NO. COA01-317

NORTH CAROLINA COURT OF APPEALS

Filed: 05 March 2002

IRENA CRANDALL, d/b/a
JIJ CONSULTING

v. Wake County
No. 98 CVD 8237

PAUL N. KNECHTEL, LINDA
SCOVILL KNECHTEL and
ADVENTURE PUBLISHING, INC.

Appeal by defendants from judgments entered 7 November 2000 and 15 December 2000 by Judges Michael R. Morgan and Alice Carson Stubbs, respectively, in Wake County District Court. Heard in the Court of Appeals 30 January 2002.

Brian E. Upchurch for plaintiff-appellee.

Law Offices of Thomas H. Stark, by Thomas H. Stark, for defendants-appellants.

THOMAS, Judge.

Defendants, Paul N. Knechtel, Linda Scovill Knechtel and Adventure Publishing, Inc., appeal judgments entered 7 November 2000 and 15 December 2000 denying their Rule 60(b) motions. Defendants set forth three assignments of error. For the reasons discussed herein, we affirm the trial court.

The facts are as follows: Plaintiff sold advertising space for defendants' magazine in accordance with an independent contractor agreement. The terms provided that she was to be paid a commission

of 28% of the net advertising sales revenues. The contract ended but, according to plaintiff, the parties agreed for her to continue selling advertising space while a new contract was formulated. She did, and was paid on the same basis as under the initial contract except for $5,045 in commissions. Plaintiff alleged in her complaint both breach of contract and unjust enrichment.

Defendants filed an answer but failed to respond to plaintiff's first set of interrogatories and first request for production of documents within the time permitted by the North Carolina Rules of Civil Procedure. Plaintiff filed motions to compel and for attorney fees, both of which the trial court granted. The trial court also ordered defendants to respond to plaintiff's requests by 26 April 1999. They did not. Plaintiff then motioned for sanctions.

On 4 June 1999, the trial court struck defendants' answer to the complaint, entered default, and awarded additional attorney fees. A default judgment was entered on 9 July 1999.

Defendants moved for relief from the default judgment pursuant to Rule 60(b) on 6 September 2000, citing the negligence of their attorney. The motion was denied on 7 November 2000. On 7 December 2000, defendants filed a notice of appeal and another Rule 60(b) motion for relief from the July 1999 judgment based on identical grounds. The trial court denied the second motion, finding that defendants' first 60(b) motion was finally decided and there was no authority for a subsequent 60(b) motion based on the same arguments. Defendants then timely filed notice of appeal from that

order.

By defendants' three assignments of error, they argue the trial court erred in denying their Rule 60(b) motions for relief in that: (1) the default judgment was not supported by sworn evidence; (2) the default judgment was occasioned by their attorney's neglect; and (3) they motioned for relief within a reasonable time. Defendants subsequently abandoned their assignment of error regarding the second 60(b) motion and order.

Rule 60(b)(6) of the North Carolina Rules of Civil Procedure, which is the subsection specifically argued by defendants in their brief, provides that a party may be relieved from a final judgment for "[a]ny . . . reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6). Under this rule, the movant must show that extraordinary circumstances exist and that justice demands relief. *Dollar v. Tapp*, 103 N.C. App. 162, 404 S.E.2d 482 (1991). Relief under Rule 60(b)(6) will only be disturbed after a showing of abuse of discretion. *Williams v. Jennette*, 77 N.C. App 283, 335 S.E.2d 191 (1985).

Here, defendants first contend the default judgment was not supported by sworn evidence because the complaint was not verified, and there was no affidavit or verification in the record at the time the default judgment was entered. However, by the express language in the default judgment, it was entered "from the record and the *verified* complaint[.]" (Emphasis added). There is a presumption that a judgment is correct. *General Tire & Rubber Co. v. Distributors, Inc.*, 256 N.C. 561, 124 S.E.2d 508 (1962). Thus,

the default judgment's statement is controlling, absent proof to the contrary.

Defendants next allege the complaint was not verified. The record, however, includes a verification of the complaint and an affidavit by plaintiff's counsel stating it was presented and accepted in open court in support of plaintiff's motion for entry of default judgment. Defendants have not overcome their burden of proving the judgment was erroneous and we therefore reject this argument.

Defendants also contend the default judgment was entered in error because they were "victimized" by their attorney's neglect. Defendants assert they did not know their answers to discovery requests were still outstanding and that there was a hearing on plaintiff's motion to compel. Further, defendants contend they knew nothing of the default judgment hearing.

In an affidavit, defense counsel, Bradley L. Tharp (Tharp), stated that he neglected defendants' case because of a lack of support staff at his firm, an increased caseload due to the absence of one the partners (his wife), his wife's complicated pregnancy, illness in the family, scheduling errors, and complications from serious injuries he sustained in an automobile accident. This Court has held that an attorney's neglect resulting in an adverse outcome is not imputable to litigants who otherwise acted reasonably. *Spainhour & Sons Grading Co. v. Carolina E.E. Homes, Inc.*, 109 N.C. App. 174, 426 S.E.2d 728 (1993). However, this Court has also held that "the mere employment of counsel is not

enough . . . . The client may not abandon his case on employment of counsel, and when he has a case in court he must attend to it . . . . The party seeking to set aside a default judgment must be without fault." *Norton v. Sawyer*, 30 N.C. App. 420, 423, 227 S.E.2d 148, 151-52, *rev. denied*, 291 N.C. 176, 229 S.E.2d 689 (1976). Thus, the pertinent query is whether defendants were culpable in failing to attend to their case.

The evidence shows that each defendant was properly served with the complaint, summons, and discovery requests. Defendant Paul Knechtel acknowledged in his affidavit that he knew of the motion to compel in January 1999 and met in Tharp's office in March 1999 to discuss his responses to the interrogatories. He also acknowledged that he knew of Tharp's pending motion to withdraw as counsel. Nonetheless, he states he was never informed of a hearing concerning the case. Defendant Linda Scovill Knechtel, in her affidavit, stated she was unaware of the motion to compel and the entry of default judgment and that she "relied totally" on defendant Paul Knechtel, her husband, "to deal with the legal matters and the attorneys with respect to the litigation."

The evidence shows that defendants were generally aware of the status of the case, but neglected to follow its progress even after learning that problems were developing. They were clearly on notice that an increased vigilance was essential. The act of hiring counsel is not enough to insulate a party against abandoning their case. *See Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E.2d 819, (1978). We therefore reject this argument.

Lastly, defendants contend the trial court erred in determining their motion for relief from the judgment was not made within a reasonable time. Rule 60(b)(6) requires that the "motion shall be made within a reasonable time[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (1999). Whether a motion is made within a reasonable time depends upon the circumstances of the individual case. *Nickels v. Nickels*, 51 N.C. App. 690, 277 S.E.2d 577, *cert. denied*, 303 N.C. 545, 281 S.E.2d 392 (1981). In the instant case, the motion for relief was filed on 6 September 2000, approximately fourteen months after the 9 July 1999 default judgment, and the trial court determined that it was not made within a reasonable time. The trial court will be reversed only upon a showing of abuse of discretion. *See Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980). In the instant case, defendants neither argue nor show an abuse of the trial court's discretion. We therefore reject this assignment of error.

AFFIRMED.

Judges WYNN and HUDSON concur.

Report per Rule 30(e).