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NO. COA00-1523

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

DEBRA ANN OLIVING,
Plaintiff-Appellee,

v.

Dare County
No. 00 CVD 398

TODD WILLIAM OLIVING,
Defendant-Appellant.

Appeal by defendant from order entered 22 August 2000 by Judge Margaret L. Sharpe and from order entered 3 October 2000 by Judge C. Christopher Bean, both in District Court, Dare County. Heard in the Court of Appeals 8 November 2001.

Kellogg and Evans, by Susan Harman-Scott, for plaintiff-appellee.

The Twiford Law Firm, L.L.P., by Edward A. O'Neal, for defendant-appellant.

McGEE, Judge.

Todd William Olving (defendant) appeals from orders of the trial court denying his motions to continue and to set aside judgment.

Debra Ann Olving (plaintiff) filed a verified complaint (R.5) on 16 June 2000 seeking an absolute divorce and requesting that the parties' 8 June 1999 separation agreement be incorporated into the divorce judgment. Plaintiff alleged in her complaint:

1. That the Plaintiff is a resident of Dare

County of the State of North Carolina for more than six months . . . preceding the institution of this Action.

. . .

4. That the Plaintiff and Defendant separated on June 8, 1999, and terminated their marital relationship and thereafter ceased to live together as husband and wife. That Plaintiff intended at the date of separation to remain permanently separated and apart from the Defendant.

5. That the Plaintiff and Defendant have lived separate and apart from each other since the date of separation stated in Paragraph four above, continuously and without interruption.

. . .

7. That no claims exist for alimony or equitable distribution.

8. The parties properly executed a valid separation agreement . . . which provides that it be incorporated in to the divorce decree and become an order of the court.

Plaintiff's complaint was served on defendant on 20 June 2000. Defendant filed a motion on 30 June 2000 to extend the time for filing responsive and defensive pleadings for thirty days. An order was filed on 30 June 2000 extending the time for defendant to file responsive and defensive pleadings until and including 21 August 2000.

Plaintiff filed a motion for summary judgment on 2 August 2000 requesting that her verified complaint be accepted by the court "in lieu of testimonial evidence and in support of the Plaintiff's claim for an absolute divorce as provided in G.S. 50-10(d)."

Defendant's counsel sent defendant's unverified answer and

counterclaim to plaintiff's counsel by U.S. Mail and telefax on 21 August 2000 and filed the answer and counterclaim with the Clerk of Court on 22 August 2000. Defendant asked in his pleadings that he be granted an absolute divorce from plaintiff, that the court equitably divide the marital property, and that the separation agreement be set aside. Defendant's counsel also sent to plaintiff's counsel by U.S. Mail and telefax a motion to continue the hearing on the absolute divorce incorporating the parties' separation agreement on 21 August 2000 and filed the motion with the Clerk of Court on 22 August 2000. Following a hearing on 22 August 2000, the trial court entered an order finding:

5. That there are no claims for alimony or equitable distribution of marital property between the parties. Further, the parties have properly executed a separation agreement filed with the court and have agreed for the said separation agreement to be incorporated in this Order.

The trial court concluded that:

1. No genuine issues exist as to any material fact as to the Plaintiff's claim for an absolute divorce.

. . .

3. That the parties properly executed a valid separation agreement filed with the court which provides that it be incorporated into the divorce decree and become an order of the court.

4. That the Plaintiff and Defendant be granted an Absolute Divorce one from the other.

The trial court granted plaintiff's motion for summary judgment, awarded an absolute divorce, and incorporated the parties'

separation agreement into the divorce judgment, which was filed in the office of the Clerk of Court on 22 August 2000 at 10:08 a.m.

Defendant's answer and counterclaim and his motion to continue were filed in the office of the Clerk of Court on 22 August 2000 at 11:18 a.m. The trial court entered an order at 1:51 p.m. that same day, denying defendant's motion to continue stating that

[t]his cause was heard . . . on motion of the defendant for a continuance. It appears to the Court that the defendant is represented by counsel, that the defendant was duly served and noticed for this hearing, that defendant obtained an order extending the time to file an answer up to and including the 21st day of August, 2000, that no answer has been filed, that counsel for the defendant has appeared in court for this hearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of the defendant for a continuance of the hearing on plaintiff's motion for summary judgment for an absolute divorce and incorporation of the separation agreement into the order is hereby denied.

Defendant filed a motion to set aside the judgment on 31 August 2000, citing N.C. Gen. Stat. § 1A-1, Rules 59 and 60. This motion was denied in an order entered by Judge C. Christopher Bean on 3 October 2000. Defendant appeals the 22 August 2000 and the 3 October 2000 orders.

I.

The dispositive issue in defendant's first five assignments of error is whether defendant's answer and counterclaim raised genuine issues of material fact, thus precluding summary judgment for plaintiff.

Summary judgment is appropriate if "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). Once a party seeking summary judgment makes the requisite showing,

an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (1999).

Our Court has stated that

[a] verified pleading may be treated as an affidavit for summary judgment purposes if it: (1) is made on personal knowledge; (2) sets forth such facts as would be admissible into evidence; and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.

Daniel v. Daniel, 132 N.C. App. 217, 219, 510 S.E.2d 689, 690 (1999) (citing N.C. Gen. Stat. § 1A-1, Rule 56(e) (1990) and *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972)).

In the present case, plaintiff filed a verified complaint in which she stated, being first duly sworn, that she had

read the foregoing Complaint and that the same is true to [her] own knowledge and belief, except as to those matters and things stated upon information and belief and as to those, [she] believes them to be true.

In her motion for summary judgment filed 2 August 2000, plaintiff requested that the court accept her verified complaint in

lieu of testimonial evidence and in support of her claim for absolute divorce as provided in N.C. Gen. Stat. § 50-10(d) (1999). Upon our review, plaintiff's verified complaint satisfies the statutory criteria to be treated as an affidavit, in that it "state[s] in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters [she] believes them to be true" as required by N.C. Gen. Stat. § 1A-1, Rule 11(b) (1999).

The trial court may enter summary judgment granting an absolute divorce pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 by "finding all requisite facts from nontestimonial evidence presented by affidavit, verified motion or other verified pleading." N.C. Gen. Stat. § 50-10(d) (summary judgment appropriate for absolute divorce pursuant to N.C. Gen. Stat. § 50-6 if based on one year's separation and residence of one party in the state for a period of six months). The trial court in this case made findings of fact in its judgment based upon plaintiff's verified complaint.

In the case before us, defendant argues the trial court erred in finding of fact number five and conclusions of law numbers one, three and four: (1) because defendant properly served his answer and counterclaim on plaintiff's counsel and properly filed these pleadings within five days with the court, pursuant to N.C. Gen. Stat. § 1A-1, Rules 5(b), (d), (e) and 12(a)(1); and (2) because defendant's answer and counterclaim raised genuine issues of material fact as to the claims determined by the trial court,

precluding summary judgment for plaintiff.

Whether or not defendant's answer and counterclaim were properly served and filed, defendant's argument nonetheless lacks merit. Plaintiff's verified complaint establishes that plaintiff and defendant lived separate and apart for one year and plaintiff was a resident of the State of North Carolina for at least six months prior to filing the action for divorce, being the requirements for absolute divorce pursuant to N.C. Gen. Stat. § 50-6. In responding to plaintiff's motion for summary judgment, the burden shifted to defendant to show a genuine issue of material fact for trial, or that plaintiff was not entitled to judgment sought as a matter of law. *Daniel*, 132 N.C. App. at 219, 510 S.E.2d at 690. We note defendant's answer and counterclaim were not verified and the trial court is not required to consider a defendant's unverified pleading for purposes of a summary judgment motion. *Venture Properties I v. Anderson*, 120 N.C. App. 852, 854-55, 463 S.E.2d 795, 796-97 (1995), *disc. review denied*, 342 N.C. 898, 467 S.E.2d 908 (1996).

Defendant failed to meet his burden in that he filed no opposing affidavit to plaintiff's motion for summary judgment and therefore did not show there was a genuine issue of material fact for trial. The trial court did not err in granting plaintiff's motion for summary judgment on her claim for absolute divorce. Defendant's first five assignments of error are overruled.

II.

Defendant argues in his sixth assignment of error that the

trial court erred in granting plaintiff's motion for summary judgment on her claim for absolute divorce because the trial court failed to follow correct procedures in granting summary judgment.

In his brief to our Court, defendant relies on the procedures set forth in N.C. Gen. Stat. § 1A-1, Rule 55, dealing with entry of default and default judgment. This reliance, however, is misplaced because at issue in this assignment of error are the requisites of N.C. Gen. Stat. § 1A-1, Rule 56 for entry of summary judgment. The order of the trial court granting plaintiff's motion for summary judgment does not refer to Rule 55, and there is also no reference to Rule 55 in the record to show that Rule 55 was argued before or considered by the trial court. Additionally, nowhere in the trial court's order granting summary judgment does the court state that its basis for entry of summary judgment for plaintiff was defendant's "failure to file an answer" that could have resulted in a default, as defendant argues.

Defendant's sixth assignment of error is overruled.

III.

Defendant contends in his seventh and eighth assignments of error that the trial court erred in refusing to grant defendant's motion to continue and such error was an abuse of discretion by the trial court. Defendant argues that he served his answer and counterclaim on plaintiff's counsel pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(a)(1), and that he filed the pleadings with the court within five days of service on plaintiff in compliance with N.C. Gen. Stat. § 1A-1, Rule 5(b), (d) and (e). Defendant also argues

that the trial court was "duly informed" that defendant had filed and served his answer and counterclaim along with his motion for continuance. Defendant contends the statement by the trial court that "no answer has been filed" was incorrect and therefore the order denying defendant's motion to continue is "void and of no legal effect[.]" Further, defendant argues the trial court's denial of his motion to continue was "an abuse of discretion based on an erroneous conclusion of law" because defendant had properly filed an answer. We disagree.

The standard of review on appeal for denial of a motion to continue is generally whether the trial court abused its discretion. *Wachovia Bank & Tr. Co. v. Templeton Olds.-Cadillac-Pontiac*, 109 N.C. App. 352, 356, 427 S.E.2d 629, 631, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). The movant bears the burden of showing sufficient grounds to justify a continuance. *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976).

In this case, the trial court stated in its order, and the defendant does not dispute, that "counsel for the defendant has appeared in court for this hearing" on the motion for continuance. Defendant had the opportunity to argue his contentions at the hearing before the trial court and to provide the trial court with documents not appearing in the court file. Also, the order of the trial court did not state that its basis for denying the motion for continuance was defendant's failure to file an answer but merely recited that no answer had been filed when it heard defendant's

motion.

Defendant relies on the procedures in N.C. Gen. Stat. § 1A-1, Rule 55 for a default as a basis for his argument that the trial court abused its discretion in denying the motion for a continuance. This reference is erroneous, however, because at issue in these two assignments of error is defendant's motion to continue and its denial, not entry of a default judgment.

Defendant has failed to show an abuse of discretion by the trial court. The trial court did not abuse its discretion in denying defendant's motion to continue. Defendant's seventh and eighth assignments of error are overruled.

IV.

Defendant argues in his final two assignments of error that the trial court erred by failing to set aside the divorce judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(8) and N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) because there were genuine issues of material fact which precluded summary judgment for plaintiff.

A motion for a new trial, as well as a motion to set aside judgment, are within the sound discretion of the trial court, whose ruling is reviewable by our appellate courts only for abuse of discretion. *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (discussing N.C. Gen. Stat. § 1A-1, Rule 59). See also *Cole v. Cole*, 90 N.C. App. 724, 370 S.E.2d 272, disc. review denied, 323 N.C. 475, 373 S.E.2d 862 (1988) (discussing N.C. Gen. Stat. § 1A-1, Rule 60(b)).

"A new trial may be granted . . . [based upon] [e]rror in law

occurring at the trial and objected to by the party making the motion[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a) (8) (1999). Further, "the court may relieve a party . . . from a final judgment, order, or proceeding . . . [if a] judgment is void." N.C. Gen. Stat. § 1A-1, Rule 60(b) (4) (1999).

Because we determined in Part I that the trial court did not err in granting summary judgment for plaintiff, we find no abuse of discretion by the trial court in denying defendant's motion to set aside the judgment. Defendant's final two assignments of error are overruled.

We affirm the orders of the trial court.

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).