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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-51

No. COA20-167

Filed 2 March 2021

Harnett County, No. 14 CVS 0235

INROCK DRILLING SYSTEMS INC., Plaintiff,

v.

CMP TECHNOLOGIES, INC., Defendant.

Appeal by Defendant from order entered 13 November 2019 by Judge Mary Ann Tally in Harnett County District Court. Heard in the Court of Appeals 27 January 2021.

Inrock Drilling Systems, Inc., pro se, for Plaintiff-Appellee.

Akins Hunt Atkins, P.C., by Kristen Atkins Lee, for Defendant-Appellant.

CARPENTER, Judge.

I. Factual and Procedural Background

¶ 1

Plaintiff-Appellee Inrock Drilling Systems, Inc., (“Inrock” or “Plaintiff”) is a Texas corporation. Defendant-Appellant CMP Technologies, Inc., (“CMP” or “Defendant”) is a North Carolina corporation. Defendant contracted with Plaintiff for the lease of heavy equipment and the assistance of an operating technician.

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¶ 2

Defendant used the equipment and the services of the technician as contracted without complaint. When Defendant failed to remit payment to Plaintiff, Plaintiff obtained a default judgment in Texas. Defendant's registered agent did not sign for the Texas Secretary of State's certified mailing; however, Defendant and Defendant's counsel requested and received copies of court filings and participated in settlement negotiations. Settlement negotiations were unsuccessful.

¶ 3

Plaintiff sought to enforce the Texas judgment in North Carolina under the Full Faith and Credit Clause. Plaintiff's counsel filed a Notice of Filing of Foreign Judgment in connection with the Texas default judgment. First, Plaintiff attempted to serve process on Defendant via certified mail at the address registered with the North Carolina Secretary of State. Certified mail sent to the registered address was returned unsigned. The building at the registered address was not the principal place of business of Defendant but was rented to another business. Plaintiff's counsel learned the building was rented to another business by placing a phone call to the business located at the registered address. As part of a due diligence inquiry, Plaintiff's counsel attempted to procure the correct address for Defendant from Defendant's counsel. Defendant's counsel declined to provide an address where Defendant could be served and Defendant's counsel would not respond, when asked, whether they would accept service on Defendant's behalf. Plaintiff's counsel stated

at the hearing that she served process on Defendant via the North Carolina Secretary of State's Office.

¶ 4 Defendant filed a motion for relief, notice of defenses, and motion to dismiss pursuant to N.C. Gen. Stat § 1A-1, Rules 12(b)(2), (4), (5), and (6) for lack of personal jurisdiction, insufficient process, insufficient service of process, and failure to state a claim upon which relief may be granted. Plaintiff filed a motion to enforce the foreign judgment. The Honorable Mary Ann Tally heard the matter in Harnett County Superior Court. Judge Tally denied Defendant's motion to dismiss and granted Plaintiff's motion to enforce the foreign judgment.

¶ 5 On appeal, the parties stipulated that personal jurisdiction was proper in North Carolina Superior Court.

II. Issues

¶ 6 Defendant argues on appeal the trial court erred by granting Plaintiff's motion to enforce foreign judgment and denying Defendant's motion to dismiss.

III. Jurisdiction

¶ 7 Appeal lies in this Court as a matter of right pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

IV. Standard of Review

¶ 8 "We review *de novo* questions of law implicated by the denial of a motion to dismiss for insufficiency of service of process 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) (citing *A.H. Beck Found. Co. v. Jones Bros.*, 166 N.C. App. 672, 678, 603 S.E.2d 819, 823 (2004) (reviewing the denial of a motion to dismiss for lack of personal jurisdiction)).

V. Analysis

¶ 9

Defendant appeals the denial of its motion to dismiss, but only presents an argument regarding its motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(5) for insufficient service of process. Plaintiff did not file a brief for this Court’s consideration. It is not the role of this court “to create an appeal for an appellant.” *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). “That burden rests solely with the appellant.” *Krause v. RK Motors, LLC*, 252 N.C. App. 135, 140, 797 S.E.2d 335, 339 (2017). “Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.” N.C. R. App. P. 28(b)(6) (2019). Therefore, this Court will not address the trial court’s denial of Defendant’s motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(2), (4), or (6). For the following reasons, we vacate both the trial court’s granting of Plaintiff’s motion to enforce foreign judgment and the trial court’s denial of Defendant’s motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(5).

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¶ 10

Plaintiff’s counsel represented to the trial court that process was served through the North Carolina Secretary of State. North Carolina law permitted Plaintiff to serve Defendant through the Secretary of State.

“When an entity required to maintain a registered office and registered agent under G.S. § 55D-30 fails to appoint or maintain a registered agent in this State, or when its registered agent cannot with due diligence be found at the registered office . . . the Secretary of State becomes an agent of the entity upon whom any such process, notice or demand may be served. Service . . . is made by delivering to and leaving with the Secretary of State or any clerk authorized by the Secretary of State to accept service of process Service on an entity under this subsection is effective for all purposes from and after the date of the service on the Secretary of State.”

N.C. Gen. Stat. § 55D-33; *see also Smith v. Jones*, 183 N.C. App. 643, 647, 645 S.E.2d 198, 201 (2007) (holding the denial of an LLC’s motion to set aside a default judgment based on alleged improper substituted service on the Secretary of State was proper because the LLC’s failure to receive actual notice of the lawsuit was due to the LLC’s own failure to properly maintain a registered office; only after several attempts to serve the LLC by serving the registered agent and by mail failed, was process served on the Secretary of State).

¶ 11

In this case, the trial court found as fact that Plaintiff “presented evidence of four instances where Defendant’s Registered Agent failed to sign for certified mail.” Plaintiff’s counsel represented to the trial court that she was unsuccessful in locating

the correct address for Defendant after an attempt to serve the registered agent at the address identified on the North Carolina Secretary of State's website, after requesting the correct address from Defendant's counsel, and finally, after inquiring whether Defendant's counsel would accept service of process on Defendant's behalf. Plaintiff's counsel stated at the hearing that after exhausting options and exercising due diligence, process was served via North Carolina Secretary of State pursuant to N.C. Gen. Stat. § 55D-33.

¶ 12 Defendant alleges in its brief, however, Plaintiff's failure to file an affidavit of service in the manner prescribed by N.C. Gen. Stat. § 1-75.10 is fatal. We agree. N.C. Gen. Stat. § 1-75.10 provides:

“[w]here the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows: . . .

(4) Service by Registered or Certified Mail. - In the case of service by registered or certified mail, by affidavit of the serving party averring:

- a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
- b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
- c. That the genuine receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10(a)(4) (2019).

¶ 13 In this case, Plaintiff was relegated to serving process on Defendant via the North Carolina Secretary of State due to Defendant's failure to provide an accurate address and registered agent where process could be served. Service upon Defendant through the North Carolina Secretary of State was therefore proper. However, an affidavit meeting the requirements of N.C. Gen. Stat. § 1-75.10(a)(4) was necessary. Per N.C. Gen. Stat. § 55D-33, the Secretary of State was "an agent of the entity upon whom any such process, notice or demand may be served." N.C. Gen. Stat. § 55D-33(b).

¶ 14 Plaintiff's counsel represented to the trial court such service was made. The transcript reflects Defendant's counsel never claimed Defendant had not received copies of the summons and complaint from the North Carolina Secretary of State. Yet, North Carolina law provides it was Plaintiff's burden to submit an affidavit to the trial court stating process was served upon the North Carolina Secretary of State. N.C. Gen. Stat. § 1-75.10(a)(4).

¶ 15 While such an affidavit from the Plaintiff stating service was effectuated upon the North Carolina Secretary of State may have been presented to the presiding judge at the hearing, no such affidavit of service is found in the record on appeal. Plaintiff was required by statute to produce and file an affidavit reflecting service of process upon the North Carolina Secretary of State. See N.C. Gen. Stat. § 1-75.10(a)(4).

Therefore, based on the evidence in the record, we cannot say the trial court properly denied Defendant's motion to dismiss for insufficient service of process.

VI. Conclusion

¶ 16 The record in this case is insufficient to permit this Court to determine that the trial court properly denied Defendant's motion to dismiss for insufficient service of process. Therefore, we vacate the trial court's action in granting Plaintiff's motion to enforce foreign judgment and remand the matter to the trial court for further consideration of the issue of the missing affidavit of service.

VACATED AND REMANDED.

Judges HAMPSON and JACKSON concur.

Report per Rule 30(e).