NO. COA01-877

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

WALL STREET LIMITED
PARTNERSHIP, A North Carolina
Limited Partnership, and
WSLP COLLEGE WALL CONDOMINIUM
ASSOCIATION, INC.,
A North Carolina Corporation

Plaintiffs,

v. Buncombe County
No. 98 CVD 02799

GRACE ELIZABETH DAUGHTRIDGE,

Defendant.

Appeal by defendant from order entered 31 January 2001 by Judge Peter L. Roda in Buncombe County District Court. Heard in the Court of Appeals 23 April 2002.

*Westall, Gray, Connolly & Davis, P.A., by Jack W. Westall, Jr., for plaintiff-appellees.*

*J. Elizabeth Spradlin, P.A., for defendant-appellant.*

TIMMONS-GOODSON, Judge.

Grace Elizabeth Daughtridge (hereinafter "defendant") appeals from an order of the trial court denying her motion seeking relief from judgment granting Wall Street Limited Partnership ("Wall Street") and WSLP College Wall Condominium Association, Inc. ("Association") (hereinafter collectively, "plaintiffs") a lien against certain real property owned by defendant. For the reasons

stated herein, we affirm the order of the trial court.

On 22 June 1998, plaintiffs filed a complaint against defendant seeking a lien against defendant's property for unpaid condominium assessments. According to the complaint, Wall Street conveyed ownership of a condominium unit to defendant by a deed recorded in Buncombe County on 14 October 1992. By incorporation, this deed was subject to terms and conditions contained in Wall Street's "Declaration of Condominium" ("Declaration"), which was recorded in Buncombe County on 18 November 1991. Pursuant to the Declaration, plaintiffs regularly assessed condominium fees and mailed notices regarding amounts due to all condominium owners. On or about 21 July 1993, plaintiffs filed a lien against defendant's property for unpaid condominium assessments, totaling $468.09 including attorneys fees. Thereafter, plaintiffs continued to assess and mail notices of condominium dues to all condominium owners, including the defendant. The complaint alleged that, despite continued use and occupation of the condominium unit for business operations, defendant never paid any condominium dues. Plaintiffs calculated that, as of 10 June 1998, defendant owed $3,426 in condominium assessments. Plaintiffs requested (1) that judgment be granted against defendant in the amount of $3,426,(2) that the judgment be declared a lien against defendant's condominium unit and (3) that the unit be sold pursuant to law and proceeds applied to the satisfaction of the judgment.

On 22 June 1998, the Buncombe County clerk's office issued a civil summons against defendant. The sheriff left a copy of the

summons and complaint at 14 Wall Street in Asheville, North Carolina, and noted that Betty Daughtridge (hereinafter "Daughtridge"), defendant's mother, received the service. Thereafter, on 30 June 1998, plaintiffs caused an alias and pluries summons to be issued against defendant at 890 McKinnish Cove Road in Asheville, North Carolina. Again, the sheriff left a copy of this summons and complaint with Daughtridge and noted on said summons that defendant was served at her dwelling house or usual place of abode with a person of suitable age and discretion then residing therein. On 15 October 1998, a Buncombe County deputy clerk issued a second alias and pluries summons against defendant to be served at 238 Brookberry Circle in Chapel Hill, North Carolina. Subsequently, this summons was sent to Orange County and the signing deputy sheriff noted that defendant was not served because the address on the summons was located in Durham County. On 20 October 1998, plaintiffs filed a Motion for Entry of Default against defendant. On 11 November 1998, plaintiffs deposed Daughtridge. On 15 February 1999, a third alias and pluries summons was issued, upon which defendant's address was listed as unknown. Thereafter, plaintiffs filed an Affidavit of Publication which indicated that a Notice of Service of Process was published in *Black Mountain News* once a week for three consecutive weeks, beginning on 25 February 1999.

Defendant did not respond to plaintiffs' complaint and the matter was placed on the 28 September 1999 trial calendar. On 29 September 1999, the trial court entered a judgment against

defendant, which awarded plaintiffs a judgment lien ("September 1999 judgment") against defendant's condominium unit. In addition, the trial court ordered defendant to reimburse plaintiffs for certain costs of the action, including deposition fees, service by publication costs, and attorneys fees. On 2 August 2000, defendant filed a motion for relief from judgment pursuant to Rules 60 and 62 of the North Carolina Rules of Civil Procedure. On 8 September 2000, the trial court stayed the enforcement of the September 1999 judgment, pending disposition of defendant's Rule 60 motion, and ordered defendant to pay a $7,000 security bond. The trial court heard defendant's Rule 60 motion on 17 January 2001. Upon hearing defendant's evidence, the trial court determined that service of process upon defendant was proper and denied defendant's Rule 60 motion. The trial court's written order was entered on 31 January 2001 and, on 15 February 2001, defendant filed a timely notice of appeal to this Court.

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The dispositive issues before this Court are: (1) whether the trial court abused its discretion in denying defendant's Rule 60 motion based on its finding "that Service of Process upon the Defendant was proper;" and (2) whether the trial court abused its discretion in denying defendant's Rule 60 motion when it failed to enter findings regarding defendant's new evidence. Because we find no abuse of discretion, we affirm the order of the trial court.

We note initially that neither defendant's Rule 60 motion nor the trial court's order denying said motion cite a specific

subsection. Defendant argues that subsection (b) of Rule 60 applies. We agree.

N.C. Gen. Stat. § 1A-1, Rule 60(b) provides, in pertinent part:

> On 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 the following reasons:
> (1) Mistake, inadvertence, surprise, or excusable neglect;
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . .

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2001).

In ruling on a Rule 60(b) motion, this Court has held that the trial court should "make findings of fact and determine from such facts whether the movant is entitled to relief from such judgment or order." *York v. Taylor*, 79 N.C. App. 653, 655, 339 S.E.2d 830, 832 (1986). However, the law has evolved in such a fashion as to make the entering of findings, although still considered to be the better practice, optional unless requested by a party. *See Nations v. Nations*, 111 N.C. App. 211, 214, 431 S.E.2d 852, 855 (1993), *disc. review denied*, 329 N.C. 789, 408 S.E.2d 524 (1991). Moreover, the trial court's findings of fact made upon a Rule 60(b) motion are binding on appeal if supported by any competent evidence in the record. *See Williamson v. Savage*, 104 N.C. App. 188, 193, 408 S.E.2d 754, 757 (1991). It is well settled that "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).

We note, as discussed during the Rule 60(b) hearing and in plaintiffs' brief, that defendant's motion for relief from judgment, filed 2 August 2000, made no reference to sufficiency of service as grounds for defendant's relief. Instead, defendant's Rule 60(b) motion alleged that she had "new evidence which by due diligence could not have been discovered in time to move for a new trial" and, "in the alternative that the judgment [was] . . . void" because of plaintiffs' misconduct in not giving proper notice to Daughtridge's attorney before deposing Daughtridge even though plaintiffs believed that defendant and Daughtridge "were one in the same person."

During the Rule 60(b) hearing, however, defendant elected to raise the issue of sufficiency of service and argued that the trial court lacked jurisdiction to enter judgment against her. Although plaintiffs correctly noted that defendant failed to allege insufficient service in her Rule 60(b) motion, this failure did not waive defendant's right to assert this defense at the Rule 60(b) hearing. In *Leasing, Inc. v. Brown*, we declared that:

> [T]he right to assert the defense of lack of jurisdiction over the person is . . . waived under two circumstances . . . . The objection is waived if omitted from the first motion made [under Rule 12] or if it is not "included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."

*Leasing, Inc. v. Brown*, 14 N.C. App. 383, 385, 188 S.E.2d 574, 575 (1972)(citation omitted). In *Leasing*, defendant's Rule 60(b)

motion was neither a motion made under Rule 12 nor a responsive pleading. Therefore, no waiver to assert the objection occurred. *Id.* at 386, 188 S.E.2d at 575. Moreover, because Rule 60(b) serves as "'a grand reservoir of equitable power to do justice in a particular case,'" it was within the trial court's discretion to hear all issues "'appropriate to accomplish justice.'" *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App 709, 712, 222 S.E.2d 706, 708 (1976) (citations omitted). Thus, the service of process issue became part of defendant's Rule 60(b) motion. "It was then incumbent upon the trial court to hear the evidence, find the facts and determine the validity of the service." *In re Phillips*, 18 N.C. App. 65, 69, 196 S.E.2d 59, 61 (1973).

We now examine the first issue: whether the trial court abused its discretion in denying defendant's Rule 60(b) motion based on its finding "that Service of Process upon the Defendant was proper." Under North Carolina law, service of process is governed by § 1A-1, Rule 4. Because defendant's condominium unit, which is the subject of this action, is located in North Carolina and defendant is known, § 1A-1, Rule 4(k)(1) of the North Carolina General Statutes governs. Rule 4(k)(1) states that:

> In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for the exercise of jurisdiction in rem or quasi in rem . . . the manner of service of process shall be as follows:
> (1) Defendant Known. -- If the defendant is known, he may be served in the appropriate manner prescribed for service of process in section (j), or, if otherwise appropriate section (j1); except that the requirement for

> service by publication in (j1) shall be satisfied if made in the county where the action is pending and proof of service is made in accordance with section (j2).

N.C. Gen. Stat. § 1A-1, Rule 4(k)(1) (2001). Therefore, sections (j), (j1) and (j2) of Rule 4 also apply in this case. According to § 1A-1, Rule 4(j), service of process upon a natural person shall be as follows:

> a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.
> b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.
> d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(1) (2001).

Alternatively, § 1A-1, Rule 4(j1), in pertinent part, states that:

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication . . . . [S]ervice of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for

> legal advertising . . . . Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(2), 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) (2001). And Rule 4(j2) subsection (3) states:

> Before judgment by default may be had on service by publication, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by publication, information, if any, regarding the location of the party served which was used in determining the area in which service by publication was printed and proof of service in accordance with G.S. 1-75.10(2).

N.C. Gen. Stat. § 1A-1, Rule 4(j2)(3) (2001).

As discussed previously, on four separate occasions, plaintiffs caused a civil summons to be issued against defendant and, in addition, attempted service by publication in *Black Mountain News*. Although the trial court failed to specify which of these attempts constituted proper service, if one of the attempts was consistent with the preceding statutes then the trial court's finding is correct. *See Shiloh Methodist Church v. Keever Heating & Cooling Co.*, 127 N.C. App. 619, 492 S.E.2d 380 (1997). Therefore, we will examine each service attempt in chronological order, stopping when, and if, one attempt validates the trial court's finding.

The first attempt at service occurred on 22 June 1998. The Buncombe County clerk's office issued a civil summons against

defendant. The sheriff left a copy of the summons and complaint at 14 Wall Street in Asheville, North Carolina, and noted that Daughtridge received the service. Therefore, the service of 22 June 1998 was an attempt at service by delivery.

Rule 4(j)(a) and Rule 4(j)(b) govern service by delivery. Under Rule 4(j)(1)(a), a sheriff can serve a defendant, "[b]y delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." However, in this case, the sheriff did not deliver the summons and complaint to defendant. Moreover, defendant contends that she has lived in Colorado since May of 1993 and there is no comparable evidence to the contrary. Therefore, because Daughtridge is not the defendant and 14 Wall Street, Asheville, North Carolina, was not defendant's usual place of abode, Rule 4(j)(1)(a) does not apply. Therefore, this service attempt is effective only if it falls within Rule 4(j)(1)(b); specifically, "by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute." Consequently, this service attempt is effective only if Daughtridge was defendant's agent.

In *Simms v. Stores, Inc.*, 18 N.C. App. 188, 196 S.E.2d 545 (1973), this Court stressed that "'[t]he agency for receipt of process may be implied from the surrounding circumstances. But the

mere appointment of an agent, even with broad authority, is not enough; it must be shown that the agent had specific authority, express or implied, for the receipt of service of process.'" *Id.* at 193, 196 S.E.2d at 548 (citation omitted), *overruled on other grounds*, 285 N.C. 145, 203 S.E.2d 769 (1974). Moreover, in *Paper Co. v. Bouchelle*, 19 N.C. App. 697, 200 S.E.2d 203 (1973), this Court held that "'in defining the term 'agent' it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative[.]'" *Id.* at 699, 200 S.E.2d at 205 (quoting *Whitehurst v. Kerr,* 153 N.C. 76, 79-80, 68 S.E. 913, 914 (1910)).

In *Paper Co.,* a deputy sheriff left copies of a summons, an attachment order, and notice of levy with defendant's employee. *Id.* at 698, 200 S.E.2d at 203-04. Defendant argued that service of process was not proper because the employee was not designated to be defendant's agent. While acknowledging that the employee was "not expressly designated to be an agent for service of process," the Court determined "that the surrounding circumstances" presented in the case were "sufficient to imply that [the employee] was . . . [defendant's] agent for the service of process." *Id.* at 700, 200 S.E.2d at 205. The surrounding circumstances warranting this conclusion included: the employee's age (38); his business experience of 15 years; "his full-time employment status; his past experience with garnishment papers and proceedings; the confidence which was expressed in his abilities . . . and that . . . [the employee] was . . . 'of sufficient character and rank as to afford

reasonable assurance that he [would] communicate to his company the fact that service of process had been served upon him.'" *Id.* at 700, 200 S.E.2d at 205 (quoting *Whitehurst,* 153 N.C. at 79-80, 68 S.E. at 914).

In the case at bar, the record establishes the following: (1) when plaintiffs conveyed the condominium unit to defendant, it was Daughtridge, not the defendant, who attended the closing; (2) defendant, who resided in Washington, D.C., at the time, gave Daughtridge the money to purchase the property; (3) at the closing, Daughtridge listed defendant's address on the deed as 14 Wall Street, Asheville, North Carolina; (4) Daughtridge, not the defendant, wrote the checks paying the property taxes for the condominium unit; (5) Daughtridge has eighteen years of business experience; (6) Daughtridge was the previous owner of defendant's property; (7) on 3 September 1993, a judgment was entered against Daughtridge in favor of Wall Street regarding said property; (8) Daughtridge is the only tenant at defendant's property; (9) Daughtridge forwards defendant's mail to defendant's Colorado address; and (10) during the Rule 60(b) hearing, Daughtridge admitted that she was defendant's agent at the time of the closing.

As discussed herein, the trial court's findings of fact made upon a Rule 60(b) motion are binding on appeal if supported by any competent evidence in the record. *See Williamson,* 104 N.C. App. at 193, 408 S.E.2d at 757. The surrounding circumstances presented in this case establish competent evidence in the record upon which the trial court could find that Daughtridge was defendant's agent on 22

June 1998. Therefore, the trial court's finding "that Service of process upon the Defendant was proper" is correct.

We now turn to the second issue: whether the trial court abused its discretion in denying defendant's Rule 60(b) motion when it failed to enter findings regarding defendant's new evidence. While the better practice is for the trial court to make findings of fact, the current state of the law imposes no duty to enter findings. *See Nations*, 111 N.C. App. at 214, 431 S.E.2d at 855. Accordingly, as defendant did not request findings of fact to be made, the trial court was under no duty to enter any findings in its order denying defendant's motion for relief from judgment.

Where the trial court does not enter findings in an order denying a Rule 60(b) motion, "the question on appeal is 'whether, on the evidence before it, the [trial] court could have made findings of fact sufficient to support its legal conclusion[.]'" *Grant v. Cox*, 106 N.C. App. 122, 125, 415 S.E.2d 378, 380 (1992) (citation omitted). In the case at bar, in addition to defendant's claim that service of process was deficient, defendant argued to the trial court that relief from judgment should be granted because (1) plaintiffs engaged in misconduct when they deposed Daughtridge without notifying her attorney and (2) there was newly discovered evidence. While N.C. Gen. Stat. § 1A-1, Rule 60(b)(3)(2001) provides relief from judgment for misconduct of an adverse party, the alleged misconduct in this case had no bearing on the entry of the default judgment against defendant. For one, Daughtridge's deposition was not presented in the default proceeding.

Furthermore, while defendant's attorney contends she would have become aware of the need to contact defendant[1] had she been notified of plaintiffs' intent to depose Daughtridge and thus could have avoided the entry of the default judgment against defendant; the trial court correctly found defendant to have been served with process. As defendant therefore had notice of the proceedings against her, it is irrelevant that a potential, alternative avenue of informal notice was prevented.

Defendant's Rule 60(b) motion also asserted that she had newly discovered evidence which warranted relief from judgment. "[T]o constitute 'newly discovered evidence' within the meaning of Rule 60(b)(2), the evidence must be such that it could not have been obtained in time for the original proceeding through the exercise of due diligence." *Waldrop v. Young*, 104 N.C. App. 294, 297, 408 S.E.2d 883, 884 (1991). Defendant merely presented evidence at the Rule 60(b)hearing that she did not receive notice of the condominium charges she was to pay. This does not constitute "newly discovered evidence" pursuant to Rule 60(b)(2) because at the time of the default proceeding, defendant was aware of her lack of notice as to the condominium charges. Accordingly, the evidence in the record supports the trial court's conclusion that "the [default] [j]udgment of the [trial] [c]ourt previously entered . . . was properly rendered."

We therefore conclude that the trial court did not abuse its discretion in denying defendant's Rule 60(b) motion nor in failing

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[1]Defendant's attorney also represented Daughtridge.

to enter findings regarding defendant's new evidence. The order of the trial court is therefore

Affirmed.

Judges GREENE and HUNTER concur.

Report per Rule 30(e).