NO. COA13-319
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

AVINASH THAKORLAL BHATHELA

v. WAKE COUNTY
No. 11 CVD 19076

SHAWN CURRIE

Appeal by defendant from judgment entered 22 October 2012 by Judge James Fullwood in Wake County District Court. Heard in the Court of Appeals 26 August 2013.

E. Gregory Stott, for plaintiff-appellee.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC by Steven B. Fox and Kara V. Bordman, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Shawn Currie ("Defendant") appeals the denial of his Motion to Set Aside Default Judgment. On appeal, Defendant argues the trial court erred and abused its discretion when it denied Defendant's Motions to set aside the Default Judgment and Entry of Default Judgment. Upon review, we reverse the trial court's denial of Defendant's motion to set aside the entry of default and remand for further proceedings.

I. Facts & Procedural History

At 1:15 P.M. on 9 November 2011, Avinash Bhathela ("Plaintiff") was driving north on South Saunders Street in Raleigh. While Plaintiff was stopped at a red light, Defendant hit the rear of Plaintiff's car, injuring Plaintiff.

On 14 December 2011 Plaintiff filed a complaint against Defendant in Wake County District Court seeking damages for negligence. That same day, Plaintiff also sent a summons with the complaint to Defendant by certified mail to 35730 Manila Street in Westland, Michigan. On 5 January 2012, the U.S. Postal Service returned the summons with the following notation: "Return to Sender, Unclaimed, Unable to Forward."

On 14 February 2012, Plaintiff had the clerk issue an alias and pluries summons to Defendant seeking service of process upon Mike Robertson, the N.C. Commissioner of Motor Vehicles, as statutory agent for service of process in these circumstances. *See* N.C. Gen. Stat. § 1-105 (2011). That same day, Plaintiff resent a copy of the alias and pluries summons with the complaint to Defendant at 35730 Manila Street in Westland, Michigan. Robertson received the alias and pluries summons and complaint on 16 February 2012. On 19 February 2012, the U.S. Postal Service returned the complaint and summons sent to Defendant 14 February 2012 with the following notation: "Return to Sender, Not Deliverable as Addressed, Unable to Forward." On

21 February 2012, Robertson issued a Notice of Service. On 23 February 2012, Robertson sent a copy of the summons and complaint to Defendant at the Manila Street address in Westland, Michigan. As noted by the Commissioner's office on the face of the envelope, on 28 February 2012, the U.S. Postal Service returned the letter to Robertson with a notation reading: "Temporarily Away, Return to Sender."

On 9 March 2012, Plaintiff's counsel filed an "Affidavit of Counsel under Rule 4(j)(1) and N.C.G.S. § 1-105" reciting the above facts with the Wake County Clerk of Superior Court. Based on the affidavit, on 26 March 2012, the Wake County Clerk of Superior Court filed an entry of default.

The case came on for a default and inquiry hearing during the 20 April 2012 Civil Session of Wake County District Court. Neither Defendant nor his counsel was present. At the hearing, Plaintiff testified and offered into evidence a medical bill for treatment of injuries he sustained from the 9 November 2011 accident. On 25 April 2012, the district court entered a default judgment: (1) awarding Plaintiff compensatory damages of $8,972; and (2) assessing court costs of $206.94 against Defendant.[1] At no point prior to default judgment does the record indicate Defendant participated in the case.

[1] The trial court stated in its conclusions of law that Plaintiff's attorney's fees should be taxed as costs to the

On 29 May 2012, Defendant filed a motion to set aside the default judgment. On 5 June 2012, Plaintiff's counsel filed another affidavit and attached relevant return receipts and copies of envelopes. The Rule 60 motion came on for hearing during the 24 August 2012 civil session of Wake County District Court. On 22 October 2012, the district court entered an order denying Defendant's motion. On 20 November 2012, Defendant filed timely notice of appeal.

II. Jurisdiction & Standard of Review

This Court has jurisdiction to review the instant case pursuant N.C. Gen. Stat. § 7A-27(c) (2011). We review the decision of the trial court for abuse of discretion. "The decision whether to set aside a default judgment under Rule 60(b) is left to the sound discretion of the trial judge and will not be overturned on appeal absent a clear showing of abuse of discretion." *Monaghan v. Schilling, M.D., P.L.L.C.*, 197 N.C. App. 578, 581, 677 S.E.2d 562, 564 (2009) (quotation marks and citation omitted); *see also Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975) ("[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion.").

---

defendant, but it did not include those attorney's fees in the decretal portion of its order.

"Where the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion." *Creasman v. Creasman*, 152 N.C. App. 119, 124, 566 S.E.2d 725, 729 (2002) (quotation marks and citation omitted).

III. Analysis

On appeal, Defendant argues: (i) the trial court lacked jurisdiction to enter default judgment; and (ii) the trial court abused its discretion by denying Defendant's motion to set aside default judgment. We reverse.

Defendant first argues that the trial court lacked jurisdiction because N.C. Gen. Stat. § 1-105 was not strictly complied with. After an auto accident, section 1-105 provides for service on nonresidents of North Carolina by delivering a copy of the service of process to the Commissioner of Motor Vehicles, along with a fee of ten dollars. N.C. Gen. Stat. § 1-105(1) (2011).

> Notice of such service of process and copy thereof must be forthwith sent by certified or registered mail by plaintiff or the Commissioner of Motor Vehicles to the defendant, and the entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were

> delivered to the defendant, on which date service on said defendant shall be deemed completed. If the defendant refuses to accept the certified or registered letter, service on the defendant shall be deemed completed on the date of such refusal to accept as determined by notations by the postal authorities on the original envelope, and if such date cannot be so determined, then service shall be deemed completed on the date that the certified or registered letter is returned to the plaintiff or Commissioner of Motor Vehicles, as determined by postal marks on the original envelope. If the certified or registered letter is not delivered to the defendant because it is unclaimed, or because he has removed himself from his last known address and has left no forwarding address or is unknown at his last known address, service on the defendant shall be deemed completed on the date that the certified or registered letter is returned to the plaintiff or Commissioner of Motor Vehicles.

N.C. Gen. Stat. § 1-105(2) (2011). Plaintiff must complete an affidavit of compliance attaching the defendant's return receipt or the original envelope as part of the record. N.C. Gen. Stat. § 1-105(3) (2011). Defendant argues that the trial court lacked jurisdiction to enter default judgment because Defendant had not properly been served.

Defendant first argues that Plaintiff's 9 March 2012 affidavit was not complete and that Plaintiff's 5 June 2012 affidavit was after the default judgment and thus the trial court erred in considering it. We disagree.

Under the circumstances, service on an out of state motorist is complete on the date the letter was returned to the Commissioner of Motor Vehicles. An affidavit is not required for service to be complete on a defendant. *Quattrone v. Rochester*, 46 N.C. App. 799, 802, 266 S.E.2d 40, 42 (1980) ("The filing of the affidavit does not affect the completeness of the service but rather merely perfects the record and furnishes proof of compliance with G.S. 1-105 for the guidance of the courts."). The trial court did not err in considering the 5 June 2012 affidavit in its review of Defendant's Motion to Set Aside Default Judgment.

Defendant next argues that the service of process described in the affidavit is inadequate. He argues that the 14 December 2011 mailing was not sufficient under N.C. Gen. Stat. § 1-105 because Plaintiff had not yet left a copy of the service of process with the Commissioner of Motor Vehicles. When Plaintiff delivered service of process to the Commissioner of Motor Vehicles and then sent a copy to Defendant on 14 February 2012, the letter was not sent by certified or registered mail as required by N.C. Gen. Stat. § 1-105. Finally, Defendant argues that the mailing sent by the Commissioner of Motor Vehicles on 23 February 2012 was not sufficient because it came back marked "temporarily away," not "refused" or "unclaimed" as referenced in the statute.

N.C. Gen. Stat. § 1-105(2) references procedures "[i]f the defendant refuses to accept the certified or registered letter" or "[i]f the certified or registered letter is not delivered to the defendant because it is unclaimed, or because he has removed himself from his last known address and has left no forwarding address or is unknown at his last known address." Defendant argues that a strict construction of the statute means that a letter returned as "temporarily away" does not fit the "refused" or "unclaimed" requirement in the statute. We disagree.

"The plain language of G.S. 1-105(2) does not expressly predicate the classification of a forwarded package as 'unclaimed' on nonresident defendants' first being afforded an opportunity to claim it." *Coiner v. Cales*, 135 N.C. App. 343, 348, 520 S.E.2d 61, 64 (1999) ("Strict construction precludes this Court from adding this condition precedent to the statute."). Our Court has therefore held mail as "unclaimed" that was not delivered and was marked "moved, not forwardable" or indicated that "the forwarding order had expired." *Id.*

We find the present case analogous to those cases finding other phrases marked by the United States Postal Service to mean that the letter is "unclaimed." Although "temporarily away" is not defined in the record, it is clear that the letter was not claimed by anyone at Defendant's address and that the U.S. Postal Service could not deliver the letter. This is sufficient

to meet the language in N.C. Gen. Stat. § 1-105(2) that the letter was "unclaimed."

Defendant also contends that the trial court abused its discretion in denying Defendant's motion pursuant to Rule 60(b) of our Rules of Civil Procedure. Defendant argues that the clerk mistakenly entered default less than 30 days after the letter was returned to the Commissioner of Motor Vehicles.[2] We agree.

The entry of default and default judgment mistakenly find that service was complete on 21 February 2012, the date on the notice sent by Robertson to Defendant. This does not comport with N.C. Gen. Stat. § 1-105(2), which states that if a letter is unclaimed, service is complete "on the date that the certified or registered letter is returned to the . . . Commissioner of Motor Vehicles." According to a notation placed on the returned envelope by the Commissioner's office, the letter was received by the Commissioner's office on 28 February 2012. We hold service was complete on this date.

A defendant has 30 days following service to file an answer. N.C. R. Civ. P. 12(a)(1). Therefore, Defendant had until 29 March 2012 to file his answer. Entry of default was entered on 26 March 2012 prematurely.

---

[2] While Defendant did not raise this issue before the trial court, we consider his argument on appeal in order to prevent manifest injustice. N.C. R. App. P. 2.

The clerk did not have the legal authority to make the entry of default on 26 March 2012 prior to the expiration of the time for Defendant to answer. *See G & M Sales of E. N. Carolina, Inc. v. Brown*, 64 N.C. App. 592, 593, 307 S.E.2d 593, 594 (1983). Because entry of default was entered without authority, it is void. Thus, the trial court's denial of Defendant's Motion to Set Aside Default Judgment was based on a void order. Because the clerk lacked the proper evidence to have made the finding that Defendant was in default, entering default was an abuse of discretion.

IV. Conclusion

For the foregoing reasons, the determination of the trial court is

REVERSED AND REMANDED.

Chief Judge Martin and Judge ELMORE concur.

Report per Rule 30(e).