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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-667

Filed 01 August 2023

Disciplinary Hearing Commission, No. 92DHC17

THE NORTH CAROLINA STATE BAR, Plaintiff,

v.

KENNETH FRANK IREK, Defendant.

Appeal by Defendant from Order entered 10 May 2022 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 24 January 2023.

*The North Carolina State Bar, by Deputy Counsel David R. Johnson and Katherine Jean, for Plaintiff-Appellee.*

*Kenneth Frank Irek, Defendant-Appellant, Pro se.*

HAMPSON, Judge.

**Factual and Procedural Background**

Kenneth Frank Irek (Defendant) appeals from an Order denying Defendant's Rule 60 Motion for Relief entered on 10 May 2022 by a Disciplinary Hearing Panel (Hearing Panel) of the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar (State Bar). This matter stems from disciplinary proceedings initiated by

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the State Bar in 1992 against Defendant, which ultimately resulted in an Order of Discipline entered in January 1993 disbaring Defendant from the practice of law in North Carolina. The Record on Appeal tends to reflect the following:

On 13 March 1992, the State Bar and Defendant entered a Consent Order of Preliminary Injunction in a civil action in Wake County Superior Court finding it appeared Defendant misappropriated client funds and failed to promptly pay or deliver funds held for clients in violation of the Rules of Professional Conduct and enjoining Defendant from accepting or withdrawing funds as a fiduciary. This Consent Order noted Defendant's last known address of record with the State Bar was a P.O. Box in Raleigh, North Carolina.

Subsequently, on 10 August 1992, the State Bar initiated the disciplinary action at bar by filing a Complaint before the DHC alleging multiple violations of the Rules of Professional Conduct (the 1992 Complaint). After multiple attempts to locate and serve Defendant with a Summons and the 1992 Complaint, the State Bar resorted to service of process by publication pursuant to Rule 4(j1) of the North Carolina Rules of Civil Procedure. The Notice of Service of Process by Publication was published in the *News and Observer* on three dates between September and October 1992. Copies of the Notice were also sent to Defendant's last known address of record with the State Bar and his last known residential address by certified mail. The copies were returned unclaimed. The Notice of Service of Process by Publication did contain two typographical errors. The first appeared in the caption of the matter

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naming Defendant as “Kenneth Grank Irek”, although the notice is directed to Kenneth Frank Irek. The second incorrectly lists the file number of the action as “91 DHC 17” rather than 92 DHC 17.

On 13 November 1992, the State Bar moved for entry of default against Defendant. The same day, the State Bar also submitted an Affidavit Supporting Service by Publication outlining the steps the State Bar had undertaken to obtain personal service on Defendant both before and after service by publication. Also on 13 November 1992, the DHC entered default against Defendant. A few days later, on 16 November 1992, the State Bar moved the DHC for Entry of Discipline.

On 8 January 1993, the DHC entered Findings of Fact and Conclusions of Law concluding the DHC had personal and subject matter jurisdiction over Defendant and determining Defendant had committed multiple violations of the Rules of Professional Conduct. With respect to service of process on Defendant, the DHC made Findings listing the efforts of the State Bar to personally serve Defendant:

54. Letters of notice and other communications sent by the State Bar to [Defendant’s] last known official address in May and June 1992 were returned unclaimed.

55. Between mid-August and Sept. 9 1992, the [] State Bar attempted to serve [Defendant] personally with the summons and complaint in this proceeding through the Wake County Sheriff’s Department.

56. The Wake County Sheriff’s Department was unable to serve [Defendant] and returned the process unserved to the [] State Bar after Sept. 9, 1992.

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57. On Sept. 22, 1992, the [] State Bar mailed a copy of the summons and complaint herein to [Defendant] by certified mail at his last known residence address . . . . The letter, which also enclosed a copy of the notice of publication prepared by the State Bar, was returned unclaimed.

58. Prior to Oct. 6, 1992, the [] State Bar received information that members of [Defendant's] family were residing at [a Hillsborough address].

59. On Oct. 6, 1992, the [] State Bar sent an alias & pluries summons and the complaint herein to the Orange County Sheriff's Department to attempt service upon [Defendant] at the Hillsborough address.

60. On Oct. 7, 1992, the [] State Bar mailed a copy of the alias & pluries summons and the complaint herein to [Defendant] by certified mail to [Defendant] at the Hillsborough address. The letter was returned unclaimed.

61. The Orange County Sheriff's Department attempted service upon [Defendant] at the Hillsborough address on Oct. 21, 1992. The return of service indicates that [Defendant]'s wife informed the sheriff's deputy that [Defendant] was living in Florida as of Oct. 21, 1992.

62. On Nov. 5, 1992, . . . a staff investigator employed by the [] State Bar contacted [Defendant]'s wife and father by telephone. Both indicated that they did not know where [Defendant] was. [Defendant's wife] stated that she believed [Defendant] was in Florida but that she did not have his address.

63. Following May 1992, the [] State Bar had no reliable information regarding [Defendant]'s whereabouts and its attempts to serve [Defendant] with various documents by certified mail and in person were unsuccessful.

64. The [] State Bar served [Defendant] with the complaint in this matter by publication pursuant to N.C.

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Gen. Stat. Section G.S. 1A-1, Rule 4(j1). The notice of the instant disciplinary proceeding appeared in the Raleigh News & Observer Newspaper on Sept. 28, Oct. 5[,] and Oct. 12, 1992.

Also on 8 January 1993, the DHC entered a separate Order of Discipline finding aggravating factors against Defendant and based on its Findings of Fact and Conclusions of Law, ordered Defendant disbarred.

On 24 January 2022, almost 29 years later, Defendant filed his Motion for Relief From the Order of Discipline, 92 DHC 17, entered 8 January 1993, pursuant to Rule 60(b)(4) and Rule 60(b)(6) (Motion for Relief). This Motion for Relief alleged the State Bar failed to use due diligence in personally serving Defendant with process. The Motion for Relief further asserted service by publication was, therefore, invalid and the DHC obtained no personal jurisdiction over Defendant. As a result, Defendant contended, the Order of Discipline was void pursuant to Rule 60(b)(4) of the Rules of Civil Procedure and should be vacated. Specifically, the Motion for Relief alleged the State Bar did not attempt to serve Defendant at an office address on St. Mary's Street in Raleigh. Defendant also alleged he utilized this office until on or about 26 August 1992—approximately two weeks after the filing of the Complaint—when he left for Florida. Defendant also submitted a supporting brief in which, in addition to his contentions regarding service by publication, he also sought relief from judgment pursuant to Rule 60(b)(6) of the Rules of Civil Procedure on the basis the DHC had not maintained a recording or transcript of the disciplinary hearing. In a

subsequent deposition taken on 23 February 2022, Defendant admitted: “[I] knew that I was disbarred since 1993” and learned he had been disbarred “[p]robably close to 1993, when I got disbarred. One of them was in May, and one of them was in January. So, one of those two, I was aware.”

On 10 May 2022, the Hearing Panel of the DHC, entered its Order denying Defendant’s Rule 60 Motion for Relief. The Hearing Panel determined “Despite the State Bar’s exercise of due diligence in its attempts to serve Defendant, it was unable to serve Defendant in person or by certified mail[,]” and “[t]hus, the State Bar properly resorted to service by publication.” The Hearing Panel also noted that “As part of the Findings of Fact and Conclusions of Law the Hearing Panel made when entering the [O]rder of [D]iscipline, it considered whether the State Bar exercised due diligence in attempting to serve Defendant by means other than publication.” The Hearing Panel further found Defendant had not offered any new evidence that was not before the original hearing panel or that “alternative methods of service would have been fruitful.” The Hearing Panel also found “Defendant has known that he was disbarred in North Carolina since 1993.”

The Hearing Panel concluded “Defendant failed to meet his burden . . . of establishing that the State Bar did not exercise due diligence before serving him with publication.” Thus, the Hearing Panel further concluded the DHC “obtained personal jurisdiction over Defendant”, and “the Order of Discipline was not void or voidable.” With respect to Defendant’s Rule 60(b)(6) contentions, the Hearing Panel concluded:

“Defendant’s motion for relief . . . was not brought within a reasonable time.” The Hearing Panel also concluded: “the State Bar complied with its obligation to make and preserve a complete record of the proceedings and evidence”, and further, “Defendant did not establish that his inability to obtain a copy of the transcript of the January 1993 hearing from the State Bar is an extraordinary circumstance requiring the order of discipline be set aside.” On 3 June 2022, Defendant filed Notice of Appeal pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 84-28(h).

### **Issues**

The issues on appeal are whether the DHC erred by: (I) concluding Defendant failed to bring his Motion for Relief under Rule 60(b)(6) within a reasonable time; and (II) denying Defendant’s Motion for Relief under Rule 60(b)(4) which alleged the 1993 Order of Discipline was void for lack of personal jurisdiction over Defendant.

### **Analysis**

#### **I. Rule 60(b)(6)**

“[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). A trial court abuses its discretion when its ruling is “manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Brown v. Foremost Affiliated Ins. Servs. Inc.*, 158 N.C. App. 727, 732, 582 S.E.2d 335, 339 (2003) (citation and quotation marks omitted).

Rule 60(b)(6) of the North Carolina Rules of Civil Procedure provides: a trial court may relieve a party from a final judgment for “[a]ny other reason justifying relief from the operation of the judgment[.]” N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2021). Motions pursuant to subsection (6) “shall be made within a reasonable time.” *Id.* “What constitutes a ‘reasonable time’ depends upon the circumstances of the individual case.” *Nickels v. Nickels*, 51 N.C. App. 690, 692, 277 S.E.2d 577, 578 (1981) (citations omitted). “‘Further, to set aside a judgment or order pursuant to Rule 60(b)(6) requires a showing: (1) that extraordinary circumstances exist and (2) that justice demands relief.’” *Sea Ranch II Owners Ass’n v. Sea Ranch II, Inc.*, 180 N.C. App. 226, 229, 636 S.E.2d 332, 334 (2006) (quoting *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987)).

Here, the DHC concluded Defendant failed to bring his Motion for Relief pursuant to Rule 60(b)(6) within a reasonable time. On appeal—other than paying lip service to this requirement and broadly claiming in conclusory fashion that his Motion was filed within a reasonable time—Defendant makes no argument actually challenging this conclusion or articulating how the DHC erred or abused its discretion. “Under Rule 28(b)(6), an issue ‘not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.’” *Wiley v. L3 Commc’ns Vertex Aerospace, LLC*, 251 N.C. App. 354, 365, 795 S.E.2d 580, 589 (2016) (citing N.C.R. App. P. 28(b)(6)). Therefore, Defendant has abandoned any argument that his Motion for Relief pursuant to Rule 60(b)(6) was brought within a



reasonable time. Indeed, Defendant's Motion was not brought until almost thirty years after his disbarment in 1993—with any right of appeal long since expired. In deposition testimony, Defendant acknowledged he learned of his disbarment in either January or May 1993. However, Defendant took no action towards requesting any record of the proceedings, appealing his disbarment, or seeking a transcript of the evidence. Thus, on the facts before us, Defendant has not shown extraordinary circumstances exist or justice demands relief under Rule 60(b)(6). Consequently, we cannot conclude the DHC abused its discretion in determining Defendant's Motion for Relief under Rule 60(b)(6) was not brought within a reasonable time.

## II. Rule 60(b)(4)

Rule 60(b)(4) of the North Carolina Rules of Civil Procedure provides grounds for relief from a judgment when “[t]he judgment is void[.]” N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2021). “Although Rule 60(b) contains the requirement that all motions made pursuant thereto be made ‘within a reasonable time,’ the requirement is not enforceable with respect to motions made pursuant to Rule 60(b)(4), because a void judgment is a legal nullity which may be attacked at any time.” *Allred v. Tucci*, 85 N.C. App. 138, 141, 354 S.E.2d 291, 294 (1987) (citation omitted).

Here, Defendant sought relief under Rule 60(b)(4) on the basis that service by publication of the 1992 Complaint was invalid, meaning the DHC obtained no personal jurisdiction over him, and thus, the 1993 Order of Discipline is void. “‘A defect in service of process by publication is jurisdictional, rendering any judgment

or order obtained thereby void.’” *Cotton v. Jones*, 160 N.C. App. 701, 703, 586 S.E.2d 806, 808 (2003) (quoting *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980)). “Service of process by publication is in derogation of the common law. Therefore, statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute.” *Id.* (citation and quotation marks omitted). “Rule 4(j1) permits service by publication on a party that cannot, through due diligence, otherwise be served.” *Id.* (citing N.C. Gen. Stat. § 1A-1, Rule 4(j1)). Under Rule 4(j1): “Upon completion of such service [by publication] there shall be filed with the [trial] court an affidavit showing the publication and mailing . . . , the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.” N.C. Gen. Stat. § 1A-1, Rule 4(j1).

Defendant first contends the State Bar did not exercise due diligence in attempting to serve him with the 1992 Complaint because the State Bar did not attempt service at his North Carolina office address. Thus, Defendant contends, service by publication was invalid, and the State Bar failed to obtain jurisdiction over him. For its part, the State Bar contends it was not required to attempt service at a business address Defendant had already abandoned.

“Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff’s knowledge or, with due diligence, can be

ascertained, service of process by publication is not proper.” *Fountain*, 44 N.C. App. at 587, 261 S.E.2d at 516 (citations omitted). However, “there is no ‘restrictive mandatory checklist for what constitutes due diligence’ for purposes of service of process by publication; [r]ather, a case by case analysis is more appropriate.” *Jones v. Wallis*, 211 N.C. App. 353, 358, 712 S.E.2d 180, 184 (2011) (quoting *Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372 (1980)). “Further, a plaintiff is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of ‘due diligence.’ This is particularly true when there is no indication in the record that any of the steps suggested by a defendant would have been fruitful.” *Id.* at 359, 712 S.E.2d at 185.

In this case, the State Bar, in 1992, filed an Affidavit setting forth its efforts at due diligence to serve Defendant in support of its Motion for Entry of Default. The original Hearing Panel made extensive Findings of Fact detailing the State Bar’s efforts in 1993 to serve Defendant at various addresses and to inquire as to his whereabouts. Indeed, Defendant offered no evidence that was not before the original Hearing Panel in support of his Motion for Relief from Judgment. While Defendant contends the State Bar was required to attempt service at his office address in Raleigh, Defendant points to no evidence that such an attempt would have been fruitful. This is particularly so considering the fact the State Bar initiated this action in August 1992, and Defendant concedes he left North Carolina for Florida, while knowing the State Bar was investigating him, the very same month, and after prior

attempts to personally serve Defendant or mail him documents had been unsuccessful. Thus, Defendant has failed to establish the State Bar failed to exercise due diligence in attempting to serve him before resorting to service by publication. Therefore, the DHC did not err in denying Defendant's Motion for Relief from Judgment under Rule 60(b)(4) on this basis.

Defendant next contends that two typographical errors in the Notice of Service of Process by Publication render service by publication void.<sup>1</sup> Defendant specifically contends that the Notice of Service of Process by Publication erroneously captioned his name as "Kenneth Grank Irek"—rather than Kenneth Frank Irek—and this deprived the DHC of jurisdiction to enter any disciplinary orders, notwithstanding the fact the Notice specifically then addresses itself: "To Kenneth Frank Irek". Defendant further contends the Notice incorrectly designated the file number of the case as "91 DHC 17" rather than 92 DHC 17. Defendant, however, cites no authority to support his contention clerical errors in the Notice of Service of Process by Publication in this case render a judgment void.

Our North Carolina Supreme Court has noted, quoting the Fourth Circuit with approval:

"A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If

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<sup>1</sup> Defendant did not raise this argument below. However, in that Defendant raises this as a jurisdictional argument, we address in the first instance whether these typographical errors amount to jurisdictional defects. *See generally* N.C.R. Civ. P. 10(b)(1).

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it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.”

*Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 84-85, 243 S.E.2d 756, 758 (1978) (quoting *United States v. A. H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir., 1947)). Service of process is not void where “there was no substantial possibility of confusion in this case about the identity of [the] party being sued.” *Harris v. Maready*, 311 N.C. 536, 544, 319 S.E.2d 912, 917 (1984). This is particularly so when “[a]ny person served in this manner would make further inquiry personally or through counsel if he had any doubt that he was being sued and would be required to answer the complaint when it was filed.” *Id.* Ultimately, the test for the constitutional validity of service “is not whether defendants received *actual* notice but whether the notice was of a nature *reasonably calculated* to give them actual notice and the opportunity to defend.” *Royal Bus. Funds Corp. v. S.E. Dev. Corp.*, 32 N.C. App. 362, 369, 232 S.E.2d 215, 219 (1977). For example, we have recognized where the published notice listed the wrong county as where the action was commenced, this rendered the judgment void, because had the defendant attempted to respond to an action in that wrong county, the defendant would not have found the pending case. *Connette, ex rel. A.M.R. v. Jones*, 196 N.C. App. 351, 354, 674 S.E.2d 751, 753 (2009).

Here, notwithstanding the minor and obvious clerical error in the caption, the Notice itself was directed to Kenneth Frank Irek. Moreover, the Notice plainly makes

clear a disciplinary proceeding against Kenneth Frank Irek has been instituted by the State Bar. We are persuaded “there was no substantial possibility of confusion in this case about the identity of . . . [the] party being sued.” *Harris*, 311 N.C. at 544, 319 S.E.2d at 917. Similarly, notwithstanding the incorrect file number, the Notice was such that any reasonable person being served in this manner, if they had any doubt, would inquire personally or through counsel with the State Bar and DHC to determine whether they were, in fact, the person against whom disciplinary proceedings were being initiated and the contents, and file number, of the complaint filed in those disciplinary proceedings. *See id.* Here, then, the Notice of Service of Process by Publication, despite its clerical errors, was reasonably calculated to provide Defendant notice of the proceedings and the opportunity to defend against the disciplinary proceedings. Thus, the clerical errors in the Notice of Service of Process by Publication do not render service of process by publication void. Therefore, in turn, the Order of Discipline disbarring Defendant was not void. Consequently, the DHC did not abuse its discretion by denying Defendant’s Motion for Relief pursuant to Rule 60(b)(4) of the North Carolina Rules of Civil Procedure.<sup>2</sup>

### **Conclusion**

Accordingly for the foregoing reasons, the Order denying Defendant’s Rule 60

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<sup>2</sup> Defendant also includes a third argument that he is entitled to monetary damages against the DHC and State Bar. We deem this argument so utterly meritless—certainly in this procedural posture and as raised in this appellate court—to warrant no further discussion other than to reject it out of hand.

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Motion for Relief is affirmed.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).