NO. COA10-282

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

FEDERATED FINANCIAL CORPORATION
OF AMERICA,
Plaintiff,

v. Wake County
No. 08 CVD 9162

HAROLD ROWELL, individually and
d/b/a HAROLD'S PLUMBING,
Defendant.

Appeal by Defendant from order entered 16 September 2009 by Judge Jane P. Gray in District Court, Wake County. Heard in the Court of Appeals 8 June 2010.

Gregory P. Chocklett, for plaintiff-appellee.

Harold W. Rowell, defendant-appellant, pro se.

WYNN, Judge.

"To set aside a judgment on the grounds of excusable neglect under Rule 60(b), the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense."[1] In the instant case, the trial court found that Defendant Harold Rowell had shown excusable neglect in failing to perfect his appeal of an arbitration award, but denied Defendant's 60(b) motion on the grounds that he failed demonstrate

[1]*Scoggins v. Jacobs*, 169 N.C. App. 411, 413, 610 S.E.2d 428, 431 (2005) (quotation omitted).

a meritorious defense to Plaintiff's cause of action. Because we agree that Defendant failed to demonstrate a meritorious defense, we hold that the trial court did not abuse its discretion by denying Defendant's motion.

Defendant had a credit card account with Advanta Bank Corp.. On 27 May 2008, Federated Financial Corporation of America ("Plaintiff") filed a complaint seeking to recover the unpaid balance on Defendant's account along with interest as well as costs and attorney's fees. The complaint stated that Advanta Bank Corp. assigned the rights to Defendant's credit card account to Plaintiff. Attached to the complaint as proof of this assignment were a "Bill of Sale and Assignment" and the affidavit of Joan L. Flees, Plaintiff's Vice President of Portfolio Services. Also attached were a copy of the credit card agreement and a copy of the original credit card application signed by Defendant. The complaint alleged that Defendant breached the credit card agreement and owed Plaintiff $6,709.38 plus interest.

On 7 July 2008, Defendant filed an answer denying Plaintiff's claims and asserting a number of affirmative defenses. In August 2008, Plaintiff filed a motion for summary judgment. Attached to the motion was a credit card statement indicating that Defendant last made a partial payment on the account on 16 May 2005.

Before the trial court ruled on the motion for summary judgment, the case was referred to arbitration.[2] On 10 September

[2]The record does not include the order referring the case to arbitration. Plaintiff's brief indicates that the referral to arbitration was ordered pursuant to N.C.G.S. § 7A-37.1 (2009).

2008, W. Hugh Thompson conducted the arbitration hearing and awarded Plaintiff $9,096.66. (According to the arbitrator's award, this sum was calculated by adding together the principal sum ($6,709.38), the interest accrued as of the date of the award ($1,380.87), and attorney's fees ($1,006.41)).

On 14 October 2008, Defendant filed[3] a request for a trial *de novo*.[4] Defendant attempted to pay the filing fee by including with his request a check for $100 made out to the Wake County Clerk of Superior Court and drawn from the account of American Builders. Defendant's request was mailed back to him with a notation indicating that the "Court does not accept company checks unless registered with [the] court house."

This statute, although authorizing nonbinding arbitration in certain civil actions, specifically states that "[t]his procedure . . . shall not be employed in actions in which the sole claim is an action on an account, including appeals from magistrates on such actions." N.C. Gen. Stat. § 7A-37.1(c) (2009). Thus, it appears that this action should not have been referred to arbitration. Nonetheless, this Court has interpreted Rule 1(c) of the Rules of Court-Ordered Arbitration to hold that, even if a cause of action is exempt, once it is referred to arbitration, the failure of a party to file a motion for exemption within ten days constitutes a waiver of the right to object to the referral to the arbitrator. *Brock and Scott Holdings, Inc. v. West*, __ N.C. App. __, __, 679 S.E.2d 507, 511 (2009), *review improvidently allowed*, No. 352PA09, 2010 WL 2406403 (N.C. Jun 17, 2010).

[3]The record indicates that the request was mailed on 9 October 2008 and received on 10 October 2008, but was not filed until 14 October 2008.

[4]The Rules for Court-Ordered Arbitration in North Carolina provide that a party who is not in default and is dissatisfied with an arbitrator's award may appeal for a trial *de novo* with the court within thirty days from the date of service of the arbitrator's award. Rule 5(a) of the Rules for Court-Ordered Arbitration.

On 17 October 2008, the trial judge entered an order, filed on 20 October 2008, adopting the arbitrator's award as the judgment of the court.[5] Defendant subsequently mailed a cashier's check in the amount of $100 to the Wake County Clerk of Superior Court.[6]

On 8 June 2009, Defendant filed a motion under Rule 60(b) to vacate and set aside the judgment entered on 17 October 2008.[7] An order was filed on 16 September 2009 denying Defendant's motion. The order stated "Defendant has shown excusable neglect for failure to perfect his appeal of the arbitration award in a timely manner, but Defendant has not shown a meritorious defense to justify setting aside the judgment entered on the arbitration on October

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[5]Defendant's failure to file a timely demand for trial *de novo* following service of the arbitrator's award resulted, through the operation of the Rules for Court-Ordered Arbitration, in the entry of judgment against him. *See* Rule 6(b) of the Rules for Court-Ordered Arbitration ("If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial de novo within 30 days after the award is served, the clerk or the Court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action.").

[6]The record is unclear as to when this cashier's check was mailed. However, because the check was dated 21 October 2008 and Defendant claims that he attached the check to a letter mailed 22 October 2008, presumably the trial judge's order adopting the arbitration award was filed before the Wake County Clerk of Superior Court properly received Defendant's payment of the filing fee. Arguably, because Defendant's request for trial *de novo* was filed prior to the receipt of the cashier's check, the delay in filing was not due to improper payment of the filing fee but rather due to Defendant's delay in mailing the request. However, the issue of whether the trial court abused its discretion in finding excusable neglect on the part of Defendant is not before this Court on appeal.

[7]The motion also sought the vacation of an order entered 23 January 2009, but Plaintiff's argument on appeal exclusively addresses the denial of the motion as to the judgment entered 17 October 2008.

17, 2008." On 16 October 2009, Defendant filed a notice of appeal from the denial of his 60(b) motion.

Before addressing the denial of the 60(b) motion, we note that on appeal Defendant also attempts to raise a number of challenges to the trial court's adoption of the arbitrator's award as the judgment of the court. Specifically, Defendant argues that the trial court erred when entering judgment because the court lacked personal jurisdiction; the statute of limitations barred the action; and the complaint failed to state a claim upon which relief could be granted. However, Defendant has waived his right to appeal from the judgment, so we must dismiss the instant appeal insofar as it challenges the trial court's entry of judgment. *See West*, __ N.C. App. at __, 679 S.E.2d at 512; *Taylor v. Cadle*, 130 N.C. App. 449, 453-54, 502 S.E.2d 692, 695 (1998).

In *West*, the Court considered a challenge to an arbitrator's award and determined that the appellant had waived his right to appeal because of the operation of the Rules of Court-Ordered Arbitration. The Court noted:

> Rule 6(b) of the Rules for Court-Ordered Arbitration provides in part: "If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial de novo within 30 days after the award is served, the clerk or the Court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action." The commentary to Rule 6-adopted by the Supreme Court along with the rule-explains that "[a] judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court.... *By failing to demand a trial de novo the right to appeal is waived.*"

West, __ N.C. App. at __, 679 S.E.2d at 509-10.

In the case *sub judice*, the arbitrator's award was entered on 10 September 2008 and mailed the same day. Even allowing for the three-day extension of time contemplated when service is accomplished by mail,[8] Defendant was required to file his request for trial *de novo* no later than 13 October 2008. The record indicates that the request was not filed until 14 October 2008.

Thus, because the request for trial *de novo* was not filed within the thirty-day window (or thirty-three day window assuming the operation of Rule 6(e)), Defendant waived his right to appeal the judgment. *See Taylor*, 130 N.C. App. at 454, 502 S.E.2d at 695. Indeed, because Defendant's request was not timely, the court was statutorily *required* to enter judgment[9] on the award. *See Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 405-06, 553 S.E.2d 84, 87 (2001)(stating that "[t]he word 'shall' is defined as 'must' or 'used in laws, regulations, or directives to express what is mandatory'")(quoting Webster's Collegiate Dictionary 1081 (9th ed. 1991)). Accordingly, we dismiss Defendant's appeal insofar as it pertains to the entry of judgment through adoption of the arbitrator's award. *See Pasour v. Pierce*,

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[8] *See* N.C. Gen. Stat. § 1A-1, Rule 6(e)(2009)("Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.").

[9] Notably, this judgment had the same effect as a consent judgment. *See* Rule 6(b) of the Rules for Court-Ordered Arbitration. As a consent judgment, it is not appealable. *See West*, __N.C. App. at __, 679 S.E.2d at 510.

46 N.C. App. 636, 639, 265 S.E.2d 652, 653 (1980)("[I]t is the duty of an appellate court to dismiss an appeal if there is no right to appeal.").

Notwithstanding the fact that Defendant has no right to appellate review of the entry of judgment in this case, he is entitled to a review of the trial court's denial of his Rule 60(b) motion. The standard of review for the denial of a Rule 60(b) motion is abuse of discretion. *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006).

> A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)(internal citation omitted).

Of relevance to this case, a court may, under Rule 60(b), relieve a party from judgment for:

> (1) Mistake, inadvertence, surprise, or excusable neglect;
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> . . . .
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> . . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2009). However, our Courts have established that in order to grant the remedy of setting aside judgment on any of these grounds, the moving party must establish that he has a meritorious defense. *See JMM Plumbing & Utils., Inc.*

v. Basnight Constr. Co., 169 N.C. App. 199, 202, 609 S.E.2d 487, 490 (2005)(requiring meritorious defense to grant relief under Rule 60(b)(1)); *Croom v. Hedrick*, 188 N.C. App. 262, 268, 654 S.E.2d 716, 721 (2008)(requiring meritorious defense to grant relief under Rule 60(b)(3)); *Royal v. Hartle*, 145 N.C. App. 181, 184, 551 S.E.2d 168, 171 (requiring meritorious defense to grant relief under Rule 60(b)(6)), *disc. review denied*, 354 N.C. 365, 555 S.E.2d 922 (2001). "[O]therwise the court would be engaged in the vain procedure of setting aside a judgment, when, if there be no defense, it would be its duty to enter the same judgment again on motion of the adverse party." *Cayton v. Clark*, 212 N.C. 374, 376, 193 S.E. 404, 405 (1937). "In determining whether a meritorious defense has been shown, the court should determine whether the movant has, in good faith, presented by his allegations, *prima facie*, a valid defense." *Bank v. Finance Co.*, 25 N.C. App. 211, 212, 212 S.E.2d 552, 553 (1975).

In his Motion to Vacate and Set Aside Judgment, Defendant asserted that the judgment entered in this case should be set aside because of, *inter alia*, evidence of excusable neglect and fraud. The trial court agreed that Defendant showed excusable neglect in failing to timely file his request for trial *de novo*. However, the trial court denied Defendant's Rule 60(b) motion because of Defendant's failure to show that he had a meritorious defense to Plaintiff's claim. We therefore examine the record to determine if Defendant presented the *prima facie* elements of a defense.

We note that Defendant did not explicitly state which defense

his excusable neglect deprived him of the opportunity to present. Defendant did state that Plaintiff's attorney's fraud deprived him of the opportunity to raise a statute of limitations defense. Still, even in so stating, Defendant did not allege which statute of limitations applied; when it began to run; or when it expired. Instead, the motion merely stated that "Plaintiff's attorney . . . knows that Plaintiff's case is barred by the Statute of Limitations" and that Defendant believed that "Plaintiff's complaint is barred by the statute of limitations." *Cf. Janicki v. Lorek*, 255 N.C. 53, 63, 120 S.E.2d 413, 421 (1961)("The plea of a statute of limitations is not good if it merely states that the party pleads the statute."); *see also Bank v. Warehouse Co.*, 172 N.C. 602, 603, 90 S.E. 698, 698 (1916)(stating that defendant pleading the statute of limitations as a defense must actually "state the facts constituting the defense").

Notwithstanding the trial court's determination that Defendant's motion established excusable neglect on his part, it was Defendant's duty to set forth a meritorious defense. Merely asserting a belief, whether on the part of Plaintiff or Defendant, that the statute of limitations bars the action is insufficient to discharge this duty. As such, after careful consideration, we discern no abuse of discretion and, accordingly, the decision of the trial court to deny Defendant's Rule 60(b) motion is affirmed.

Dismissed in part; affirmed in part.

Judges HUNTER and STEPHENS concur.

Report per rule 30(e).