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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-222

No. COA21-291

Filed 5 April 2022

Guilford County, No. 20 CVD 7106

CARROLL AT BELLEMEADE, LLC dba CARROLL AT BELLMEADE, Plaintiff,

v.

KABUTO, INC., Defendant.

Appeal by Defendant from order entered on 17 February 2021 by Judge Kimberly M. Fletcher in Guilford County District Court. Heard in the Court of Appeals 12 January 2022.

Rossabi Law Partners, by Gavin J. Reardon, for the Plaintiff-Appellee.

Revolution Law Group, by C. Scott Meyers, for the Defendant-Appellant.

JACKSON, Judge.

¶ 1 Kabuto, Inc. ("Defendant") appeals from the trial court's order denying its motion to set aside a judgment in an action for summary ejectment. We affirm the order of the trial court.

I. Background

¶ 2 Defendant operates a restaurant by the same name in Greensboro, North Carolina. In March 2020, Defendant entered into a lease for an apartment in

downtown Greensboro for Wendy Kimball, one of its employees and officers. The apartment is in a development owned and operated by Carroll at Bellemeade, LLC ("Plaintiff").

¶ 3 In April 2020, Defendant was contacted by Plaintiff through Ms. Kimball to inform her that Plaintiff would not be following its ordinary procedures concerning late fees and evictions because of the COVID-19 pandemic. On or about 6 April 2020, Plaintiff stopped accepting rent payments from tenants through the online portal where rent was paid unless the tenant first signed an agreement with terms in addition to the original lease terms. Defendant was not interested in signing this agreement, and therefore was unable to pay Plaintiff rent as it became due.

¶ 4 On 15 May 2020, Plaintiff sent Defendant an Unconditional Quit Notice demanding that the premises be vacated by 31 May 2020. Defendant then engaged counsel to negotiate with Plaintiff. On 27 May 2020, the parties appeared to have achieved an agreement in principle that would allow Defendant to remain in possession of the apartment. A settlement agreement had been drafted, but Plaintiff never executed it.

¶ 5 On 24 April 2020, Plaintiff filed an action for summary ejectment against Defendant in the small claims division of Guilford County District Court, which was served by posting on 28 April 2020. The summons issued by the district court set a trial date of 9 June 2020, but the trial was continued to 30 June 2020. On 30 June

2020, Defendant failed to appear, and Plaintiff obtained a judgment for possession of the premises.

¶ 6 On 27 July 2020, Defendant moved the court to set aside the summary ejectment judgment under Rule 60(b)(1) of the North Carolina Rules of Civil Procedure, arguing that counsel for Defendant was unaware of the action for summary ejectment, which had been filed by an attorney at an outside law firm representing Plaintiff while counsel for Defendant was negotiating a settlement of the parties' dispute with one of Plaintiff's in-house attorneys, who was not aware of the actions of the attorney at the outside firm.

¶ 7 Defendant's motion came on for hearing before Magistrate Christie D. Haynes on 25 August 2020 in Guilford County Small Claims Court. Magistrate Haynes denied the motion in an order entered on 1 September 2020. Defendant thereafter posted bond to stay execution of the summary ejectment pending appeal and noticed appeal to district court from the magistrate's denial of its motion on 11 September 2020.

¶ 8 On 10 February 2021, Plaintiff moved to dismiss Defendant's appeal from the magistrate's judgment.

¶ 9 The matters came on for hearing before the Honorable Kimberly M. Fletcher in Guilford County District Court. The court denied both motions in an order entered on 17 February 2021.

¶ 10 Defendant entered timely written notice of appeal to our Court from the district court's order, posting a second bond to stay execution of the summary ejectment judgment pending appeal on 8 April 2021.

II. Analysis

¶ 11 In its sole argument on appeal, Defendant contends that the trial court abused its discretion in denying Defendant's motion to set aside judgment. Specifically, Defendant argues that the court abused its discretion in finding no excusable neglect and in making no finding of a meritorious defense. We disagree.

A. Standard of Review

¶ 12 Under Rule 60(b)(1) of the North Carolina Rules of Civil Procedure, "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . [m]istake, inadvertence, surprise, or excusable neglect[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2021). "[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 trial court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Defendant's Neglect Was Not Excusable, and Thus No Finding Regarding a Meritorious Defense Was Required

¶ 13 "To set aside a judgment on the grounds of excusable neglect under Rule 60(b), the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 424, 349 S.E.2d 552, 554 (1986). What constitutes excusable neglect depends on what may be reasonably expected of a party under the circumstances. *See McIntosh v. McIntosh*, 184 N.C. App. 697, 704-05, 646 S.E.2d 820, 825 (2007). "Excusable neglect is something which must have occurred at or before entry of judgment, and which caused it to be entered." *Norton v. Sawyer*, 30 N.C. App. 420, 424, 227 S.E.2d 148, 152 (1976). "[E]xcusability of the neglect on which relief is granted is that of the litigant, not that of the attorney." *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 131, 180 S.E.2d 407, 410 (1971). "As has often been stated, a party served with a summons must give the matter the attention that a person of ordinary prudence would give to his important business." *Grant v. Cox*, 106 N.C. App. 122, 125, 415 S.E.2d 378, 381 (1992) (internal marks and citation omitted). "Failure to respond to a summons within the time allowed is not excusable neglect." *Id.*

¶ 14 In the present case, Plaintiff filed an action for summary ejectment against Defendant in the small claims division of Guilford County District Court on 24 April

2020, which was served by posting on 28 April 2020. The complaint sought possession only, and the summons set trial for 9 June 2020. The certificate of service for the complaint and summons reflects that Defendant's registered agent for service of process was sent the complaint and summons by United States Postal Service next-day air mail. Trial was subsequently continued to 30 June 2020. Defendant concedes that it was aware of the eviction action and that it failed to appear at trial.

¶ 15 "A lawsuit is a serious matter. He who is a party to a case in court must give it that attention which a prudent man gives to his important business." *Pepper v. Clegg*, 132 N.C. 312, 315, 43 S.E. 906, 907 (1903) (internal marks and citations omitted). Our Supreme Court has held that a defendant who fails to appear at trial "los[es] [its] rights, if [it] had any to protect, by [its] own inattention and inexcusable neglect." *White v. Hans Rees' Sons*, 150 N.C. 678, 680, 64 S.E. 777, 778 (1909). Defendant therefore lost its rights to contest Plaintiff's entitlement to a summary ejectment judgment by (1) failing to notify its counsel that the eviction action had been filed; (2) failing to answer or assert counterclaims after receiving the complaint and summons in the summary ejectment action, which were served on Defendant both by posting and next-day air mail; and (3) failing to appear on the date set for trial.

¶ 16 Defendant contends that the eviction action was filed during settlement negotiations between Defendant's counsel and in-house counsel for Plaintiff by an

attorney at an outside law firm without the knowledge of the in-house attorney with whom Defendant's counsel had been negotiating. Defendant's counsel represents that counsel was never served with a copy of the Complaint in Summary Ejectment and that the attorney with whom he had been negotiating only refused to finalize the settlement after learning of the summary ejectment judgment obtained by the attorney at the outside law firm. However, while Defendant's counsel's representation suggests that Plaintiff's attorneys could have comported themselves with greater professionalism by coordinating their efforts better, it does not absolve Defendant from failing to notify its own counsel of the eviction action, or from failing to appear at trial. After all, relief for excusable neglect is only available for the excusable neglect "of the litigant, not that of the attorney." *Kirby*, 11 N.C. App. at 131, 180 S.E.2d at 410. We therefore hold that Defendant's failure to appear at trial did not constitute excusable neglect.

¶ 17 "In the absence of sufficient showing of excusable neglect, the question of meritorious defense becomes immaterial." *Howard v. Williams*, 40 N.C. App. 575, 580, 253 S.E.2d 571, 574 (1979). Accordingly, we hold that the trial court did not abuse its discretion in denying Defendant's motion, and that the absence of a finding of a meritorious defense was not erroneous.

III. Conclusion

¶ 18 For the reasons stated above, we affirm the order of the trial court.

AFFIRMED.

Judges DILLON and WOOD concur.

Report per Rule 30(e).