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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-828

Filed: 5 May 2020

Buncombe County, No. 17-CVD-5275

EVERETT S. SCROGGS, Plaintiff,

v.

TRACTORS ON THE CREEK, LLC, Defendant.

Appeal by Defendant from judgment entered 1 July 2019 by Judge J. Calvin Hill in Buncombe County District Court. Heard in the Court of Appeals 1 April 2020.

*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 the trial court's entry of judgment upon Plaintiff's Motion for Entry of Judgment by Default ("Motion") 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 entering judgment as Defendant did not receive adequate notice of the hearing upon the Motion, and the award of attorneys' fees was not

supported by the evidence. Because Defendant failed to move the trial court to set aside the default judgment pursuant to Rule 55(d) or Rule 60(b) of the North Carolina Rules of Civil Procedure, we are precluded from reviewing the issues it raises.

***I. Background***

This is the second appeal to this Court taken by Defendant in this case. A detailed procedural history and factual background can be found in this Court's unpublished opinion, *Scroggs v. Tractors on the Creek, LLC*, No. COA 18-1024, 2019 N.C. App. LEXIS 353 (N.C. Ct. App. Apr. 16, 2019) ("*Scroggs I*"). In *Scroggs I*, we concluded that the clerk of court properly issued entry of default and affirmed the trial court's order denying Defendant's motion made pursuant to N.C. Gen. Stat. § 1A-1, Rule 55(d), to set aside the entry of default. *Id.* at \*7-8. We also concluded, however, that the clerk lacked the authority to enter default judgment and concluded that the trial court erred by denying Defendant's motion made pursuant to N.C. Gen. Stat. § 1A-1, Rules 55(d) and 60(b), to set aside the default judgment as void. *Id.* at \*9. We thus remanded the case for further proceedings. *Id.* at \*10.

Upon remand, on 22 May 2019, Plaintiff served the Motion upon Defendant, which states as follows:

NOW COMES the Plaintiff, pursuant to Rule 55(b)(2) of the North Carolina Rules of Civil Procedure, and moves the Court for entry of judgment by default, after entry of default by the Clerk, against the Defendant. Plaintiff moves for the entry of judgment by default in the

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amount of \$4,184.40, plus his reasonable attorney's fees incurred through the time of the hearing.

Pursuant to Rule 55(b)(2)(b)(1) of the North Carolina Rules of Civil Procedure, Plaintiff will ask the Court to decide this motion without a hearing if the Defendant fails to serve a written response, stating the grounds for opposing the motion, within 30 days after service of the motion.

With this Motion, Plaintiff served upon Defendant a Notice of Potential Hearing ("Notice") which states as follows:

PLEASE TAKE NOTICE that the Plaintiff, through counsel, will bring on to be heard before the Judge Presiding over Buncombe County District Court, Civil Session, the attached MOTION FOR ENTRY OF JUDGMENT BY DEFAULT, on Friday, June 28, 2019, at 9:30 a.m., or as soon thereafter as the Court may hear the motion, in Courtroom 2A, Buncombe County Courthouse, 60 Court Plaza, Asheville, NC 28801.

Pursuant to Rule 55(b)(2)(b)(1) of the North Carolina Rules of Civil Procedure, Plaintiff will ask the Court to decide the motion without a hearing if the Defendant fails to serve a written response, stating the grounds for opposing the motion, within 30 days after service of the motion.

Defendant filed and served an Answer to Complaint ("Answer") on 14 June 2019. Plaintiff appeared in Buncombe County District Court 28 June 2019 for a hearing on the Motion. Defendant did not appear at the hearing through counsel or otherwise. Plaintiff presented evidence in support of his Motion. At the conclusion of the hearing, the trial court rendered judgment in favor of Plaintiff, awarding him \$2,900 in compensatory damages, \$9,750 in attorneys' fees, and other costs of the

action. Written judgment was entered 1 July 2019. Defendant appealed the judgment to this Court on 16 July 2019.

## ***II. Analysis***

Defendant argues on appeal that the trial court erred by entering default judgment because the notice of hearing it received was not adequate, and because the attorneys' fee award was not supported by the evidence. The record, however, indicates that Defendant did not move the trial court to set aside the default judgment pursuant to Rule 55(d) or Rule 60(b) of the North Carolina Rules of Civil Procedure.

"This Court has previously held, with respect to a default judgment, that '[f]ailure to attack the judgment at the trial court level precludes such an attack on appeal.'" *Golmon v. Latham*, 183 N.C. App. 150, 151, 643 S.E.2d 625, 626 (2007) (quoting *Univ. of N.C. v. Shoemate*, 113 N.C. App. 205, 216, 437 S.E.2d 892, 898, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 413 (1994)). See *Akshar Distribution Co. v. Smoky's Mart Inc.*, 837 S.E.2d 621, 627 (N.C. Ct. App. 2020) (defendants' failure to move the trial court to set aside the default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rules 55(d) or 60(b) precluded appellate review of the issues raised concerning the default judgment).

As in *Golmon*, Defendant should have first filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rules 55(d) or 60(b). It would then have been able to appeal to this

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Court from any denial of that motion. *Golmon*, 183 N.C. App. at 152, 643 S.E.2d at 626. Because Defendant failed to follow this procedure, we are precluded from reviewing the issues it raises. *Id.* We thus dismiss Defendant's appeal.

DISMISSED.

Judges MURPHY and YOUNG concur.

Report per Rule 30(e).