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NO. COA13-59
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

BRYAN THOMPSON, as Public
Administrator of the ESTATE OF
CHELSEY POWERS,
Plaintiff

v.

Forsyth County
No. 09 CVS 4187

JAMES GUTIERREZ, GERARDO GARCIA
and FRANCISCO RAMOS,
Defendants

Appeal by defendant James Gutierrez from order entered 2 August 2012 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 15 August 2013.

Law Offices of Jonathan S. Dills, P.A., by Jonathan S. Dills, for plaintiff-appellee.

William E. West, Jr., for defendant-appellant.

CALABRIA, Judge.

James Gutierrez ("Gutierrez") appeals from the trial court's order denying his motion to set aside an entry of default and an entry of default judgment. We affirm.

I. Background

On 28 May 2007, Gutierrez, Gerardo Garcia, and Francisco Ramos (collectively "defendants") were driving together in a green sport utility vehicle when they stopped in front of a home on Charles Street in Winston-Salem, North Carolina. Fifteen-year-old Chelsey Powers ("Chelsey"), her twin sister Ciera, and their neighbor (collectively "the children") were sitting in the front yard of the home. Defendants briefly spoke to the children and asked to purchase marijuana. One of the defendants then began firing a gun from the back seat of the vehicle. Although Chelsey attempted to flee, she was struck in the head by a bullet. Chelsey was taken to the hospital and treated with life-saving measures, but ultimately died from the gunshot wound.

On 28 May 2009, Bryan Thompson, as Public Administrator of the Estate of Chelsey Powers ("plaintiff"), initiated a wrongful death action against defendants. Plaintiff served the summons and complaint upon Gutierrez by certified mail. On 20 July 2009, Gutierrez filed a motion for an extension of time within which to answer plaintiff's complaint. The motion was granted and Gutierrez was given until 31 August 2009 to respond to plaintiff's complaint. However, Gutierrez ultimately never filed a responsive pleading.

On 4 June 2010, plaintiff filed a motion for entry of default against all defendants, and default was entered by the clerk that same day. The case was then regularly calendared for trial during the 20 September 2010 civil session of Forsyth County Superior Court. Defendants failed to appear at the trial. On 17 November 2010, the trial court entered a judgment which included a finding which stated that "[b]y operation of the Entry of Default, the Court finds all allegations against Defendants in the Complaint are true and deemed admitted by Defendants." The court concluded that defendants were jointly and severally liable for Chelsey's death and awarded plaintiff \$2,000,000.00 in compensatory damages and \$6,000,000.00 in punitive damages.

On 12 November 2010, Gutierrez filed a "Motion to Set Aside Entry of Default," but that motion was never set for hearing. On 8 February 2011, Gutierrez filed another motion, entitled "Motion to Set Aside Entry of Default Judgment, Entry of Default, and to Enlarge Time for Filing of Answer" ("motion to set aside"). In his motion to set aside, Gutierrez argued, *inter alia*, that the trial court's 17 November 2010 judgment should be set aside on the basis of excusable neglect because that judgment constituted a default judgment that required written

notice to Gutierrez three days prior to any hearing, which he did not receive. He also asserted that he could establish a meritorious defense to plaintiff's claims. After a hearing, the trial court denied Gutierrez's motion on 2 August 2012. Gutierrez appeals.

II. Motion to Dismiss

As an initial matter, we address plaintiff's motion to dismiss Gutierrez's appeal. Plaintiff contends that Gutierrez violated N.C.R. App. P. 7(a)(1) by failing to include a transcript of the hearing for the motion to set aside as part of the record on appeal. Pursuant to that rule, "[w]ithin fourteen days after filing the notice of appeal the appellant shall contract for the transcription of the proceedings or of such parts of the proceedings not already on file, *as the appellant deems necessary, in accordance with these rules[.]*" N.C.R. App. P. 7(a)(1) (2013) (emphasis added). The rule also specifically provides that

[i]f the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall cite in the record on appeal the volume number, page number, and line number of all evidence relevant to such finding or conclusion.

Id. In the instant case, Gutierrez's arguments do not include any arguments contending that any of the trial court's findings of fact or conclusions of law are unsupported by the evidence. Instead, Gutierrez raises legal issues that this Court can resolve by examining the trial court's judgment. This Court has previously explained that "[u]nder . . . limited circumstances, a narrative of evidence or a verbatim transcript is not necessary to understand defendant's [issues on appeal]." *Napowsa v. Langston*, 95 N.C. App. 14, 20, 381 S.E.2d 882, 885 (1989). After reviewing Gutierrez's arguments, we believe that that neither a narrative of evidence nor a verbatim transcript is necessary for our review of the instant case. Therefore, we deny plaintiff's motion to dismiss.

III. Motion to Set Aside Default Judgment

Gutierrez argues that the trial court erred by denying his Rule 60(b) motion to set aside the entry of default judgment. We disagree.

"[I]f a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." N.C. Gen. Stat. § 1A-1, Rule 55(d) (2011). "[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." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

In the instant case, defendant moved to have the trial court's default judgment set aside on the basis of excusable neglect pursuant to Rule 60(b)(1).

N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2011) of the North Carolina Rules of Civil Procedure permits a court to set aside a default judgment on the grounds of [m]istake, inadvertence, surprise, or excusable neglect[.] Determining what constitutes excusable neglect is a fact-specific determination in which the Court must consider all the surrounding circumstances to decide what may be reasonably expected of a party in paying proper attention to his case. The party claiming excusable neglect must also show that he had a meritorious defense.

Grier v. Guy, ___ N.C. App. ___, ___, 741 S.E.2d 338, 341 (2012) (internal quotations and citations omitted). Gutierrez contends that the trial court was required to find excusable neglect because he presented evidence that he did not receive three days' notice of the default judgment hearing as required by N.C. Gen. Stat. § 1A-1, Rule 55(b)(2) (2011).

Even assuming, *arguendo*, that Gutierrez is correct about his lack of notice constituting excusable neglect, he still must demonstrate a meritorious defense. *Grier*, ___ N.C. App. at ___, 741 S.E.2d at 341. In his brief, however, Gutierrez has only

challenged the entry of the default judgment based upon his claim that his lack of notice prior to that judgment demonstrated excusable neglect. He does not argue anywhere in his brief that the *entry of default* by the clerk was improper after he failed to timely file his responsive pleading. Therefore, that entry of default remains undisturbed.

The unchallenged entry of default against Gutierrez "results in all allegations of plaintiff's complaint being deemed admitted against that defendant, and thereafter, defendant is prohibited from defending on the merits of the case." *Estate of Teel v. Darby*, 129 N.C. App. 604, 607, 500 S.E.2d 759, 762 (1998). Thus, by operation of the entry of default, plaintiff's allegations against Gutierrez are deemed admitted and Gutierrez "is prohibited from defending on the merits of the case." *Id.* As a result, Gutierrez necessarily cannot show that he has a meritorious defense against plaintiff's claims and has therefore failed to demonstrate he is entitled to relief pursuant to Rule 60(b)(1). This argument is overruled.

IV. Conclusion

Gutierrez's Rule 60(b) motion to set aside the trial court's judgment required Gutierrez to establish both excusable

neglect and a meritorious defense. Since, on appeal, Gutierrez did not challenge the entry of default against him, he is prohibited by that entry of default from defending against the merits of plaintiff's claims. Consequently, he has failed to establish a meritorious defense and is not entitled to relief pursuant to Rule 60(b)(1). Accordingly, the trial court's order is affirmed.

Affirmed.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).