IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-842

Filed: 6 February 2018

Mecklenburg County, No. 16 CVS 3222

BRANCH BANKING AND TRUST COMPANY, Plaintiff,

v.

JAMES WILLIAM SURANE and wife, KIMBERLY R. THAXTON, Defendants.

Appeal by defendant from order entered 2 March 2017 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 November 2017.

*Blanco Tackabery & Matamoros, P.A., by Ashley S. Rusher and M. Rachael Dimont, for plaintiff-appellee.*

*James W. Surane for defendant-appellant.*

DIETZ, Judge.

Defendant Kimberly Thaxton appeals from the trial court's order denying her motion to set aside a judgment under Rule 60(b)(4) and Rule 60(b)(6) of the Rules of Civil Procedure.

The trial court entered judgment against Thaxton in accordance with a confession of judgment she executed as part of a settlement agreement. As explained

below, although Thaxton contends that she has a meritorious affirmative defense to the underlying claims against her, she has not shown either that the trial court lacked jurisdiction to enter the judgment or that denying her motion to set aside that judgment was arbitrary and resulted in a substantial miscarriage of justice. Accordingly, we affirm the trial court's order denying Thaxton's Rule 60(b) motion.

**Facts and Procedural History**

In 2008, Kimberly Thaxton's husband, James Surane, obtained a loan from BB&T for $1,058,000. The loan was secured by a promissory note executed by Surane and a deed of trust executed by Surane and Thaxton. As additional security for the loan, Thaxton also executed a guaranty agreement covering all amounts owed by Surane under the promissory note.

Surane later defaulted on the note and BB&T commenced foreclosure proceedings on the property under the deed of trust. Surane sued BB&T in 2010 but was unable to stop the foreclosure. The proceeds from the foreclosure sale of the property did not cover the remaining balance on the note and BB&T then sued Surane and Thaxton to collect the remaining balance.

After discovery, mediation, and settlement discussions, the parties ultimately settled the dispute. The settlement agreement provided that "[t]he parties herein wish to resolve all disputes between them arising out of" the 2008 loan, the property under the 2008 deed of trust, Surane's lawsuit against BB&T, and BB&T's deficiency

lawsuit. The release provided that Thaxton "shall hereby release, acquit and forever discharge BB&T . . . of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever . . . on account of or in any way arising out of the Loan, the Property, or the above-referenced lawsuits." As part of the settlement agreement, Surane and Thaxton also executed a confession of judgment to BB&T in the amount of $607,453.31 plus interest.

Surane and Thaxton later defaulted on the terms of the settlement agreement and BB&T filed the confession of judgment with the Mecklenburg County Clerk of Superior Court. The clerk entered judgment against Surane and Thaxton, jointly and severally, in the amount of $799,359.23.

On 16 February 2017, Thaxton moved to set aside that judgment under Rule 60(b)(4) and Rule 60(b)(6) on the ground that the judgment, with respect to her, was void for illegality and contrary to public policy because the guaranty agreement she signed was obtained in violation of federal and state law.

Following a hearing, the trial court entered an order on 2 March 2017 denying Thaxton's Rule 60(b) motion. Thaxton timely appealed.

**Analysis**

Thaxton argues that the trial court erred in denying her motion to set aside the judgment under Rule 60(b)(4) and Rule 60(b)(6). She contends that the guaranty

agreement she signed was illegal because the bank imposed that agreement as a condition of a loan to her husband based on their marital status, in violation of state and federal discrimination laws. As explained below, the trial court did not abuse its discretion in denying relief under Rule 60.

"[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). "Abuse of discretion is shown when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Brown v. Foremost Affiliated Ins. Servs., Inc.*, 158 N.C. App. 727, 732, 582 S.E.2d 335, 339 (2003).

Thaxton first contends that she was entitled to relief under Rule 60(b)(4) because the judgment is void for illegality. Under Rule 60(b)(4), "[a] judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered." *Hillard v. Hillard*, 223 N.C. App. 20, 22, 733 S.E.2d 176, 179 (2012). "A Rule 60(b)(4) motion is only proper where a judgment is 'void' as that term is defined by the law. A judgment will not be deemed void merely for an error in law, fact, or procedure." *Ottway Burton, P.A. v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992).

Here, Thaxton does not argue that the trial court lacked jurisdiction—that is, that the trial court lacked the power to enter a judgment enforcing the settlement agreement. Thaxton instead argues that the bank's demand that she guarantee the loan to her husband was unlawful and that "a guarantor-spouse may use a bank's violation [of the applicable state and federal laws] as an affirmative defense."

The existence of this allegedly meritorious affirmative defense is not a basis to set aside a judgment under Rule 60(b)(4). Indeed, our Supreme Court recently held that this precise affirmative defense may be waived by litigants—which confirms that it is not a jurisdictional issue that renders any corresponding judgment void. *RL Regi North Carolina, LLC v. Lighthouse Cove*, LLC, 367 N.C. 425, 428, 762 S.E.2d 188, 190 (2014).

Simply put, although the affirmative defense on which Thaxton relies might have allowed her to prevail had she litigated the underlying contract dispute, it did not deprive the trial court of jurisdiction to enter a judgment enforcing the parties' settlement agreement. Accordingly, the trial court did not abuse its discretion in rejecting Thaxton's Rule 60(b)(4) argument.

Thaxton next argues that the trial court should have set aside the judgment under the catch-all provision in Rule 60(b)(6). Under Rule 60(b)(6), "a judgment may be set aside for any reason justifying relief from the operation of the judgment." *Piedmont Rebar, Inc. v. Sun Constr., Inc.*, 150 N.C. App. 573, 575, 564 S.E.2d 281,

283 (2002). "Rule 60(b)(6) is equitable in nature and permits a trial judge to exercise his [or her] discretion in granting or withholding the desired relief. As such, the trial judge's ruling may be reversed on appeal only upon a showing that the decision results in a substantial miscarriage of justice." *Id.* (citations omitted).

Here, rather than litigating the bank's underlying claim and asserting the affirmative defense that she contends was meritorious, Thaxton settled the dispute and signed a binding settlement agreement and corresponding confession of judgment. Thaxton later breached the terms of that settlement agreement and the trial court entered a judgment based on Thaxton's confession of judgment. The trial court's decision not to set aside that judgment under the catch-all provision in Rule 60(b)(6) was the product of a reasoned decision and was neither arbitrary nor a substantial miscarriage of justice. Accordingly, we find no abuse of discretion in the trial court's decision and affirm the trial court's order.

**Conclusion**

For the reasons discussed above, we affirm the trial court's order denying Thaxton's Rule 60(b) motion.

AFFIRMED.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).