IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-232

Filed: 7 November 2017

Wilson County, No. 15 CVS 1694

MARSHALL B. PITTS, JR., Plaintiff,

v.

JOHN WAYNE TART; INVESTIGATIVE SOLUTIONS ISNC, LLC; JIMMY LAMAR HENLEY, JR.; and CRYSTAL NICOLE JUSTESEN, Defendants.

Appeal by Defendants from order entered 8 November 2016 by Judge J. Carlton Cole in Wilson County Superior Court. Heard in the Court of Appeals 7 September 2017.

Hairston Lane, P.A., by James E. Hairston, Jr., for the Plaintiff-Appellee.

Goldberg Segalla, LLP, by David L. Brown and Martha P. Brown; and The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr., for the Defendants-Appellants.

DILLON, Judge.

Defendants appeal from the trial court's order denying their Motion to Set Aside Entry of Default. After careful review, we reverse the order of the trial court.

I. Background

In August 2015, Plaintiff filed his Complaint in this action. In October 2015, before their Answer was due, Defendants filed a Motion to Dismiss the Complaint. Four months later, in mid-February 2016, the trial court entered an order granting in part and denying in part the Defendants' Motion to Dismiss. The order further stated that Defendants were to have until 29 February 2016 to file their Answer to Plaintiff's non-dismissed claims. Defendants, however, neglected to file their Answer before 29 February 2016.

On 24 March 2016, Plaintiff filed a Motion for Entry of Default against Defendants with the Clerk of Court. That same day, the Clerk entered default against all Defendants.

On 1 April 2016, thirty-two (32) days after their Answer was due, Defendants received notice of the entry of default. That same day, after receiving the notice of the entry of default, Defendants faxed their Answer to Plaintiff. The following business day (4 April 2016), Defendants filed their Answer with the court along with their Motion to Set Aside Entry of Default.

Seven months later, in November 2016, the trial court entered its Order denying Defendants' Motion and certified the issue for immediate appeal pursuant to Rule 54(b) of our Rules of Civil Procedure. Defendants appealed.

II. Jurisdiction

The trial court's Order denying Defendant's Motion to Set Aside Entry of Default is interlocutory. The trial court, though, certified this matter for immediate appeal pursuant to Rule 54(b) of our Rules of Civil Procedure. However, Rule 54 does not apply since the order from which Defendants appeal is not a "final judgment as to one or more but fewer than all . . . claims or parties," but rather it is merely an order denying a motion to set aside an entry of default. N.C. Gen. Stat. § 1A-1, Rule 54(b); *see Pendley v. Ayers*, 45 N.C. App. 692, 694, 263 S.E.2d 833, 834 (1980) ("An entry of default is not a final order or a final judgment.").

Notwithstanding, in the interest of judicial economy, we exercise our discretion to treat Defendants' attempted appeal as a petition for writ of *certiorari*; and we issue such writ in order to consider the merits of the appeal. *See Bailey v. Gooding*, 301 N.C. 205, 210-11, 270 S.E.2d 431, 434 (1980) ("We recognize the discretionary authority of the Court of Appeals to treat a purported appeal as a petition for writ of certiorari and to issue its writ in order to consider the appeal.")

III. Analysis

We review a trial court's denial of a motion to set aside entry of default for an abuse of discretion. *Auto. Equip. Distributors, Inc. v. Petroleum Equip. & Serv., Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896 (1987). In exercising its discretion, the trial court should be guided by the consideration that default judgments are disfavored by the law and that "any doubt should be resolved in favor of setting aside

an entry of default so that the case may be decided on its merits." *Peebles v. Moore*, 48 N.C. App. 497, 504-05, 269 S.E.2d 694, 698 (1980).

The trial court may set aside an entry of default upon a showing by the moving party of "good cause." N.C. Gen. Stat. § 1A-1, Rule 55(d) (2015); *Byrd v. Mortensen*, 308 N.C. 536, 539, 302 S.E.2d 809, 812 (1983). "Good cause" under Rule 55 is a lower standard than the "excusable neglect" standard which a defendant must satisfy to justify the setting aside of a default judgment under Rule 60(b). *See Whaley v. Rhodes*, 10 N.C. App. 109, 111-12, 177 S.E.2d 735, 737 (1970). That is, an entry of default may be set aside under Rule 55 even if the neglect by the defendant in filing an answer on time was not technically "excusable" neglect, "particularly where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant." *Peebles*, 48 N.C. App. at 504, 269 S.E.2d at 698 (internal citations omitted).

The trial court determined that Defendants failed to meet their burden of showing that good cause existed. In making its determination, the trial court applied the three factors found in *Luke v. Omega Consulting*: (1) whether the defendant was diligent in pursuing the matter; (2) whether the plaintiff suffered any harm by virtue of the delay; and (3) whether the defendant would suffer grave injustice by being unable to defend the action. *Luke v. Omega Consulting Group, LLC*, 94 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009). This is a close case; however, for the reasons

stated below, we follow our decision in *Peebles* and similar cases to conclude that the trial court abused its discretion in this case.

In *Peebles*, our Court reversed a trial court's denial of a defendant's motion to set aside a default where the facts showed that the defendant had hired an attorney; the attorney missed the deadline to file the answer through inadvertence which was not excusable; the inadvertence, however, was that of the defendant's insurer and *not* that of the defendant himself; the answer was filed promptly upon discovery of the mistake; and the short delay did not prejudice the plaintiff beyond the fact that the plaintiff had to endure a short delay and had to prosecute his claim. *Peebles*, 48 N.C. App. at 507, 269 S.E.2d at 700. Like in *Peebles,* in the present case, the trial court's findings show that Defendants hired an attorney soon after being served with the Complaint; Defendants' attorney made an appearance almost immediately; Defendants' attorney missed the deadline to file the Answer by thirty-two (32) days; that upon being made aware of the inadvertence by Plaintiff's counsel, Defendants' counsel faxed the Answer to Plaintiff's counsel and filed the Answer the next business day; and that Plaintiff has not been prejudiced *due to the thirty-two (32) day delay* beyond having to endure the short delay.

We do not believe that the trial court accurately applied the three factors that it cited in the order. For instance, in determining that Defendants were not diligent in pursuing the matter, the trial court essentially penalized Defendants for exercising

their right under Rule 12 to seek dismissal of the Complaint before filing their Answer. The trial court based its conclusion on the *eight-month* gap between the filing of the Complaint (in August 2015) and the time Defendants filed their Answer (in April 2016), rather than on the mere *thirty-two (32)* gap between the deadline and Defendants' service of the Answer. As the trial court found, the Answer was not due until shortly after the trial court ruled on Defendants' Rule 12 motion to dismiss. There is nothing in the findings or the record to indicate that Defendants filed their Rule 12 motion in bad faith, or that the motion was without merit. Rather, the trial court found that the Motion was partially meritorious, noting that Defendants' Rule 12 motion was allowed in part.

Regarding the second factor, the trial court's only basis in determining that the Plaintiff had suffered harm due to Defendants' failure to meet the deadline is "the substantial delay of [Plaintiff's] right to present his claims in this case." However, it appears that the trial court inappropriately relied upon the eight-month gap in determining that a "substantial delay" had occurred, rather than the thirty-two (32) day delay. Further, the trial court did not find that Plaintiff suffered any other harm by virtue of the delay. For instance, there is no indication that a witness died, evidence was lost, or that the thirty-two (32) day delay would have otherwise made any difference in Plaintiff's ability to present his claims.

Lastly, the trial court stated that Defendants would suffer no injustice by the trial court's refusal to allow them to defend against Plaintiff's allegations because "there is no evidence of any diligence by any of the Defendants regarding the timely filing of their respective answers to Plaintiff's complaint." We believe, though, that there is evidence that Defendant was diligent and was not otherwise dilatory. They hired counsel almost immediately. They clearly participated with their counsel during the course of litigation, as evidenced by their partial success on the Rule 12 motion to dismiss. There is nothing in the record evidencing that Defendants, themselves, knew of the February 29 deadline to file the Answer when the trial court set the deadline in mid-February in its order allowing in part Defendants' Rule 12 motion. It appears that Defendants provided their counsel with the information necessary to prepare the Answer, because their counsel served the Answer immediately upon being alerted by Plaintiff's counsel of the missed deadline. It is clear that the default would do an injustice to Defendants by stripping them of their ability to defend against Plaintiff's claims.

As in *Peebles*, we conclude that "the [short] delay in answer did not prejudice [P]laintiff, and it appears that allowing default here would do an injustice to [D]efendant[s]. In light of the general disfavor toward default, we find that the trial court abused its discretion in failing to set aside default, and we believe that justice

will best be served by allowing this case to be tried on its merits." *Peebles*, 48 N.C. App. at 507, 269 S.E.2d at 700.

REVERSED and REMANDED.

Judges HUNTER, JR., and ARROWOOD concur.

Report per Rule 30(e).