NO. COA03-1408

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2004

BIEMANN AND ROWELL COMPANY,
Plaintiff,

v. Guilford County
No. 99 CVS 9132

THE DONOHOE COMPANIES, INC.,
d/b/a DONOHOE CONSTRUCTION
COMPANY,
Defendant.

Appeal by plaintiff from judgment entered 5 June 2003 by Judge Ben F. Tennille in Guilford County Superior Court. Heard in the Court of Appeals 25 August 2004.

Erwin and Eleazer, P.A., by L. Holmes Eleazer, Jr., and Fenton T. Erwin, Jr., for plaintiff.

Safran Law Offices, by Perry R. Safran and Brian J. Schoolman, for defendant.

LEVINSON, Judge.

Plaintiff, Biemann and Rowell Company, appeals from the trial court's award of costs to defendant, Donohoe Construction Company, pursuant to N.C.G.S. § 1A-1, Rule 68(a). We affirm.

Biemann and Rowell Company (hereinafter Biemann) and Donohoe Construction Company (hereinafter Donohoe) were both hired by the State of North Carolina to perform construction work related to the building of the Neuropsychiatric Hospital at the University of North Carolina. The project experienced delays, and related

disputes between the parties ensued. Following the completion of the project, Biemann filed a suit against Donohoe seeking $950,000 in damages for breach of contract and damages in excess of $10,000 for negligence. Donohoe answered and filed counterclaims for breach of contract. By agreement of the parties, the case was transferred to the North Carolina Business Court. In an order entered 5 June 2000, the trial court dismissed the claims of both parties. On an appeal taken by Biemann, this Court affirmed the trial court's order.

On 18 February 2002 Donohoe filed a motion to tax costs against Biemann. The stated basis for the motion was as follows:

> 1. On November 1, 1999, [Donohoe] served an Offer of Judgment pursuant to [N.C.G.S. § 1A-1, Rule] 68(a) in the amount of $50,000.00 on counsel for [Biemann].
>
> 2. [Biemann] did not accept [Donohoe's] offer of judgment.
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> . . . .
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> 4. The award of judgment from the trial was in an amount less than [Donohoe's] Offer of Judgment as the trial court ruled in favor of [Donohoe] on all counts [with respect to Biemann's claims], denying any recovery to [Biemann].

The offer of judgment was attached to Donohoe's motion as an exhibit; a certificate of service stated that Donohoe's attorney, Perry Safran, had personally served Biemann's attorney, Fenton Erwin, with the offer of judgment.

At a hearing on the motion for costs, Biemann contended that it had not been served with Donohoe's offer of judgment. Mr. Erwin filed an affidavit with the court in which he stated that he had no

record of ever having received the offer prior to the motion for costs. Mr. Erwin attached his time records to the affidavit; his records tended to show that, on the date he was allegedly personally served, he was in Charlotte and had no meeting with Mr. Safran, whose office is in Raleigh.

The trial court noted the discrepancy between the certificate of service and Mr. Fenton's records. The trial court also noted that Donohoe had sought expert witness fees in its motion to tax costs, but had not provided proof that the witnesses had been subpoenaed. The parties were given until 7 June 2002 to submit additional materials bearing on the motion. On 5 June 2002, Donohoe filed a supplemental memorandum. Attached to the memorandum were a subpoena for John McTyre dated 15 November 1999 and an affidavit from a paralegal in Mr. Safran's office, Paulette Erwin, stating that she had hand-delivered the subpoena to Mr. McTyre.

In an order entered 5 June 2003, the trial court granted Donohoe's motion to tax costs against Biemann in the amount of $22,010.21. From this order, Biemann appeals, contending that the trial court erred in its award of costs because (1) there was insufficient evidence for the trial court to find that the offer of judgment was served, and (2) John McTyre was not properly and validly subpoenaed to testify.

The following principles guide our review: The instant case involved ruling on a motion and neither party requested findings. Therefore, the trial court was not required to make findings of

fact, and "'it will be presumed that the judge, upon proper evidence, found facts sufficient to support his ruling.'" *See Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001) (quoting *Cameron-Brown Co. v. Davis*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986)). Where a judge sits as a finder of fact, questions concerning the weight and credibility of evidence are the province of the trial court. *Cartin v. Harrison*, 151 N.C. App. 697, 703, 567 S.E.2d 174, 178, *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

With these principles in mind, we first address Biemann's argument that there was insufficient evidence of service of the offer of judgment. This contention is without merit.

N.C.G.S. § 1A-1, Rule 68(a) (2003) provides as follows:

> [A] party defending against a claim may **serve** upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

(emphasis added). Service of the offer of judgment may be made upon a party's attorney by delivering a copy to the party or the party's attorney of record. N.C.G.S. § 1A-1, Rule 5(b) (2003). "Delivery of a copy within [Rule 5(b)] means handing it to the attorney or to the party, leaving it at the attorney's office with a partner or employee, or by sending it to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. Eastern Time on a regular business day, as evidenced by a

telefacsimile receipt confirmation." *Id.* A party making an offer of judgment must file a certificate of service, which is required to indicate "the date and method of service or the date of acceptance of service." N.C.G.S. § 1A-1, Rule 5(d) (2003). "[T]he certificate of service itself . . . 'raise[s] a rebuttable presumption of valid service.'" *Hocke v. Hanyane*, 118 N.C. App. 630, 633, 456 S.E.2d 856, 860 (1995) (quoting *In re Cox*, 36 N.C. App. 582, 586, 244 S.E.2d 733, 736 (1978)).

Biemann concedes that "[t]here is a presumption that a certificate of service establishes what it says." It follows that there is a presumption that the offer of judgment was personally served upon Biemann's counsel. Biemann contends, however, that this presumption was conclusively rebutted by the affidavit and time records submitted to the court by Mr. Erwin. We do not agree.

In the present case, Biemann raised questions as to whether the certificate of service was credible. However, the trial court was not required to find the evidence offered to rebut the certificate of service to be credible. Indeed, because the trial court granted the motion to tax costs against Biemann, it necessarily follows that the trial court did not find this rebuttal evidence credible. Such a finding is the province of the trial court and is supported by evidence of a certificate of service, to which a presumption of verity is accorded. This assignment of error is overruled.

We next address Biemann's argument that the trial court erred in awarding Donohoe the costs associated with the expert testimony

offered by John McTyre because Mr. McTyre was not properly and validly subpoenaed to testify. We are unpersuaded that the trial court erred.

A court may not tax a party with an expert witness' fee unless the expert witness testifies pursuant to a subpoena. *See Coffman v. Roberson*, 153 N.C. App. 618, 628, 571 S.E.2d 255, 261 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003); *Blackmon v. Bumgardner*, 135 N.C. App. 125, 132, 519 S.E.2d 335, 340 (1999). Prior to 2003,[1] the following provision of N.C.G.S. § 1A-1, Rule 45 (2001) governed service of subpoenas:

> (e) Service. -- All subpoenas may be served by the sheriff, by his deputy, by a coroner or by any other person not less than 18 years of age, who is not a party. . . . Service of a subpoena for the attendance of a witness may be made by . . . delivery of a copy to the person named therein . . . by any person authorized by this section to serve subpoenas. Personal service shall be proved by return of a sheriff, his deputy, or a coroner making service and by return under oath of any other person making service. . . .

This Court has held that a trial court may consider a sworn affidavit in determining whether or not a witness has been served with a subpoena. *See Coffman*, 153 N.C. App. at 628, 571 S.E.2d at 261 ("[T]he record clearly reflects, through the sworn affidavit of plaintiffs' attorney, that all of the expert witnesses testified at trial pursuant to a subpoena.").

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[1]In 2003, the General Statutes were amended such that service of subpoenas is now governed by N.C.G.S. § 1A-1, Rule 45(b), which does not require a return as proof of service. The pre-2003 rules governing service of subpoenas are applicable in the instant case.

In the instant case, Donohoe submitted a subpoena for John McTyre. Attached to the subpoena was a standard form return of service. The certification portion of the return states the subpoena was served on 15 November 1999 "by delivering a copy of th[e] [s]ubpoena to the first person named on [the] front [John McTyre]." A zero was handwritten in as the amount of the service fee. The spaces reserved for "Date Served" and "Signature of Authorized Server" were left blank. With the subpoena and return of service, Donohoe also submitted the affidavit of Paulette Ervin, dated 5 June 2002, in which she swore to having served the subpoena on John McTyre on 15 November 1999 "via hand delivery."

Biemann concedes that it has found no authority concerning whether service is valid where the return is irregular on its face, but submits that this Court should adopt a rule whereby "the further away in time a party seeks to rectify an irregular or non-complaint act, the stricter should be the standard as to whether compliance has been achieved." We are unpersuaded that this case is the appropriate one in which to consider such a rule. Though the return of service was not properly completed, an affidavit indicated that the person who should have properly completed the return of service did, in fact, serve the subpoena upon the expert witness whose fees were sought to be taxed. The trial court apparently found the affidavit credible. With the threshold question of whether the expert witness received a subpoena requiring his testimony answered in the affirmative, the trial

court did not err in making an award of costs pursuant to G.S. § 1A-1, Rule 68(a). This assignment of error is overruled.

Affirmed.

Judges GEER and THORNBURG concur.

Report per Rule 30(e).