IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-63

No. COA21-146

Filed 1 February 2022

Mecklenburg County, No. 18 CVD 12267

ASSOCIATE MD, LLC, Plaintiff,

v.

METABOLIC MEDICINE LLC, d/b/a HEALTHY FUTURES, and JAMEEL RIZK, Individually, Defendants.

Appeal by defendant and cross-appeal by plaintiff from order entered 7 August 2019 by Judge Roy H. Wiggins and judgment entered 3 November 2020 by Judge Paulina N. Havelka in Mecklenburg County District Court. Heard in the Court of Appeals 24 August 2021.

Lord Law Firm, PLLC, by Harrison A. Lord, for plaintiff-appellee and cross-appellant.

Clawson and Staubes, PLLC, by Jeremy S. Foster, for defendant-appellant and cross-appellee Jameel Rizk.

DIETZ, Judge.

¶ 1 Plaintiff Associate MD, LLC obtained an entry of default and then summary judgment against Defendant Jameel Rizk in a breach of contract action. The trial court later denied Rizk's motion to set aside the entry of default but granted a Rule

60(b)(6) motion to set aside the summary judgment. Following a new motion for summary judgment and hearing, the trial court again entered summary judgment against Rizk. Both parties appealed the trial court's final judgment.

¶ 2 As explained below, the trial court was well within its sound discretion to deny the request to set aside the default, but to grant the Rule 60(b) motion based on the impact of Hurricane Florence on Rizk's coastal South Carolina community. We therefore affirm the trial court's judgment.

Facts and Procedural History

¶ 3 In 2018, Plaintiff Associate MD, LLC sued Defendants Metabolic Medicine LLC and Jameel Rizk for breach of contract and served Rizk by certified mail.

¶ 4 After Rizk failed to timely respond to the complaint, Associate MD obtained an entry of default. Associate MD later moved for summary judgment and served the motion and accompanying notice of hearing on Rizk. Rizk received service and contacted the Mecklenburg County clerk's office to request a postponed hearing date on the ground that he was unable to attend the hearing because of the effects of Hurricane Florence. But, as Rizk explained in an affidavit, he "was not provided with" a continuance "or information on how to get another date." Rizk did not retain counsel to respond to the motion and did not move for a continuance.

¶ 5 Rizk did not appear at the summary judgment hearing. Following the hearing, the trial court entered summary judgment in favor of Associate MD and against Rizk

for $51,951.30 in treble damages, plus interest, attorneys' fees in the amount of $7,792.70, and costs.

¶ 6 Associate MD domesticated the judgment in Rizk's home state of South Carolina and sought to enforce the judgment in that state. Rizk then moved to set aside the judgment and entry of default under Rules 55 and 60 of the North Carolina Rules of Civil Procedure.

¶ 7 The trial court denied the motion to set aside the entry of default but granted the motion to set aside the judgment. Associate MD later took a voluntary dismissal of some claims in the complaint and then moved for summary judgment on the remaining claims. At this second summary judgment hearing, Rizk made an oral motion to dismiss for lack of subject matter jurisdiction and an oral cross-motion for summary judgment. The trial court denied Rizk's motions and granted Associate MD's motion for summary judgment. The trial court entered judgment in Associate MD's favor for $17,317.10 in actual damages, plus interest, and $2,597.56 in attorneys' fees.

¶ 8 Rizk appealed the judgment and Associate MD cross-appealed.

Analysis

I. Denial of motion to set aside entry of default

¶ 9 We begin with the denial of Rizk's motion to set aside the entry of default. The denial of a motion to set aside an entry of default pursuant to N.C. R. Civ. P. 55(d) is

reviewed for abuse of discretion. *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 621, 610 S.E.2d 469, 470 (2005). This is an exceedingly narrow standard for an appellate court, and we can find that a trial court abused its discretion only where the trial court's ruling is "manifestly unsupported by reason . . . [or] so arbitrary that it could not have been the result of a reasoned decision." *Lewis v. Hope*, 224 N.C. App 322, 323, 736 S.E.2d 214, 216 (2012).

¶ 10 The defaulting party carries the burden of showing good cause to set aside entry of default. *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 487, 586 S.E.2d 791, 794 (2003). The factors this Court has identified as relevant in evaluating a showing of good cause include: "(1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action." *Auto. Equip. Distribs., Inc. v. Petroleum Equip. & Serv., Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896–97 (1987).

¶ 11 Here, the trial court acted well within its sound discretion in determining that Rizk had not shown good cause. Associate MD properly served Rizk with the summons and complaint in June 2018 and served Rizk with numerous other filings for nearly a year. Nevertheless, Rizk waited until May 2019, when Associate MD sought to enforce the judgment in South Carolina, to appear and seek to set aside the entry of default. Even on appeal, Rizk offers no explanation for why he failed to diligently respond to the allegations in the complaint. Moreover, Associate MD

presented evidence to the trial court concerning the expenses it incurred in seeking to enforce the judgment in South Carolina and how it would be harmed if the entry of default was set aside nearly a year after it was entered. In light of these facts, the trial court did not abuse its discretion by finding no good cause to set aside the entry of default.

II. Denial of motion to dismiss

¶ 12 Rizk next argues that the trial court erred by denying his motion to dismiss the complaint, made after the trial court declined to set aside the entry of default but granted Rizk's request to set aside the judgment.

¶ 13 Rizk concedes that, although he moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, the argument he asserted was properly brought under Rule 12(b)(3) for improper venue because it was based on the forum selection clause in the contract.

¶ 14 Venue arguments, unlike subject matter jurisdiction arguments, are waivable. A defendant "must affirmatively raise a venue objection to enforce a forum selection clause" and if the defendant "fails to object by timely motion or answer the defense is waived." *LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 408–09, 747 S.E.2d 292, 297 (2013). Here, because Rizk failed to appear and assert this venue argument before the entry of default, this venue argument is waived. *Id.* at 409–10, 747 S.E.2d at 297–98.

¶ 15 On appeal, Rizk also asserts an argument concerning lack of personal jurisdiction. But again, personal jurisdiction, unlike subject matter jurisdiction, is waivable. *Zellars v. McNair*, 166 N.C. App. 755, 757, 603 S.E.2d 826, 828 (2004). Rizk did not assert this personal jurisdiction argument in his motion to set aside the entry of default or in his motion to dismiss. Accordingly, this argument is waived on appeal. We therefore hold that the trial court properly denied Rizk's motion to dismiss.

III. Granting of motion to set aside judgment

¶ 16 Associate MD cross-appeals the trial court's grant of the motion to set aside the judgment. As an initial matter, this appeal is not properly before us. Unlike many other appellate courts, in North Carolina state court a cross-appellant must file its own appellant's brief on the issues subject to the cross-appeal. *Countrywide Home Loans, Inc. v. Reed*, 220 N.C. App. 504, 507–08, 725 S.E.2d 667, 670 (2012). Here, Associate MD did not file an appellant's brief and instead raised its cross-appeal arguments in its appellee's brief. Thus, we are not required to entertain these arguments, which were not properly asserted under the rules of appellate procedure. *See* N.C. R. App. P. 13(c).

¶ 17 In any event, the trial court's ruling was proper. We review the trial court's grant of a Rule 60(b) motion to set aside a judgment for abuse of discretion. *Trivette v. Trivette*, 162 N.C. App. 55, 62, 590 S.E.2d 298, 304 (2004). Rule 60(b) permits a trial court to set aside a final order under six specifically designated conditions,

including a final "catch-all" condition: "Any other reason justifying relief from the operation of the judgment." N.C. R. Civ. P. 60(b)(6).

¶ 18 To prevail in setting aside a default judgment under Rule 60(b)(6), the movant "must show: (1) extraordinary circumstances exist, (2) justice demands the setting aside of the judgment, and (3) [the movant] has a meritorious defense." *Gibby v. Lindsey*, 149 N.C. App. 470, 474, 560 S.E.2d 589, 592 (2002).

¶ 19 In its order, the trial court found that Rizk, a resident of South Carolina, was unable to attend the summary judgment hearing due to "the approach of Hurricane Florence" which forced mandatory evacuations of South Carolina including the area around Rizk's home, and that Rizk's "responsibilities to his family and home" during this natural disaster "prevented him from attending the Summary Judgment hearing." The court also found that Rizk attempted to reschedule the hearing date but "was denied." Finally, although the court made no express finding about the damages awarded in the initial summary judgment, the court's ultimate judgment indicates that the court determined that, had Rizk attended the summary judgment hearing, he could have offered a meritorious defense that reduced the damages awarded in that judgment.

¶ 20 The trial court's order was a reasoned one and contains findings that satisfy the criteria for setting aside a judgment under Rule 60(b)(6). Accordingly, the trial court's grant of that motion was within the court's sound discretion. We therefore

reject Associate MD's arguments in its cross-appeal.

Conclusion

¶ 21 We affirm the trial court's judgment.

AFFIRMED.

Chief Judge STROUD and Judge COLLINS concur.

Report per Rule 30(e).