IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-599

Filed: 7 July 2020

Lee County, No. 18CVS412

OM SHANKAR CORPORATION, Plaintiff,

v.

SAI DEVELOPERS, INC., Defendant.

Appeal by Defendant from orders entered 12 March 2019 by Judge Claire Hill in Superior Court, Lee County. Heard in the Court of Appeals 7 January 2020.

Elizabeth Myrick Boone and Eddie S. Winstead, III, for Plaintiff-Appellee.

Oak City Law LLP, by Samuel Pinero II, for Defendant-Appellant.

McGEE, Chief Judge.

SAI Developers, Inc. ("Defendant") appeals from an order granting OM Shankar Corporation's ("Plaintiff") motion for sanctions and an order compelling Defendant to pay Plaintiff attorney's fees. On appeal, Defendant argues that the trial court abused its discretion by entering default judgment in favor of Plaintiff in the amount of $73,360.08 based on an "irrelevant and erroneous finding of fact" and without conducting a hearing on damages. Additionally, Defendant contends that

the trial court erred by not considering less severe sanctions before striking Defendant's answer and entering default judgment. Plaintiff has filed a motion to dismiss Defendant's appeal from the attorney's fees order. We affirm the trial court's order granting Plaintiff's motion for sanctions and dismiss Defendant's appeal from the attorney's fees order.

I. Factual and Procedural Background

Plaintiff and Defendant entered into a construction contract (the "contract") on 18 April 2017 for Defendant to construct and install gasoline pumps, tanks, and a canopy on real property owned by Plaintiff in Sanford, North Carolina. Plaintiff agreed to pay Defendant $204,378.69 in installment payments; Defendant agreed to commence work on the project within 30 days of 18 April 2017 and to complete the project on or before 7 July 2017.

Defendant initially planned to install the gasoline pipes above ground; however, in July of 2017, Defendant discovered that installing above-ground tanks would violate the Unified Development Ordinance. The Lee County Planning Department approved the site for underground tanks by a letter dated 18 August 2017 and Defendant provided plans for the project to the Lee County Planning Department in December of 2017. The Planning Department issued a letter on 1 March 2018 "approving the conceptual design and plans for the project as being in compliance with the [Unified Development Ordinance]." Defendant, however, did not

seek to obtain a building permit from the Lee County Permit Office and took no further actions regarding its contractual obligations with Plaintiff.

Plaintiff mailed Defendant a letter (the "demand letter") on 23 March 2018 and advised Defendant "to consider this letter notification of termination of contract and a demand for the immediate payment to [Plaintiff] the sum of $73,360.08." The demand letter laid out the timeline agreed upon by the parties: Defendant had agreed to commence work within 30 days of 18 April 2017 and complete work on or before 7 July 2017; however, because Defendant recommended and sought permits for the installation of above ground tanks (which were ultimately denied), the construction start date had been moved to 17 July 2017. The demand letter noted that although approximately eight months had passed since the agreed-upon amended start date, "no work ha[d] been commenced at the project site." Defendant was advised in the demand letter to "cease any and all planning and work associated with this project immediately" and was provided a list of expenses, totaling $73,360.08, that Plaintiff had incurred "as a result of delays in the implementation of this contract[:]"

> 1) $45,000.00 paid May 23, 2017 to SAI Developers.
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> 2) $15,000.00 paid September 17, 2017 to SAI Developers.
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> 3) $475.00 paid to GSG Capital on May 19, 2017, for loan closing costs.
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> 4) $5,000.00 paid to E3 Acquisitions & Consulting, LLC, as consultants for obtaining funding for the project.

5) $7,885.08 in interest paid to US Bank since June, 2017.

Plaintiff filed a verified complaint (the "complaint") against Defendant on 9 May 2018 alleging breach of contract and money owed. Defendant filed a motion for extension of time to respond to the complaint and, by order entered 11 June 2018, the trial court granted Defendant's motion, extending the time for Defendant to respond to 11 July 2018. Defendant failed to file an answer or other responsive pleading and, as a result, Plaintiff filed a motion for entry of default, an affidavit in support of its motion for entry of default, and a motion for default judgment on 12 July 2018. On that same day, the Clerk of Superior Court, Lee County, entered default against Defendant pursuant to N.C. Gen. Stat. § 1A-1, Rule 55. Defendant filed a motion to set aside entry of default on 14 August 2018 based on "excusable neglect," and attached a "proposed answer." The trial court entered an order setting aside entry of default on 21 August 2018, finding that "good cause exists to set aside entry of default and that Plaintiff consents to the setting aside of the entry of default."

Defendant filed an answer approximately three months later, on 16 November 2018. In the answer, Defendant admitted it had received from Plaintiff $45,000.00 on 23 May 2017 and $15,000.00 on 17 September 2017. Plaintiff served Defendant with the first set of interrogatories and request for production of documents on 19 August 2018. The parties verbally agreed to extend Defendant's deadline for responding to discovery to 24 October 2018. Defendant failed to comply with the 24

October 2018 deadline and the parties made another verbal agreement to extend the discovery deadline for an additional thirty days. When the parties appeared in Superior Court, Lee County on 3 December 2018, Defendant still had not responded to Plaintiff's discovery requests. The trial court entered a consent order to compel on 6 December 2018, directing Defendant to respond to discovery within twenty days of the entry of the order and allowing Plaintiff to seek sanctions in the event Defendant failed to comply with the order.

Plaintiff filed a motion for sanctions (the "motion for sanctions") on 8 February 2019, outlining the history of its discovery requests and alleging that Defendant had not responded to the initial interrogatories and request for production of documents served 19 August 2018. Plaintiff further alleged that it had contacted Defendant's counsel "on several occasions" regarding discovery, "but ha[d] received no response." As a result, Plaintiff requested that the trial court order Defendant to pay Plaintiff reasonable expenses, including attorney's fees, and either strike Defendant's answer in its entirety or enter default judgment against Defendant.

Plaintiff's counsel received an email from Defendant's counsel containing answers to interrogatories on 22 February 2019. Two days later, at 11:40 p.m., Plaintiff alleged that it "received a stream of emails with attachments that were propounded as the responses to the Request for Production of Documents." Plaintiff's motion for sanctions came on for hearing on 25 February 2019 in Superior Court, Lee

County. After Plaintiff's counsel recited the history of the discovery proceedings, Defendant's counsel stated that he did not "have any disagreement with [Plaintiff's counsel's] recitation of the facts," but asked that the court "consider a lesser sanction than striking the answer." The trial court announced from the bench that it had considered lesser sanctions, that it was granting Plaintiff's motion to strike Defendant's answer in its entirety, and that it was rendering default judgment against Defendant. The trial court entered an order on 12 March 2019 (the "sanctions order") striking Defendant's answer, entering default judgment against Defendant in the amount of $73,360.08 as sought in Plaintiff's complaint, and ordering that Defendant pay the costs of the action. On that same day, the trial court entered an order requiring Defendant to pay Plaintiff $1,245.00 in attorney's fees (the "attorney's fees order"). Defendant filed a notice of appeal from the sanctions order and the attorney's fees order on 15 April 2019.

II. Motion to Dismiss

Plaintiff filed a motion to dismiss[1] Defendant's appeal from the attorney's fees order on 24 October 2019. Plaintiff argues that although Defendant filed notice of appeal from the attorney's fees order, Defendant has made no argument regarding attorney fees in its brief to this Court. Rule 28(a) of the North Carolina Rules of Appellate Procedure provides that "[i]ssues not presented and discussed in a party's

[1] Defendant did not file a response to Plaintiff's motion to dismiss.

brief are deemed abandoned." N.C. R. App. P. 28. Because Defendant has abandoned any argument regarding the attorney's fees order, we allow Plaintiff's motion to dismiss Defendant's appeal from the attorney's fees order.

III. Analysis

A. *Entry of Default Judgment*

Defendant argues that the trial court erred by entering default judgment against Defendant in the amount of $73,360.08 as a discovery sanction (1) without conducting an evidentiary hearing and (2) based on an "irrelevant and erroneous finding of fact." We disagree.

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(c) allows the trial court to sanction a party's failure to obey a court order to provide or permit discovery by various methods, including by entering "[a]n order striking out pleadings or parts thereof, or . . . rendering a judgment by default against the disobedient party[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(c) (2019). "A default judgment admits only the allegations contained within the complaint, and a defendant may still show that the complaint is insufficient to warrant plaintiff's recovery." *Hunter v. Spaulding*, 97 N.C. App. 372, 377, 388 S.E.2d 630, 634 (1990) (citation omitted). "Sanctions under Rule 37 are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion." *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995) (citation omitted).

In the present case, the trial court struck Defendant's answer, entered default judgment against Defendant in the amount of $73,360.08, and ordered Defendant to pay the costs of the action. In regard to the entry of default judgment, N.C. Gen. Stat. § 1A-1, Rule 55(b)(2) provides:

> *If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary* to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as[he] deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina.

N.C. Gen. Stat. § 1A-1, Rule 55(b)(2) (2019) (emphasis added). "As other jurisdictions have recognized, the rule embodies important concepts of due process, and due process requires adherence to the procedural safeguards of notice and hearing even when default is used as a Rule 37 sanction." *Hunter,* 97 N.C. App. at 380, 388 S.E.2d at 635. "Adher[ing] to the procedural safeguards of notice and hearing[,]" *id.*, this Court has explained that when default judgment is entered against a defendant as a discovery sanction, that defendant must "be afforded an opportunity to be heard on the question of punitive damages." *Id.* In contrast, however, "[c]ompensatory damages are demonstrable and capable of being alleged in a sum certain by a plaintiff" without a hearing on damages. *Id.* Thus, "[w]hen [a] plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be

made certain," N.C. Gen. Stat. § 1A–1, Rule 55(b)(1), a trial court "properly enter[s] judgment for the . . . [plaintiff] on [its] claim of compensatory damages[.]" *Hunter*, 97 N.C. App. at 380, 388 S.E.2d at 635–36 (citation omitted).

Plaintiff's complaint alleges claims for breach of contract and money owed, specifically alleging that Plaintiff "has made demand upon the Defendant for the payment in the amount of $73,360.08 together with ongoing interest, but the Defendant has failed and refused to pay the same." Regarding specific compensatory damages, Plaintiff alleges the following:

> 17. Subsequent to the execution of the contract, Plaintiff paid to the Defendant the sum of $45,000,00, which sum was paid on May 23, 2017.
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> 18. On September 17, 2017, Plaintiff paid an additional $15,000.00, according to the payments schedule, to the Defendant.
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> 19. That contemporaneously with the execution of the construction contract with the Defendant, the Plaintiff engaged the services of E3 Acquisitions and Consulting, LLC, of Birmingham, Alabama, for the purpose of assisting Plaintiff in obtaining financing for the cost of construction and installation of the gas pumps.
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> 20. That E3 Acquisitions and Consulting, LLC, was paid the sum of $5,000.00 for their assistance in locating funding for the project.
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> . . . .
>
> 22. That GSG Capital was paid $475.00 for loan closing cost in May, 2017.

> 23. That the $60,000 paid to Defendant was withdrawn from the US Bank account for which Plaintiff had paid interest to US Bank in the sum of $7,885.08 as of May, 23, 2018.

Thus, the total amount of damages alleged in the complaint equals $73,360.08 ($45,000.00 + $15,000.00 + $5,000.00 + $475.00 + $7885.08 = $73,360.08). Moreover, Plaintiff attached the contract and the demand letter as exhibits to the complaint and explicitly incorporated the documents by reference in the complaint.[2] Thus, because Plaintiff set out the specific damages totaling $73,360.08 in the complaint, and the complaint incorporates by reference the demand letter and the contract, a hearing on damages was *not necessary* "in order to enable the judge to enter judgment or to carry it into effect[.]" N.C. Gen. Stat. § 1A-1, Rule 55(b)(2).

Defendant also argues that "the trial court abused its discretion by entering judgment based on an irrelevant and erroneous finding of fact"—Finding of Fact #1—which states:

> That this is an action commenced by the Plaintiff by the filing of a Complaint on May 9, 2018, in the Superior Court of Lee County. The Plaintiff's causes of action were for breach of contract and money owed, with a total amount claimed to be owed by the Defendant to the Plaintiff of $73,360.08.

[2] Defendant asserts that "there is no contract in the record, in the file, attached to the complaint, or referred to by the Court." However, Plaintiff's complaint specifically provides that "[a] copy of said contract is attached hereto as Exhibit A and incorporated herein by reference" and the amended record on appeal contains the complaint, the construction contract (designated as Exhibit A), and the demand letter (designated as Exhibit B). Thus, we reject Defendant's assertion.

Finding of Fact #1 is supported by the complaint, the contract, and the demand letter. Defendant insists that Finding of Fact #1 is insufficient because "[a] conclusory allegation that [Plaintiff] asked for an arbitrary amount is not a sufficient measure of contract damages." However, Plaintiff's demand for $73,360.08 was *not* "arbitrary;" indeed, as discussed above, it was the sum of the damages explicitly alleged in the complaint. Moreover, the demand letter, attached as an exhibit to the complaint and incorporated therein, identified each specific expense incurred by Plaintiff in furtherance of the contract and noted that "[t]he total of the costs incurred by [Plaintiff] to date is $73,360.08." Thus, the trial court's award of $73,360.08 was not based on a "conclusory allegation."

Having determined that an evidentiary hearing on damages was not necessary in this particular case and that the sanctions order was not based on an erroneous finding of fact, we hold the trial court did not abuse its discretion in granting Plaintiff's motion for sanctions. The sanctions order contains numerous findings of fact detailing Defendant's lengthy history of evasive and dilatory techniques regarding discovery requests. Because Defendant does not challenge these findings of fact, they are binding on this Court. *See Tinkham v. Hall*, 47 N.C. App. 651, 652–53, 267 S.E.2d 588, 590 (1980) ("When findings of fact are not challenged by exceptions in the record, they are presumed to be supported by competent evidence

and are binding on appeal."). Thus, we hold the trial court did not abuse its discretion in entering default judgment in favor of Plaintiff in the amount of $73,360.08.

B. *Less Severe Sanctions*

Defendant argues that the trial court erred by not considering less severe sanctions before striking its answer and entering default judgment. We disagree.

Our Court has explained that "[e]ither the transcript of the hearing on the motion for sanctions or the court's order must indicate that the trial court considered a less severe sanction before dismissing a party's action." *Sigmon v. Johnston*, 214 N.C. App. 561, 714 S.E.2d 867 (2011). In the present case, at the hearing on Plaintiff's motion for sanctions, Defendant's counsel stated, "the court should consider lesser sanctions and only should consider striking the answer where it feels lesser sanctions wouldn't do, wouldn't work[.]" In response, the trial court stated from the bench,

> [a]ll right. In my discretion, considering all of the factors in this case, the timeline as set out by [Plaintiff's counsel], the lack of compliance by the defendant with all deadlines in this case, the court does order – court in its discretion will grant the motion of the plaintiffs [sic] to strike the defendant's answer in its entirety and render default judgment against the defendant. *The court has considered lesser sanctions and it does not appear that they would be sufficient in this matter, due to the non-compliance with all deadlines in this case.*

(Emphasis added). Thus, the transcript[3] indicates that the trial court considered less severe sanctions prior to striking Defendant's answer and entering default judgment.

IV. Conclusion

In sum, we hold that the trial court did not err by entering default judgment against Defendant in the amount of $73,360.08. Additionally, we hold that the trial court considered less severe sanctions before striking Defendant's answer and entering default judgment against Defendant. Finally, we allow Plaintiff's motion to dismiss Defendant's appeal from the attorney's fees order.

DISMISSED IN PART; AFFIRMED IN PART.

Judges DIETZ and YOUNG concur.

Report per Rule 30(e).

[3] Defendant argues that Plaintiff should be estopped from referencing the transcript from the sanctions hearing in its brief because Plaintiff objected to the transcript being used in the record on appeal. Although, prior to filing its brief on appeal, Plaintiff filed an objection to the inclusion of the transcript in the record based on Defendant's failure to comply with the North Carolina Rules of Appellate Procedure, Plaintiff filed a "motion to require transcript to be filed" on 8 October 2019. This Court dismissed the motion "without prejudice to counsel arranging with the court reporter to upload the transcript to this Court's e-filing site under COA19-599." The transcript has since been uploaded and is now included in the record on appeal. Rule 9 of the North Carolina Rules of Appellate Procedure provides that "[i]n appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9. Parties may cite any of these items in their briefs and arguments before the appellate courts." N.C. R. App. P. 9. Therefore, Plaintiff's initial objection to the transcript is of no consequence in light of the fact that the transcript has been uploaded and is now included in the record on appeal for this Court's review.