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NO. COA01-195

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

PAUL D. BURNS, GARY J. MARSH,
WALTER J. MARSH, PAUL J.
SOCHACKI and CESARE EVOLA,
Plaintiffs

v.

Dare County
No. 00 CVS 24

MIKE A. BEACHAM and BEN SEAL,
Defendants

Appeal by defendant Ben Seal from order entered 4 May 2000 by Judge J. Richard Parker and judgment entered 29 September 2000 by Judge William C. Griffin, Jr. in Dare County Superior Court. Heard in the Court of Appeals 7 January 2002.

C. Everett Thompson, II, for plaintiff-appellees.

Trimpi, Nash & Harman, L.L.P., by John G. Trimpi, for defendant-appellant.

CAMPBELL, Judge.

Defendant Ben Seal ("Defendant Seal") appeals from the trial court's discovery sanctions order striking his answer, entering a judgment by default, and ordering him to pay attorney's fees and expenses. He also appeals from the trial court's judgment against him and co-defendant Mike Beacham finding them jointly and severally liable for damages in the amount of \$657,000.00 plus

interest, for \$25,000.00 in additional attorney's fees, and for \$2,312.75 in costs.

Plaintiffs filed this action against defendants seeking compensatory damages, punitive damages, and, in the alternative, a true and accurate accounting, based on defendants' alleged civil conspiracy, conversion, fraud, unfair and deceptive trade practices, violation of the North Carolina Racketeer Influenced and Corrupt Organizations ("RICO") Act, assault, and intentional infliction of emotional distress. Plaintiffs allegedly invested more than \$200,000.00 with defendants based on representations that defendants were agents of Rynor Corporation, a company in need of investment capital to be repaid on a monthly basis at a greatly enhanced value. Plaintiffs further alleged that defendants had acknowledged that plaintiffs' investments had grown as promised and that plaintiffs were entitled to more than \$1.8 million from defendants, but that defendants had failed to pay plaintiffs what they were owed. Defendant Seal filed an answer denying all of the essential allegations of plaintiffs' complaint. Defendant Beacham failed to answer plaintiffs' complaint, and the record indicates that a judgment by default was entered against him.

On 20 March 2000, plaintiffs filed a motion to compel Defendant Seal to appear for the taking of his deposition after he failed to appear for his properly noticed deposition on 16 March 2000. Subsequently, plaintiffs' counsel and Defendant Seal agreed to the taking of his deposition on 23 March 2000; however, Defendant Seal again failed to appear without being excused by

plaintiffs or the trial court. On 27 March 2000, plaintiffs filed a motion for sanctions against Defendant Seal for his failure to appear on two occasions for the taking of his deposition after proper notice. Plaintiffs requested that Defendant Seal's answer be stricken, that the allegations of plaintiffs' complaint be taken as true, that Defendant Seal be prohibited from introducing any evidence contradicting plaintiffs' allegations, and that plaintiffs receive such other relief to which they were entitled.

Plaintiffs' motion for sanctions was heard by Judge Parker on 26 April 2000. In conjunction with the hearing, plaintiffs' counsel filed an affidavit verifying that Defendant Seal had failed to appear for a third scheduled deposition on 19 April 2000. After hearing from both sides, the trial court found as fact that Defendant Seal had failed to appear for the taking of his deposition after proper notice on three occasions. The trial court ordered that Defendant Seal's answer be stricken, that judgment by default be entered against him, and that the matter be tried only on the issue of damages. The trial court further ordered Defendant Seal to pay attorney's fees and costs associated with his failures to appear. In addition, the trial court ordered Defendant Seal to appear for the taking of his deposition on 9 May 2000.

On 5 September 2000, the case was heard on the issue of damages by Judge Griffin. The individual plaintiffs and Defendant Seal testified at the hearing. Based upon the evidence presented and the arguments of counsel, Judge Griffin found as fact that defendants had jointly and severally engaged in a fraudulent

investment scheme whereby they enticed plaintiffs to invest money which had not been returned. Based on these findings of fact, Judge Griffin concluded, as a matter of law, that defendants had violated the North Carolina RICO Act and that plaintiffs were entitled to treble damages and reasonable attorney's fees pursuant to N.C. Gen. Stat. § 75D-8(c). Judge Griffin also awarded plaintiffs costs in the amount of \$2,312.75, and ordered defendants to provide a true and accurate accounting to plaintiffs on or before 16 October 2000. Judge Griffin's judgment was entered on 29 September 2000. On 13 October 2000, plaintiffs filed a motion to correct a clerical mistake in the trial court's judgment pursuant to N.C. R. Civ. P. 60(a). Defendant Seal filed notice of appeal on 26 October 2000. On 13 December 2000, the trial court's judgment was amended to change the amount of attorney's fees awarded to plaintiffs from \$25,000.00 to \$30,000.00.

Defendant Seal first contends that Judge Parker erred in striking his answer and entering judgment by default without considering less severe sanctions. We disagree.

N.C. R. Civ. P. 37(d) provides that when a party fails "to appear before the person who is to take his deposition, after being served with a proper notice . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just," including the imposition of certain sanctions authorized under N.C. R. Civ. P. 37(b)(2). N.C. R. Civ. P. 37(d) (2000). The permissible sanctions under Rule 37(b)(2) include:

(c) *An order striking out pleadings or parts thereof, or staying further proceedings until*

the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

N.C. R. Civ. P. 37(b)(2)(c) (2000) (emphasis added). The imposition of sanctions under Rule 37 "is within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion." *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995).

Defendant Seal does not dispute the authority of the trial court to impose the sanctions it imposed under Rule 37. However, he argues that the trial court must consider less severe sanctions before striking a party's answer and rendering a judgment by default. See *Cheek v. Poole*, 121 N.C. App. 370, 465 S.E.2d 561 (1996); *Goss v. Battle*, 111 N.C. App. 173, 432 S.E.2d 156 (1993). Defendant Seal asserts that there is nothing in the transcript of the hearing on plaintiffs' motion for sanctions, or in the trial court's sanctions order, to indicate that the trial court considered less severe sanctions; thus, the order should be vacated.

The transcript of the hearing on plaintiffs' motion for sanctions indicates that plaintiffs requested the trial court strike Defendant Seal's answer, prevent him from presenting any evidence, order him to pay plaintiffs' expenses, and order him to appear for the taking of his deposition. In response, counsel for Defendant Seal requested the trial court limit any sanctions to monetary expenses incurred as a result of Defendant Seal's failures to appear. After the hearing, the trial court ordered that

Defendant Seal's answer be stricken, that judgment by default be entered against him, that he pay attorney's fees and costs, and that he appear for the taking of his deposition. However, the trial court did not order that Defendant Seal be prevented from presenting evidence contradicting plaintiffs' factual allegations. In fact, the transcript of the hearing on the issue of damages reveals that Defendant Seal was later allowed to present evidence through his oral testimony. The record here shows that plaintiffs requested sanctions more severe than those that were ultimately ordered, while Defendant Seal expressly requested less severe sanctions. We believe it may be inferred from this record that the trial court considered all available sanctions, including the lesser alternative proposed by Defendant Seal, in arriving at its decision. See *Chateau Merisier, Inc. v. Le Mueble Artisanal GEKA, S.A.*, 142 N.C. App. 684, 544 S.E.2d 815 (2001); *Hursey*, 121 N.C. App. at 179, 464 S.E.2d at 507. Thus, we hold that the sanctions imposed by Judge Parker were appropriate in light of Defendant Seal's actions in this case.

Defendant Seal next contends that Judge Parker erred in awarding attorney's fees and expenses as part of the sanctions against him without making findings of fact as to the reasonableness of the attorney's fees and expenses.

Rule 37(d) provides that a party who fails to attend his properly noticed deposition shall "pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other

circumstances make an award of expenses unjust." N.C. R. Civ. P. 37(d). Relying on this Court's decision in *Benfield v. Benfield*, 89 N.C. App. 415, 366 S.E.2d 500 (1988), Defendant Seal maintains the trial court was required to make findings of fact to support its conclusion that the award was reasonable.

However, Defendant Seal has not sufficiently preserved for appellate review those questions related to the trial court's failure to make findings to support the reasonableness of its award of attorney's fees and expenses. N.C. R. App. P. 10(b)(1) provides:

In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. . . .

N.C. R. App. P. 10(b)(1) (2000). Counsel for plaintiffs herein submitted an affidavit to the trial court stating that he had expended fifteen hours preparing for, and traveling to and from, Defendant Seal's missed depositions, that his normal hourly rate was \$175.00 per hour, and that the court reporting expenses for Defendant Seal's missed depositions were \$400.00. At the hearing on plaintiffs' motion for sanctions, Defendant Seal's attorney asked the trial court to limit any sanctions to monetary expenses. Defendant Seal's attorney did not question the reasonableness of the attorney's fees and expenses set forth in the affidavit submitted by opposing counsel, nor did she request that the trial

court make findings of fact concerning the reasonableness of those expenses. Following the trial court's announcement of its intention to order Defendant Seal to pay \$2,625.00 in attorney's fees and \$400.00 in expenses, Defendant Seal's attorney made no objection. Therefore, we conclude that Defendant Seal has not properly preserved this assignment of error for appellate review pursuant to N.C. R. App. P. 10(b)(1). See *West v. Tilley*, 120 N.C. App. 145, 461 S.E.2d 1 (1995).

Moreover, Defendant Seal's contention that findings of fact are required to support the reasonableness of an award of attorney's fees and expenses under Rule 37(d) does not take into account N.C. R. Civ. P. 52(a)(2), which states, in pertinent part, that "[f]indings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party. . . ." N.C. R. Civ. P. 52(a)(2) (2000). The record here does not reveal that either party made such a request of Judge Parker. Absent such a request, we leave it to the discretion of the trial judge to determine whether findings of fact are necessary. See *Watkins v. Hellings*, 321 N.C. 78, 361 S.E.2d 568 (1987) (holding that the trial court is not required to make negative findings of fact with respect to the four exceptions found in N.C. R. Civ. P. 37(c) in order to support an order taxing sanctions to a party, unless requested to do so by one of the parties).

By his next several assignments of error, Defendant Seal argues that Judge Griffin erred in his judgment by making findings

of fact and conclusions of law based on Judge Parker's erroneous entry of judgment by default. Having concluded that Judge Parker did not err in striking Defendant Seal's answer and entering judgment by default, we need not address these assignments of error.

Defendant Seal next contends that the trial court erred in its judgment by awarding attorney's fees without sufficient evidence or findings of fact to support a conclusion that such award was reasonable. In its judgment, the trial court awarded plaintiffs attorney's fees pursuant to N.C. Gen. Stat. § 75D-8(c), which states, in pertinent part:

(c) Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages and reasonable attorneys fees.

N.C.G.S. § 75D-8(c) (2000). Defendant Seal maintains that where a statute provides for an award of reasonable attorney's fees the trial court must make findings to support such an award.

However, we again conclude that Defendant Seal did not properly preserve this assignment of error for appellate review pursuant to N.C. R. App. P. 10(b)(1). The transcript of the hearing on damages indicates that counsel for plaintiffs asked for attorney's fees at the conclusion of the evidence, and submitted an affidavit in support thereof. The record does not reveal that counsel for Defendant Seal at any time objected to this affidavit or requested that the trial court make findings of fact to support the reasonableness of the attorney's fees requested by plaintiffs.

Thus, Defendant Seal did not properly preserve this issue for appellate review. Further, findings of fact were not required under N.C. R. Civ. P. 52(a)(2), since Defendant Seal did not request them below.

Defendant Seal next contends that the trial court erred in its judgment by awarding costs to plaintiffs in the amount of \$2,312.75, the bulk of which was made up of deposition costs. First, Defendant Seal argues that he had already been taxed with a portion of these costs when he was ordered to pay \$400.00 in court reporting fees in the 4 May 2000 sanctions order. Second, he contends that the deposition expenses were unnecessary in light of the fact that liability against him had already been established by the trial court's entry of judgment by default.

We first note that Defendant Seal failed to properly preserve for appellate review the question of the reasonableness of the costs taxed against him by not objecting to the trial court. See N.C. R. App. P. 10(b)(1). Assuming, *arguendo*, that this assignment of error was properly preserved for review, we find no abuse of discretion in the trial court's award of deposition costs in this case. See *Minton v. Lowe's Food Stores*, 121 N.C. App. 675, 468 S.E.2d 513 (1996).

By his final assignment of error, Defendant Seal contends that Judge Tillett's 13 December 2000 order correcting the judgment to increase the amount of attorney's fees awarded to plaintiffs from \$25,000.00 to \$30,000.00 was error in that the trial court did not have jurisdiction to do so after Defendant Seal's notice of appeal

had been filed on 26 October 2000. We disagree.

We first note that Defendant Seal has failed to give notice of appeal to this Court from the trial court's order correcting the judgment entered on 13 December 2000. Thus, the order is not properly subject to our review. Second, the trial court's order correcting the judgment was permitted under N.C. R. Civ. P. 60(a), which provides:

(a) *Clerical mistakes.* -- Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

N.C. R. Civ. P. 60(a) (2000). In the instant case, plaintiffs' motion to correct the judgment was based on the grounds that the trial court's findings of fact and conclusions of law stated that plaintiffs had incurred \$30,000.00 in attorney's fees, while the decretal portion of the judgment only awarded plaintiffs \$25,000.00 in attorney's fees. Review of the judgment indicates that plaintiffs' assertion was correct. We conclude that the trial court's failure to award plaintiffs the amount of attorney's fees set forth in the findings of fact and conclusions of law was an inadvertent clerical oversight, the correction of which did not affect the substantive rights of the parties. See *Watson v. Watson*, 118 N.C. App. 534, 455 S.E.2d 866 (1995) (holding that courts do not have the power under Rule 60(a) to affect the

substantive rights of the parties or to correct substantive errors in their decisions). Thus, the trial court had authority under Rule 60(a) to correct the judgment accordingly up until the day the appeal was docketed in this Court. An appeal is docketed in this Court when the record on appeal is filed. See N.C. R. App. P. 12(b) (2000). In the instant case, the record on appeal was not filed until 13 February 2001. Therefore, Judge Tillett's order entered on 13 December 2000 was well within the trial court's authority under Rule 60(a). Accordingly, Defendant Seal's final assignment of error is overruled.

In conclusion, we find no merit in any of Defendant Seal's arguments on appeal. Accordingly, we affirm the order entered 4 May 2000, the judgment entered 29 September 2000, and the corrected judgment entered 13 December 2000.

Affirmed.

Chief Judge EAGLES and Judge McCULLOUGH concur.

Report per Rule 30(e).