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NO. COA09-1210

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

MARTHA EUBANKS OWEN and
LOLAN M. EUBANKS,
Plaintiffs,

v. Transylvania County
No. 08 CVS 334

DANIEL KHI EUBANKS and TONYA EUBANKS, CHARLES ARTHUR HEATH and Wife, MARY HEATH, and WAYMAN TRACY HEATH and SUSY HEATH,
Defendants.

Appeal by defendant from orders entered 20 April 2009 by Judge A. Robinson Hassell in Transylvania County Superior Court. Heard in the Court of Appeals 10 February 2010.

Walter C. Carpenter for plaintiff.

Donald H. Barton for defendant.

ELMORE, Judge.

Daniel Khi Eubanks (defendant) appeals from an order granting a motion by Martha Eubanks Owen and Lolan M. Eubanks (plaintiffs) for sanctions against defendant. We affirm.

I.

Plaintiffs initiated a civil suit against defendant (and others) on 3 September 2008; in that matter, defendant represented himself. On 4 November 2008, during discovery, defendant was noticed for deposition to take place on 20 November 2008. The

notice was mailed to his P.O. Box, which was also indicated on defendant's answer as his home address. On 20 November 2008, defendant did not appear at the deposition, nor was he heard from regarding his absence. Messages were left by plaintiff's attorney on defendant's cellular and home telephones on 20 November 2008, but defendant did not respond to either message.

Subsequently, on 22 January 2009, plaintiffs filed a motion for sanctions; the motion hearing was set for 23 February 2009. Notice of the hearing was mailed to defendant at the same P.O. Box. Defendant did not respond. On 23 February 2009, when defendant did not appear at the hearing, an order was signed by Judge Alan Z. Thornburg ordering defendant to appear on 11 March 2009 at plaintiff's attorney's office for deposition.

The new notice to appear was mailed to defendant at the same P.O. Box as before. When defendant did not appear on 11 March 2009 as ordered, plaintiff's attorney called that day, again leaving messages on defendant's home and cellular telephones. Following defendant's failure to appear for the deposition on 11 March 2009, plaintiff's attorney filed a motion for sanctions against defendant.

Defendant admitted that he had been served with the original complaint and that his mailing address was the same P.O. Box to which plaintiff's attorney had sent multiple notices. Defendant also admitted to receiving a copy of the order that he appear on 1 March 2009 to be deposed. Defendant's proffered excuse to the court as to his absence at the deposition was: "I work nights in

Sylva, I get off in the mornings and drive an hour from Sylva to my house in Sapphire. Then by the time I drive over there, I'm done wore out tired." In the record at the time were certificates of service for both orders; also, defendant had appeared in superior court on 20 April 2009 when notice was sent to him at the P.O. Box address used for the later orders. The lower court was not persuaded by defendant's arguments and granted the motion for sanctions.[1]

Those sanctions consisted of: (1) striking defendant's answer, (2) entering judgment by default against defendant and holding that "the matter will be tried on issues of damages only," and (3) ordering defendant to pay plaintiffs $730.00 as expenses, including $600.00 of that amount to be paid as attorney's fees to Walter C. Carpenter, attorney for plaintiffs.

II.

The order by the trial court as to the default judgment is a final order, and thus the appeal lies to this Court. *See* N.C. Gen. Stat. § 7A-27(b)-(d) (2009). The order imposing sanctions for failure to comply with a discovery order is appealable as a final judgment even though it is interlocutory in nature. *Leder v. Leder*, 166 N.C. App. 498, 500, 601 S.E.2d 882, 884 (2004). Sanctions that include the striking of defendants' answer and the entry of a default judgment against defendants affect a substantial right and are thus immediately appealable to this Court. *Essex*

[1]At the hearing, the remaining defendants were given an opportunity to speak in regards to their motions to dismiss; those motions were denied, but are not part of this appeal.

Group, Inc. v. Express Wire Services, Inc., 157 N.C. App. 360, 362, 578 S.E.2d 705, 707 (2003).

While this Court normally reviews imposition of sanctions under an abuse of discretion standard, "the most drastic penalties, dismissal or default, are examined in the light of the general purpose of the Rules to encourage trial on the merits." *Battle v. Sabates*, ___ N.C. App. ___, ___, 681 S.E.2d 788, 797 (2009) (citing N.C. Gen. Stat. § 1A-1, Rule 37(d)) (quotations and citations omitted). As this Court stated in *Battle*, then, we review such orders using "an abuse of discretion standard while remaining sensitive to the general preference for dispositions on the merits that lies at the base of our rules of civil procedure." *Id.* at ___, 681 S.E.2d at 797. In applying the abuse of discretion standard, we will affirm unless it is shown that the ruling "was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at ___, 681 S.E.2d at 798.

Per Rule 37(b) of the North Carolina Rules of Civil Procedure, when "a party fails to obey an order to provide or permit discovery" when an action is pending, one possible sanction is "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2009).

Per Rule 37(d), if a party fails to attend his or her deposition, "the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among

others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule." N.C. Gen. Stat. § 1A-1, Rule 37(d) (2009).

III.

Defendant first argues that the trial court erred by entering the default judgment against him because the trial court did not adequately consider whether other, lesser sanctions would have been appropriate. We disagree.

We first note that this Court has consistently upheld trial court orders entering default judgments and imposing sanctions where parties were properly noticed but failed without justification to appear for their depositions. *See Cutter v. Brooks*, 36 N.C. App. 265, 267-68, 243 S.E.2d 423, 424-25 (1978) (holding that the imposition of such sanction is within the sound discretion of the trial judge); *Adair v. Adair*, 62 N.C. App. 493, 497-98, 303 S.E.2d 190, 193 (1983) (holding that a trial judge may enter default judgment as sanction for failure to appear for deposition after having received proper notice).

Despite the almost total lack of case law cited by defendant in support of this argument, it is clear from the record that the trial court did consider whether lesser sanctions would properly punish defendant for the discovery violations. The trial court prefaced its findings of fact with the following:

> After hearing the evidence presented, including the verified motion of Plaintiffs' attorney, and the Court having carefully reviewed the Court file and having heard from [defendant] and having heard the arguments of counsel, and pursuant to N.C.G.S. §1A-1 Rule

> 37 and the Court's inherent authority . . . [,]

the trial court then concluded that,

> having heard evidence and arguments as to the awarding of expenses[, the court] finds as fact that the sum of $730.00 constitutes reasonable expenses, including attorney's fees, incurred by Movant and should be awarded as expenses.

In plaintiff's motion for sanctions, the expenses and fees totaling $730.00, incurred in connection with the motion were described as follows: Asheville Recording Service for Court Reporter, $130.00; attorney's fees, $200.00; and anticipated court time for motion, $400.00. As the court noted at the hearing, these charges reflect plaintiff's attorney's preparation twice for the two depositions that defendant failed to attend and a third time for the hearing to demonstrate defendant's failure to attend. Therefore, the expenses and attorney fees to be paid are reasonable and justified under the circumstances. *Adair* at 497-98, 303 S.E.2d at 193; *Brooks* at 267-68, 243 S.E.2d at 424-25. Defendant's argument on this point is overruled.

IV.

Defendant next argues that the trial court erred in finding as fact that defendant was properly served with a notice to take deposition. This argument is invalid.

Defendant denies receiving notice to appear at the deposition. The notice to take deposition was mailed to defendant's P.O. Box on 4 November 2008, and telephone calls were made on 20 November 2008 to defendant's cellular and home telephones, where messages were

left to the same effect. A certificate of service in the record shows that defendant was served by mail a copy of Judge Thornburg's 23 February 2009 order instructing him to appear on 11 March 2009 to be deposed; indeed, defendant acknowledged in open court that he received a copy of the order and that he did not attend because it inconvenienced him. The record supports the finding of fact that defendant was properly served with notice and, thus, this argument is overruled.

V.

Defendant's final argument is that the trial court erred in finding as fact that the motion made on 22 January 2009 and the order entered on 23 February 2009 were duly served on him. This argument is invalid.

As to the motion, defendant argues that it did not have the required certificate of service attached and thus was in violation of Rule 5(b) of the North Carolina Rules of Civil Procedure. The record, however, contains the motion, the notice of motion hearing, and a certificate of service indicating that both were served on defendant on 22 January 2009.

As to the order, defendant's assignment of error is that he was not duly served with the order, but in his brief argues that, although it was signed on 23 February 2009 and accompanied by a certificate of service dated 24 February 2009, it was "filed stamped [*sic*]" 3 April 2009, in violation of Rule 5(d)(7) of the North Carolina Rules of Civil Procedure, which requires that such orders be filed within five days after service. Regardless of this

discrepancy between the assignment of error and his argument, the record contains a valid certificate of service for the order, and the order itself clearly bears a stamp showing it was filed on 25 February 2009. As such, this argument is overruled.

Affirmed.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).