

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-515

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

ANNE RANDOLPH ENGLAND,  
Executrix of The Estate  
of GINA ENGLAND BAKER,  
Plaintiff,

v.

Gaston County  
No. 97 CVS 4726

KENNETH LEE BOGLE, JR.,  
Defendant.

Appeal by defendant from an order entered 29 January 2002 by Judge F. Donald Bridges in Gaston County Superior Court. Heard in the Court of Appeals 7 October 2002.

*Kenneth Lee Bogle, Jr., pro se, defendant appellant.*

*Stott, Hollowell, Palmer & Windham, L.L.P., by Heather Graham Connor, for plaintiff appellee.*

McCULLOUGH, Judge.

On 22 December 1997, plaintiff Anne Randolph England, Executrix of the Estate of Gina England Baker, filed a wrongful death action against defendant Kenneth Lee Bogle, Jr., and his employer, Linsco/Private Ledger Corporation, d/b/a LPL Financial Services. Plaintiff alleged that on 26 December 1996, defendant entered the decedent's home and "beat her to a state of unconsciousness, inflicting such injuries which resulted in her death." On 13 May 1998, defendant pled guilty to second-degree

murder. Defendant immediately began serving his sentence of over 700 months.

On 22 June 1998, plaintiff obtained an entry of default against defendant only, stating that defendant "has failed to answer or otherwise respond in a timely fashion." Later, on 20 July 1998, the case was removed from the pending trial list by order of the trial court. This order stated that "the case has been placed in private mediation to resolve all pending matters," and that "[t]his action to remove the case from the trial docket is done without prejudice to the rights of any party to move the Court to re-open the file if further action becomes appropriate or necessary." Plaintiff ultimately took a voluntary dismissal as to defendant's employer on 25 November 1998.

Over two years later, on 5 December 2000, defendant filed a motion to dismiss with prejudice and for summary judgment. The motions were denied on 5 March 2001. Defendant gave notice of appeal. On 24 August 2001, while his appeal was pending, defendant served a request for admissions on plaintiff's counsel. On 30 October 2001, the trial court entered an order stating that plaintiff did not have to reply to defendant's request for admissions, because it was "inappropriate and untimely" to serve the request before defendant's appeal had been resolved. The trial court further stated that defendant could re-serve the request for admissions once the appeal had been resolved. The trial court then dismissed defendant's appeal in a separate order for failure to timely serve the proposed record on appeal. Defendant's subsequent

petition for writ of certiorari to this Court seeking review of the 5 March 2001 order was denied. At no point did defendant re-serve the request for admissions on plaintiff.

However, on 29 October 2001, defendant had made a motion for summary judgment based on his belief that the admissions that he had served on plaintiff were then deemed admitted because they were never answered. On 16 November 2001, defendant made a motion for sanctions pursuant to Rule 11 in superior court. On or about 23 November 2001, defendant filed a motion for sanctions pursuant to N.C.R. App. P. 34 in this Court. This Court denied the motion on 11 December 2001. Next, defendant filed an amended motion for summary judgment on 21 December 2001. Then, on 31 December 2001, defendant filed a second motion for Rule 11 sanctions in superior court. Finally, on 29 January 2002, the trial court entered an order denying all of defendant's pending motions. Additionally, the trial court admonished defendant for filing frivolous motions and censured him for violation of Rule 11. Defendant appeals.

Defendant makes the following assignments of error: The trial court's denial of defendant's amended motion for summary judgment was error (1) because defendant was entitled to judgment as a matter of law since plaintiff's admissions under N.C.R. Civ. P. 36 prove plaintiff does not have capacity to sue; (2) because defendant was entitled to judgment as a matter of law since there was no genuine issue of fact as the statute of limitations had run; and (3) because plaintiff admitted under N.C.R. Civ. P. 36 that this action was filed in bad faith to harass defendant without

expectation of recovery.

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Initially we note the fact that an entry of default has been entered in this case. There is no evidence in the record that it has been set aside nor reduced to a default judgment. Our Supreme Court has stated:

[W]e do not suggest that a defendant may simply refuse to answer plaintiff's complaint and thereby indefinitely forestall litigation. If after he receives the complaint and summons, defendant fails to file answer within the 30 day period as required by G.S. 1A-1 Rule 12(a)(1) plaintiff may move for entry of default under G.S. 1A-1 Rule 55(a), and thereafter seek judgment by default under G.S. 1A-1 Rule 55(b). Rule 55(a) provides specifically that entry of default would have been appropriate here. In its pertinent part, Rule 55(a) provides as follows:

"(a). ENTRY. When a party against whom a judgment for affirmative relief is sought has failed to plead . . . and that fact is made to appear by affidavit [or] motion of attorney for the plaintiff, . . . the clerk shall enter his (the party failing to file) default."

In Wright and Miller, Federal Practice and Procedure: Civil, § 2688, it is stated:

"Once the default is established defendant has no further standing to contest the factual allegations of plaintiff's claim for relief. If he wishes an opportunity to challenge plaintiff's right to recover, his only recourse is to show good cause for setting aside the default . . . and, failing that, to contest the amount of recovery." (See *Harris v. Carter*, 33 N.C. App. 179, 234 S.E.2d 472 (1977) holding G.S. 1A-1 Rule 55 to be the counterpart to Federal Rules of Civil Procedure Rule 55.)

When default is entered due to defendant's failure to answer, the substantive allegations raised by plaintiff's complaint are no longer in issue, and for the purposes of entry of default and default judgment are deemed admitted. *Acceptance Corp. v. Samuels*, 11 N.C. App. 504,

509, 181 S.E.2d 794, 798 (1971). However, following entry of default in favor of plaintiff, defendant is entitled to a hearing where he may move to vacate such entry. His motion to vacate is governed by the provisions of G.S. 1A-1 Rule 55(d) which provides as follows:

"(d) SETTING ASIDE DEFAULT. For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)."

In moving for relief of judgment pursuant to Rule 55(d), the burden is on the defendant, as the defaulting party, not to refute the allegations of plaintiff's complaint, nor to show the existence of factual issues as in summary judgment, but to show *good cause* why he should be allowed to file answer to plaintiff's complaint. See *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

*Bell v. Martin*, 299 N.C. 715, 720-21, 264 S.E.2d 101, 105 (1980).

In the case *sub judice*, defendant has made no motion to set aside the entry of default and has instead appealed the denial of his various motions which have as their purpose the contesting of the merits of plaintiff's lawsuit. As there is no final judgment and defendant has failed to comply with Rule 55(d), this appeal is interlocutory in nature and is hereby dismissed.

Appeal dismissed.

Chief Judge EAGLES and Judge HUDSON concur.

Report per Rule 30(e).