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NO. COA05-1082

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

UNITED LEASING CORPORATION,
and SHIELD FAMILY
PARTNERSHIP, III,

Plaintiffs,

v.

Wake County
No. 03 CVS 5152

JOSEPH F. GUTHRIE, TAMI
GUTHRIE, JUDY GUTHRIE, KELLY
PITTMAN, LANCE PITTMAN, JOSEPH
GUTHRIE FAMILY TRUST, GROWTH
OPPORTUNITIES, INC., and
SHOWCASE AMERICA, INC.

Defendants.

Appeal by defendants from judgment entered 30 April 2004 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 22 February 2006.

Francis & Austin, PLLC, by John S. Austin, for plaintiffs-appellees.

Nicholls & Crampton, P.A., by Kevin L. Sink, and Steven S. Biss, for the defendant-appellant.

ELMORE, Judge.

I. Facts

United Leasing Corporation (ULC), a Virginia corporation, and the Shield Family Partnership, III (the Shield Partnership), a Virginia limited partnership (collectively plaintiffs), initiated

this action by filing a complaint in Wake County Superior Court against Joseph Guthrie, Tami Guthrie, Judy Guthrie, and the Joseph Guthrie Family Trust (collectively the Guthries); Kelly Pittman and Lance Pittman (the Pittmans); Growth Opportunities, Inc. (Growth Opportunities); and Showcase America, Inc. (Showcase). The parties, in part through their membership in Kelsie Properties, LLC (Kelsie Properties), a Virginia limited liability company, conducted business activities in North Carolina.¹

The underlying dispute between the parties resulted from a series of allegedly improper business transactions. First, on or about 8 October 1998, ULC agreed to loan \$500,000.00 to United American Company (American), a company under the operation and control of Joseph Guthrie, in exchange for a promissory note and security interest in American's inventory. On 23 May 2000 ULC obtained American's entire inventory pursuant to the terms of the loan agreement. Plaintiffs allege that Judy Guthrie and Tami Guthrie absconded with the inventory obtained by ULC and converted it to their own use.

Second, in November 1998, without notifying the Shield Partnership, Joseph Guthrie and the Joseph Guthrie Family Trust used Kelsie Properties to enter into a ten-year, \$2,600,000.00, lease agreement with Parker-Raleigh Development XX (Parker-Raleigh). On 26 May 2000 Parker-Raleigh enforced a lockout provision in their lease and demanded that ULC pay \$37,499.37 in

¹ Kelsie Properties was fifty percent owned by the Shield Partnership and fifty percent owned by the Joseph Guthrie Family Trust.

back rental payments. In response, ULC filed suit against Parker-Raleigh to obtain its inventory. Parker-Raleigh counterclaimed against ULC and filed third-party actions against Joseph Guthrie, Kelsie Properties, and ULC's president, Edward Shield, asserting claims for fraud, negligent misrepresentation, and unfair and deceptive acts and practices. Plaintiffs assert that the Parker-Raleigh dispute was a direct result of the Guthries' failure to pay the rent due under the lease and engagement in unfair and deceptive acts.

To resolve the dispute over the ten-year lease agreement, ULC paid Parker-Raleigh \$360,000.00 on behalf of themselves and Kelsie Properties. Plaintiffs claim that the Guthries failed to properly assist in the defense of Kelsie Properties but that they benefitted directly from the settlement. Plaintiffs believe that making the settlement payment was "necessary to avoid prolonged litigation and a potential judgment." In sum, ULC, on behalf of themselves and Kelsie Properties, paid \$515,000.00, which included cost of defense and other charges.

II. Procedural History

On 16 April 2003 plaintiffs filed suit against defendants for various claims associated with the allegedly improper transactions. On 15 May 2003, upon motion of defendants, the court granted defendants an additional thirty days to file a responsive pleading.² On 7 July 2003 defendants made a special appearance and

² Generally, Rule 12 of the North Carolina Rules of Civil Procedure requires a defendant to serve his answer within thirty days after service of the summons and complaint upon him. N.C.

filed a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2). On 17 November 2003 this motion was granted as to Tami Guthrie, Judy Guthrie, and the Joseph F. Guthrie Family Trust, but denied as to defendants Joseph Guthrie and the Pittmans (collectively defendants). During this time defendants failed to file an answer to plaintiffs' complaint and failed to respond to plaintiffs' discovery requests. On 26 November 2003 defendants filed a motion to dismiss for failure to state a claim under Rule 12(b)(6) but still filed no answer. Following consideration of defendants' Rule 12(b)(6) motion, just four of the six claims against defendants were allowed to proceed on 16 February 2004. One month later, on 16 March 2004, the clerk signed an entry of default against defendants in accordance with N.C. Gen. Stat. § 1A-1, Rule 12(a)(1), which requires the defendant to file a responsive pleading within twenty days after notice of the court's order in ruling on a motion permitted under Rule 12.

Only after plaintiffs had filed a motion for default judgment on 23 March 2004 did defendants file their answer, which they filed the next day. Soon after, on 2 April 2004, defendants filed a motion to set aside the entry of default. These motions were consolidated for hearing on 6 April 2004.

On 30 April 2004 the trial court entered an order denying defendants' motion to set aside the entry of default and allowing plaintiffs' motion for default judgment. Judge Evelyn W. Hill granted the default judgment for plaintiffs in the amount of

Gen. Stat. § 1A-1, Rule 12(a)(1) (2005).

\$515,000.00 plus court costs. Judge Hill also found that defendants had "continuously delayed or attempted to delay" the progress of the proceeding, noting that defendants "had opportunities on three (3) separate occasions to file an answer but failed to do so." Finally, Judge Hill found that the "continued delays by Defendants [had] seriously prejudiced Plaintiffs in this action."

Defendants' initial attempt to appeal from the default judgment failed because of further procedural missteps. Defendants timely filed a notice of appeal but failed to timely file a proposed record on appeal. As a result, this Court dismissed the appeal and awarded costs to plaintiff. Finally, on 1 February 2005, this Court allowed defendants' petition for writ of certiorari to "appeal from the default judgment entered 30 April 2004."

III. Entry of Default

Defendants argue that the trial court erred in failing to set aside the entry of default and in entering the default judgment against them. In support of their position, defendants contend that their motions to dismiss for lack of personal jurisdiction under Rule 12(b)(2) and failure to state a claim under Rule 12(b)(6) should have been granted. Also, defendants argue that insufficient evidence was presented to support the sum certain amount of damages awarded by the trial court. But at least several of defendants' contentions are beyond the scope of our review.

Following Judge Hill's default judgment, and after the dismissal of defendants' original appeals from that judgment, we allowed defendants' petition for writ of certiorari. Rule 21 of the North Carolina Rules of Appellate Procedure allows an appellate court to issue a writ of certiorari to review the judgments of trial tribunals when the right to prosecute an appeal has been lost. N.C.R. App. P. 21 (2006). An appellate court's review on certiorari is commonly limited to a review of certain, specified issues. See *State v. Roberts*, 351 N.C. 325, 326-27, 523 S.E.2d 417, 418 (2000) ("The Court of Appeals allowed the petition for writ of certiorari for the limited purpose of vacating the [previous] judgment and commitment . . . and reinstating the judgment and commitment entered . . . on 22 July 1998."). Although defendants raise fifty-four assignments of error in their brief to this Court, certiorari was granted only to consider defendants' appeal from the default judgment entered 30 April 2004.

Specifically, while we agreed to determine whether the trial court erred in denying defendants' motion to set aside the entry of default due to the fact that it is a part of the order for which certiorari was allowed, we did not agree to review the trial court's orders denying defendants' Rule 12(b)(2) and 12(b)(6) motions. Therefore, defendants' contentions regarding personal jurisdiction and plaintiffs' failure to state a claim will not be considered on appeal. We note, however, that defendants' contentions received ample consideration by the trial court, since: (1) the court considered affidavits, arguments, and authorities

presented by the parties before concluding that it had personal jurisdiction over defendants due to business activities conducted by defendants in North Carolina;³ and (2) on the Rule 12(b)(6) motion, the court heard arguments of counsel, reviewed the record, and considered other good cause shown before it allowed four of six claims against defendants to proceed. While we acknowledge that, at least in some circumstances, a review of personal jurisdiction by our Court is appropriate on certiorari following a default judgment, see *Advanced Wall Sys., Inc. v. Highlande Builders, LLC*, 167 N.C. App. 630, 631, 605 S.E.2d 728, 729 (2004), such a review is not appropriate here. Unlike in the case at bar, our Court in *Advanced Wall* reviewed the trial court's denial of defendant's Rule 60(b) motion, which had been made on personal jurisdiction grounds. 167 N.C. App. at 631, 605 S.E.2d at 729.

We now turn to the question of whether the trial court erred in failing to set aside the clerk of court's entry of default. "For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." N.C. Gen. Stat. § 1A-1, Rule 55(d) (2005). Our review of a trial court's decision on good cause is one of great deference. See *Basnight Construction Company, Inc. v. Peters & White Construction Company*, 169 N.C. App.

³ Additionally, although not required to do so, defendants did not appeal the trial court's personal jurisdiction ruling under N.C. Gen. Stat. § 1-277(b) or N.C. Gen. Stat. § 7A-27 (2005), which give any interested party the right of immediate appeal from an adverse ruling as to the court's jurisdiction over the person. See *A.R. Haire, Inc. v. St. Denis*, ___ N.C. App. ___, ___, 625 S.E.2d 894, 898 (2006).

619, 620, 610 S.E.2d 469, 470 (2005) (standard of review is whether trial court abused its discretion in denying defendants' motion to set aside the entry of default).

After the entry of default, defendants argued that because they had cooperated with plaintiffs' discovery requests, and because their procedural mistakes had been inadvertent, they had shown good cause to set aside the entry of default. Specifically, defendants argued that they had made the appropriate documents available to plaintiffs at all times, that they had filed an answer prior to the entry of the default judgment, and that their failure to submit a timely answer was inadvertent and mistaken.

An entry of default against defendants limits their ability to argue the merits of their case. This Court has stated that:

[w]hen an entry of default is made and the allegations of the complaint are sufficient to state a claim, the defendant has no further standing to contest the merits of plaintiff's right to recover. His only recourse is to show good cause for setting aside the default and, failing that, to contest the amount of the recovery.

Hartwell v. Mahan, 153 N.C. App. 788, 790-91, 571 S.E.2d 252, 253 (2002) (internal quotations omitted); see also *Bell v. Martin*, 299 N.C. 715, 721, 264 S.E.2d 101, 105 (1980); *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 509-10, 181 S.E.2d 794, 798 (1971).

A review of the record reveals that defendants advanced no meritorious grounds constituting good cause for setting aside the entry of default. In fact, defendants failed to properly file with this Court a record on appeal detailing their grounds for setting aside the entry of the default. The only evidence presented tended

to show that defendants were properly served with the complaint but failed to show good cause for failing to respond in a timely manner. See *Hartwell*, 153 N.C. App. at 790-91, 571 S.E.2d at 253. As such, we discern no abuse of discretion by the trial court in denying defendant's motion to set aside the entry of default. See *Old Salem Foreign Car Serv., Inc. v. Webb*, 159 N.C. App. 93, 98, 582 S.E.2d 673, 676 (2003) (finding no abuse of discretion in denying defendant's motion to set aside entry of default where defendant advanced no grounds constituting good cause); cf. *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 108, 264 S.E.2d 395, 397 (1980) (finding no abuse of discretion where defendant's legal department misplaced the suit papers and did not relocate them until the day of the entry of default).

IV. Default Judgment

Since defendants failed to show good cause for setting aside the entry of default, their only remaining recourse is to contest the amount of plaintiffs' recovery. See *Hartwell*, 153 N.C. App. at 790-91, 571 S.E.2d at 253. Therefore, we turn our review to whether the trial court abused its discretion in entering the judgment awarding damages to plaintiffs in the sum certain amount of \$515,000.00 plus court costs. See *Basnight*, 169 N.C. App. at 620, 610 S.E.2d at 470.

The record tends to show that Judge Hill relied exclusively on allegations made in plaintiff's complaint in determining the amount of damages. It is not clear under North Carolina law what constitutes sufficient evidence to support a trial judge's default

judgment for a sum certain amount. For the clerk to enter a default judgment, however, the amount due must appear in an affidavit or, alternatively, a verified pleading *if such pleading "contains information sufficient to determine or compute the sum certain."* N.C. Gen. Stat. § 1A-1, Rule 55(b)(1) (2005) (emphasis added); *Grant v. Cox*, 106 N.C. App. 122, 126, 415 S.E.2d 378, 381 (1992). "The mere demand for judgment of a specified dollar amount [is] not enough under the statute to permit the [clerk of court] to enter a default judgment." *Basnight*, 169 N.C. App. at 623, 610 S.E.2d at 472; (citing *Hecht Realty, Inc. v. Hastings*, 45 N.C. App. 307-08, 309, 262 S.E.2d 858, 859 (1980)).

Our review of the record shows that plaintiffs offered nothing more than the "bare assertions" laid forth in their complaint to support damages in the amount of \$515,000.00. See *Basnight*, 169 N.C. App. at 623, 610 S.E.2d at 472. Foremost, the record tends to show that plaintiffs presented no evidence of damages during the consolidated motion hearing. Specifically, it appears that plaintiffs failed to provide the trial court with copies of contracts, submitted invoices, or other documents detailing the alleged damages. See *id.* at 623-24, 610 S.E.2d at 472 ("What would help identify the amount owed with some level of certainty would typically be [a] contract or submitted invoice"). Second, while the damages figure appears to be based on information contained in plaintiffs' complaint,⁴ the surviving claims in the

⁴ In their complaint, plaintiffs claim in part to have incurred the following expenses: \$360,000.00 to settle claims by Parker-Raleigh; \$80,000.00 in legal fees; and \$75,000 relating to

complaint seek varying amounts of damages that do not add up to \$515,000.00; indeed, a close review of the complaint reveals that plaintiffs claim \$1,970,000.00 in alleged damages in their surviving causes of action.⁵

Since it appears that the trial judge here awarded damages based only on plaintiffs' bare assertions, the accuracy of which are in question, we must conclude that the trial judge abused her discretion in entering a default judgment in the amount of \$515,000.00 plus court costs. Accordingly, we remand to the lower court for a hearing on damages.

Affirmed in part, reversed in part, and remanded.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).

the clean-up and removal of inventory at American's Raleigh, North Carolina location. The sum of these amounts is \$515,000.00; however, these amounts were claimed only in plaintiffs' second cause of action, which was dismissed in the trial court's order dated 16 February 2004.

⁵ The following causes of action and corresponding damages amounts were not dismissed by the trial court: first cause of action (contribution), \$180,000.00; second cause of action (conversion), \$900,000.00; third cause of action (fraud), \$10,000.00; fourth cause of action (unfair and deceptive trade practices), \$440,000.00; and fourth cause of action (civil conspiracy), \$440,000.00. The sum of these amounts is \$1,970,000.00.