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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-555

Filed 16 April 2024

Forsyth County, No. 21 CVS 6163

LUXEYARD, INC., Plaintiff,

v.

ROBERT KLINEK, Defendant.

Appeal by Defendant from order and judgment entered 24 February 2023 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 15 November 2023.

*No brief filed for Plaintiff-Appellee.*

*Bell, Davis & Pitt, P.A., by Daniel C. Bruton, for Defendant-Appellant.*

GRIFFIN, Judge.

Defendant Robert Klinek appeals from an order and judgment entered by the trial court domesticating a prior judgment that Plaintiff Luxeyard, Inc., obtained in Texas. Defendant contends the trial court erred by denying his two pretrial motions to dismiss, which argued (1) Plaintiff failed to properly serve Defendant with a summons and complaint; and (2) the court lacked subject matter jurisdiction because

Plaintiff's corporate charter was revoked, and it therefore did not have capacity to sue. We hold the trial court erred in denying Defendant's first motion to dismiss because Plaintiff failed to properly serve Defendant.

### **I. Factual and Procedural Background**

Plaintiff is, purportedly, a corporation incorporated under and subject to Delaware corporate law. In August 2017, Plaintiff obtained a judgment against Defendant in a Texas trial court (the "Texas Judgment"). On 14 December 2021, Plaintiff filed a complaint against Defendant in Forsyth County Superior Court seeking domestication of the Texas Judgment. The Forsyth County Clerk of Court issued a summons in the matter on the same day. Plaintiff attempted to serve Defendant with a summons and complaint in the matter by certified mail with return receipt, as set out in Rule 4(j)(1)(c) of the North Carolina Rules of Civil Procedure.

On 8 February 2022, Defendant filed a motion to dismiss Plaintiff's complaint under rule 12(b)(5) of the North Carolina Rules of Civil Procedure (the "Service Motion"), arguing that he did not receive service and that neither he nor anyone else authorized ever signed a return receipt. On 15 February 2022, Plaintiff filed an affidavit of service claiming service was "in fact, received" by Defendant on 19 January 2022. Plaintiff attached a copy of the return receipt evidencing its certified mail to Defendant. The return receipt indicates that an "agent" named "Robert" received the certified mailing, but the signature box of the return receipt shows only "WJ 329 C19."

Plaintiff then filed a response to Defendant’s Service Motion on 7 March 2022. On 8 March 2022, following a hearing on the matter, the trial court entered an order denying Defendant’s Service Motion.

On 9 March 2022, Defendant filed a second motion to dismiss, asserting lack of capacity and subject matter jurisdiction (the “SMJ Motion”). On 1 April 2022, Plaintiff filed a response to the SMJ Motion, and Defendant filed a reply on 4 April 2022. On 19 April 2022, following a hearing, the trial court entered an order denying the SMJ Motion. Defendant then filed an answer to Plaintiff’s complaint on 16 May 2022.

On 30 January 2023, the trial court held a bench trial on the merits of Plaintiff’s complaint. On 24 February 2023, the trial court entered an order and judgment domesticating Plaintiff’s Texas Judgment against Defendant.

Plaintiff timely appeals.

## **II. Analysis**

Defendant argues the trial court erred by denying his two pretrial motions to dismiss Plaintiff’s claim. We hold the trial court erred by denying Defendant’s Service Motion, and therefore reverse the order and judgment.

Defendant’s Service Motion alleged that Plaintiff’s complaint should be dismissed pursuant to Rule 12(b)(5) because Plaintiff failed to properly serve Defendant with the summons and complaint in this action. Rule 12(b)(5) of the North Carolina Rules of Civil Procedure enables a party to move to dismiss an action for

“[i]nsufficiency of service of process.” N.C. R. Civ. P. 12(b)(5); *see Stewart v. Shipley*, 264 N.C. App. 241, 244, 825 S.E.2d 684, 686 (2019). “This Court reviews ‘questions of law implicated by . . . a motion to dismiss for insufficiency of service of process’ *de novo*.” *Patton v. Vogel*, 267 N.C. App. 254, 256, 833 S.E.2d 198, 201 (2019) (citation omitted). “[A] trial court is not required to make findings of fact in an order denying a motion to dismiss for insufficiency of process.” *New Hanover Cnty. Child Support Enf’t ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012) (citing N.C. Gen. Stat. § 52(a)(2) (2011)). When the court does not issue findings of fact, we presume that the judge found the facts necessary to support their judgment. *Id.*

“Jurisdiction over the person of a defendant is obtained by service of process upon him, by his voluntary appearance, or consent.” *Matter of M.L.C.*, 289 N.C. App. 313, 316, 889 S.E.2d 458, 460 (2023) (quoting *Hale v. Hale*, 73 N.C. App. 639, 641, 327 S.E.2d 252, 253 (1985)). “Rule 4 of the North Carolina Rules of Civil Procedure provides the methods of service of summons and complaint necessary to obtain personal jurisdiction over a defendant, and the rule is to be strictly enforced to insure that a defendant will receive actual notice of a claim against him.” *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) (citation omitted).

Rule 4(j)(1)(c) authorizes service to be made upon a natural person “[b]y mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the

addressee.” N.C. R. Civ. P. 4(j)(1)(c). Where such service is challenged, it may be proved by the manner described in N.C. Gen. Stat. § 1-75.10(a)(4):

(a) Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

...

(4) Service by Registered or Certified Mail. -- In the case of service by registered or certified mail, by affidavit of the serving party averring:

a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;

b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and

c. That the genuine receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10 (2021). “[A] person relying on the service of a notice by mail must show strict compliance with the requirements of the statute.” *Fulton v. Mickle*, 134 N.C. App. 620, 623, 518 S.E.2d 518, 521 (1999).

Here, the trial court denied Defendant’s motion after “considering all appropriate matters of record and the arguments of counsel,” but did not provide any further reasoning for its decision. We therefore presume the trial court found that Plaintiff presented sufficient evidence of Defendant’s genuine receipt of service or

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such other evidence showing actual notice. We disagree that the evidence was sufficient to support such findings.

Plaintiff's affidavit failed to prove service by registered or certified mail under section 1-75.10. The affidavit attested that Plaintiff addressed the mailing to Defendant's home address, and the return receipt purports to show that it was left at the same address. However, the receipt attached to the affidavit does not show Defendant received the mailing. The receipt indicates that Defendant's "agent" accepted the mailing on his behalf, but it does not contain an appropriate signature or state a helpful identification of Defendant's alleged agent. The signature box noted only: "WJ 329 C19"; and that it was "Received by . . . 'Robert'". The record does not indicate who "Robert" may be, apart from Defendant himself, and how Robert may be Defendant's agent.

During the trial court proceedings below, Plaintiff proposed that the "C19" portion of the "WJ 329 C19" notation was a reference to the Covid-19 pandemic. The notation was meant to signify that the postal worker elected to deliver the summons and complaint without human contact pursuant to the contactless Customer Signature Services procedures promulgated by the United States Postal Service in 2020, and which may have persisted into January 2022. Nonetheless, this practice cannot be held to comply with the purposeful practice of service under Rule 4(j)(1)(c).

Our Court has previously held service insufficient in cases where the signature line on the return receipt of registered or certified mailings does not reflect actual

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receipt by a natural person, either the addressee themselves or an authorized agent. See *Yves v. Tolentino*, 287 N.C. App. 688, 689, 884 S.E.2d 70, 71 (2023); *Hamilton v. Johnson*, 228 N.C. App. 372, 378–79, 747 S.E.2d 158, 162–63 (2013); see also *Scott v. Vural*, 288 N.C. App. 104, 883 S.E.2d 661, 2023 WL 2377787, \*2–\*3 (2023) (unpublished). We reach the same result here.

**III. Conclusion**

We hold that Plaintiff failed to show proper service of process of its summons and complaint upon Defendant. The trial court erred in denying Defendant’s Rule 12(b)(5) motion to dismiss.

REVERSED.

Judges MURPHY and STADING concur.

Report per Rule 30(e).