IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-501

Filed: 20 December 2016

Guilford County, No. 10 CVS 4454

CITY OF GREENSBORO, Plaintiff,

v.

ALVIS FEWELL, Defendant.

Appeal by defendant from order entered 4 February 2016 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 6 October 2016.

Assistant City Attorney John Roseboro for plaintiff-appellee City of Greensboro.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for defendant-appellant.

ZACHARY, Judge.

In this case, plaintiff City of Greensboro (the City) cited and fined defendant Alvis Fewell (Fewell), the operator of a nightclub, for violations of the City's fire code. Fewell neither paid nor appealed the citations, so the City filed a complaint in Guilford County Superior Court to collect the outstanding fines. Multiple summonses were issued, and the City attempted to serve its summonses and complaint on Fewell at two locations on four separate occasions. After all attempts at service were

returned, the City served Fewell by publication in a local newspaper and eventually obtained a default judgment against him. This judgment attached to Fewell's real property.

Thereafter, Fewell sold a parcel of real property, and the City's judgment was satisfied out of the proceeds of that real estate transaction. Fewell then filed a motion to set aside the City's default judgment under Rule 60(b) on the ground that the judgment was void due to insufficient service of process. The trial court entered an order denying Fewell's motion.

On appeal from the denial of his Rule 60(b) motion, Fewell focuses on steps he contends that the City had to take to serve him personally before resorting to service by publication. However, the proper inquiry should focus on steps that the City actually took to effect personal service. As explained below, the City's unsuccessful efforts to serve Fewell personally were more than sufficient to justify eventual service by publication. Accordingly, we affirm the trial court's order.

I. Background

This case arises out of a complaint filed by the City against Fewell, which sought to collect fines imposed under the Greensboro Code of Ordinances. In early 2009, Fewell operated[1] a nightclub called Alexander Devereux's, which was located

[1] The record is unclear as to whether Fewell owned Alexander Devereux's, but this is not a salient point on appeal. Fewell's brief states that he was the "president" of Alexander Devereux's, and it is clear that he was identified as the party who was ultimately responsible for receiving and addressing the fire code violations.

at 2800A High Point Road in Greensboro, North Carolina. On 8 March 2009 and 5 April 2009, Fewell was issued and served with "Civil Penalty" citations for exceeding "lawfully posted occupancy limits" at Alexander Devereux's. The City issued these citations, with fines totaling $29,250.00, under its Fire Prevention Code. After Alexander Devereux's closed on 1 May 2009, Lounge 2800, an entity not associated with Fewell, leased the commercial premises located at 2800 High Point Road.[2] Fewell never appealed or paid the citations.

In early March 2010, the City filed a complaint against Fewell in Guilford County Superior Court and sought to collect the unpaid fines plus interest. The original summons was issued on 5 March 2010, and five days later, the City attempted to serve the summons and complaint via certified mail addressed to Fewell at 3408 Cabarrus Drive in Greensboro (the Cabarrus Drive Residence). The Cabarrus Drive Residence was listed as Fewell's address on his voter registration records with the North Carolina State Board of Elections. However, this attempt at service was unsuccessful. The City also attempted service at the Cabarrus Drive Residence through the Guilford County Sheriff, but the Sheriff's Office returned process unserved and reported that Fewell could not be located for service.

[2] Precise information regarding when Alexander Devereux's vacated the commercial property located at 2800A High Point Road and when Lounge 2800 began to occupy the premises is not contained in the record. However, the parties do not appear to dispute that Fewell operated Alexander Devereux's, and that he was not associated with the ownership or operation of Lounge 2800.

Having already conducted two unsuccessful attempts at service, the City searched the local telephone directory, Guilford County Tax records, and various internet directories in order to locate a current, alternative address for Fewell. Staff members in the City's legal department also searched for an alternative address using a paid locator service, which indicated that Fewell's last known address was 1011 Somerset Drive, Winston-Salem, North Carolina (the Somerset Drive Residence). The Somerset Drive Residence was deeded to Fewell on 23 September 2010.

Two summonses were issued for Fewell at the Somerset Drive Residence, the first on 14 September 2010[3] and the second on 23 November 2010. The City attempted to serve both summonses through the Forsyth County Sheriff's Office, but once again, service was unsuccessful and Fewell could not be located. Handwriting on the 14 September 2010 summons, which was returned unserved on 26 October 2010, indicated that although several notes had been left at the Somerset Drive Residence, no contact had been made and the notes had been removed.

After two unsuccessful service attempts each at the Cabarrus Drive and Somerset Drive Residences, the City served Fewell by running notice of service by publication in the *Winston-Salem Journal*, a newspaper that meets the applicable statutory requirements for publishing legal notices. The notice ran for three

[3] The Forsyth County Sheriff's Office received this summons on 29 September 2010, after the property had been deeded to Fewell.

consecutive weeks in January 2011. After Fewell failed to respond to the City's complaint, the City filed a motion for entry of default, which was granted in April 2011. Consequently, an assistant clerk of Guilford County Superior Court entered a default judgment against Fewell on 23 August 2011.

According to Fewell, he was never aware of the City's lawsuit or the subsequent entry of default judgment until he sold real estate on 13 November 2015. At that time, the City received $29,935.00 from the sale's proceeds to satisfy its default judgment against Fewell.

On 24 November 2015, Fewell filed a motion to set aside the default judgment[4] pursuant to Rule 60(b)(4) of the North Carolina Rules of Civil Procedure.[5] According to Fewell's motion, the City failed to use reasonable diligence in locating his current address and, as a result, he was improperly served by publication. Based on this reasoning, Fewell moved that the default judgment be set aside as void. After hearing Fewell's motion on 1 February 2016, the trial court entered an order denying the motion on 4 February 2016. The trial court's order contained no written findings, but the court did make written conclusions that, *inter alia*, the City had used "due diligence" in attempting personal service on Fewell, that Fewell was properly served by publication, and that the default judgment was not void. Defendant appeals.

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[4] Nothing in Fewell's motion suggests that he sought to set aside the *entry* of default. Rather, the motion only sought to set aside the default judgment as void.

[5] Fewell filed an amended Rule 60(b)(4) motion in December 2015.

II. Motion to Set Aside Default Judgment

Fewell's sole argument on appeal is that the trial court erred in denying his motion to set aside the default judgment. More specifically, Fewell contends that his Rule 60(b) motion should have been granted because service by publication was improper in this case and, therefore, he was never properly served with process.

A. Standard of Review

Rule 55(d) of the North Carolina Rules of Civil Procedure provides that a default judgment may be set aside in accordance with Civil Procedure Rule 60(b). N.C. Gen. Stat. § 1A-1, Rule 55(d) (2015). "A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void." *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980) (citation omitted). Pursuant to Rule 60(b)(4) (2015), "the court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . [if] [t]he judgment is void[.]"

Before this Court on appeal, "[t]he standard of review for the denial of a Rule 60(b) motion is abuse of discretion." *Milton M. Croom Charitable Remainder Unitrust v. Hedrick*, 188 N.C. App. 262, 266, 654 S.E.2d 716, 719 (2008). Under this standard, a trial court's ruling may be reversed "only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's discretion] 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).

"A trial court is not required to make written findings of fact when ruling on a Rule 60(b) motion, unless requested to do so by a party." *Milton M. Croom*, 188 N.C. App. at 266, 654 S.E.2d at 719 (citation omitted). When, as here, "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.' " *Grant v. Cox*, 106 N.C. App. 122, 125, 415 S.E.2d 378, 380 (1992) (alteration omitted) (quoting *Tex. W. Fin. Corp. v. Mann*, 36 N.C. App. 346, 349, 243 S.E.2d 904, 907 (1978)).

B. Analysis

After the City's attempts to serve Fewell at the Cabarrus Drive and Somerset Drive Residences, service of process was obtained by publication in the *Winston-Salem Journal*. It is well established

> that a court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily specified methods. Thus, absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed. . . . The purpose of the service requirement is to provide notice to the party against whom the proceeding or action is commenced and allow them an opportunity to answer or otherwise plead.

Fender v. Deaton, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998) (internal citations omitted), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999). Rule 4(j) of the North Carolina Rules of Civil Procedure sets out the procedure for service upon natural persons, and Rule 4(j1) "permits service by publication on a party that cannot, through due diligence, otherwise be served." *Cotton v. Jones*, 160 N.C. App. 701, 703, 586 S.E.2d 806, 808 (2003). Under Rule 4(j1),

> [a] party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. . . . [S]ervice of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending.

N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2015).

As service by publication is in derogation of the common law, "statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute." *Fountain*, 44 N.C. App. at 586, 261 S.E.2d at 516. To that end, the dispositive question for this Court is whether Fewell was actually subject to service

by publication. This determination requires an inquiry into whether the City exercised due diligence under Rule 4(j1) prior to serving Fewell by publication.

Fewell makes a series of arguments as to why the City failed to meet Rule 4(j1)'s "due diligence" standard before serving him by publication. For the reasons that follow, we strongly disagree.

Service by publication is void when the plaintiff fails to use due diligence in ascertaining the defendant's address. *Fountain*, 44 N.C. App. at 587, 261 S.E.2d at 516.

> Due diligence dictates that [the] plaintiff use all resources reasonably available to [it] in attempting to locate defendants. Where the information required for proper service of process is within [the] plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper. The public record is generally regarded as being reasonably available, and this Court has consistently attached a level of significance to whether or not the public record has been inspected in order to ascertain an appropriate address for service of process.

Jones v. Wallis, 211 N.C. App. 353, 357-58, 712 S.E.2d 180, 183 (2011) (citations and quotation marks omitted). Even so, this Court has expressly refused to "make a restrictive mandatory checklist for what constitutes due diligence. . . . Rather, a case by case analysis is more appropriate." *Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372 (1980).

Fewell first argues that because he was the owner of rental property located at 2315C Patriot Way in Greensboro (the Patriot Way Residence) "[a]t all material

times," service should have been attempted at that address. According to Fewell, the City, "as the provider of water and sewer services to [the Patriot Way Residence] had actual knowledge that [Fewell] was the owner of that property by reason of its utility records."

Unfortunately for Fewell, the record belies any contention that service at the Patriot Way Residence would have been fruitful. Indeed, the City's water account record for the Patriot Way Residence shows that a tenant occupied the property sometime shortly before or after 16 November 2009, and that it was not Fewell's residence. Significantly, 2315C Patriot Way was listed as the "service address" on the City's records, but the "mailing address" listed on the water account was the Somerset Drive Residence, which was the location of two unsuccessful service attempts in September and November of 2010. Given these circumstances, which suggest both that the Patriot Way Residence was rental property and that the Somerset Drive Residence was Fewell's primary residence, any service attempt at the Patriot Way Residence would have been in vain.

Second, although Fewell admits that he bought the Somerset Drive Residence in 2010, he insists that the residence "was not yet inhabitable . . . as of the time [this] lawsuit was filed [in] March . . . 2010, and during the time that efforts were being made to serve process on [Fewell] in Winston-Salem." Fewell then argues, in passing,

that while the City "mistakenly believed that [Fewell] was located in Forsyth County, rather than Guilford County, . . . this belief was highly unreasonable."

Once again, the record tells a different story. According to the files of the Winston-Salem/Forsyth County Inspections Division, a certificate of compliance and *occupancy* for the Somerset Drive Dwelling was issued on 24 April 2009. This certificate was issued to the construction company that eventually deeded the Somerset Drive Residence to Fewell on 23 September 2010. Contrary to Fewell's assertion that this residence was uninhabitable in March 2010, the pertinent Forsyth County property records contain a photograph showing a fully-constructed dwelling at 1101 Somerset Drive. The photograph bears a date stamp of 27 April 2010, which was roughly five months before the City made its first service attempt at the Somerset Drive Residence in late September 2010. We refuse to accept Fewell's convenient assertion that he could not be found at the Somerset Drive Residence when service was attempted.

Even so, the essence of Fewell's argument is that publication in Forsyth County was improper and inadequate. Rule 4(j1) requires that the publication be "circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending." When the circumstances mentioned above are considered along with the fact that a paid locator

service pinpointed the Somerset Drive Residence as Fewell's last known address, it is apparent that the City's attempts to serve Fewell at that location were eminently reasonable. In other words, the City had reliable information that Fewell resided in Forsyth County at the time service was attempted in September and November 2010, and that this was Fewell's last known place of residence. Consequently, the City had good reason to publish service of process in a publication that was circulated in Forsyth County. We conclude, therefore, that Fewell's argument on this point is disingenuous and wholly without merit.

Finally, Fewell argues that the exercise of due diligence required the City to "make inquiry about [his] whereabouts" by going to 2800A High Point Road, the commercial premises where Fewell (as the operator of Alexander Devereux's) originally incurred the fire code violations for which he was later fined and sued. As the argument goes, "[h]ad [the City] made inquiry of the persons in charge of or present at Lounge 2800, they likely would have forwarded the inquiry to [Fewell], since they were all in communication with him."

As an initial matter, we note that Fewell correctly points out that the City's complaint erroneously alleged that he was the owner of Lounge 2800 when the fire violations occurred. But once the record is read in context, it is clear that the reference to Lounge 2800 was either a typographical error or one based on the fact that Alexander Devereux's occupied the premises at 2800A High Point Road when

the relevant citations were issued, while Lounge 2800 occupied 2800A High Point Road location when the City filed its complaint against Fewell in March 2010. At any rate, nothing in the record suggests that serving Fewell at 2800A High Point Road would have been productive. There is no evidence that Fewell could be found there after 1 May 2009, and it was not his residence. Moreover, just because Fewell asserts that an "inquiry" directed to Lounge 2800's management would have yielded his contact information does not make it so. This is the type of Monday morning quarterbacking that this Court has shunned in the context of Rule 4(j1): "[A] plaintiff is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of 'due diligence.' This is particularly true when there is no indication in the record that any of the steps suggested by a defendant would have been fruitful." *Jones*, 211 N.C. App. at 359, 712 S.E.2d at 185. The *Jones* Court explicitly noted "that Rule 4(j1) requires 'due diligence,' not that a party explore every possible means of ascertaining the location of a defendant." *Id.* at 358-59, 712 S.E.2d at 184.

Furthermore, although Fewell would have us determine whether the City acted with "due diligence" based on steps that were not taken, we must instead look at what the City actually did to discover Fewell's address. Here, a series of steps were taken to locate Fewell, which included: (1) attempted service of Fewell at the Cabarrus Drive Residence, which was listed as his current address in public voting

records, by certified mail; (2) attempted service of Fewell at the Cabarrus Drive Residence via the Guilford County Sheriff's Office; (3) a telephone directory search; (4) an internet search; (5) a Guilford County Tax record search; (6) a search conducted by a paid locator service, which indicated that Fewell's last known address was the Somerset Drive Residence; and (7) attempted service of Fewell at the Somerset Drive Residence via the Forsyth County Sheriff's Office on two different occasions. Based on the circumstances of this case, we conclude that the City's actions well exceeded the "due diligence" necessary to justify the use of service of process by publication.

To sum up, none of the items on Fewell's "restrictive mandatory checklist for what [would have] constitute[d] due diligence for purposes of permitting Rule 4([j1]) publication" would have been fruitful. *Emanuel*, 47 N.C. App. at 347, 267 S.E.2d at 372. By contrast, the City's efforts to locate and serve Fewell easily satisfied Rule 4(j1)'s due diligence standard. These efforts were detailed in the exhibits attached to the City's response in opposition to Fewell's Rule 60(b)(4) motion to set aside judgment. As a result, the evidence presented to the trial court would have allowed the court to make findings of fact sufficient to support its legal conclusions. Accordingly, the trial court did not abuse its discretion in denying Fewell's motion to set aside the default judgment entered against him.

III. Conclusion

For the reasons stated above, we affirm the trial court's order.

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

Report per Rule 30(e).