

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-699

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

MURAD A. ZABEN,
Plaintiff

v.

Mecklenburg County
No. 00 CVD 1307

JENNIFER A. GARDINER,
Defendant

Appeal by defendant from order entered 12 February 2001 by Judge Fritz Y. Mercer in Mecklenburg County District Court. Heard in the Court of Appeals 13 March 2002.

The Oliver Law Firm, P.A., by James M. Goard, for plaintiff-appellee.

Morris York Williams Surles & Barringer, L.L.P., by Christa C. Pratt, for defendant-appellant.

WALKER, Judge.

Defendant appeals from an order denying her motions to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(2), (4) and (5) and to set aside a default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rules 60(b)(3) and (6). The record in this case establishes the following: On 13 June 1999, plaintiff and defendant were involved in an automobile accident on Sharon Amity Road in Charlotte. In a complaint filed on 28 January 2000, plaintiff sought damages for his personal injuries he alleged were caused by defendant's negligence. Service of summons and complaint

was attempted by the sheriff's department at 3449 #E1 N. Sharon Amity Road in Charlotte. This was the address listed for defendant on the police accident report. Approximately ten days later, the summons was returned unserved with a notation stating defendant was "unknown per resident since Nov[ember]." Thereafter, an alias and pluries summons was issued on 21 March 2000 to the same address.

On 25 April 2000, plaintiff's attorney filed an affidavit in which he averred he had made every effort to locate or determine the whereabouts of defendant, but the summons had been returned unserved. Additional alias and pluries summonses were issued on 30 May 2000 and 31 July 2000. The record does not indicate that defendant was ever served.

On 23 June 2000, plaintiff moved for entry of default stating that defendant had failed to file any pleading and that the time in which to do so had expired. Three days later, after determining defendant had been properly served, the clerk of superior court entered a default against defendant. On 21 August 2000, pursuant to plaintiff's motion, the trial court entered a default judgment against defendant. Thereafter, on 16 October 2000, the trial court heard evidence on the issue of damages and awarded plaintiff \$8,250.00 for damages arising out of the accident. The trial court also ordered defendant to pay attorney's fees.

On 22 December 2000, defendant filed a motion to dismiss plaintiff's complaint pursuant to Rules 12(b)(2), (4) and (5) alleging lack of jurisdiction over the person, insufficiency of process and insufficient service of process. Defendant also filed

a motion to set aside the default judgment under Rules 60(b)(3) and (6). After a hearing on 12 February 2001, the trial court denied defendant's motions.

We address defendant's assignments of error as follows: (1) whether the trial court erred in denying defendant's motion to dismiss plaintiff's complaint based on a lack of jurisdiction over defendant; (2) whether the trial court erred in failing to set aside the default judgment where the judgment was void as a matter of law; and (3) whether the trial court abused its discretion in failing to set aside the default judgment pursuant to Rules 60(b)(3) and (6).

Defendant first contends the trial court erred as a matter of law in denying her motion to dismiss plaintiff's complaint by reason of a lack of personal jurisdiction. Specifically, defendant maintains that because plaintiff's attorney failed to exercise due diligence in his efforts to locate defendant, plaintiff was not entitled to serve defendant by publication.

"[I]t is well established that a court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily specified methods." *Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998), *disc. rev. denied*, 350 N.C. 94, 527 S.E.2d 666 (1999). "[A]bsent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed." *Id.* (citations omitted).

"A party that cannot with *due diligence* be served by personal delivery or registered or certified mail may be served by publication." N.C. Gen. Stat. § 1A-1, Rule 4(j1) (1999) (emphasis added). "Due diligence" requires a plaintiff to use "all resources reasonably available" in his efforts to locate a defendant. *Winter v. Williams*, 108 N.C. App. 739, 742, 425 S.E.2d 458, 460, *disc. rev. denied*, 333 N.C. 578, 429 S.E.2d 578 (1993) (citations omitted). "In determining whether due diligence has been exerted in effecting service, this Court has rejected use of a 'restrictive mandatory checklist' and has held determination in each case is based upon the facts and circumstances thereof." *Barclays American/Mortgage Corp. v. BECA Enterprises*, 116 N.C. App. 100, 103, 446 S.E.2d 883, 886 (1994) (*citing Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372, *disc. rev. denied*, 301 N.C. 87 (1980)).

Here, defendant does not dispute plaintiff's assertions that he attempted personal service at defendant's last-known address, that he attempted service via certified mail, and that he contacted the Department of Motor Vehicles in an effort to determine whether defendant had changed her address. Rather, she merely points out that the only evidence in the record to support these assertions is the affidavit in which plaintiff's attorney averred that he had "made every effort to locate and determine the whereabouts" of defendant. Defendant also contends plaintiff's attorney had failed to use all resources reasonably available to locate defendant in that he could have informed defendant's insurance carrier of the

impending proceedings. However, defendant concedes there is no authority which would require plaintiff, under the facts of this case, to contact defendant's carrier prior to the filing or serving of the complaint. It is the duty of the appellant to see that the record is complete. See *Collins v. Talley*, ___ N.C. App. ___, ___, 553 S.E.2d 101, 102 (2001). Accordingly, we cannot conclude the trial court erred as a matter of law in determining that defendant was properly served when it denied defendant's motion to dismiss plaintiff's complaint.

Defendant next argues that the trial court erred as a matter of law in denying its motion to set aside the default judgment on grounds that the judgment was void. Defendant's argument is based on two contentions: (1) that the trial court lacked jurisdiction over the person due to insufficient process and service of process; and (2) that plaintiff failed pursuant to Rule 55(c) to post the bond required for service by publication.

We have already addressed defendant's contention that the trial court lacked personal jurisdiction and we are unable to conclude the trial court erred in this matter. With respect to defendant's argument that plaintiff failed to post the bond required for service by publication, defendant neither presented this argument to the trial court nor assigned it as an error to this Court. Thus, we decline to address the merits of this issue for the first time on appeal. See N.C.R. App. P. 10(b)(1)(2002) ("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"); and *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991) ("the scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal") (citations omitted).

Finally, defendant contends the trial court abused its discretion in failing to set aside the default judgment pursuant to Rules 60(b)(3) and (6). Rule 60(b) states in pertinent part that a trial court may relieve a party from a final judgment by reason of:

(3) [f]raud, . . . misrepresentation, or other misconduct of an adverse party; [or]

. . .

(6) [a]ny other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b). On appeal, "[a] trial court's ruling on a Rule 60(b) motion is reviewable only for an abuse of discretion." *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616, *disc. rev. denied*, 348 N.C. 281, 502 S.E.2d 846 (1998).

Defendant's motion to set aside the judgment was based on her contention that plaintiff's attorney had failed to exercise due diligence in his efforts to effect service of process. Defendant also contends that, as a result, plaintiff failed to provide her with actual or constructive notice. Since we are unable to determine that the trial court erred in concluding plaintiff's

attorney had exercised due diligence, we decline to find an abuse of discretion on those grounds. Furthermore, the record shows that plaintiff complied with the requirements for service by publishing the required notice. See N.C. Gen. Stat. § 1A-1, Rule 4(j1).

We affirm the trial court's denial of defendant's motions to dismiss plaintiff's complaint and to set aside the default judgment.

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).