NO. COA05-967

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

LOUIS S. DEVONE, SHIRLEY DEVONE CURRINGTON and LOUIS S. DEVONE, Executor of the Estate of MRS. IRENE D. BELL DEVONE, 02-E-1211,
Plaintiffs,

v.

Durham County
No. 04 CVS 00342

JAMES MILTON DEVONE SR.,
Defendant.

Appeal by defendant from judgment entered 16 March 2005 by Judge John W. Smith in Durham County Superior Court. Heard in the Court of Appeals 23 February 2006.

William A. Marsh III for plaintiff appellees.

James Milton Devone, Sr., pro se, defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from a default judgment entered against him. We affirm.

Facts

The parties are the children of the late Irene D. Bell. On 28 January 2004, plaintiffs filed a complaint in Durham County Superior Court alleging that defendant had used a purported power of attorney to improperly deed to himself real property belonging to Mrs. Bell. Plaintiffs sought to have the deed revoked so as to

permit the property to be distributed in accordance with a specific bequest contained in Mrs. Bell's will. Plaintiffs' complaint alleged that the power of attorney at issue was executed by Mrs. Bell in June 1974, but was subsequently lost. This power of attorney thereafter was recorded on an affidavit executed in November 1995, but subsequently was revoked. According to plaintiffs, the 7 December 1995 deed that defendant used to convey Ms. Bell's real property to himself was invalid because the power of attorney under which he had executed the deed had been revoked.

Defendant, acting *pro se*, filed a motion to dismiss plaintiffs' suit on 18 March 2004. By an order entered 15 July 2004, the superior court denied defendant's motion to dismiss. Notwithstanding the denial of his motion to dismiss, defendant failed to proceed with his defense by filing an answer to plaintiffs' complaint. Accordingly, on 17 February 2005, seven months after the denial of defendant's motion to dismiss, plaintiffs filed a motion for entry of default against defendant. On the same date, the presiding superior court judge entered default against defendant.

On 21 February 2005, plaintiffs filed a motion for judgment on the pleadings and served defendant with a copy of this motion. Defendant filed a brief in opposition in which he expounded upon the importance of testamentary documents but failed to address the entry of default against him. Following a hearing, the superior court entered a judgment in plaintiffs' favor which rendered void the conveyance made under defendants' purported power of attorney

and ordered Ms. Bell's former home to be disposed of in accordance with her will.

Defendant now appeals, contending that the trial court erred by (1) granting plaintiffs' motion for judgment on the pleadings when defendant had not been given notice of the hearing conducted to determine whether default should be entered; (2) making an entry of default against defendant before plaintiffs filed their motion for entry of default; (3) voiding the conveyance of the property to defendant in the absence of verified evidentiary facts; (4) exercising jurisdiction "after a complaint was filed presenting no verified evidentiary facts[;]" and (5) denying defendant's motion to dismiss "on the ground that there was no genuine issue of material fact as evidence that defendant did not own the property in dispute." For the reasons that follow, we conclude that these contentions are entirely feckless.

Discussion

1. Defendant's Argument That He Received Insufficient Notice Prior to Entry of Default

Rule 55(a) of the North Carolina Rules of Civil Procedure governs **entry** of default as follows:

> [w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

N.C. Gen. Stat. § 1A-1, Rule 55(a). Rule 55(b) permits a party who has obtained an entry of default against another party to seek a default **judgment**. N.C. Gen. Stat. § 1A-1, Rule 55(b) (2005). Rule 55 does not specifically mention a requirement that notice be given to an adverse party against whom an entry of default is being sought under subsection (a), and entry of default may be obtained without serving notice upon a defendant. *See Blankenship v. Town & Country Ford, Inc.*, 155 N.C. App. 161, 168, 574 S.E.2d 132, 136 (2002), *pl.'s pet. for disc. review denied in part and dismissed in part*, 357 N.C. 61, 579 S.E.2d 384-85 (2003). Rule 55 does require an adverse party to be notified of a motion for a default judgment: "If the party against whom judgment by default is sought has appeared in the action, that party . . . shall be served with written notice of the application for judgment at least three days prior to the hearing on such application." N.C. Gen. Stat. § 1A-1, Rule 55(b)(2)(a).

In the instant case, the record reveals that defendant was not served with notice of the hearing to determine whether an entry of default should be made, but was served with the requisite notice prior to the hearing on the motion for default judgment. As defendant was notified in accordance with the requirements of Rule 55, he is not entitled to have the entry of default or the default judgment against him disturbed for lack of notice.

2 Defendant's Argument That The Trial Court Erred by Entering Default Prior to the Filing of the Motion To Enter Default

Defendant has failed to cite any authority or offer any arguments which support, or are even related to, his argument that the trial court erred by entering default before the motion seeking entry of default was filed by plaintiffs. Accordingly, this argument is abandoned. *See* N.C. R. App. P. 28(b)(6) (2006) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

We note, however, for the sake of clarity, that the record does not indicate that the trial court made an *ex mero motu* entry of default against defendant. Rather, the record tends to reflect that the trial court was presented with a motion for entry of default, that the court subsequently signed an order entering defendant's default, and that both documents were thereafter filed with the clerk of superior court. The clerk date-stamped the motion for entry of default at 10:06 a.m. on 17 February 2005 and date-stamped the motion for entry of default at 10:29 on the same day. We are entirely unpersuaded that these circumstances warrant a reversal in the instant case.

3. Defendant's Argument That the Trial Court Erred By Invalidating the Conveyance to Defendant in the Absence of Verified Evidentiary Facts

When a default judgment is entered, the allegations set forth in the plaintiffs' complaint are deemed admitted. *See* N.C. Gen. Stat. § 1A-1, Rule 55(b) (permitting entry of default judgment on the basis of plaintiff's complaint); N.C. Gen. Stat. § 1A-1, Rule 8(d) (2005) ("Averments in a pleading to which a responsive

pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."); *Lowe's v. Worlds*, 4 N.C. App. 293, 295, 166 S.E.2d 517, 518 (1969) ("A default judgment admits . . . the averments in the complaint[.]") (decided under N.C. Gen. Stat. § 1-211, the predecessor of Rule 55). Accordingly, there is no merit in defendant's contention that the default judgment against him is unsupported by evidence in the record.

4. Defendant's Argument that the Trial Court Erred By Exercising Jurisdiction Over the Present Case

Defendant cites the famous, albeit outdated, personal jurisdiction case of *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878), *overruled by Shaffer v. Heitner*, 433 U.S. 186, 206, 53 L. Ed. 2d 683, 699 (1977), for the proposition that the trial court's exercise of jurisdiction denied him due process of law.[1] We note that, as a lifelong resident of this state who remains domiciled here, defendant is subject to the personal jurisdiction of North

[1] *Pennoyer* held that "no State can exercise direct jurisdiction and authority over persons or property without its territory" and that any attempted exercise of such jurisdiction by a state would be a violation of the Fourteenth Amendment to the Federal Constitution and, therefore, void. 95 U.S. at 722-23, 24 L. Ed. at 568-69. Therefore, under *Pennoyer*, a non-resident defendant who would not consent to jurisdiction had to be served inside the borders of a state for that state to exercise personal jurisdiction, though the state still had the option of exercising *in rem* jurisdiction over property of the defendant located within its borders if the proper procedures were followed. *Id.* at 727-28, 24 L. Ed. at 570. Eighty years later, the United States Supreme Court supplanted the procrustean *Pennoyer* approach with a minimum contacts analysis. *Shaffer*, 433 U.S. at 206, 53 L. Ed. 2d at 699 ("It is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*.").

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5. Defendant's Argument That the Trial Court Erred By Denying His Motion to Dismiss

Defendant insists that the trial court should have granted his motion to dismiss because "there was no genuine issue of material fact as evidence that defendant did not own the property in dispute." Defendant's argument in this regard relies upon the statutes governing adverse possession of real property. As our review of the record reveals that defendant did not raise the issue of adverse possession before the trial court, the argument is not properly before us at this time. *See* N.C. R. App. P. 10(b)(1) (2006) ("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 . . . . ").

Conclusion

Defendant's appeal is completely without merit. His assignments of error are overruled. The challenged default judgment is

Affirmed.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).