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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-619

No. COA20-837

Filed 16 November 2021

Wake County, No. 19 CVS 017121

A. MAYNOR HEATING & AIR CONDITIONING, INC., Plaintiff,

v.

SAMUEL BOYD GARDNER, Defendant.

Appeal by Defendant from order entered 14 August 2020 by Judge Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 11 August 2020.

Miller Monroe & Plyler, PLLC, by Paul T. Flick, for the Plaintiff-Appellee.

Vann Attorneys, PLLC, by J.D. Hensarling and Ian S. Richardson, for the Defendant-Appellant.

DILLON, Judge.

¶ 1 This case involves a dispute between former business partners. The appeal turns on whether the default judgment against Defendant was void, as Defendant argues that he was never properly served with the summons and complaint.

I. Background

¶ 2 On 20 December 2019, Plaintiff filed its complaint against Defendant. Eleven days later, on 31 December 2019, Plaintiff attempted service on Defendant by sending the summons and complaint by certified mail, return receipt requested, to an address that Defendant had represented on various employment forms as his address seven months prior. On that same date, Plaintiff also emailed the summons and complaint to Defendant's email address.

¶ 3 About a week later, on 6 January 2020, the summons and complaint were served. The return receipt was purportedly signed by Defendant, bearing the signature "S. Gardner." Defendant later claimed that he, in fact, was living in Georgia; that it was his brother who signed on his behalf; and that his brother mailed the documents to his Georgia residence.

¶ 4 In any event, on 13 January 2020, Plaintiff filed an Affidavit of Service of Process. Defendant did not answer the complaint within the time allowed. Therefore, on 11 February 2020, Plaintiff filed a Motion for Entry of Default Judgment, mailing a copy of the motion to the address where the complaint had been served. The next day, on 12 February 2020, the clerk entered default.

¶ 5 Three days after default was entered, Defendant acknowledged the suit through a text message to Plaintiff's counsel, stating, "What a joke [] your legal filling [sic] is. I would be embarrassed to call myself a lawyer if I filed this."

¶ 6 With an entry of default in hand, Plaintiff noticed a hearing for its Motion for Default Judgment, scheduled for 30 March 2020. The hearing was postponed two months to 20 May 2020 due to the Chief Justice's Emergency Directives issued in response to the COVID-19 pandemic.

¶ 7 On 20 May 2020, after a hearing on the matter, the trial court entered its Default Judgment against Defendant.

¶ 8 Six days later, on 26 May 2020, Defendant finally made an appearance in the matter, filing his Motion to Set Aside Entry of Default. He later filed a Motion to Set Aside Default Judgment and A Motion to Stay Enforcement of Default Judgment.

¶ 9 Defendant's motions were heard and denied. Defendant timely appealed.

II. Standard of Review

¶ 10 Defendant essentially argues that the judgment against him is void because he was never properly served.

¶ 11 Under North Carolina's Rules of Civil Procedure, our Court may relieve a party from a final judgment if "[t]he judgment is void" or "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(4), (6) (2020). "[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court, and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). An abuse of discretion occurs when a challenged action is "manifestly unsupported by reason,"

Clark v. Clark, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980), or "so arbitrary that it could not have been the result of a reasoned decision[,]" *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

III. Analysis

A. Personal Jurisdiction

¶ 12 Defendant first argues that the trial court lacked personal jurisdiction due to defective service and process. We disagree.

¶ 13 Our Supreme Court has held that when "there [is] no valid service of process, the court acquire[s] no jurisdiction over [the] defendant." *Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974).

¶ 14 In this case, Plaintiff chose to serve Defendant through certified mail pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c). This statute provides that process may be served on a natural person:

> By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

Id.

¶ 15 Here, it is undisputed that Plaintiff mailed the complaint via certified mail, return receipt requested; that the mailing was addressed to Defendant only; that Defendant's brother received the mailing and signed for Defendant; that Defendant's

brother then forwarded the mailing to Defendant in Georgia; and that Defendant, in fact, received it. Accordingly, for the reasoning below, we must conclude that the trial court did not err in determining that Defendant was properly served.

¶ 16 In resolving the issue before us, we are mindful of our Supreme Court's statement that "[t]he purpose of a service of summons is to give notice to the party against whom a proceeding is commenced to appear at a certain place and time and to answer a complaint against him." *Harris v. Maready*, 311 N.C. 536, 541, 319 S.E.2d 912, 916 (1984).

¶ 17 Rule 4 of our Rules of Civil Procedure provides that the affidavit of a plaintiff stating that (s)he indeed properly served the defendant by certified mail, return receipt requested in accordance with Rule 4(j) "raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized [to accept service for the defendant]." N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2).

¶ 18 Here, Defendant filed two affidavits in rebuttal to this presumption. His own affidavit states that he was not at the Raleigh address where the summons/complaint was delivered at the time of delivery; that the Raleigh address is that of his brother's residence; that his brother signed for the mailing; that he never authorized his brother "to accept any legal service on [his] behalf"; that he did receive the summons/complaint from his brother sometime in February; and that he lived in Georgia.

¶ 19 The affidavit of Defendant's brother states that he received the package on 6 January 2020 at his home; that at that time, Defendant resided in Georgia; that he "signed [his] brother's name in order to receive the Certified Mailing"; that on 8 January 2020, he forwarded the mailing to his brother's Georgia address; and that he did not know what the mailing was about.

¶ 20 Based on our jurisprudence, we must conclude that Defendant has failed to rebut the presumption of proper service, even if full weight is given to the averments in the affidavits.

¶ 21 For instance, the affidavits seem to challenge his brother's role as his agent to receive process. But our Court has held that once a defendant who seeks to rebut the presumption of proper service "generally must present evidence that service of process failed to accomplish its goal of providing defendant with notice of the suit, *rather than simply questioning the . . . role or authority of the person who signed for delivery of the summons*." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 493, 586 S.E.2d 791, 797 (2003) (emphasis added). Our Court recognized that "the crucial issue is not whether the individual signing for the summons was formally employed by defendant as his agent, but whether or not defendant in fact received the summons." *Id.* at 493, 586 S.E.2d at 798.

¶ 22 Accordingly, in *Granville*, we rejected the defendant's argument that he rebutted the presumption, noting that "[c]onspicuously *absent* from defendant's

affidavit is any allegation that he did not receive the summons, or did not receive notice of the suit." *Id.* at 494, 586 S.E.2d at 798; *see also In re Williams*, 149 N.C. App. 951, 959, 563 S.E.2d 202, 206 (2002) (holding that where the defendant "did not rebut this presumption by showing that he never received the summons and complaint . . . the defendant was sufficiently served with process"). In the same way, Defendant's brother admits to mailing the summons and complaint to Defendant a few days after they were delivered to him, and Defendant admits that he received them two months before judgment was entered against him.

¶ 23 Defendant also takes issue with the fact that the mailing was served at a location that was not his residence. However, it is not fatal that the mailing was not delivered to Defendant's residence, as the Rule contains no such requirement where service is attempted by certified mail, return receipt requested. *See* N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c); *see also Fender v. Deaton*, 130 N.C. App. 657, 503 S.E.2d 707 (1998) (defendant properly served when delivered to his place of employment and signed for by a co-employee).

¶ 24 Accordingly, we hold that the trial court obtained personal jurisdiction as the dictates of Rule(4)(j) were satisfied.

B. Timing of Service

¶ 25 Defendant contends that service of process was improper because he received notice after the entry of default. However, his brother as his "agent" admitted

receiving the summons and complaint long before default was entered. It may be that Defendant, himself, did not personally receive the documents until a month later, on 15 February 2020, the day he sent a text message to Plaintiff's counsel acknowledging that the suit had been filed. However, his brother's affidavit stated that he mailed the summons/complaint to Defendant on 8 January 2020, strong evidence that Defendant received the documents long before default was entered. Also, Defendant had two months after sending his text acknowledging the suit to have the entry of default set aside before the default judgment was entered in May 2020. Accordingly, we are not persuaded by Defendant's argument.

C. Extraordinary Circumstances

¶ 26 Defendant argues that extraordinary circumstances existed in this case, noting the presence of the COVID-19 pandemic and miscommunications with opposing counsel, along with the alleged errors argued above. Thus, by his estimation, the judgment must be set aside. We disagree.

¶ 27 A court may relieve a party under N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) from a final judgment for "any other reason justifying relief from the operation of the judgment." This rule, however, does not grant our Court a broad sweeping power to set aside judgments simply under the name of *justice*. On the contrary, "a court cannot set aside a judgment pursuant to [Rule 60(b)(6)] without a showing (1) that extraordinary circumstances exist and (2) that justice demands relief." *Thacker v.*

Thacker, 107 N.C. App. 479, 481, 420 S.E.2d 479, 480 (1992).

¶ 28 Here, we conclude that this case is not extraordinary, requiring the trial court to set aside the default judgment. Defendant was given procedural notice in January and received actual notice by mid-February. These dates precede the public pandemic response that did not occur until mid-March.[1] Further, Defendant has not shown how the pandemic hindered him from filing his answer.

¶ 29 Moreover, Defendant has failed to show a *meritorious defense* to Plaintiff's claims. Our Court has stated, "it would be a waste of judicial economy to vacate a judgment or order when the movant could not prevail on the merits of the civil action." *In re Oxford Plastics v. Goodson*, 74 N.C. App. 256, 259, 328 S.E.2d 7, 9 (1985). "A meritorious defense requires a 'proffer of evidence which would permit a finding for the defaulting party or which would establish a valid counterclaim.' " *Baker v. Baker*, 115 N.C. App. 337, 340, 444 S.E.2d 478, 481 (1994) (citation omitted).

IV. Conclusion

¶ 30 We conclude that service of process was valid and that the trial court did not err in denying Defendant's motion to set aside the default judgment.

AFFIRMED.

Judges ZACHARY and CARPENTER concur.

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[1] North Carolina's Governor declared a state of emergency on 10 March 2020.

Report per Rule 30(e).