IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-221

Filed: 2 October 2018

Bladen County, No. 15 CVS 108

DENISE GUIDOTTI, Plaintiff,

v.

DONALD MAC MOORE, SR., Defendant.

Appeal by plaintiff from orders entered 21 July 2015 and 11 September 2017 by Judge James Gregory Bell and Edwin G. Wilson, Jr., respectively, in Bladen County Superior Court. Heard in the Court of Appeals 4 September 2018.

*Denise Guidotti, pro se, for plaintiff-appellant.*

*Alan I. Maynard, for defendant-appellee.*

ARROWOOD, Judge.

Denise Guidotti ("plaintiff") appeals from an order granting Donald Mac Moore, Sr. ("defendant")'s motions to set aside entry of default, default judgment, and extension of answer times, and an order dismissing plaintiff's complaint. For the reasons stated herein, we affirm.

## I. Background

Plaintiff previously commenced two other actions against defendant. She filed the first case, 12 CVD 7709, in Cumberland County in 2012, seeking over $10,000.00 in damages against defendant, defendant's son, and defendant's business, All Vinyl Siding and Windows. The complaint alleged: (1) civil conversion, (2) account/unjust enrichment, (3) unfair and deceptive trade practices, (4) demand for punitive damages, (5) injunctive relief, and (6) breach of contract as causes of action based on plaintiff's June 2011 contract with defendant for home repairs at 371 and 375 Woodberry Circle, and 4600 Strathmore Drive, and her dissatisfaction with the repairs. The case resulted in an arbitration award entered against defendant's company, awarding plaintiff $5,100.00.

Plaintiff filed the second case, 14 CVD 440, against defendant in Bladen County in 2014 based on plaintiff's dissatisfaction with the home repairs defendant made at 371 and 375 Woodberry Circle, and 4600 Strathmore Drive, in June 2011.[1] The complaint alleged: (1) unjust enrichment or breach of contract, (2) fraud, (3) unfair and deceptive acts and practices, (4) conversion, (5) negligence, and (6) intentional infliction of emotional distress as causes of action. The parties reached a settlement in the amount of $7,500.00, with a consent judgment specifying the settlement entered on 4 March 2015.

[1] Although plaintiff's brief on appeal argues that the complaint only includes 371 Woodberry Circle, the complaint itself makes allegations related to a contract for repairs at 375 Woodberry Circle and 4600 Strathmore Drive.

On 27 February 2015, plaintiff filed the instant suit against defendant, seeking over $25,001.00 in damages related to plaintiff's dissatisfaction with home repairs at 371 and 375 Woodberry Circle and 4600 Strathmore Drive in June 2011.[2] The complaint alleged nine claims for relief: (1) unjust enrichment or breach of contract, (2) fraud, (3) unfair and deceptive acts and practices, (4) conversion, (5) intentional infliction of emotional distress, (6) violation of Chapter 75D, the North Carolina Racketeer Influenced and Corrupt Organizations Act ("NC RICO"), (7) civil conspiracy, (8) constructive trust, and (9) negligence.

On 18 March 2015, the summons and complaint were served on defendant's wife. Defendant asked his son to have the complaint reviewed by an attorney. Within the thirty day answer period, an attorney who was familiar with the prior actions between the parties reviewed the papers. The attorney told defendant's son that it appeared to be "double jeopardy." Defendant interpreted this statement to mean that he did not need to take action or respond to the complaint.

After no response from defendant, plaintiff filed a motion for entry of default on 20 April 2015. The Clerk of Bladen County Superior Court entered default against defendant that same day. On 8 May 2015, plaintiff moved for default judgment. The motion came on for hearing on 18 May 2015 before the Honorable James Gregory

[2] Although plaintiff's brief on appeal argues that the complaint only includes 375 Woodberry Circle and 4600 Strathmore Drive, the complaint itself also includes allegations related to 371 Woodberry Circle.

Bell. Defendant was not served with the motion for entry of default, the entry of default, the motion for default judgment, the calendar request, the trial calendar, or the notice of hearing.

On 26 May 2015, default judgment was entered against defendant, awarding plaintiff $59,305.00 in damages and $10,800.00 in attorney's fees. Defendant only became aware of further action in the case when he received the default judgment in the mail in late May or early June 2015.

On 16 June 2015, defendant moved to set aside the entry of default and default judgment, and to extend answer times. The matter came on for hearing before the Honorable James Gregory Bell on 29 June 2015. On 21 July 2015, the trial court entered an order setting aside the entry of default, default judgment, and extending answer times. Plaintiff filed a motion for relief from or rehearing of the order setting aside judgment and entry of default. Defendant responded on 10 August 2015. The trial court denied plaintiff's motion for relief on 27 August 2015.

On 2 September 2015, defendant answered plaintiff's complaint. In his answer, defendant moved that the complaint be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because the claims were barred by *res judicata*, collateral estoppel, and the relevant statutes of limitation. On 11 September 2017, the trial court dismissed plaintiff's complaint pursuant to Rule 12(b)(6).

Plaintiff appeals.

## II. Discussion

Plaintiff argues on appeal that the trial court erred by setting aside the default judgment, and dismissing her complaint. We address each argument in turn.

### A. Default

Plaintiff first argues that the trial court erred in setting aside the default judgment. We disagree.

"Default is a two-step process requiring (i) the entry of default and (ii) the subsequent entry of a default judgment." *Coastal Fed. Credit Union v. Falls*, 217 N.C. App. 100, 108, 718 S.E.2d 192, 197 (2011) (alteration, citation, and internal quotation marks omitted). Rule 55(d) of the North Carolina Rules of Civil Procedure provides that a default judgment may be set aside "in accordance with Rule 60(b)." N.C. Gen. Stat. § 1A-1, Rule 55(d) (2017).

Rule 60(b) of the North Carolina Rules of Civil Procedure states, "[o]n 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 . . . [m]istake, inadvertence, surprise, or excusable neglect." N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2017).

> [W]hat constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case. Excusable neglect must have occurred at or

> before entry of judgment and must be the cause of the default judgment being entered.

*Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 555 (1986) (citations omitted). The party moving for relief must also show that it "has a meritorious defense." *Id.* at 424, 349 S.E.2d at 554 (citations omitted). "The decision to set aside a judgment under Rule 60(b)(1) is a matter within the trial court's discretion." *Scoggins v. Jacobs*, 169 N.C. App. 411, 413, 610 S.E.2d 428, 431 (2005) (citations omitted).

Here, defendant asked his son to have an attorney review the complaint. Within the answer period, an attorney familiar with the prior actions between the parties reviewed the complaint and summons at defendant's son's request. The attorney told defendant's son it appeared to be "double jeopardy," which defendant interpreted to mean he did not need to take action. Defendant alleges that his misunderstanding of the attorney's advice caused the default judgment to be entered against him. Once he realized his mistake, defendant retained an attorney and responded to the action.

Given the prior actions between the parties involving the same subject matter and the attorney's statement to defendant's son, it was not unreasonable for defendant to rely on his understanding of the attorney's advice. Therefore, defendant's actions constitute excusable neglect.

We now turn to whether defendant demonstrated "that he has a meritorious defense." *McInnis*, 318 N.C. at 424, 349 S.E.2d at 554 (citations omitted). Here, the trial court found that defendant forecasted meritorious defenses, including: statutes of limitation, *res judicata*, and collateral estoppel.

We agree with defendant that statutes of limitation constitute a meritorious defense. According to plaintiff's complaint, the contract was signed and defendant's work was completed in June 2011. Around the same time, plaintiff became aware of alleged defects in the work, which were immediately apparent. As a result, the three-year statute of limitations barring plaintiff's unjust enrichment or breach of contract, fraud, conversion, intentional infliction of emotional distress, constructive trust, and negligence claims began to run in June 2011, and plaintiff was required to file a complaint as to these claims by June 2014. *See* N.C. Gen. Stat. § 1-52 (2017). Although plaintiff argues she reserved certain claims during the 14 CVD 440 settlement to be brought at a later time, that contention is without support in the record, and has no bearing on the statute of limitations.

We note that plaintiff also argues the statutes of limitation did not begin to run until April 2014, when she became aware of the extent of the damages to the windows at 371 Woodberry Circle. We disagree. Although under N.C. Gen. Stat. § 1-52(16) a cause of action "shall not accrue until bodily harm to claimant or physical damage to his property becomes apparent or ought reasonably to have become

apparent to the claimant," this statute only delays "the accrual of a cause of action in the case of latent damages until the plaintiff is aware he has suffered damage, not until he is aware of the full extent of the damages suffered." *Pembee Mfg. Corp., Inc. v. Cape Fear Const. Co.*, 69 N.C. App. 505, 508-509, 317 S.E.2d 41, 43 (1984), *aff'd*, 313 N.C. 488, 329 S.E.2d 350 (1985).

Here, the complaint alleges that although it was immediately evident that defendant damaged the windows, it was not apparent the "lower edges had rotted right along with the sills" until April 2014. As these damages should have been reasonably apparent in late June 2011, and plaintiff took immediate issue with defendant's work on the windowsills, this argument is without merit. *See, e.g., id.* at 509, 317 S.E.2d at 43. Therefore, the trial court did not err in determining that the relevant statutes of limitations constitute a meritorious defense. We need not discuss whether the additional defenses defendant offered were meritorious, as one meritorious defense is sufficient for the purpose of relief pursuant to Rule 60(b)(1).

Thus, because defendant's failure to timely answer this suit constituted excusable neglect and defendant put forth a meritorious defense in his motion to set aside default judgment, the trial court did not err by setting aside the default judgment.

Nevertheless, plaintiff argues that we must vacate the order regardless of whether there were grounds to set the default judgment aside because the trial court

improperly obtained the order by emailing a proposed order to the judge without serving a copy on plaintiff in violation of Rule 3.5 of the North Carolina Rules of Professional Conduct. We are not convinced. Even assuming *arguendo* that a violation of the North Carolina Rules of Professional Conduct occurred as alleged by plaintiff, it would not constitute grounds to vacate the order. *See* N.C. Rev. R. Prof. Conduct 0.2[7] (2017). Thus, we affirm the trial court's order to set aside the default judgment.

B. Dismissal of the Complaint

Next, plaintiff argues the trial court erred by dismissing her complaint. We disagree.

The standard for review of a dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure "is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997) (citation and internal quotation marks omitted). We "conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

As previously discussed *infra*, six of plaintiff's claims, breach of contract, negligence, fraud, conversion, constructive trust, and intentional infliction of emotional distress, were barred by their respective statute of limitations. *See* N.C. Gen. Stat. § 1-52. Under N.C. Gen. Stat. § 1-52, plaintiff should have filed her complaint by June 2014 to proceed on these claims because the complaint alleges the repair contract at issue was signed and all work was completed in June 2011, and all claims ought to have been reasonably apparent by this time. Therefore, the trial court properly dismissed plaintiff's claims for breach of contract, negligence, fraud, conversion, constructive trust, and intentional infliction of emotional distress.

The trial court found separate grounds for dismissing the three claims not barred by statutes of limitation: civil conspiracy, unfair and deceptive trade practices, and violation of NC RICO. First, the trial court dismissed the claim for civil conspiracy because a claim for "Civil Conspiracy is not recognized as a separate claim for relief by North Carolina cases or statutes." Plaintiff does not contend this conclusion was error on appeal, thus we need not address the trial court's dismissal of this claim. Similarly, plaintiff does not argue the trial court's determination that plaintiff's complaint failed to allege a violation of NC RICO was erroneous. Accordingly, we also need not address the trial court's dismissal of the NC RICO claim.

Finally, the trial court properly dismissed the remaining claim, unfair and deceptive trade practices, which was barred by *res judicata*. "[U]nder *res judicata* . . ., a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *McInnis*, 318 N.C. at 428, 349 S.E.2d at 556. For this action to be barred by *res judicata*, defendant had to show the previous suit resulted in a final judgment on the merits, the same cause of action was involved, and plaintiff and defendant were either parties or stand in privity with the parties in the previous action. *Williams v. Peabody*, 217 N.C. App. 1, 5, 719 S.E.2d 88, 92 (2011). This "doctrine prevents the relitigation of all matters that were or should have been adjudicated in the prior action. *Id.* (citation, internal quotation marks, and ellipses omitted).

The trial court concluded defendant demonstrated that the requirements of *res judicata* bar the claim of unfair and deceptive trade practices because plaintiff filed a complaint against defendant for the same damages in 14 CVD 440, which ended in a final judgment. We agree. A close examination of the complaints reveals this case is an attempt by plaintiff to bring a second suit based on the same causes of action in 14 CVD 440, that being defendant's labor and conduct at 371 and 375 Woodberry Circle and 4600 Strathmore Drive in June 2011. Therefore, *res judicata* bars plaintiff's claim for unfair and deceptive trade practices as the claims in this action

are considered merged with the previous judgments pursuant to the doctrine of *res judicata*.

We need not address the trial court's conclusions with regard to collateral estoppel because the court's other grounds for dismissing plaintiff's claims demonstrated that each allegation of the complaint was insufficient to state a claim upon which relief may be granted. Therefore, the trial court did not err in dismissing plaintiff's complaint.

## III. Conclusion

For the reasons discussed, we affirm the trial court's order to set aside default judgment, and the order dismissing plaintiff's complaint.

AFFIRMED.

Judges BRYANT and HUNTER, JR. concur.

Report per Rule 30(e).