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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-862

Filed: 17 September 2019

Durham County, No. 16CVD3884

CHAD PERRY, Plaintiff,

v.

PHILLIP JACKSON, NEW BEGINNINGS OUTREACH CDC, and FIVE POINTS LOFTS, LLC, Defendants.

Appeal by Plaintiff from order entered 17 May 2018 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 7 August 2019.

Perry, Perry & Perry, P.A., by Robert T. Perry, for Plaintiff-Appellant.

Berman & Associates, by Gary K. Berman, for Defendant-Appellee.

DILLON, Judge.

Plaintiff Chad Perry appeals from the denial of his motion for post-judgment relief. We affirm.

I. Background

In July 2016, Plaintiff filed an unverified complaint against Defendants Phillip Jackson, New Beginnings Outreach CDC (“New Beginnings”), and Five Points Lofts, LLC (“Five Points”). In the complaint, Plaintiff alleged that Mr. Jackson, acting as

the agent of Five Points, entered into an oral contract with Plaintiff to remove a brick foundation and chimney from a property owned by Five Points for \$1,500. Plaintiff further alleged that he completed the work but that Mr. Jackson failed to compensate him after multiple requests.

Five Points answered, denying that it had any contractual or agency relationship with Jackson.

Some months later, in March 2018, Five Points moved for summary judgment, supporting its motion with an affidavit from Reynolds Maxwell, its sole member and manager. In his affidavit, Mr. Maxwell averred that Five Points' contract was with New Beginnings Outreach, a different corporation than Defendant New Beginnings Outreach CDC, and that Mr. Jackson was not and had never been an agent of Five Points.

Five Points' motion was set for hearing on 9 April 2018. However, Plaintiff did not respond to the motion, and neither Plaintiff nor his counsel was present at the hearing. The trial court concluded that there were no genuine issues of material fact and entered summary judgment in favor of Five Points.

Three weeks later, on 30 April 2018, Plaintiff filed a motion for relief from summary judgment ("the Rule 60(b) motion"). Plaintiff also provided an affidavit in which he averred the allegations in his complaint were true and that he had received a call from Mr. Maxwell, who indicated he would pay Plaintiff for the work he did.

Neither Plaintiff's motion nor his affidavit addressed the reason for his failure to attend the hearing on Five Points' motion for summary judgment.

But three days later, on 3 May 2018, Plaintiff's counsel filed an affidavit averring that he had recently suffered from a myriad of health and personal problems, which "hinder[ed his] ability to adequately conduct [his] personal and professional affairs."

On 16 May 2018, an arbitration award in favor of Plaintiff was entered against Mr. Jackson and New Beginnings. Plaintiff was awarded \$1,800 plus interest and costs. The trial court entered judgment based on the award on 25 June 2018.

The next day, on 17 May 2018, the trial court entered an order denying Plaintiff's Rule 60(b) motion. The court found that the evidence provided by Plaintiff "provides no ground for relief from the summary judgment." Plaintiff filed timely notice of appeal.

II. Analysis

Plaintiff argues that the trial court erred by denying his Rule 60(b) motion. We disagree.

"A trial court's ruling on a Rule 60(b) motion is reviewable only for an abuse of discretion. The trial court's findings of fact are conclusive on appeal, if supported by competent evidence. However, those conclusions of law made by the court are reviewable on appeal." *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611,

616 (1998) (citations omitted). “Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.” *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

While plaintiff’s motion does not identify a specific subsection of Rule 60(b) as the basis for the motion, on appeal he argues that he was entitled to relief based on Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. N.C. R. Civ. P. 60(b)(6) (“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.”). Setting aside a judgment pursuant to Rule 60(b)(6) should only occur when (1) extraordinary circumstances exist, and (2) there is a showing that justice demands it. *Huggins v. Hallmark Enters., Inc.*, 84 N.C. App. 15, 24-25, 351 S.E.2d 779, 785 (1987). The determination whether relief under Rule 60(b)(6) is warranted “is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought.” *Id.* at 25, 351 S.E.2d at 785 (internal quotation marks and citation omitted).

Plaintiff has not shown an abuse of discretion. In its order denying the Rule 60(b) motion, the trial court made unchallenged findings that Five Points’ attorney mailed a notice of the summary judgment hearing to Plaintiff’s counsel and that

neither Plaintiff nor his counsel attended the hearing or notified the court or opposing counsel that they would be absent. The court also found that Plaintiff's motion to set aside the judgment provided no grounds for vacating the summary judgment.

Neither of the affidavits submitted to the trial court in support of Plaintiff's Rule 60(b) motion addressed the alleged agency relationship between Jackson and Five Points. Although Plaintiff, for the first time, purported to verify the allegations in his complaint as part of his affidavit in support of the Rule 60(b) motion, the only allegations regarding agency in the complaint were made "upon information and belief." Such allegations are not considered competent evidence for purposes of summary judgment. *See Asheville Sports Props., LLC, v. City of Asheville*, 199 N.C. App. 341, 345, 683 S.E.2d 217, 220 (2009). Thus, Plaintiff never provided any competent evidence to refute Maxwell's affidavit averring that Jackson was never the agent of Five Points.

Plaintiff argues that he "should not be barred from relief of the summary judgment because extraordinary circumstances prevented his attorney . . . from making a court appearance the day of the hearing." However, given that Plaintiff has failed to forecast any competent evidence that would undermine the trial court's summary judgment decision, it does not appear his attorney's attendance at the summary judgment hearing would have altered the outcome. Under these

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circumstances, we find no abuse of discretion in the trial court's denial of Plaintiff's Rule 60(b) motion. The trial court's order is affirmed.

AFFIRMED.

Judges ZACHARY and BROOK concur.

Report per Rule 30(e).