IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-602

Nos. COA22-77, 22-370

Filed 6 September 2022

Mecklenburg County, No. 2021 CVS 6227

RACHEL GOODE, Plaintiff,

v.

LEISURE ENTERTAINMENT CORP. d/b/a LASER QUEST, Defendant.

Appeals by Plaintiff from orders entered 19 October 2021 by Judge Robert C. Ervin and 21 December 2021 by Judge Lisa Bell in Mecklenburg County Superior Court. Consolidated by order entered 19 May 2022 and heard in the Court of Appeals 9 August 2022.

Justice in Action Law Center, by Alesha S. Brown, and Hall & Dixon, PLLC, by Issa Hall, for Plaintiff-Appellant.

Young Moore and Henderson, P.A., by David W. Earley, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiff Rachel Goode appeals from orders granting Defendant Leisure Entertainment Corp.'s motion to dismiss and denying her motion for relief under Rule of Civil Procedure 60(b). Because no summons was ever issued to or served on Leisure Entertainment Corp., the trial court did not err by dismissing Plaintiff's complaint

for lack of personal jurisdiction based upon insufficient process and insufficient service of process. Additionally, the trial court did not abuse its discretion by denying Plaintiff's 60(b) motion. We affirm the trial court's orders.

I. Background

¶ 2 On 15 April 2021, Plaintiff filed a complaint against "Versent Corporation ULC d/b/a Laser Quest," alleging that she was injured while participating in a game of laser tag at a facility in Charlotte operated by "Versent Corporation ULC." Plaintiff asserted claims for negligence, negligence per se, and negligent infliction of emotional distress. Following the filing of the complaint, the clerk of court issued a summons directed to "Versent Corporation ULC d/b/a Laser Quest."

¶ 3 "Versent Entertainment ULC" filed a motion to dismiss accompanied by an affidavit of Michael Lowry, its "sole officer and director." Lowry averred in pertinent part:

> 3. Versent Entertainment ULC was previously an Alberta, Canada corporation known as "Versent Corporation ULC".
>
> 4. On December 21, 2018, "Versent Corporation ULC" became a British Columbia, Canada corporation and legally changed its name to "Versent Entertainment ULC".
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> 5. Versent Entertainment ULC is insolvent, has ceased business operations, and has no employees.
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> 6. Before ceasing business operations, Versent Entertainment ULC operated Laser Quest locations located exclusively in Canada.
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> 7. Versent Entertainment ULC was not and is not

> qualified to do business in North Carolina.
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> 8. Versent Entertainment ULC has never conducted business in, or directed advertising toward, North Carolina.
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> 9. While it was conducting business operations, Versent Entertainment ULC had no employees in North Carolina, maintained no bank accounts in North Carolina, and did not own or lease any property in North Carolina.
>
> 10. Leisure Entertainment Corp. is a Delaware corporation and is authorized to conduct business in North Carolina.
>
> 11. The Laser Quest location at issue in this case, located in Charlotte, North Carolina, was leased and operated by Leisure Entertainment Corp. at the time of the incident at issue in this case.
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> 12. Versent Entertainment ULC did not control the operations of Leisure Entertainment Corp., including Leisure Entertainment Corp.'s operations at the Charlotte, North Carolina Laser Quest location.
>
> 13. Versent Entertainment ULC kept separate finances from those of Leisure Entertainment Corp.
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> 14. Versent Entertainment ULC and Leisure Entertainment Corp. filed separate tax returns.

¶ 4 After Versent Entertainment ULC filed its motion to dismiss, Plaintiff filed an amended complaint against only "Leisure Entertainment Corp. d/b/a Laser Quest." The amended complaint contained the same factual allegations and asserted the same claims as Plaintiff's original complaint. No summons was ever issued to or served on Leisure Entertainment Corp.

¶ 5 Leisure Entertainment Corp. filed a motion to dismiss the amended complaint for lack of personal jurisdiction, insufficiency of process, insufficiency of service of process, and failure to state a claim upon which relief can be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2), (4), (5), and (6). The trial court entered an order granting the motion to dismiss ("Rule 12(b) Order") with the following pertinent findings of fact and conclusions of law:

> 6. A summons directed to Leisure Entertainment Corp. has never been issued in this action.
>
> 7. Because a summons directed to Leisure Entertainment Corp. was not issued within the period prescribed by N.C. R. Civ. P. 4(a) and 6(a) following the filing of the Amended Complaint, this action abated after August 24, 2021.
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> . . . .
>
> 9. Proof of service of process upon Leisure Entertainment Corp. in compliance with N.C. Rule of Civil Procedure 4 or N.C. Gen. Stat. § 1-75.10 was never filed in this action.
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> . . . .
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> 11. Plaintiff has the initial burden of establishing proof of service.
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> 12. Plaintiff has not met her burden of establishing proof of service.
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> 13. Because no summons directed to Leisure Entertainment Corp. has ever been issued and this action has abated, there is insufficient process in this action and dismissal pursuant to N.C. R. Civ. P. 12(b)(4) is appropriate.
>
> 14. Because no summons directed to Leisure Entertainment Corp. has ever been issued, no summons

> directed to Leisure Entertainment Corp. has ever been served on Leisure Entertainment Corp., and this action has abated, there has been insufficient service of process in this action and dismissal pursuant to N.C. R. Civ. P. 12(b)(5) is appropriate.
>
> 15. Because no summons directed to Leisure Entertainment Corp. has ever been issued, no summons directed to Leisure Entertainment Corp. has ever been served on Leisure Entertainment Corp., and this action has abated, the Court lacks personal jurisdiction over Leisure Entertainment Corp. and, therefore, dismissal pursuant to N.C. R. Civ. P. 12(b)(2) is appropriate.

The trial court denied the motion to dismiss for failure to state a claim as moot.

¶ 6 Following entry of the Rule 12(b) Order, Plaintiff filed a motion for relief under N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) and (6) ("Rule 60(b) Motion"). Plaintiff contended that "the failure to secure the issuance of a summons to Leisure Entertainment was the product of excusable neglect on the part of Plaintiff's counsel" which should not be imputed to Plaintiff, justifying relief under Rule 60(b)(1), and that Plaintiff's counsel committed "gross neglect" amounting to an "extraordinary circumstance," justifying relief under Rule 60(b)(6). The trial court entered an order denying the motion ("Rule 60(b) Order").

¶ 7 Plaintiff separately noticed appeal from the Rule 12(b) Order and Rule 60(b) Order. This Court consolidated Plaintiff's appeals on 19 May 2022.

II. Discussion

A. Rule 12(b) Order

¶ 8 Plaintiff argues that the trial court erred by granting Defendant's motion to

dismiss.

> The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record. Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal. We review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law . . . .

Bell v. Mozley, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (quotation marks, brackets, and citations omitted).

1. Equitable Estoppel

¶ 9 Plaintiff first argues that the trial court erred by not estopping Defendant from seeking dismissal of the amended complaint. Plaintiff has failed to preserve this argument for appellate review.

¶ 10 To "preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context" and must "obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1). Plaintiff did not plead equitable estoppel in the amended complaint, did not raise the issue of equitable estopped at any point in opposition to Defendant's motion to dismiss, and did not secure a ruling on this issue. Accordingly, Plaintiff has failed to preserve her equitable estoppel argument for appellate review. *See, e.g.*, *Mitchell, Brewer, Richardson, Adams, Burge &*

Boughman, PLLC, v. Brewer, 209 N.C. App. 369, 387, 705 S.E.2d 757, 770 (2011) (declining to consider an equitable estoppel argument for the first time on appeal).

2. Insufficiency of Process, Insufficiency of Service of Process, and Personal Jurisdiction

¶ 11 Plaintiff next argues that the trial court erred by dismissing the amended complaint for insufficiency of process, insufficiency of service of process, and lack of personal jurisdiction.

¶ 12 Under Rule 4 of the North Carolina Rules of Civil Procedure, "[u]pon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." N.C. Gen. Stat. § 1A-1, Rule 4(a) (2021). The summons "shall be directed to the defendant or defendants," *id.* § 1A-1, Rule 4(b), and service of the summons must be made in a time and manner consistent with the Rules of Civil Procedure.

¶ 13 "The summons, not the complaint, constitutes the exercise of the power of the State to bring the defendant before the court. As such, defects in the summons receive careful scrutiny and can prove fatal to the action." *Latham v. Cherry*, 111 N.C. App. 871, 873, 433 S.E.2d 478, 480 (1993) (citation omitted). "[F]or a court to obtain personal jurisdiction over a defendant, a summons must be issued and service of process secured by one of the statutorily specified methods." *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 335, 714 S.E.2d 770, 774 (2011) (citation omitted). "Absent valid service of process, a court does not acquire personal jurisdiction over the

defendant and the action must be dismissed." *Bentley v. Watauga Bldg. Supply, Inc.*, 145 N.C. App. 460, 462, 549 S.E.2d 924, 925 (2001) (quotation marks and citation omitted).

¶ 14 Plaintiff does not challenge the trial court's findings that a "summons directed to Leisure Entertainment Corp. has never been issued in this action" and, consequently, "[p]roof of service of process upon Leisure Entertainment Corp. in compliance with N.C. Rule of Civil Procedure 4 or N.C. Gen. Stat. § 1-75.10 was never filed in this action." These findings are therefore binding on appeal. *Bell*, 216 N.C. App. at 543, 716 S.E.2d at 871.

¶ 15 Plaintiff instead argues that process and service of process were sufficient here because the substitution of Leisure Entertainment Corp. for Versent Corporation ULC merely corrected a misnomer as to the defendant's identity. We disagree.

¶ 16 Process is not insufficient if the caption contains a misnomer of the defendant but

> the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit.

Storey v. Hailey, 114 N.C. App. 173, 178, 441 S.E.2d 602, 605 (1994) (quoting *Harris v. Maready*, 311 N.C. 536, 546, 319 S.E.2d 912, 919 (1984)). "If the amendment

amounts to a substitution or entire change of parties, however, the amendment will not be allowed." *Harris*, 311 N.C. at 546, 319 S.E.2d at 918.

¶ 17 This case is analogous to *Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 450 S.E.2d 24 (1994), *aff'd per curiam*, 342 N.C. 404, 464 S.E.2d 46 (1995). In *Franklin*, the initial complaint named "Winn Dixie Stores, Inc." as the defendant and multiple summons were directed to the same. *Id.* at 30, 450 S.E.2d at 26. The plaintiff ultimately filed and served an amended complaint naming "Winn Dixie Raleigh, Inc." as the defendant. *Id.* at 32, 450 S.E.2d at 27. However, after filing the amended complaint, the plaintiff never served a summons on "Winn Dixie Raleigh, Inc." *Id.* at 37, 450 S.E.2d at 30. This Court held that the trial court did not err by dismissing the amended complaint for insufficiency of service of process. *Id.* at 36, 450 S.E.2d at 29. While "Winn-Dixie Stores, Inc." and "Winn-Dixie Raleigh, Inc." were "both Florida corporations authorized to do business in North Carolina," they "were separate and distinct corporations at the time the cause of action accrued." *Id.* at 34-35, 450 S.E.2d at 28. Accordingly,

> the named defendant in the original summons and complaint, "Winn Dixie Stores, Inc.", was not a mistake or misdescription permitting the amendment of the summons. Rather, Winn Dixie Stores, Inc. was the correct name of the wrong corporate party defendant, a substantive mistake which is fatal to this action. Quite simply, plaintiffs sued the wrong corporation.

Id. at 35, 450 S.E.2d at 28.

¶ 18 Here, Plaintiff did not seek to "merely correct[] a mistake in the name of defendant" denoted in the summons. *Liss v. Seamark Foods*, 147 N.C. App. 281, 285, 555 S.E.2d 365, 368 (2001). Instead, as in *Franklin*, Plaintiff attempted to substitute a new defendant after initially suing the wrong corporation. Plaintiff's original complaint named "Versent Corporation ULC d/b/a Laser Quest" as the sole defendant and the only summons issued in this case was directed to "Versent Corporation ULC d/b/a Laser Quest." Versent and Leisure are separate legal entities: Versent is a British Columbia, Canada corporation; Leisure is a Delaware corporation. Plaintiff may not, under the guise of correcting a misnomer in the process issued to another entity in this case, substitute Leisure as the defendant. *See Harris*, 311 N.C. at 546, 319 S.E.2d at 918.

¶ 19 Plaintiff also contends on several occasions in her brief that Leisure had actual notice of the suit, but "[i]t is well-settled that process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid, even though a defendant had actual notice of the lawsuit." *Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604 (1996). The trial court did not err by dismissing Plaintiff's amended complaint for lack of personal jurisdiction based on insufficient process and insufficient service of process.

B. Rule 60(b) Order

¶ 20 Plaintiff next argues that the trial court erred by denying her Rule 60(b)

Motion because it warranted relief for excusable neglect under N.C. Gen. Stat. § 1A-1, Rule 60(b)(1).[1]

¶ 21 Rule 60(b)(1) permits a trial court to, "[o]n motion and upon such terms as are just, . . . 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). "In determining whether to grant relief under Rule 60(b)(1), the trial court has sound discretion which will be disturbed only upon a showing that the trial court abused its discretion." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 655 (1998) (citations omitted).

¶ 22 Plaintiff disputes the trial court's conclusion that Plaintiff "raised no facts pursuant to Rule 60(b) that would justify relief from" the Rule 12(b) Order. Plaintiff argues that the grounds for dismissal under Rule 12(b) "resulted from mistakes made by [Plaintiff's] counsel that should not be imputed to Plaintiff." Plaintiff's argument is without merit. Our Supreme Court has held that an attorney's negligence is not

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[1] Plaintiff also asserted in her Rule 60(b) Motion that her trial counsel's performance amounted to gross neglect sufficient to justify relief under Rule 60(b)(6), which permits relief for "[a]ny other reason justifying relief from the operation of the judgment." However, Plaintiff has abandoned this argument on appeal. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

Additionally, Plaintiff's brief in No. COA22-370, her appeal from the Rule 60(b) Order, substantially reiterates her arguments from her brief in No. COA22-77, her appeal from the Rule 12(b) Order. Defendant's arguments that the trial court erred by granting the motion to dismiss are not properly raised in a motion for relief under Rule 60, *Morehead v. Wall*, 224 N.C. App. 588, 592, 736 S.E.2d 798, 801 (2012), and as discussed above are without merit.

"excusable neglect" justifying relief under Rule 60(b)(1). *Id.* at 546, 501 S.E.2d at 655.

> In enacting Rule 60(b)(1), the General Assembly did not intend to sanction an attorney's negligence by making it beneficial for the client and to thus provide an avenue for potential abuse. Allowing an attorney's negligence to be a basis for providing relief from orders would encourage such negligence and present a temptation for litigants to use the negligence as an excuse to avoid court-imposed rules and deadlines. Plaintiffs have argued that this Court should provide relief from an order if only the attorney, rather than the client, was negligent. Looking only to the attorney to assume responsibility for the client's case, however, leads to undesirable results.

Id. Accordingly, "[i]gnorance, inexcusable negligence, or carelessness on the part of an attorney will not provide grounds for relief under Rule 60(b)(1)." *Clark v. Penland*, 146 N.C. App. 288, 292, 552 S.E.2d 243, 245 (2001) (citation omitted).

¶ 23 The record reflects that Plaintiff's trial counsel admittedly failed to "locate a lease that may have been filed with the Register of Deeds indicating that" Leisure Entertainment Corp. operated the laser tag facility, confirm the name of the corporate entity operating the facility while corresponding with both an insurer and with Versent Entertainment ULC, obtain or serve a summons directed to Leisure Entertainment Corp. upon filing the amended complaint, and timely serve a response to Defendant's motion to dismiss. Additionally, as Defendant notes, Plaintiff's trial counsel took no action to secure the issuance or service of a proper summons in the approximately two-week period the motion to dismiss was pending. Under the circumstances, this conduct amounted to inexcusable neglect by Plaintiff's trial

counsel. The trial court did not abuse its discretion by denying relief under Rule 60(b)(1).

III. Conclusion

¶ 24 The trial court did not err by granting Defendant's motion to dismiss for lack of personal jurisdiction and did not abuse its discretion by denying Plaintiff's Rule 60(b) Motion. The Rule 12(b) Order and Rule 60(b) Order are each affirmed.

AFFIRMED.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).