An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA12-461
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

DELOTE BUILDERS, LLC,
Plaintiff,

v.

Union County
No. 09-CVS-04466

LINDA CONLEY and
NEIGHBORHOOD ASSISTANCE
CORPORATION OF AMERICA,
Defendants.

Appeal by Defendant Neighborhood Assistance Corporation of America from order entered 15 December 2011 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 26 September 2012.

Caldwell, Helder, Helms, & Robison, P.A., by R. Kenneth Helms, Jr. and Aimee E. Bennington, for Plaintiff.

Allen, Kopet & Associates, P.L.L.C., by W. James Flynn, for Defendant.

STEPHENS, Judge.

Procedural History and Factual Background

Defendant Neighborhood Assistance Corporation of America ("NACA") is a non-profit organization that works with low and moderate income borrowers in obtaining mortgages and providing

continued post-purchase assistance to borrowers. NACA's Chief Executive Officer ("CEO") is Mr. Bruce Marks ("Mr. Marks"), who has held that position for more than twenty-five years. This appeal arises from events surrounding the assistance provided by NACA to Defendant Linda Conley ("Ms. Conley"), a homeowner, in communications with her repair contractor, Plaintiff-Appellee Delote Builders ("Delote Builders"), after a fire had damaged Ms. Conley's home.

On 13 November 2009, Delote Builders filed a complaint against Ms. Conley and NACA alleging: (1) breach of contract against Ms. Conley; (2) fraud in the inducement or, alternatively, negligent misrepresentation against NACA; (3) punitive damages against NACA; and (4) unfair and deceptive trade practices against NACA. The company also sought attorneys' fees against NACA. Delote Builders filed an affidavit of service as to NACA on 20 January 2010, evidencing NACA's receipt of Delote Builders' summons and complaint on 17 November 2009. Delote Builders subsequently filed a motion for entry of default against NACA on 21 January 2010. An entry of default against NACA was filed by the Clerk of Superior Court in Union County on 21 January 2010.

Following the entry of default, Delote Builders filed a motion for default judgment as to both NACA and Conley on 23 September 2010, along with an affidavit in support of that

motion. On 11 October 2010, pursuant to that motion, Delote Builders also filed an affidavit in support of an award of attorneys' fees. One month later, on 10 November 2010, the trial court entered a default judgment against NACA and Ms. Conley, awarding damages, costs, and attorneys' fees to Delote Builders.

One year, one month, and three days later, on 13 December 2011, NACA filed a motion to set aside the default judgment pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. Attached to the motion were affidavits by the Director of NACA, Ms. Frances Epps, and the CEO of NACA, Mr. Marks.

The trial court entered an order denying NACA's motion on 15 December 2011. In denying NACA's motion, the Honorable Christopher W. Bragg, Superior Court Judge presiding, found as fact that the affidavit of Mr. Marks "allege[d] facts more appropriately supporting mistake, inadvertence or excusable neglect under Rule 60(b)(1)" and concluded as a matter of law that those alleged facts were "[not] sufficient to meet the requirement of Rule 60(b)(6)." Judge Bragg further noted that motions under subsection (1) of Rule 60(b) must be "filed within one (1) year of the entry of the Default Judgment." As NACA waited more than one year to file its motion to set aside the default judgment, Judge Bragg found as a matter of law that NACA "did not timely file the Motion" and, further, could "not

circumvent the time for filing a motion . . . by designating its motion as one made under [a different rule]." NACA appeals the order of the trial court.

Standard of Review

"Findings of fact made by the trial court upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence." *Norton v. Sawyer*, 30 N.C. App. 420, 422, 227 S.E.2d 148, 151, *cert. denied*, 291 N.C. 176, 229 S.E.2d 689 (1976); *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 132, 180 S.E.2d 407, 410, *cert. denied*, 278 N.C. 701, 181 S.E.2d 602 (1971). In addition, facts found by a trial judge on a motion to set aside a default judgment are conclusive if there is any evidence on which to base such findings. *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 704, 179 S.E.2d 890, 891 (1971).

Conclusions of law made by the judge on facts she or he has found are reviewable on appeal. *Norton*, 30 N.C. App. at 422, 227 S.E.2d at 151; *U.S.I.F. Wyneewood Corp. v. Soderquist*, 27 N.C. App. 611, 615, 219 S.E.2d 787, 790 (1975). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the

lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 351, 354 (2008) (quotation marks omitted).

"A trial court's decision of whether to set aside an entry of default[] will not be disturbed absent abuse of discretion." *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009). A trial court abuses its discretion when its decision "is manifestly unsupported by reason[] or so arbitrary that it could not have been the result of a reasoned decision." *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992) (internal quotation marks omitted).

Discussion

NACA contends that the trial court erred in finding as fact that NACA's motion alleged facts more appropriately supporting mistake, inadvertence, or excusable neglect under Rule 60(b)(1) and concluding as law that the facts of this case are not "sufficient to meet the requirements of Rule 60(b)(6)." Thus, NACA argues that the trial court abused its discretion by denying NACA's motion to set aside the default judgment.

In support of its contention, NACA acknowledges that it "ha[s] no grounds to argue that its conduct demonstrated diligence or that it acted in a manner reasonably expected of a party paying proper attention to a case" and, thus, "a motion under Rule 60(b)(1) would have been inappropriate under the controlling law and would have been futile." In light of its

admitted inability to meet the strictures of Rule 60(b)(1), NACA contends that the trial court erred by "choos[ing] to interpret the affidavit of Bruce Marks and other evidence before it" so that relief was only applicable under Rule 60(b)(1). We address that contention first.

Rule 60(b)(1) provides relief from a judgment or order on the basis of mistake, inadvertence, surprise, or excusable neglect. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2011). In the alternative, subsection (6) of Rule 60(b) allows a trial court to grant relief from a default judgment based on "any other reason justifying relief from the operation of the judgment." *Id.*

"While Rule 60(b)(6) has been described as 'a grand reservoir of equitable power to do justice in a particular case,' . . . it should not be a 'catch-all' rule." *Norton*, 30 N.C. App. at 426, 227 S.E.2d at 153 (citing 7 Moore's Federal Practice, § 60.27[2] at 375 (2d ed. 1975)). "Rule 60(b)(6) cannot be the basis for a motion to set aside a judgment if the facts supporting it are facts which more appropriately would support one of the five preceding clauses."[1] *Bruton v. Sea*

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[1] It should be noted, however, that when a timely motion is made under both Rule 60(b)(1) and Rule 60(b)(6) (i.e., when it is made within one year of the entry of the judgment or order), the movant need not list the specific provision under which she or he claims relief. *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971).

Captain Properties, Inc. 96 N.C. App. 485, 488, 386 S.E.2d 58, 59-60 (1989). This Court has "repeatedly held that a movant may not be allowed to circumvent the requirements for clauses (b)(1) through (b)(5) by designating their motion as one made under Rule 60(b)(6), which grants relief from a judgment or order for any other reason justifying relief from the operation of the judgment." *Id.* at 488, 386 S.E.2d at 60 (quotation marks and citation omitted); *see also Howard v. Williams*, 40 N.C. App. 575, 580, 253 S.E.2d 571, 574 (1979) ("[S]tatutory provisions designed to protect plaintiffs from defendants who do not give reasonable attention to important business affairs such as lawsuits cannot be ignored.").

In concluding that Rule 60(b)(6) is not an appropriate mechanism for setting aside the default judgment in this case, the trial court found as fact that the allegations in Mr. Marks's affidavit were more appropriate for a motion under Rule 60(b)(1). In that affidavit, Mr. Marks attempted to excuse his failure to respond to Delote Builders' lawsuit by stating that: (1) beginning in November of 2009 he had been "extremely busy . . . trying to save the homes of families," (2) he had no recollection of being told about the lawsuit, and (3) any failure to respond was "wholly unintentional." This constitutes competent evidence to support the trial court's finding.

The failures of Mr. Marks are errors resulting from

neglect, mistake, inadvertence, and perhaps even surprise — each of which connotes the lack of intentionality that is claimed by Mr. Marks. *See* American Heritage College Dictionary 912 (3d ed. 1997) ("neglect . . . 3. To fail to do or carry out as through carelessness or oversight."); ***id.*** at 873 ("mistake . . . 1. An error or a fault resulting from defective judgment, deficient knowledge, or carelessness."); ***id.*** at 685 ("inadvertent . . . 2. Marked by unintentional lack of care."); ***id.*** at 1367 ("surprise . . . 4.a. To cause (someone) to do or say something unintended."). These failures fall well within the provisions of Rule 60(b)(1) and are not properly addressed under Rule 60(b)(6). They are the type of actions that Rule 60(b) was meant to protect against — situations in which the plaintiff (i.e., Delote Builders) might be prejudiced by the defendant's failure to "give reasonable attention to important business affairs such as lawsuits" — and, thus, are not sufficient to draw water from the grand reservoir of Rule 60(b)(6).

Therefore, we affirm the trial court's finding that the facts alleged by NACA are more appropriately brought under Rule 60(b)(1) as this finding is based on competent evidence and further affirm the trial court's conclusion that these alleged facts are not "sufficient to meet the requirement of Rule 60(b)(6)." Having found that Rule 60(b)(1) should be applied, we need not address NACA's argument that their actions justify

relief under Rule 60(b)(6). To quote from NACA's own brief: "[I]f grounds exist under Rule 60(b)(1), then a Rule 60(b)(6) motion is precluded."

Applying Rule 60(b)(1), we affirm the trial court's conclusion of law that "motions brought pursuant to Rule 60(b)(1) [must] be filed within one (1) year of entry of the Default Judgment." *See* N.C. Gen. Stat. § 1A-1, Rule 60(b). In this case, NACA's motion was filed one year, one month, and three days after entry of the default judgment. As such, the trial court properly concluded that NACA did not file a timely motion. We agree and hold that the trial court's order — which (1) relied on the facts alleged in the affidavit of Mr. Marks, (2) properly found that Rule 60(b)(6) was not an appropriate avenue from which NACA could claim relief, and (3) denied NACA's motion to set aside the default judgment — was supported by reason and, thus, not an abuse of discretion.

AFFIRMED.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).