IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-54

Filed: 19 September 2017

Durham County, No. 16 CVD 2173

INTERNAL CREDIT SYSTEMS, INC., Plaintiff,

v.

NAUTUFF LLC, Defendant.

Appeal by defendant from order entered 4 October 2016 by Judge Pat Evans in Durham County Superior Court. Heard in the Court of Appeals 24 August 2017.

Bryant & Lewis, P.A., by David O. Lewis, for plaintiff-appellee.

Glenn, Mills, Fisher & Mahoney, P.A., by Carlos E. Mahoney, for defendant-appellant.

ARROWOOD, Judge.

Nautuff LLC ("defendant") appeals from an amended default judgment and from an order of the trial court denying his motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. For the reasons stated herein, we reverse the amended default judgment.

I. Background

On 22 February 2016, Internal Credit Systems, Inc. ("plaintiff") filed a complaint against defendant for breach of contract and conversion. Plaintiff alleged that it was a North Carolina corporation and that defendant was a Texas corporation, subject to jurisdiction in North Carolina pursuant to its contractual agreement with plaintiff. Plaintiff alleged that on or about 28 August 2014, the parties entered into a contract. Pursuant to the terms of the contract, plaintiff was to be the exclusive debt collector for defendant's delinquent accounts. The contract had an automatic renewal clause authorizing the contract to renew each anniversary month. Defendant breached the contract by failing to send any further delinquent accounts for collections effective 1 December 2015. Plaintiff alleged that it had been damaged and continued to incur damages as a result of defendant's breach of contract. Plaintiff also alleged that defendant converted to its use, funds that plaintiff was entitled to pursuant to the terms of the contract. The conversion consisted of defendant accepting payments of at least $4,035.00 at its fitness facility. These payments were from members who were in collections and subject to the terms of the contract between the parties.

On 23 February 2016, plaintiff sent a copy of the complaint and summons by certified mail, return receipt requested, to the registered agent and office address listed for defendant in the Office of the Secretary of State of Texas. The mail was addressed to: "Nautuff LLC By & Thru Reg Agent James Hall 1115 FM 131 Denison,

TX 75020[.]" On 18 March 2016, the United States Postal Service ("USPS") returned the 23 February 2016 certified mail to plaintiff's counsel, marked as "Return to Sender, Unclaimed, Unable to Forward."

On 9 March 2016, plaintiff sent a copy of the complaint and summons by certified mail, return receipt requested, to the Texas Secretary of State for service on defendant. The copies were received by the Texas Secretary of State on 14 March 2016 and were forwarded on 17 March 2016, by certified mail, return receipt requested, to: "Nautuff LLC Registered Agent, James Hall 1115 FM 131 Denison, TX 75020." On 11 April 2016, the copies were returned to the Texas Secretary of State, bearing the notation: "Return to Sender, Not Deliverable As Addressed, Unable to Forward."

Defendant did not file any motion or responsive pleading within thirty days of 14 March 2016.

On 16 April 2016, plaintiff's president, Ted Lachman, filed an "Affidavit of Amount Due" that states "[t]hat upon information and belief defendant owes plaintiff for breach of contract and conversation [sic] of funds of Twenty Four Thousand Dollars ($24,000.00)."

On 29 April 2016, plaintiff filed a motion for entry of default against defendant pursuant to Rule 55 of the North Carolina Rules of Civil Procedure. That same day,

the clerk entered an "Entry of Default" against defendant and plaintiff filed a motion for default judgment.

On 23 May 2016, the trial court entered a default judgment against defendant. The default judgment stated that defendant had been "regularly served with process by the Secretary of State in Texas" and having failed to appear and answer the plaintiff's complaint, ordered plaintiff to recover from defendant "the sum of $24,000.00, plus interest thereon at the legal rate from thereafter, until paid, together with plaintiffs' costs in the amount of $150.00 (filing fee of this action)."

On 18 July 2016, defendant filed a motion for relief from the default judgment pursuant to Rule 60(b)(1), (3), (4), and (6) of the North Carolina Rules of Civil Procedure. That same day, defendant also filed a motion for a temporary restraining order and preliminary injunction. On 18 July 2016, the trial court entered a temporary restraining order, enjoining and restraining plaintiff from any attempts to enforce or collect the default judgment. On 29 July 2016, the trial court entered a preliminary injunction, enjoining plaintiff from enforcing the default judgment until an order was entered on defendant's Rule 60(b) motion.

On 25 August 2016, the trial court entered an amended default judgment that provided as follows:

> In this action, the Defendant Nautuff, LLC, having been sent service by the Plaintiff and the Secretary of State in Texas, and having failed to appear and answer the Plaintiffs' Complaint filed herein, the legal time for

> answering having expired and no answer or other pleading having been filed, the Default of the Defendant was entered according to law, upon Plaintiff's application to the clerk and after affidavits of proof of service of summons now, in pursuance of the prayer for relief contained in the Complaint and in accordance with law;
>
> IT IS ORDERED and adjudged that Plaintiff Internal Credit Systems, Inc., have and recover from Defendant Nautuff, LLC a judgment in the sum of $24,000.00 (Twenty-Four Thousand Dollars), plus interest thereon at the legal rate from thereafter, until paid, together with Plaintiff's costs in the amount of $13.70 (Thirteen Dollars and Seventy Cents) which represents the costs of service of this action.

On 14 September 2016, defendant filed a motion for relief from the amended default judgment pursuant to Rule 60(b)(3), (4), and (6) of the North Carolina Rules of Civil Procedure.

On 27 September 2016, defendant filed notice of appeal from the amended default judgment.

On 4 October 2016, the trial court entered an order denying defendant's motion for relief from default judgment and denying defendant's motion for relief from the amended default judgment. On 11 October 2016, defendant filed notice of appeal from the 4 October 2016 order.

II. Appellate Jurisdiction

As a preliminary matter, we review our jurisdiction to hear defendant's appeal. Although defendant filed timely notice of appeal from the 4 October 2016 order

denying the Rule 60(b) motion, defendant failed to file timely notice of appeal from the 25 August 2016 amended default judgment, the underlying order which forms the basis of its issues on appeal. Defendant concedes that notice of appeal should have been filed on or before 26 September 2016 and that its notice of appeal, filed on 27 September 2016, was untimely pursuant to Rule 3(c)(1) of the North Carolina Rules of Civil Procedure. *See* N.C. R. App. P. 3(c)(1) (2017) ("In civil actions and special proceedings, a party must file and serve a notice of appeal: (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure[.]"). As such, we are without jurisdiction to review the case. *See Atchley Grading Co. v. W. Cabarrus Church*, 148 N.C. App. 211, 212-13, 557 S.E.2d 188, 188-89 (2001) (dismissing for lack of jurisdiction where the plaintiff appealed from an order denying its Rule 59 and Rule 60 motions but its arguments pertained to the underlying order).

However, defendant asks our Court to treat its purported appeal as a petition for writ of certiorari pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ."). We elect to use our discretion to grant defendant's petition and review defendant's arguments on the merits.

III. Discussion

On appeal, defendant argues that the trial court erred by denying the Rule 60(b) motion under subsections (4), (3), and (6). Defendant also argues that the trial court erred in entering the amended default judgment because it was not supported by any competent evidence.

A. Standard of Review

"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, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default." N.C. Gen. Stat. § 1A-1, Rule 55(a) (2015). "Once an entry of default has been made, Rule 55 authorizes the plaintiff to move for entry of a default judgment." *Alexander v. Alexander*, __ N.C. App. __, __, 792 S.E.2d 901, 903 (2016). "[I]f a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." N.C. Gen. Stat. § 1A-1, Rule 55(d).

Rule 60, in pertinent part, provides:

> (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. – 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:
>
> . . . .
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of

> an adverse party;
>
> (4) The judgment is void;
>
> . . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b)(3), (4), and (6) (2015).

"A trial court's decision to enter a default judgment, as well as a clerk or lower court's entry of default, are both reviewable for abuse of discretion." *Wiley v. L3 Communs. Vertex Aero., LLC*, __ N.C. App. __, __, 795 S.E.2d 580, 587 (2016). Likewise, "[t]he decision whether to set aside a default judgment under Rule 60(b) is left to the sound discretion of the trial judge and will not be overturned on appeal absent a clear showing of abuse of discretion." *Monaghan v. Schilling,* 197 N.C. App. 578, 581, 677 S.E.2d 562, 564 (2009) (citation omitted).

A. Denial of Defendant's Rule 60 Motion Under Subsection (b)(4)

First, defendant argues that the trial court erred by denying defendant's motions for relief from the default and amended default judgment under Rule 60(b)(4). Specifically, defendant argues that because substitute service was not valid, personal jurisdiction did not exist over defendant, and thus, the default judgment and amended default judgment were void. In addition, defendant challenges findings of fact 14, 27 through 29, and 32 and conclusions of law 1 through 4.

The manner of service of process upon a domestic or foreign corporation is governed by Rule 4(j)(6) of the North Carolina Rules of Civil Procedure. Rule 4(j)(6), in pertinent part, provides as follows:

> In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:
>
> . . . .
>
> (6) Domestic or Foreign Corporation. – Upon a domestic or foreign corporation by one of the following:
>
> (a) By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.
>
> (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 officer, director or agent to be served as specified in paragraphs a and b.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(6)(a)-(c) (2015). "[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to

support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Jackson v. Culbreth*, 199 N.C. App. 531, 537, 681 S.E.2d 813, 817 (2009) (citation omitted). "A trial court's unchallenged findings of fact are 'presumed to be supported by competent evidence and [are] binding on appeal.' " *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012) (citation omitted).

In its order denying defendant's motion to set aside the default and amended default judgment, the trial court entered the following findings of fact which defendant challenges on appeal as not being supported by the evidence:

> 14. After the plaintiff's failed attempt to serve the defendant by certified mail, return receipt requested through the registered agent and registered office listed by the defendant with the Texas Secretary of State, the plaintiff served the defendant with a copy of the summons and complaint by sending on 9 March 2016 copies of the summons and complaint by the U.S. Mail via certified mail, return receipt requested, addressed to "Service of Process Secretary of State P.O. Box 12079 Austin, TX 78711-2079." Counsel for plaintiff received a return receipt on 14 March 2016.
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> . . . .
>
> 27. To the extent the defendant now claims the correct address for its registered office and agent is "1115 South FM 131, Denison Texas 75020," and it therefore cannot receive mail at [1115 FM 131, Denison, Texas 75020], the defendant has violated Texas law requiring it to continuously maintain a registered agent and registered office at a street address where process may be personally served on the entity's registered agent.

> 28. Service of process on the defendant through the Office of the Secretary of the State of Texas was proper.
>
> 29. The defendant has failed to show that the Default Judgment is void.
>
> . . . .
>
> 32. In the discretion of the Court, the defendant's motion should be denied.

The trial court entered the following conclusions of law which defendant argues were erroneous:

> 1. The defendant has been validly served with process in this case.
>
> 2. The defendant failed to timely appear, respond, or otherwise defend the allegations contained in plaintiff's complaint.
>
> 3. The Entry of Default entered on 29 April 2016 is proper.
>
> 4. The Default Judgment entered on 23 May 2016 is valid and proper. The Amended Default Judgment entered on 25 August 2016 is valid and proper.

In regards to finding of fact 14, defendant contends that there was no evidence that plaintiff sent a certified letter to the Texas Secretary of State after a failed attempt to serve defendant by certified mail. However, as evidenced by the "Affidavit of Service of Process" filed by plaintiff's counsel, copy of the certified mail receipt, and copy of the returned mail, the record clearly indicates that on 23 February 2016, plaintiff sent a copy of the summons and complaint by certified mail, return receipt

requested, to "Nautuff LLC By & Thru Reg Agent James Hall 1115 FM 131 Denison, TX 75020." This mail was addressed to the registered agent and office address listed for defendant in the Office of the Secretary of State of Texas; the same registered agent and registered office address listed since defendant's formation in 2013. USPS tracking records showed that on 26 February 2016, the status of the certified mail was "Notice Left (No Authorized Recipient Available)[.]" As the trial court stated in finding of fact 12, which was unchallenged and is thus binding on appeal, the USPS tracking records showed that by 12 March 2016, the certified mail was "Unclaimed/Max Hold Time Expired." When this service attempt failed, plaintiff sent a copy of the summons and complaint by certified mail, return receipt requested, to "Service of Process Secretary of State P.O. Box 12079 Austin, TX 78711-2079." This was demonstrated by the "Affidavit of Service of Process" filed by plaintiff's counsel and the copy of the 14 March 2016 return receipt. As such, we find competent evidence in the record to support finding of fact 14.

As to finding of fact 27, defendant asserts that "[d]efendant never made this claim, it was not the basis of Defendant's Rule 60(b)(4) motion, and Plaintiff never attempted to personally serve Mr. Hall with the Summons and Complaint at the registered office." However, the record indicates otherwise. The 18 July 2016 "Defendant's Motion For Relief From Default Judgment" expressly states that "Mr. Hall's actual mailing address is 1115 South FM 131, Denison, TX 75020, not 1115

FM 131." Moreover, plaintiff's claim that the trial court erred by finding that plaintiff attempted to personally serve Mr. Hall at the registered office appears to be based upon a misreading of finding of fact 27. The trial court is not making that finding there.

With respect to findings of fact 28 and 29, defendant argues that plaintiff did not comply with § 5.251 of the Texas Business Organizations Code because plaintiff did not exercise "reasonable diligence" to serve Mr. Hall at the registered office before using substitute service. Defendant's argument hinges on its assertions that plaintiff's initial attempt at service had not yet failed; plaintiff should have served Hall at the registered office, through the local sheriff's office, a private process server, or a designated delivery service; plaintiff did not conduct any investigation into whether Hall could be located at the registered office and did not attempt to serve Hall by certified mail at the "1115 S FM 131" mailing address; and plaintiff did not contact defendant for assistance in locating Hall. We do not find its arguments convincing.

We reiterate that manner of service of process upon a domestic or foreign corporation is governed by Rule 4(j)(6) of the North Carolina Rules of Civil Procedure, allowing service by mailing a copy of the summons and complaint by certified mail, return receipt requested, to the registered agent. Plaintiff unsuccessfully attempted

to serve defendant in full compliance with Rule 4(j)(6). In unchallenged finding of fact 13, the trial court found that § 5.251

> provides that the Texas Secretary of State is the agent of a Texas LLC for purposes of service of process if the LLC fails to appoint or does not maintain a registered agent in the state or the registered agent cannot with reasonable diligence be found at the registered office.

Plaintiff was aware that service had not been successful, as demonstrated by the USPS tracking records which showed that by 26 February 2016, the status was "Notice Left (No Authorized Recipient Available)[,]" there was no change in status between 26 February 2016 and 12 March 2016, and by 12 March 2016, the updated status was "Unclaimed/Max Hold Time Expired[.]" Plaintiff was then permitted to serve defendant through the Texas Secretary of State. Accordingly, we find that findings of fact 28 and 29 are supported by competent evidence.

In regards to finding of fact 32, which we deem a conclusion of law, and conclusions of law 1 through 4, defendant argues that they are erroneous because it is not supported by Texas Business Organization Code § 5.251 and not supported by Texas law. *See Barnette v. Lowe's Home Centers, Inc.*, __ N.C. App. __, __, 785 S.E.2d 161, 165 (2016) ("Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review."). As explained above, we hold that defendant was validly served with process in compliance with Rule 5(j)(6) and it is undisputed that defendant failed to timely

appear and respond to the allegations in plaintiff's complaint. Thus, the entry of default and default judgment was proper under Rule 55. As such, the trial court did not abuse its discretion in denying defendant's Rule 60(b) motion on the basis that it was void.

B. Denial of Defendant's Rule 60 Motion Under Subsection (b)(3)

In its second argument, defendant contends that the trial court erred by denying defendant's motions for relief from default judgment and amended default judgment under Rule 60(b)(3) due to fraud and misrepresentations by plaintiff in the complaint and affidavit of amount due. In connection with its arguments, defendant challenges findings of fact 30 and 32 and conclusion of law 5.

Findings of fact 30 and 32 state as follows:

> 30. The defendant has failed to show that it has a meritorious defense that it was prevented from presenting because of fraud, misrepresentation or misconduct by the plaintiff.
>
> . . . .
>
> 32. In the discretion of the Court, the defendant's motion should be denied.

Conclusion of law 5 provides:

> 5. The Court finds that the defendant has failed to show mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or misconduct to warrant granting relief from the Default Judgment or the Amended Default Judgment

As to finding of fact 30, defendant argues that the trial court "acted under a misapprehension of law[.]" Yet, our Court has ruled that "[t]o 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) (citation omitted). As such, the trial court stated the proper standard.

Defendant argues that finding of fact 32 and conclusion of law 5 were erroneous where plaintiff made false allegations in the complaint and affidavit of amount due. Specifically, defendant contends the following constituted fraud and misrepresentation: plaintiff did not file their service agreement; the service agreement and Mr. Hall's affidavit demonstrated that plaintiff was not the exclusive debt collection agency for defendant; there was no evidence presented to support the claimed damages; and plaintiff did not offer any materials in opposition to defendant's Rule 60(b) motion. Defendant's arguments can only be characterized as challenging the merits of the case and cannot be construed as amounting to fraud or misrepresentation. It is well established that "[t]he effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint, and is prohibited from defending the merits of the case." *Hartwell v. Mahan*, 153 N.C. App. 788, 791, 571 S.E.2d 252, 253-54

(2002) (citation omitted), *disc. review denied*, 356 N.C. 671, 577 S.E.2d 118 (2003). We agree with plaintiff's characterization that "[d]isagreement with the Complaint and Affidavit is not tantamount to evidence of fraud." Based on the foregoing, we hold that the trial court did not abuse its discretion by denying defendant's Rule 60(b) motion under subsection (b)(3).

C. Denial of Defendant's Rule 60(b) Motion Under Subsection (b)(6) and the Amended Default Judgment

Defendant argues that the trial court erred by denying defendant's motions for relief from default judgment and amended default judgment under Rule 60(b)(6) due to the extraordinary circumstances and interests of justice. Defendant also argues that the trial court erred in entering the amended default judgment because it was not supported by any competent evidence. Because our discussion of each issue is closely related, we address them here together.

Rule 55(b), which deals with default judgment, provides that if the plaintiff's claim is not for a "sum certain or for a sum which can by computation be made certain," the default judgment must be entered by a judge who may conduct a hearing to adequately determine damages. N.C. Gen. Stat. § 1A-1, Rule 55(b)(1)-(2) (2015).

Here, plaintiff's complaint alleged that it was damaged "in an amount less than $25,000.00" but was filed without any attachments or exhibits. Subsequently, plaintiff filed an "Affidavit of Amount Due" from its president on the same day as its "Motion for Entry of Default." The affidavit stated that "upon information and belief

defendant owes plaintiff for breach of contract and conversation [sic] of funds of Twenty Four Thousand Dollars ($24,000.00)."

Our Court has previously held that "affidavits must be based upon personal knowledge[]" and "statements made upon information and belief' . . . do not comply with the personal knowledge requirement . . . ." *Currituck Assocs.-Residential P'ship v. Hollowell*, 170 N.C. App. 399, 403-404, 612 S.E.2d 386, 389 (2005) (citations and quotation marks omitted). Plaintiff's affidavit, therefore, is not competent evidence to support the amended default judgment in the amount of $24,000.00. It is merely a bare assertion of the amount of damages.

In addition "[r]elief is appropriate under Rule 60(b)(6) if 'extraordinary circumstances exist' and 'justice demands relief.' " *Lumsden v. Lawing*, 117 N.C. App. 514, 518, 451 S.E.2d 659, 662 (1995) (citation omitted). We believe that this is such a case. Accordingly, we hold the trial court abused its discretion in denying defendant's Rule 60 motion under subsection (b)(6), and we reverse the amended default judgment and remand to the trial court to determine, what damages, if any, plaintiff is entitled to recover. We reject defendant's contention that the Entry of Default was improper.

We find that plaintiff accomplished proper service on the defendant and was entitled to obtain an entry of default. However the trial court's judgment is not supported by competent damage evidence. Therefore, the "Amended Default

Judgment" and order denying defendant's Rule 60(b)(6) motion is reversed and the matter is remanded for a new hearing with respect to the amount of the judgment.

REVERSED.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).