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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-221

No. COA 21-478

Filed 5 April 2022

Wake County, No. 17 CVS 15044

RAYMOND CARPENTER, Plaintiff,

v.

BANK OF AMERICA CORPORATION, BANK OF AMERICA HOME LOANS SERVICING, Defendants.

Appeal by Plaintiff from order entered 12 May 2021 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 23 February 2022.

Raymond Carpenter, pro se.

McGuire Woods LLP, by Danielle M. Harper, for Defendant-Appellee.

GRIFFIN, Judge.

¶ 1 Plaintiff Raymond Carpenter appeals from an order denying his motion for relief pursuant to N.C. R. Civ. P. 60(b). Carpenter asserts that the trial court abused its discretion in denying his motion under N.C. R. Civ. P. 60(b)(1), (2), (3), and (6). We affirm the trial court's order.

I. Factual and Procedural History

¶ 2 On 8 December 2017, Carpenter, through counsel, filed a complaint against

Bank of America and Bank of America Home Loans Servicing (together, "BOA") relating to a foreclosure action BOA instituted against Carpenter's property based upon his default on a mortgage loan. Carpenter's complaint accused BOA of unfair and deceptive trade practices, breach of an implied covenant of good faith and fair dealing, and negligence. Additionally, the complaint sought an emergency restraining order and preliminary injunction to halt the foreclosure sale. Throughout the pendency of that action, the foreclosure sale was rescheduled several times.

¶ 3 On 21 March 2018, BOA filed a motion to dismiss. The trial court held a hearing on Defendant's motion to dismiss and entered an order granting BOA's motion on 6 August 2018 "for the reasons set forth in Defendants Memorandum in Support." Carpenter did not appeal the trial court's order at this time. On 8 July 2019, the foreclosure sale underlying Carpenter's complaint was cancelled once again.

¶ 4 On 30 July 2019, Carpenter filed a motion for relief from the order pursuant to N.C. R. Civ. P. 60(b) ("Rule 60 Motion"). Prior to the hearing on the Rule 60 Motion, Carpenter's counsel withdrew from the case because Carpenter prepared the motion independent of counsel and counsel had not "had any communication with [Carpenter] . . . about this matter for at least a year." After the hearing, the trial court entered an order denying the motion. Carpenter, acting pro se, filed timely written notice of appeal.

II. Analysis

¶ 5 "[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citation omitted). An abuse of discretion requires a showing that the trial court's order "was manifestly unsupported by reason" and "could not have been the result of a reasoned decision." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980); *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

A. Mistake, Inadvertence, Surprise, or Excusable Neglect

¶ 6 Carpenter argues that relief is warranted because BOA failed to provide their memorandum in support of their motion to dismiss to Carpenter or his counsel prior to the hearing. Since the trial court's original order granting BOA's motion to dismiss was based entirely on this memorandum, Carpenter asserts that he is entitled to relief from this order.

¶ 7 Rule 60(b)(1) of the North Carolina Rules of Civil Procedure permits a party to obtain relief from the court when "[m]istake, inadvertence, surprise, or excusable neglect" were present in a final judgment or order. N.C. R. Civ. P. 60(b)(1). "The surprise contemplated by the statute is some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded against." *Townsend v. Carolina Coach Co.*, 231 N.C. 81, 85, 56 S.E.2d 39, 42 (1949) (citations omitted).

¶ 8 There is no indication in the record supporting Carpenter's claim of surprise.

BOA's certificate of service indicates that their memorandum in support was sent to Carpenter's counsel on 1 August 2018. Further, Carpenter's argument fails because Carpenter's memorandum in opposition addressed the contents of BOA's memorandum in support. Since there are indications that Carpenter and his counsel were on notice of BOA's memorandum, especially to the extent that Carpenter was able to address BOA's memorandum in support, the trial court's decision with respect to this claim was not "manifestly unsupported by reason." *See Clark*, 301 N.C. at 129, 271 S.E.2d at 63.

B. Newly Discovered Evidence

¶ 9 Carpenter contends that he is entitled to relief based on his discovery of sworn declarations from former BOA employees who worked in the mortgage modification department made in relation to an unrelated federal case. These declarations put forth by Carpenter are from *In re Bank of Am. Home Affordable Modification Program (HAMP) Cont. Litig.*, No. MDL 10-2193-RWZ, 2013 WL 4759649 (D. Mass. Sept. 4, 2013) ("*HAMP*").

¶ 10 Rule 60(b)(2) permits the court to grant relief where there is "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.]" N.C. R. Civ. P. 60(b)(2). Additionally, the newly discovered evidence "must have been in existence at the time of the trial[.]" *Parks v. Green*, 153 N.C. App. 405, 412, 571 S.E.2d 14, 19 (2002) (citation omitted).

¶ 11 Here, Carpenter has failed to show that these declarations are "newly discovered evidence." While these declarations were in existence when the trial court entered the original order granting BOA's motion to dismiss, Carpenter has failed to show that these declarations could not have been found with due diligence in time to move for a new trial under Rule 59(b). *See* N.C. R. Civ. P. 59(b) ("A motion for a new trial shall be served not later than 10 days after entry of the judgment."). The federal case that these declarations arose from was decided in 2013. *See HAMP*, 2013 WL 4759649. Carpenter did not discover these declarations until July 2019. Thus, it was not unreasonable for the trial court to deny Carpenter's Rule 60 Motion under this subsection where it could have reasonably concluded that Carpenter and his counsel did not exercise due diligence in exploring decided cases outside of North Carolina to support their claim.

C. Fraud

¶ 12 Carpenter contends the sworn declarations by the former BOA employees verify the fraud claims made in his original complaint. Subsection (b)(3) of Rule 60 permits courts to relieve a party from an order where there is "[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]" N.C. R. Civ. P. 60(b)(3). "To obtain relief under Rule 60(b)(3), the moving party must 1) have a meritorious defense, 2) that he was prevented from presenting prior to judgment, 3) because of fraud, misrepresentation

or misconduct by the adverse party." *Milton M. Croom Charitable Remainder Unitrust v. Hedrick*, 188 N.C. App. 262, 268, 654 S.E.2d 716, 721 (2008). "It must be borne in mind that it is not fraud in the cause of action, but fraud in its management, which entitles a party to relief." *Scott v. Farmers Co-op. Exch., Inc.*, 274 N.C. 179, 183, 161 S.E.2d 473, 476 (1968) (citations and internal quotation marks omitted).

¶ 13 Carpenter has made no argument with respect to the required elements to show fraud under section (b)(3). Carpenter only makes a blanket assertion that the declarations further substantiate the claims in his original complaint. Further, the fraud that Carpenter contends entitles him to relief is not the fraud by which Rule 60(b)(3) is intended to provide relief. Carpenter repackages his previous fraud claims made in his original complaint. However, the fraud contemplated by Rule 60(b)(3) is intended to provide relief where there is fraud in the proceedings in determining the merits of the case; not fraud in the merits of the case itself. Accordingly, we hold the trial court's decision to deny the Rule 60 motion under this subsection was not unreasonable.

D. Other Reasons Justifying Relief

¶ 14 Carpenter claims that the trial court order should be set aside under Rule 60(b)(6) because (1) he assumed the trial court was unaware of the unrelated federal case when BOA's original motion to dismiss was granted, and (2) the foreclosure sale was cancelled one year after the dismissal with no new sale date being set.

¶ 15 Rule 60(b)(6) allows courts to grant relief from an order for "[a]ny other reason justifying relief." N.C. R. Civ. P. 60(b)(6). "Although section (6) of Rule 60(b) has often been termed a vast reservoir of equitable power, a court cannot set aside a judgment pursuant to this rule 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) (citations and internal quotation marks omitted).

¶ 16 Carpenter makes no cognizable argument establishing that any "extraordinary circumstances exist" or "that justice demands that relief be granted" under the circumstances. We conclude that the trial court did not abuse its discretion in denying Carpenter's Rule 60 motion under this subsection.

III. Conclusion

¶ 17 For the reasons stated above, the trial court's order denying Carpenter's motion is affirmed.

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).