions of law unsupported by the findings of fact,

and (3) failing to set aside the entry of default and default judgment for lack of notice to counsel. Because we conclude that the trial court properly entered default but failed to follow the relevant procedure for entering default judgment, we affirm in part and reverse in part.

I. Background

On 19 October 2017, Plaintiff filed a *pro se* complaint in Small Claims Court in Buncombe County seeking damages for faulty repairs to a golf cart. A trial was held, and judgment was entered in favor of Defendant on 17 November 2017. Plaintiff timely appealed the small claims judgment to the Buncombe County District Court on 28 November 2017.

On 8 January 2018, Defendant moved to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12 (2017), but included the wrong file number in the heading. Defendant served a copy of the Rule 12 motion on Plaintiff by mail. The clerk filed Defendant's Rule 12 motion under the file number listed in the heading, but not under the file number relevant to this action.

On 18 January 2018, Plaintiff filed a motion for leave to re-plead or amend his complaint, and noticed the motion for hearing. Defendant consented to Plaintiff's motion on 24 January 2018. On 26 January 2018 the trial court ordered:

Plaintiff shall have ten (10) days from the date of entry of this Order in which to file his detailed Complaint in this matter. The Defendant shall have thirty (30) days from service of Plaintiff's detailed Complaint pursuant to Rule 5

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of the Rules of Civil Procedure in which to file an Answer or other responsive pleading.

On 26 January 2018, Plaintiff filed an amended complaint, stating causes of action for breach of contract and violation of the North Carolina Motor Vehicle Repair Act, N.C. Gen. Stat. § 20-354 (2017). On that same day, Plaintiff served the amended complaint on Defendant.

On 6 February 2018, Defendant's counsel filed a formal notice of appearance, but included the wrong file number in the heading. Defendant served a copy of the notice of appearance on Plaintiff. The clerk corrected the file number in the heading, and filed the notice of appearance under the file number relevant to this action.

Defendant never filed an answer or other responsive pleading to the amended complaint. On 12 March 2018, Plaintiff filed a motion for entry of default and default judgment. The clerk of court entered an order allowing entry of default and a default judgment against Defendant the same day. Plaintiff did not provide Defendant with notice regarding Plaintiff's application for default judgment before default judgment was entered.

On 21 March 2018, Defendant filed a motion under N.C. Gen. Stat. § 1A-1, Rule 59 (2017) seeking a new trial and under N.C. Gen. Stat. § 1A-1, Rule 60 (2017), requesting that the trial court set aside the default judgment, arguing that Defendant had not been provided with notice of Plaintiff's motion for default judgment. Plaintiff filed a brief in opposition to the motion, and noticed the motion for hearing. On 15

May 2018, the trial court entered an order denying Defendant's motions. Defendant timely appealed to this Court on 18 May 2018.

II. Appellate Jurisdiction

The trial court's denial of Defendant's motions constitutes a final judgment of a district court in a civil action, giving this Court jurisdiction to hear Defendant's appeal under N.C. Gen. Stat. § 7A-27(b)(2) (2017).

III. Analysis

The question before us is whether the trial court erred in denying Defendant's motion to set aside the entry of default and default judgment.

Rule 55 concerns entries of default and default judgments, and is the relevant procedural rule governing our analysis here. N.C. Gen. Stat. § 1A-1, Rule 55 (2017). Although Defendant's motion did not reference it, Rule 55(d) governs when the court may set aside entries of default and default judgments, and sets forth that a trial court may set aside an entry of default "[f]or good cause shown," and may set aside a default judgment "in accordance with Rule 60(b)." *Id.*

Defendant sought relief from the default judgment pursuant to Rule 60(b),¹ but did not specify the grounds upon which it sought to set aside the entry of default.

¹ The trial court did not err in concluding that Rule 59 is not a proper avenue to seek relief here, since no trial on the operative complaint ever took place. *See, e.g., Ennis v. Munn*, No. COA12-1349, 2013 N.C. App. LEXIS 977, at *11 (unpublished) (N.C. Ct. App. Sept. 17, 2013) ("Rule 59 applies only to judgments resulting from trials"); *Jones v. Nelson*, 484 F.2d 1165, 1167 (10th Cir. 1973) ("Technically this [Rule 59] motion was improper as no trial was conducted from which a new trial motion could be filed.").

However, “[t]he failure to state a particular rule number as a basis for a motion is not a fatal error so long as the substantive grounds and relief desired are apparent and the opponent of the motion is not prejudiced thereby.” *Garrison v. Garrison*, 87 N.C. App. 591, 596, 361 S.E.2d 921, 925 (1987). By finding that “Defendant [] failed to show good cause to set aside the Clerk’s Order Allowing Entry of Default in this action[,]” the trial court implicitly expressed its understanding that Defendant sought to set aside the entry of default under Rule 55(d), and that is our understanding as well. And since, as explained below, we conclude that the trial court did not abuse its discretion in refusing to set aside the entry of default, there is no prejudice to Plaintiff. As such, we deem Defendant to have moved under Rule 55(d) to set aside the entry of default, and under Rules 55(d) and 60(b) to set aside the entry of default judgment.

a. Entry of Default

An entry of default is “an interlocutory, ministerial duty looking towards the final entry of judgment by default [and] merely a matter of form.” *Bailey v. Gooding*, 45 N.C. App. 335, 340, 263 S.E.2d 634, 638 (1980), *vacated on other grounds*, 301 N.C. 205, 270 S.E.2d 431 (1980). When a defendant fails to answer a complaint and default is entered, the substantive allegations raised by the complaint are deemed admitted for purposes of default judgment. *Bell v. Martin*, 299 N.C. 715, 721, 264 S.E.2d 101, 105 (1980). However, before default judgment is entered, the defendant is entitled to

a hearing in which he may move the court pursuant to Rule 55(d) to set aside the entry of default by showing “*good cause* [as to why] he should be allowed to file [an] answer” to the complaint. *Id.* Whether or not good cause exists to set aside an entry of default rests in the discretion of the trial court, and the trial court’s decision of whether to do so will not be disturbed unless a clear abuse of discretion is shown. *Whaley v. Rhodes*, 10 N.C. App. 109, 112, 177 S.E.2d 735, 737 (1970).

Rule 55(a) requires the clerk of court to enter default “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead” and “that fact is made to appear [to the clerk] by affidavit, motion of attorney for the plaintiff, or otherwise[.]” N.C. Gen. Stat. § 1A-1, Rule 55(a). Notably, Rule 55(a) does not require notice be given to the party against whom entry of default is sought. Because (1) Defendant was served with Plaintiff’s 26 January 2018 amended complaint, (2) Defendant never filed an answer or other responsive pleading thereto as required by the trial court’s 26 January 2018 order, and (3) Plaintiff made Defendant’s failure to plead apparent to the clerk in affidavits filed along with Plaintiff’s 12 March 2018 motion for entry of default, Rule 55(a) required the clerk to enter default against Defendant. *See Beard v. Pembaur*, 68 N.C. App. 52, 54-55, 313 S.E.2d 853, 854-55 (holding that the clerk did not err by entering default where a party, which had appeared, had failed to provide a responsive pleading).

Defendant argued in both its motion in the trial court and its appellate brief to this Court that its Rule 12 motion to dismiss the original complaint relieved it of its obligation to serve a responsive pleading to the amended complaint. Rule 15(a) requires a party to “plead in response to an amended pleading within 30 days *after* service of the amended pleading, unless the court otherwise orders[.]” N.C. Gen. Stat. § 1A-1, Rule 15 (2017) (emphasis added), and the trial court’s 26 January 2018 order specifically required Defendant to follow that course. Defendant cites no authority holding that a Rule 12 motion to dismiss an original complaint served *before* the filing of an amended complaint affects the defendant’s Rule 15 obligations with respect to the amended complaint, and we are not aware of any such authority. Since Defendant did not file a responsive pleading within 30 days after service of the amended complaint as Rule 15 as the trial court required, entry of default was proper.

Whether the filing of the Rule 12 motion was sufficient good cause to set aside the entry of default under Rule 55(d) is another question, which was up to the trial court to answer in its discretion. *Whaley*, 10 N.C. App. at 112, 177 S.E.2d at 737. But by declining to find such good cause, we conclude that the trial court did not abuse that discretion.

b. Default Judgment

As opposed to the entry of default, entry of a default judgment is not a mere matter of form, and Rule 55(b) sets out more stringent procedural requirements

before default judgment may be entered. N.C. Gen. Stat. § 1A-1, Rule 55(b). While the question of whether an adequate basis exists to set aside a default judgment also rests in the discretion of the trial court, and the trial court's decision of whether or not to do so will similarly not be disturbed absent an abuse of discretion, *Bailey*, 45 N.C. App. at 343-44, 263 S.E.2d at 640, this Court has said that “[i]n exercising its discretion the trial court should be guided by the consideration that default judgments are disfavored by the law,” *North Carolina Nat’l Bank v. McKee*, 63 N.C. App. 58, 61, 303 S.E.2d 842, 844 (1983).

Rule 55(b) has two sub-parts: Rule 55(b)(1) governs when the clerk of court may enter default judgment, while Rule 55(b)(2) governs when default judgment may only be entered by a judge. N.C. Gen. Stat. § 1A-1, Rule 55(b)(1). In relevant part, Rule 55(b)(1) allows the clerk of court to enter default judgment against a defendant upon a plaintiff's request when “the defendant has been defaulted for failure to appear[.]” *Id.* In his brief, Plaintiff concedes: “Counsel for Defendant had made an appearance in the action in district court after Plaintiff appealed from the small claims judgment.” Because Defendant appeared in this case, the clerk lacked authority to enter default judgment under Rule 55(b)(1), and default judgment could only have been entered by a judge pursuant to Rule 55(b)(2). *See Roland v. W & L Motor Lines, Inc.*, 32 N.C. App. 288, 291, 231 S.E.2d 685, 687-88 (1977) (holding that Rule 55(b)(1) “is clearly intended to allow a clerk to enter default judgment against a

defendant only if he has never made an appearance”). Since the default judgment in this case was erroneously entered by the clerk of court, it is void, and the trial court erred in not setting it aside. *Id.*

It is worth noting that even had a judge entered the default judgment, the judgment would still have been void on these facts. Under Rule 55(b)(2), where “the party against whom judgment by default is sought has appeared in the action, that party (or, if appearing by representative, the representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application.” N.C. Gen. Stat. § 1A-1, Rule 55(b)(2). And as Defendant argues and Plaintiff concedes, since Defendant appeared, notice to Defendant of Plaintiff’s application was required. The fact that no notice was given Defendant here would lead us to the same result regardless of who entered the default judgment. *See Miller v. Belk*, 18 N.C. App. 70, 75, 196 S.E.2d 44, 47-48 (1973) (vacating default judgment for lack of notice required by Rule 55(b)(2)).

IV. Conclusion

Because Defendant failed to file a responsive pleading as required and Plaintiff made that fact apparent to the clerk of court, the clerk properly issued the entry of default, and the trial court did not abuse its discretion in denying Defendant’s motion to have the default set aside. But since Defendant had made an appearance in the action, the clerk lacked the statutory authority to enter the default judgment, and

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the trial court erred in not setting aside the default judgment as void upon Defendant's motion.

The trial court's denial of Defendant's motion to set aside the default judgment is reversed and the cause remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.

Judges DILLON and INMAN concur.

Report per Rule 30(e).