REL: March 20, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180674

Living By Faith Christian Church

v.

Young Men's Christian Association of Birmingham

Appeal from Jefferson Circuit Court
(CV-18-349)

DONALDSON, Judge.

Living By Faith Christian Church ("the Church") appeals from a judgment of the Jefferson Circuit Court ("the trial court") denying the Church's Rule 60(b)(4), Ala. R. Civ. P., motion for relief from a partial default judgment. We affirm.

Procedural History

On August 14, 2018, the Young Men's Christian Association of Birmingham ("the YMCA") commenced an action against the Church and four of its employees, Jeremy Price, Johnitra Price, Tavares Cook, and Jessica Cook.[1] The YMCA's complaint alleged that the YMCA had given the Church permission to use one of the YMCA's buildings ("the building") in Birmingham on a temporary basis, that the YMCA had subsequently notified the Church that it would have to vacate the building, and that the Church had refused to vacate the building. As relief, the YMCA's complaint sought possession of the building and an award of damages. All five defendants were served with process, with Jeremy Price being served not only individually but also as the Church's agent. On September 7, 2018, a single answer signed by both of the Prices and both of the Cooks was filed on behalf of all five defendants. In the answer, the defendants described the Church as "a domestic non-profit corporation organized and existing under the laws of the State of Alabama." Jeremy Price signed the answer as "Founder &

[1]The action was commenced in the Bessemer Division of the Jefferson Circuit Court but was subsequently transferred to the Birmingham Division.

Senior Pastor, Living By Faith Christian Church," and Johnitra Price signed the answer as "Executive Pastor, Living By Faith Christian Church." A licensed attorney did not sign the answer on behalf of any of the defendants.

On October 15, 2018, the YMCA filed a motion for a partial summary judgment against all five defendants insofar as the YMCA's complaint sought possession of the building. On October 22, 2018, a response opposing the YMCA's partial-summary-judgment motion was filed on behalf of all five defendants. Jeremy Price signed that response as "Founder & Senior Pastor, Living By Faith Christian Church," and Johnitra Price signed that response as "Executive Pastor, Living By Faith Christian Church." A licensed attorney did not sign that response on behalf of any of the defendants.

Also on October 22, 2018, the YMCA filed an application and affidavit for the entry of a default judgment ("the application") against the Church for failure to answer or otherwise defend, presumably based on the fact that neither the Church's answer nor its response in opposition to the partial-summary-judgment motion had been signed by a licensed attorney. See, e.g., Progress Indus., Inc. v. Wilson, 52 So.

3d 500, 597 (Ala. 2010) (recognizing that the general rule in Alabama is that a person must be a licensed attorney in order to represent a separate legal entity, such as a corporation, and that a pleading filed by a nonattorney engaging in the unauthorized practice of law by purporting to represent a separate legal entity is a nullity). The YMCA supported its application with an affidavit signed by Dan Pile, the YMCA's president and chief operating officer, in which he testified that the YMCA owned title to the building, authenticated the attached deed by which the YMCA had acquired title to the building, testified that the YMCA had given the Church permission to use the building for Sunday church services until the YMCA conveyed the building to the A.G. Gaston Boys & Girls Club ("the Boys & Girls Club"), authenticated an e-mail informing the Church that it was permitted to use the building for Sunday church services until the building was conveyed to the Boys & Girls Club, testified that he had notified the Church that they would have to vacate the building so that the YMCA could close the transfer of the building to the Girls & Boys Club, and testified that the Church had refused to vacate the building. The YMCA served the

application on both of the Prices and both of the Cooks, but it did not send a service copy addressed to the Church. None of the defendants requested a hearing regarding the application.

On December 12, 2018, the trial court held a hearing regarding the partial-summary-judgment motion at which the YMCA's attorney, both of the Prices, and both of the Cooks appeared. The record does not contain a transcript of that hearing. On December 14, 2018, the trial court entered two separate judgments. One of those judgments was a partial default judgment against the Church insofar as the YMCA sought possession of the building. The other judgment was a partial summary judgment against the Prices and the Cooks insofar as the YMCA sought possession of the building. Neither judgment adjudicated the action insofar as the YMCA's claim sought damages. The partial default judgment against the Church contained a certification that it was a final judgment pursuant to Rule 54(b), Ala. R. Civ. P. The partial summary judgment did not contain such a certification; however, in response to a motion filed by the YMCA, the trial court, on January 10, 2019, entered an order certifying the partial

summary judgment as a final judgment pursuant to Rule 54(b).

On January 14, 2019, a motion to set aside the partial default judgment against the Church signed by Johnitra Price as executive pastor of the Church was filed. On January 16, 2019, the YMCA filed a response to the motion to set aside the partial default judgment in which it alleged, among other things, that the Prices and the Cooks had been advised at the December 12, 2018, hearing that the Church had to be represented by a licensed attorney and that, despite being so advised, a nonattorney had improperly filed the motion to set aside the partial default judgment on behalf of the Church. On January 31, 2019, the YMCA filed a motion to strike the motion to set aside the partial default judgment on the ground that it had been filed on behalf of the Church by a nonattorney.

On April 4, 2019, the trial court held a hearing at which the Prices and the Cooks appeared but no licensed attorney appeared on behalf of the Church. The trial court ruled that it could not consider arguments made by nonattorneys on behalf of the Church and denied the motion to set aside the partial default judgment.

On April 15, 2019, a licensed attorney representing the Church filed a Rule 60(b)(4), Ala. R. Civ. P., motion for relief from the partial default judgment. In that motion, the Church, citing Progress Industries, Inc. v. Wilson, 52 So. 3d 500 (Ala. 2010), and Dial v. State, 374 So.2d 361 (Ala. Civ. App. 1979), asserted that, regardless of whether the Church had validly defended the action through its having a nonattorney file the September 7, 2018, answer on its behalf, the filing of that answer on its behalf constituted an "appearance" in the action by the Church for purposes of Rule 55(b)(2), Ala. R. Civ. P.;[2] that, because the Church had appeared in the action for purposes of Rule 55(b)(2), Rule 55(b)(2) required the YMCA to give the Church notice of the filing of the application; that the YMCA had not given the Church such notice; and that, therefore, the partial default judgment against the Church had to be set aside. Following a

[2]In pertinent part, Rule 55(b)(2) provides: "If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application ...."

hearing, the trial court entered an order denying the Church's Rule 60(b)(4) motion on May 6, 2019.

On May 8, 2019, the Church filed a notice of appeal to this court. Because the appeal was within our supreme court's original appellate jurisdiction, we transferred the appeal to that court. Thereafter, pursuant to § 12-2-7(6), Ala. Code 1975, our supreme court transferred the appeal back to this court.

Timeliness of the Appeal and Finality

We first observe that the trial court's certification of the partial default judgment as a final judgment pursuant to Rule 54(b) may not have been proper because it adjudicated only a part of the YMCA's ejectment claim. See Jackson v. Davis, 153 So. 3d 820, 824-25 (Ala. Civ. App. 2014). After the briefs were submitted, we requested that the parties submit letter briefs regarding that specific issue. In its letter brief, the Church argues that the certification of the partial default judgment as a final judgment was indeed improper because that judgment disposed of only a part of the YMCA's ejectment claim and that, because the partial default judgment was improperly certified as final, it did not constitute a

final judgment. See Jackson. The Church further argues that, because the partial default judgment was not a final judgment, the Church's motion titled as a Rule 60(b)(4) motion was not actually a Rule 60(b) motion because, the Church says, a Rule 60(b) motion may be filed to challenge only a true final judgment, see Rule 60(b) (providing for relief from a "final judgment, order, or proceeding" (emphasis added)), and that, therefore, the judgment denying what purported to be a Rule 60(b)(4) motion was not a final, appealable judgment either. Based on that analysis, the Church argues that the appeal is from a nonfinal judgment and that the appeal is premature.

In its letter brief, the YMCA, citing primarily Wallace v. Belleview Properties Corp., 120 So. 3d 485 (Ala. 2012), argues that, because the Church had not filed a notice of appeal within 42 days after the entry of the partial default judgment containing the Rule 54(b) certification of finality, the propriety of that certification and the status of that judgment as a final one had become incontestable, see Wallace, 120 So. 3d at 494 ("When the trial court enters a Rule 54(b)certification, there is a facially valid order from which the time for filing a notice of appeal starts to run."), and

that, therefore, the partial default judgment must be deemed a final judgment regardless of whether the trial court's certifying it as a final judgment was improper. The YMCA further argues that, because the partial default judgment must necessarily be deemed to be a final judgment, the Church could properly challenge the validity of that final judgment by filing a Rule 60(b)(4) motion, which the Church did; that the denial of the Church's Rule 60(b)(4) motion was a separately appealable judgment; and that the Church timely filed a notice of appeal to challenge the judgment denying that Rule 60(b)(4) motion. Thus, according to the YMCA, there is a timely appeal from a final judgment denying the Church's Rule 60(b)(4) motion before this court for review.

After considering the arguments in the parties' letter briefs, we conclude that the YMCA's analysis is correct; that the certification of the partial default judgment as a final judgment became incontestable before the Church filed its notice of appeal, see Wallace; that, because the partial default judgment must necessarily be deemed a final judgment, the issue whether that judgment is a final one is not before us; that, because the partial default judgment must

necessarily be deemed a final judgment, its validity could be challenged by a Rule 60(b)(4) motion, see Rule 60(b); that the trial court's judgment denying the Church's Rule 60(b)(4) motion is a final, appealable judgment, see Weaver v. Weaver, 4 So. 3d 1171 1172 (Ala. Civ. App. 2008) ("The denial of a Rule 60(b)(4) motion is reviewable by appeal."); and that the Church filed its notice of appeal within 42 days after the denial of its Rule 60(b)(4) motion. Accordingly, we conclude that the Church's appeal is a timely appeal from the final judgment denying the Church's Rule 60(b)(4) motion. Because it is an appeal from a judgment denying a Rule 60(b)(4) motion, we note that "[a]n appeal from an order denying a Rule 60(b) motion presents for review only the correctness of that order and does not present for review the correctness of the final judgment from which the appellant seeks relief under the Rule 60(b) motion." Hilliard v. SouthTrust Bank of Alabama, N.A., 581 So. 2d 826, 828 (Ala. 1991).

Standard of Review

> "'[T]he review applicable to a Rule 60(b)(4) motion is de novo.' Greene v. Connelly, 628 So. 2d 346, 351 (Ala. 1993); accord Insurance Management & Admin., Inc. v. Palomar Ins. Corp., 590 So. 2d 209, 212 (Ala. 1991).

> "'When the grant or denial of relief turns on the validity of the judgment, as under Rule 60(b)(4), discretion has no place. If the judgment is valid, it must stand; if it is void, it must be set aside. A judgment is void only if the court rendering it lacked jurisdiction of the subject matter or of the parties, or if it acted in a manner inconsistent with due process.'
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> "Palomar Ins., 590 So. 2d at 212."

Northbrook Indem. Co. v. Westgate, Ltd., 769 So. 2d 890, 893 (Ala. 2000).

Analysis

The Church argues that the answer filed on its behalf on September 7, 2018, constituted an "appearance" by the Church for purposes of Rule 55(b)(2); that, because the Church had made an appearance in the action before the YMCA filed the application, the Church was entitled to notice of the application and a hearing regarding the application pursuant to Rule 55(b)(2); that the YMCA did not give the Church the notice required by Rule 55(b)(2) and the trial court did not hold a hearing regarding the application as required by Rule 55(b)(2); and that, because the partial default judgment was entered against the Church without the Church's being afforded the requisite notice and hearing, the partial default judgment

was entered in a manner that was inconsistent with due process and must be vacated.

The YMCA concedes that the September 7, 2018, answer filed on behalf of the Church constituted an appearance by the Church for purposes of Rule 55(b)(2) and that, therefore, Rule 55(b)(2) required that the Church be given notice of the application; however, the YMCA argues (1) that it gave the Church sufficient notice of the application to satisfy the notice requirement of Rule 55(b)(2) by serving notice of the application on Jeremy Price, the founder and senior pastor of the Church, and Johnitra Price, the executive pastor of the Church, and (2) that the trial court was not required to hold a hearing regarding the application.

In its principal brief, the Church states: "It is undisputed that the Church filed an answer on September 7, 2018, through its Pastors, Jeremy Price and Johnitra Price ...." The record reveals that the YMCA's attorney certified that he had served a copy of the application on all nondefaulting parties, which would include Jeremy Price and Johnitra Price. The Church did not argue to the trial court and has not argued on appeal that the Prices did not receive

notice of the application.[3] "The only way to communicate actual notice to a corporation is through its agents. Thus, a corporation is held responsible for the knowledge acquired by its agents while acting within the scope of their employment." Birmingham Boys' Club, Inc. v. Transamerica Ins. Co., 295 Ala. 177, 180, 325 So. 2d 167, 169 (1976). The manner in which the September 7, 2018, answer and the October 22, 2018, response in opposition to the YMCA's partial-summary-judgment motion were signed by Jeremy Price and Johnitra Price makes it clear that the Prices were acting within the scope of their employment with the Church in litigating this action.

> "When notice comes to an officer or agent in transacting the business of the principal in the scope of his authority, the constructive notice thereby drawn is conclusive. It is said to be so because in respect to the transaction of such business, the agent is for that purpose in law identified with his principal. But there is also a rebuttable presumption of actual knowledge by a principal on account of knowledge by an agent no matter when acquired, bearing upon the subject

[3]The Church argues for the first time on appeal that the certificate of service on the application did not meet the requirements of Rule 5(d), Ala. R. Civ. P.; however, "[an appellate court] cannot consider arguments raised for the first time on appeal; rather, [an appellate court's] review is restricted to the evidence and arguments considered by the trial court." Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992).

> matter of his agency, since it is the duty of such agent so to inform his principal, and it will be presumed, prima facie, that he discharged that duty. Whether he did so in fact is matter of proof in denial of the presumption."

Tennessee Valley Bank v. Williams, 246 Ala. 563, 566-67, 21 So. 2d 686, 689-90 (1945).

Based on the foregoing principles of law, we conclude that the notice of the filing of the application that Jeremy Price and Johnitra Price received constituted notice to the Church of the filing of the application. Accordingly, the Rule 60(b) motion was not due to be granted based on a lack of notice under Rule 55(b)(2).

With respect to hearings regarding applications for default judgments, Rule 55(b)(2) provides that a trial court "may conduct such hearings ... as it deems necessary and proper ...." (Emphasis added.) The Church has not cited any Alabama caselaw squarely holding that the trial court in this case was required to hold a hearing regarding the application. The YMCA has cited Abernathy v. Green Tree Servicing, LLC, 54 So. 3d 422, 426 (Ala. Civ. App. 2010), a decision in which this court implied that Rule 55(b)(2) does not require a trial court to hold such a hearing. Although the language of Rule

55(b)(2), Fed. R. Civ. P., is not identical to the language of Alabama's Rule 55(b)(2), it is substantially similar, and Federal Rule 55(b)(2) provides that United States District Courts "may conduct hearings" (emphasis added) regarding applications for default judgments. "Federal cases construing the Federal Rules of Civil Procedure are persuasive authority in construing the Alabama Rules of Civil Procedure, which were patterned after the Federal Rules of Civil Procedure." Hilb, Rogal & Hamilton Co. v. Beiersdoerfer, 989 So. 2d 1045, 1056 n.3 (Ala. 2007). Federal caselaw has held that a United States District Court is not required to hold a hearing regarding an application for a default judgment if the application itself establishes the applicant's prima facie right to the relief sought. See, e.g., Finkel v. Romanowicz, 577 F.3d 79, 87 (2d Cir. 2009) ("In permitting, but not requiring, a district court to conduct a hearing before ruling on a default judgment, Rule 55(b) commits this decision to the sound discretion of the district court.").

Accordingly, based on the presence of permissive language in Rule 55(b)(2) providing that a trial court "may" hold a hearing on an application for a default judgment, based on the

absence of any language in Rule 55(b)(2) requiring a trial court to hold such a hearing, based on the fact that the application itself established the YMCA's prima facie right to possession of the building, and based on the fact that the Church did not request a hearing regarding the application despite having notice of the filing of the application through its agents Jeremy Price and Johnitra Price, we conclude that the trial court in the present case was not required to hold a hearing on the YMCA's application and, therefore, that the trial court did not commit reversible error in denying the Church's Rule 60(b)(4) motion insofar as that motion was based on the ground that the trial court had not held a hearing regarding the application. Accordingly, we affirm the trial court's judgment.

AFFIRMED.

Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur.