IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-76

Filed: 20 December 2016

Dare County, No. 11 CRS 51756, 51758

STATE OF NORTH CAROLINA, Respondent,

v.

LUIS ALBERTO RODRIGUEZ, Defendant,

and

MATTHEW L. GREGORY, Bail Agent,

and

FINANCIAL CASUALTY & SURETY, Surety.

Appeal by Petitioners from order entered 28 August 2015 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 7 June 2016.

Phillip H. Hayes, Attorney at Law, by Phillip H. Hayes, for Petitioner-Appellants.

Schwartz & Shaw, P.L.L.C., by Richard A. Schwartz and Brian C. Shaw, for Respondent-Appellee.

INMAN, Judge.

This case addresses a dispute between a local school board beneficiary of bond forfeiture and a bail agent and surety arising from a criminal defendant's failure to appear in court. We conclude that the trial court did not abuse its discretion in

reinstating the forfeiture of bonds after determining that the bail agent had falsely represented that the criminal defendant could not appear in court because he was incarcerated.

Bail Agent Matthew L. Gregory ("Bail Agent") and Financial Casualty & Surety ("Surety") (collectively, "Petitioners") appeal from an order allowing Respondent Dare County Board of Education ("Board") (through the State of North Carolina) Rule 60(b) relief from judgments setting aside forfeitures of two bonds. On appeal, Petitioners argue the trial court erred in finding grounds to justify relief from the judgments, ruling on the merits of the judgments, and ruling, in the alternative, on the merits of later notices of forfeiture. We hold that the trial court did not abuse its discretion in granting Rule 60(b) relief and ruling on the merits of the judgments, and therefore affirm the order of the trial court.

Factual & Procedural History

The trial court's order from which this appeal arise provides the following procedural history:

On 6 October 2011, arrest warrants were issued for Luis Alberto Rodriguez ("Defendant")[1] for felony offenses stemming from a fatal motor vehicle accident. The charges included two felony counts of serious injury by vehicle in file number 11 CRS 51756, and one felony count of death by vehicle in file number 11 CRS 51758.

[1] Defendant is not a party to this appeal.

On 17 October 2011, Defendant was arrested and confined in the Dare County Detention Center. Two days later, Defendant was moved to the Central Prison Hospital in Raleigh for medical safekeeping. Defendant was incarcerated at Central Prison from 19 October to 22 November 2011. On 22 November 2011, Defendant was moved back to the Dare County Detention Center.

On 18 January 2012, the Surety and the Bail Agent posted two bonds[2]—$20,000 for file number 11 CRS 51756 and $30,000 for file number 11 CRS 51758—to secure Defendant's release from custody pending trial. Upon posting, Defendant was released from the Dare County Detention Center on the same day.

Two months later, on 23 April 2012, Defendant failed to appear for a hearing in Dare County Superior Court, and the trial court issued orders for his arrest. On 3 May 2012, the trial court ordered that the appearance bonds for Defendant be forfeited and the Surety and Bail Agent were served with notice of the forfeitures, providing that judgment would be entered on 30 September 2012 in both cases.

On 27 September 2012, three days before the final judgment date, the Bail Agent filed motions to set aside the forfeiture in both cases. In each preprinted motion, the Bail Agent checked the sixth box in the section listing reasons to allow the set aside of the forfeitures, pursuant to N.C. Gen. Stat. § 544.5(b). The sixth box states: "[t]he defendant was incarcerated in a unit of the North Carolina Division of

[2]The trial court had reduced the secured bonds from their initial amounts—$40,000 for file number 11 CRS 51756 and $60,000 for file number 11 CRS 51758.

Adult Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the state at the time of the failure to appear as evidenced by a copy of an official court record or copy of a document from the Division of Adult Correction or Federal Bureau of Prisons, including an electronic record." The Bail Agent attached to each motion a page printed from the website labeled "VINELink ver. 2.0" that correctly stated Defendant's name, offender identification number, birthdate, age, and race, but incorrectly listed his "Custody Status" as "In Custody" and listed the "Location of the Offender" as "Central Prison." The printed page attached to file number 11 CRS 51756 was dated 18 September 2012 and the page attached to 11 CRS 51758 was dated 25 September 2012.

The Board, relying upon the representations made by the Bail Agent, did not object to the Bail Agent's motions, and, on 24 October 2012, the Dare County Clerk of Superior Court ("the Clerk") granted the motions to set aside the forfeiture, and dismissed the orders of forfeiture.

In the summer of 2014, following a meeting with the victim's family, the Dare County District Attorney's Office determined that Defendant had not been in the custody of Central Prison on 23 April 2012, the date he failed to appear in court in the two cases. There is no indication in the record that the District Attorney's Office notified the Board of this revelation.

On 3 September 2014, the trial court entered an order allowing Defendant's further appearances to be secured by the original bonds, and the Clerk sent notice to Defendant's last known address that he was required to appear for a criminal administrative hearing on 17 September 2014. There is no indication in the record that the Board was served with notice of this order. Defendant failed to appear at the hearing.

As a result of Defendant's failure to appear, on 18 September 2014, the trial court entered an order for Defendant's arrest for file number 11 CRS 51756. On 23 September 2014, the trial court ordered the appearance bonds to be forfeited, and the Bail Agent and Surety were served with new notices of forfeiture for both file numbers 11 CRS 51756 and 11 CRS 51758, scheduling entry of a final judgment for 20 February 2015. There is no indication in the record that the Board was served with the new notices of forfeiture.

On 19 February 2015, the Bail Agent and Surety filed and served on the Board what is essentially a motion to set aside the new notices of forfeiture, entitled a "Motion to Strike Orders of Forfeiture and Bar Entries of Final Judgment." This motion was the first notice to the Board that Defendant had not in fact been incarcerated when he failed to appear at his hearing in April 2012. On 13 March 2015, the Board filed a "Response to Motion to Set Aside Forfeiture," a "Motion for Relief from Judgment," and a "Motion for Sanctions."

The motions came on for hearing on 11 May 2015 in Dare County Superior Court, Judge Jerry R. Tillett presiding. Near the close of the hearing, Judge Tillett announced that he would review the materials submitted and would allow the parties ten days to submit any supplemental materials or affidavits. The Board subsequently submitted a supplemental brief and affidavits from a former attorney for the Board and the sisters of the deceased victim of the motor vehicle accident.

On 28 August 2015, the trial court entered an order granting the Board's motion for relief pursuant to Rule 60(b). The trial court found that no grounds had existed justifying the earlier order setting aside the 2012 forfeitures, and found, in the alternative, that both appearance bonds were also subject to forfeiture due to Defendant's second failure to appear in 2014. Petitioners timely appealed.

Analysis

I.

Petitioners argue that the trial court erred in ordering relief from the operation of the 24 October 2012 judgments setting aside forfeiture of the appearance bonds. Specifically, Petitioners argue that the Board's Rule 60(b) motion was not made within a reasonable period of time and the facts do not show extraordinary circumstances or that justice demands such relief. We disagree.

"[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). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it 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). "When reviewing a trial court's equitable discretion under Rule 60(b)(6), our Supreme Court has indicated that this Court cannot substitute what it considers to be its own better judgment for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it probably amounted to a substantial miscarriage of justice." *Surles v. Surles*, 154 N.C. App. 170, 173 n. 1, 571 S.E.2d 676, 678, n. 1 (2002) (internal quotation marks and citations omitted).

Rule 60(b) of the North Carolina Rules of Civil Procedure, which governs motions to set aside a final judgment, provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made *within a reasonable time*[.]

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2015) (emphasis added).

Petitioners first argue that the Board's motion for relief was not made within a reasonable period of time. The trial court's determination of whether a motion was

made within a reasonable time is reviewed for abuse of discretion. *See Brown v. Windhom*, 104 N.C. App. 219, 221, 408 S.E.2d 536, 537 (1991) (holding that where the "defendant offers little explanation for the one-year delay in filing the motion for relief" this Court concludes there was "no abuse of discretion in the trial court's conclusion that the motion was not timely filed"). "What constitutes a 'reasonable time' under the rule is determined by examining the circumstances of the individual case." *Id.*

The Board was first alerted to the fact that Defendant was not incarcerated at the time of his initial failure to appear upon its receipt of Petitioners' 19 February 2015 motion to set aside the new notices of forfeiture. Over two years had passed between October 2012, when the Bail Agent represented that Defendant was incarcerated and the Clerk set aside the forfeitures of the bonds, and 19 February 2015, when the Board received notice that Defendant had not, in fact, been incarcerated in April 2012. On 13 March 2015, the Board filed an objection to Petitioners' motion to set aside the new notices of forfeiture[3] and also filed a Rule 60(b) motion for relief from the 24 October 2012 orders dismissing the forfeitures.

Petitioners argue that "[t]he Board had an opportunity to determine the sufficiency of the motions to set aside the forfeitures filed by [the Bail Agent] as [of]

[3] The Board responded to Petitioners' motion to set aside forfeiture within twenty days of service of the motion, in compliance with N.C. Gen. Stat. § 15A-544.5(d)(4) (2015). Because the motion was served by mail, "three days [were] added to the prescribed period" to respond pursuant to N.C. Gen. Stat. § 1A-1, Rule 6(e) (2015).

4 October 2012[,]" but failed to do so. Petitioners cite this Court's holding in *Standard Equip. Co. v. Albertson*, 35 N.C. App. 144, 147, 240 S.E.2d 499, 502 (1978), that "[t]he interest of deciding cases on the merits cannot outweigh all other considerations and entitle plaintiff to extraordinary relief under Rule 60(b)(6)."

In *Standard Equipment*, this Court held that the facts "d[id] not show that the judicial system or the defendant prevented movant from presenting his claim but rather that his own inattention to his affairs caused the dismissal to be entered." 35 N.C. App. at 147, 240 S.E.2d at 502. Here, by contrast, it was reasonable for the trial court to consider the particular circumstances—the timing when the Board received actual notice that the bail agent's original motions were suspect—in making a discretionary decision as to whether the objection was made within a reasonable time.

We hold that the trial court's conclusion that the Board's motion for relief was made within a reasonable time was supported by the evidence and did not constitute an abuse of discretion.

Petitioners next argue that the facts do not show that extraordinary circumstances exist or that justice demands relief. We disagree.

Our Supreme Court has held that "[t]he test for whether a judgment, order or proceeding should be modified or set aside under Rule 60(b)(6) is two pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted." *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585,

588 (1987). In *Standard Equipment*, this Court explained that the federal courts, in determining whether to vacate judgments, have identified the following relevant factors: "(1) the general desirability that a final judgment not be lightly disturbed, (2) where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure, (3) the opportunity the movant had to present his claim or defense, and (4) any intervening equities." 35 N.C. App. at 147, 240 S.E.2d at 501–02.

Here, the trial court concluded that "[i]n considering the general desirability that a final judgment not be lightly disturbed, but also the interest of deciding the case on the merits and the interest of orderly procedure and justice, the intervening equities vitiate in favor of hearing the matter of [sic] the merits on failure to appear based upon true facts." Moreover, the trial court also concluded that "[t]here is a showing of meritorious objections by [the Board] to the September 2012 motions to set aside by the Bail Agent."

Petitioners blame the Board for not scrutinizing the documents attached to the 2012 motions to set aside forfeiture submitted by the Bail Agent. We find this argument unpersuasive coming from a party who filed the documents containing the erroneous information. More importantly, the trial court found it unpersuasive, making pertinent findings of fact that support its conclusion that extraordinary circumstances exist and that justice demands relief. This Court has held that "[u]pon

hearing of a Rule 60 motion, the findings of fact by the trial court are conclusive on appeal if supported by any competent evidence." *Gentry v. Hill*, 57 N.C. App. 151, 154, 290 S.E.2d 777, 779 (1982) (citation omitted). The trial court found the following:

> 15. [The Board] relied on the Bail Agent to provide truthful and accurate information in his submissions to the [c]ourt, including the attached documents, and did not object to either motion to set aside in 11-CRS-51756 and 11-CRS-51758.
>
> 16. The Bail Agent caused to be present[ed] to [the Board] and the [c]ourt erroneous information which was material and constituted a mutual mistake, erroneous statements upon which [the Board] relied, or false or misleading information.
>
> 17. No reason under [N.C. Gen. Stat.] § 15A-544.5(b) to set aside the forfeitures in 11-CRS-51756 or 11-CRS-51758 actually existed, as Defendant was in fact not incarcerated at the time of his failure to appear.

These findings were supported by competent evidence in the record, including an affidavit by the Board's former attorney, Giovonni Wade, in which she provided the following information: in both of the 2012 motions to set aside the forfeiture, the Bail Agent checked the box indicating the Defendant was incarcerated at the time of the failure to appear; she "relied on the [B]ail [A]gent to provide truthful and accurate information to the court[;]" that "the VINELink pages appeared genuine[;]" and that she had "personal experience and knowledge of judges and attorneys in Wilson and Nash [C]ounties accepting and relying on the information provided by VINELink in bond forfeiture hearings." For these reasons, Wade did not object to the motions to

set aside the forfeiture in 2012. Wade further provided that "[h]ad I known or had reason to suspect that the VINELink pages provided by the bail agent were not electronic records of the state or that they contained false or fraudulent information, I certainly would have objected to the motions to set aside . . . and filed for sanctions against the bail agent . . . for providing fraudulent documentation to the court."

The trial court made pertinent findings of fact that support its conclusion that extraordinary circumstances exist and justice demands relief. The Bail Agent submitted erroneous information to both the Board and the trial court, denying the Board to opportunity to rightfully present its case in 2012. The Bail Agent's actions frustrated justice and allowed the Surety and Bail Agent to avoid the financial consequences of the bond forfeitures, which, had the truth been known, would not have been set aside. The trial court's determination that there were extraordinary circumstances justifying relief from the judgment and that justice demands relief was supported by the evidence and did not constitute an abuse of discretion.

Petitioners have failed to demonstrate that the trial court's decision to grant relief pursuant to Rule 60(b) was "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted). Accordingly, we hold that the trial court did not abuse its discretion in granting the Board's Rule 60(b) motion for relief.

II.

Petitioners argue that the trial court erred in determining it had the authority to apply Rule 60(b) to the 24 October 2012 judgments. Specifically, Petitioners challenge the trial court's conclusion of law that, pursuant to N.C. Gen. Stat. § 15A-544(b), there are no grounds justifying the set aside of the forfeitures in file numbers 11 CRS 51756 and 11 CRS 51758, as "clearly erroneous and not supported by the evidence." We disagree.

Section 15A-544.5(d) of the North Carolina General Statutes provides the procedure regarding motions to set aside forfeitures. N.C. Gen. Stat. § 15A-544.5(d) (2015). N.C. Gen. Stat. § 15A-544.5(d)(4) states that "[i]f neither the district attorney nor the attorney for the board of education has filed a written objection to the motion by the twentieth day after a copy of the motion is served by the moving party pursuant to Rule 5 of the Rules of Civil Procedure, the clerk shall enter an order setting aside the forfeiture, regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either."

Petitioners argue that the failure of the District Attorney and the Board to file written objections within twenty days following service of the motions to set aside the forfeitures in 2012 demonstrates conclusive grounds for the entry of the orders setting aside the forfeitures in those cases. We do not dispute this assertion; however, Petitioners do not offer any authority as to how the language of N.C. Gen. Stat. § 15A-

544.5(d)(4)—requiring entry of automatic judgment—renders the 24 October 2012 judgments invulnerable to relief under Rule 60(b).

This Court has recognized "that a bond forfeiture proceeding, while ancillary to the underlying criminal proceeding, is a civil matter." *State ex rel. Moore Cty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005). As such, Rule 60(b) of the North Carolina Rules of Civil Procedure applies. *See id.* (holding that "the Board properly proceeded by moving for a new trial or relief from order granting relief from forfeiture under Rules 59(a) and 60(b)").

We do not interpret the language of N.C. Gen. Stat. § 15A-544.5(d)(4) as barring the trial court from applying Rule 60(b) to the judgment after the fact and reject Petitioners' contrary assertion. We therefore hold that the trial court did not err in ruling on the merits on the 24 October 2012 judgments.

III.

Petitioners argue that the trial court erred in concluding, in the alternative, that even if the Board's Rule 60(b) motion had been denied, the bonds were subject to forfeiture due to Defendant's second failure to appear in September 2014. Because we affirm the trial court's ruling on the on the Rule 60(b) grounds, we need not address the additional, alternative bases for the court's order.

Conclusion

We hold that the trial court did not abuse its discretion in granting relief from the operation of the 24 October 2012 judgments pursuant to Rule 60(b) and, after granting relief, ruling on the merits on the judgments. Accordingly, we affirm the order of the trial court.

AFFIRMED.

Judges BRYANT and TYSON concur.

Report per Rule 30(e).