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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1402

Filed: 6 September 2016

Pitt County, No. 14 CVD 2186

LOCAL GOVERNMENT FEDERAL CREDIT UNION, Plaintiff,

v.

DONNA R. DISHER, Defendant.

Appeal by defendant from order entered 14 October 2015 by Judge Lee F. Teague in Pitt County District Court. Heard in the Court of Appeals 10 May 2016.

Evan Lewis for defendant-appellant.

Gaylord, McNally, Strickland & Snyder, L.L.P., by Catherine E. Thompson, for plaintiff-appellee.

DIETZ, Judge.

Donna Disher appeals from the trial court's order denying her Rule 60(b) motion to set aside a default judgment. Local Government Federal Credit Union sued Disher for the remaining balance on an auto loan after repossessing her vehicle and selling it for less than the amount of the loan.

In her Rule 60(b) motion, filed nearly a year after the default judgment, Disher argued that she missed the deadline to respond to the complaint because her father was in critical condition following heart surgery and she was traveling out-of-state to

be with him. She also argued that she had a meritorious defense because the notice she received from the credit union failed to inform her of the date after which it would sell the vehicle, instead mistakenly repeating the vehicle's VIN number.

The trial court denied Disher's motion, determining that she had established excusable neglect but had not shown a meritorious defense. We reverse and remand. Under the applicable statutory notice requirements, Disher satisfied her burden to show that "a [p]rima facie defense exists." *U.S.I.F. Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 615, 219 S.E.2d 787, 790 (1975). Because the trial court based its ruling on the failure to show a meritorious defense, we must reverse. The credit union argues that the trial court properly could deny the motion because Disher failed to assert it "within a reasonable time." N.C. R. Civ. P. 60(b). The trial court never reached this issue because it determined Disher had not shown a meritorious defense. Accordingly, we remand for the trial court to determine, in its sound discretion, whether Disher's nearly one-year delay in seeking Rule 60(b) relief was unreasonable and warrants denial of her motion.

Facts and Procedural History

Defendant Donna Disher financed the purchase of a used sport utility vehicle through Plaintiff Local Government Federal Credit Union. The parties entered into a security agreement on 7 December 2012 through which the credit union gave Disher a $13,452.00 loan secured by the vehicle. The agreement defined default to include

failure to pay any installment on time. Upon default, the credit union could repossess and sell the vehicle and apply the proceeds of the sale to the unpaid balance on the loan.

Disher defaulted on her payments and the credit union repossessed the vehicle. On 28 February 2014, the credit union sent Disher what appears to be a form letter providing notice of its plan to sell the vehicle at a private sale. The letter's opening paragraph states as follows: "We have your 2004 GMC YUKON VIN #1GKFK66U44J254445 because you have broken promises in our agreement. We will sell the vehicle at private sale after 1GKFK66U44J254445." As is apparent from these two sentences, the credit union's form letter mistakenly listed the vehicle's VIN number instead of the date after which the credit union intended to sell the vehicle.

On 2 May 2014, the credit union notified Disher that it sold the vehicle for $4,415, leaving a $9,679.41 deficiency on the loan. On 25 August 2014, after unsuccessful demand letters, the credit union sued Disher to recover the remaining balance of the loan. The credit union served Disher by certified mail on 2 September 2014. Disher did not respond to the complaint within the time provided by the Rules of Civil Procedure and, on 3 October 2014, the credit union secured entry of default and a default judgment.

Nearly a year later, on 4 September 2015, Disher filed a Rule 60(b) motion to set aside default judgment under 60(b)(1) and Rule 60(b)(6). Disher asserted that, at

the time she was served with the complaint, "she was in the process of responding to her father's medical emergency, a serious heart condition requiring a two week hospital stay beginning on September 2, 2014, and heart surgery, and trying to arrange to travel from Hawaii to Pennsylvania to be with him and help care for him."

After a hearing, the trial court denied Disher's Rule 60(b) motion. In its order, the court stated that "although the Defendant has shown sufficient grounds for excusable neglect, the Defendant has not shown a meritorious defense." Disher timely appealed.

Analysis

Disher challenges the trial court's denial of her motion to set aside the default judgment under Rule 60(b) of the North Carolina Rules of Civil Procedure based on excusable neglect.

"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." *Scoggins v. Jacobs*, 169 N.C. App. 411, 413, 610 S.E.2d 428, 431 (2005). We review the trial court's decision to set aside a default judgment under Rule 60(b) for abuse of discretion, but the individual determinations of whether the movant has shown excusable neglect and a meritorious defense are both questions of law that this Court reviews *de novo*. *Id.* at 413-14, 610 S.E.2d at 431.

The trial court determined that Disher's need to travel from Hawaii to Pennsylvania for several weeks to be with her father, who was in critical condition in a hospital following heart surgery, constituted excusable neglect for her failure to timely respond before entry of default. Neither party challenges that determination on appeal. But the court also determined that Disher had not established a meritorious defense, and denied her Rule 60(b) motion on that basis. As explained below, we hold that Disher established a potentially meritorious defense and thus reverse the trial court's determination to the contrary.

In determining whether the movant has a meritorious defense, "the trial court does not hear the facts but determines only whether the movant has pleaded a meritorious defense." *Chaparral Supply v. Bell*, 76 N.C. App. 119, 120, 331 S.E.2d 735, 736 (1985). If it is reasonably apparent to the court that "a prima facie defense exists," then the meritorious defense test is satisfied. *U.S.I.F. Wynnewood Corp.*, 27 N.C. App. at 615, 219 S.E.2d at 790.

Here, Disher argues that the credit union failed to advise her of the date after which the vehicle would be sold at a private sale, which is a requirement of the applicable statutory notice law. The parties' agreement created a security interest in personal property and thus is governed by Article 9 of the Uniform Commercial Code. N.C. Gen. Stat. § 25-9-109(a)(1). Article 9 provides guidelines for disposing of

collateral after default, including notification to the debtor. N.C. Gen. Stat. § 25-9-611(b).

Article 9 provides different standards for notification in consumer and non-consumer transactions. In either type of transaction, the notification must include "the time and place of a public disposition or the time after which any other disposition is to be made." N.C. Gen. Stat. §§ 25-9-613(1)e., 614(1)a. In a non-consumer goods transaction, a notification that provides "substantially the information" set out in the statute is sufficient even if it includes "[m]inor errors that are not seriously misleading." N.C. Gen. Stat. § 25-9-613(3)b. By contrast, in a consumer goods transaction, errors in the required information render the notification "insufficient as a matter of law." N.C. Gen. Stat. § 25-9-614 cmt. 2.

Disher concedes that there is no evidence in the record establishing whether she purchased her vehicle for consumer or non-consumer purposes (although the credit union appears to have treated the loan as a consumer loan). But even if we assume that this is a non-consumer goods transaction, we agree with Disher that the notification unquestionably omitted one of the key statutory criteria—the date after which the credit union intended to dispose of the vehicle. That omission cannot be described as a "[m]inor error[]" under the statute. N.C. Gen. Stat. § 25-9-613(3).

The statute also provides that "[w]hether the contents of a notification that lacks any of the information specified . . . are nevertheless sufficient is a question of

fact." N.C. Gen. Stat. § 25-9-613(2). Thus, this is an issue that cannot be resolved as a matter of law, but must be given to a fact-finder. As a result, under our precedent, Disher has shown a potentially meritorious defense under Rule 60(b) because she has made a "prima facie" showing that the notification was insufficient, giving rise to a fact issue unsuitable for resolution as a matter of law. *U.S.I.F. Wynnewood Corp.*, 27 N.C. App. at 615, 219 S.E.2d at 790. We therefore reject the trial court's determination that Disher did not establish a meritorious defense.

The credit union argues alternatively that Disher failed to move for relief under Rule 60(b) within a "reasonable time." N.C. R. Civ. P. 60(b). The credit union contends that Disher waited nearly a year after entry of the default judgment before seeking relief under Rule 60(b), and provided no explanation for that significant delay.[1]

What constitutes a "reasonable time" depends upon the circumstances of the individual case and is a discretionary decision for the trial court. *McGinnis v. Robinson*, 43 N.C. App. 1, 8, 258 S.E.2d 84, 88 (1979). There is precedent from this Court that could support denial of the motion because of unreasonable delay on these

[1] In making this argument, the credit union fails to cite the "reasonable time" language in Rule 60(b). But it devotes nearly a page of its brief to discussing the timeline of Disher's Rule 60(b) motion and argues that "a person of ordinary prudence would not . . .wait over a year to respond to a properly served Summons and Complaint." Although the better practice is to cite to the language in the applicable rule on which a party relies, the credit union's argument is sufficient to preserve this issue for appellate review. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.")

facts. For example, in *Sea Ranch II Owners Ass'n, Inc. v. Sea Ranch II, Inc.*, 180 N.C. App. 226, 230, 636 S.E.2d 332, 335 (2006), this Court affirmed the denial of a Rule 60(b) motion brought six months after the default judgment because the movant "failed to assert its rights claimed . . . within a reasonable time."

It appears from the record that the trial court did not address whether Disher brought this motion within a reasonable time because, having concluded that the issue did not involve a meritorious defense, the court had no need to continue to address the remaining factors in the Rule 60(b) test. Accordingly, although we reverse the trial court's holding that Disher failed to establish a meritorious defense, we remand this matter for the court to determine, in its sound discretion, whether the reasonable time factor of Rule 60(b) is satisfied in this case.

Conclusion

We reverse the trial court's order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).