11CA2627 McDonald v. OneWest Bank 10-04-2012

COLORADO COURT OF APPEALS

Court of Appeals No. 11CA2627
Saguache County District Court No. 10CV6
Honorable Martin A. Gonzales, Judge

Bruce C. McDonald,

Plaintiff-Appellee,

v.

OneWest Bank, FSB; and Federal Home Loan Mortgage Corporation,

Defendants-Appellants.

ORDER AFFIRMED

Division V
Opinion by JUDGE MILLER
Fox and Ney*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced October 4, 2012

Lester, Sigmond, Rooney & Schwiesow, Erich Schwiesow, Alamosa, Colorado, for Plaintiff-Appellee

Akerman Senterfitt LLP, Victoria E. Edwards, Denver, Colorado, for Defendants-Appellants

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2012.

In this quiet title action, defendants, OneWest Bank (OneWest) and Federal Home Loan Mortgage Corporation (FHLMC), appeal the district court's order denying their motion to set aside a judgment entered by default in favor of plaintiff, Bruce C. McDonald. We conclude that the district court did not abuse its discretion in denying defendants' motion, and we affirm.

I. Background

This matter (the underlying action) is one of four separate proceedings in state and federal courts relating to efforts to foreclose on the property where plaintiff resides in Saguache County. Plaintiff filed the initial complaint in the underlying action against OneWest on March 3, 2010, seeking to invalidate an order authorizing a foreclosure sale of his property in a prior proceeding under C.R.C.P. 120. The public trustee sale was nevertheless held on March 4, 2010, and the property was sold to OneWest, who then transferred it to FHLMC. Although plaintiff filed and recorded a notice of lis pendens concerning the underlying action on March 8, 2010, he did not serve defendants with the amended complaint until September.

On June 29, 2010, FHLMC filed a complaint for forcible entry and detainer against plaintiff (FED action).

On July 22, 2010, plaintiff filed an action for damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, common law fraud, and other statutes in the United States District Court for the District of Colorado against OneWest and other unknown defendants (federal action). The federal action was dismissed for failure to state a claim in December 2010, and the Tenth Circuit Court of Appeals affirmed that dismissal in June of this year. *McDonald v. OneWest Bank*, 680 F.3d 1264 (10th Cir. 2012).

On September 10, 2010, plaintiff amended the complaint in the underlying action, adding FHLMC as a defendant, alleging that OneWest was not entitled to foreclose and did not convey good title to FHLMC, and requesting that the court quiet title to the property in him. Plaintiff served the amended complaint on FHLMC by personal service on its designated representative in Virginia on September 17, 2010 and on OneWest by personal service on its designated representative in California on September 27, 2010. Neither defendant had a registered agent in Colorado.

Meanwhile, the district court held a hearing in the FED action on September 17, 2010 to determine whether it should be stayed until the issue of ownership was resolved in the underlying action. At that hearing, plaintiff's counsel stated that the complaint in the underlying action had been recently amended and had been sent out for service. Plaintiff's counsel further stated that he was requesting that the FED action be stayed so that the underlying action could proceed. The status and nature of the federal case was also discussed.

Neither OneWest nor FHLMC timely responded to the amended complaint in the underlying action, and plaintiff filed a motion for entry of default on October 29, 2010 and a motion for entry of default judgment on November 1, 2010. The district court entered default and default judgment against both defendants and quieted title in the property, as among the three parties, in plaintiff on November 19, 2010. Plaintiff personally served defendants with notice of the default in December 2010.

Defendants filed no papers addressed to the default judgment until they filed a motion for relief pursuant to C.R.C.P. 60 on March 18, 2011. Following a hearing and supplemental briefing, the

district court denied the motion in a well-written order. Defendants then filed a motion for reconsideration pursuant to C.R.C.P. 59(a), which the district court summarily denied.

II. Analysis

On appeal, defendants argue that the district court erred in denying its motion for relief from the final judgment pursuant to C.R.C.P. 60(b)(2) and 60(b)(3). We are not persuaded.

Pursuant to C.R.C.P. 55(c), the court may set aside the entry of a default judgment in accordance with C.R.C.P. 60(b). The decision whether to set aside a default judgment is an equitable one. *Goodman Assocs., LLC v. WP Mountain Props., LLC*, 222 P.3d 310, 319 (Colo. 2010). The district court must "strike a balance between the 'preferred rule of finality of judgments' and the need to provide relief in the interests of justice in exceptional circumstances." *Se. Colo. Water Conservancy Dist. v. O'Neill*, 817 P.2d 500, 505 (Colo. 1991) (quoting *Cavanaugh v. State*, 644 P.2d 1, 5, (Colo. 1982)). Courts favor resolution of disputes on their merits, and the criteria for vacating a default judgment should be liberally construed in favor of the movant seeking to set aside a default judgment, especially when the motion has been promptly made.

Goodman, 222 P.3d at 320. The movant bears the burden of establishing the grounds for relief by clear and convincing evidence. *Id.* at 315.

B. C.R.C.P. 60(b)(2) Claims

Defendants argue that the district court abused its discretion in denying their motion for relief from the final judgment because the judgment was procured as the result of plaintiff's counsel's misconduct in (1) failing to warn defendants of the default and (2) violating his duties under C.R.C.P. 11. Defendants also argue that permitting plaintiff to quiet title to the property does not promote substantial justice. We are not persuaded.

Under C.R.C.P. 60(b)(2), the court may set aside a final judgment for fraud, misrepresentation, or other misconduct of an adverse party. It is not enough to merely establish the existence of misconduct to prevail under C.R.C.P. 60(b)(2); the movant must show that the alleged misconduct impaired the movant's ability to fairly and fully litigate a material issue in the case. *Aspen Skiing Co. v. Peer*, 804 P.2d 166, 173 (Colo. 1991); *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582, 604 (Colo. App. 2007). Thus, the

movant must prove a causal relationship between the alleged misconduct and the default.

We review a district court's decision to deny relief under C.R.C.P. 60(b)(2) for an abuse of discretion. *See Goodman*, 222 P.3d at 314. The district court abuses its discretion where its decision is manifestly arbitrary, unreasonable, or unfair. *Id.*

1. Failure to Warn of Default

We first reject defendants' contention that, because plaintiff's counsel allegedly acted unethically and in bad faith when he failed to warn defendants' counsel of the default, the district court abused its discretion in failing to grant defendants relief from that judgment.

The district court found that defendants were properly served in the manner provided for in C.R.C.P. 4 and that plaintiff's counsel informed FHLMC's counsel at the hearing on the FED action that he intended to pursue the underlying action and that the amended complaint was in the process of being served.[1] Where, as here,

[1] FHLMC and OneWest are jointly represented before this court and were jointly represented in the post-judgment proceedings in the district court in the underlying action. OneWest was not a party to the FED proceeding, and FHLMC was not a named defendant in the

defendants were properly served and plaintiff's counsel explicitly informed FHLMC's counsel that he intended to pursue the underlying action and that service of process was underway, we perceive no abuse of discretion in the district court's declining to set aside the default judgment on the basis of alleged misconduct of plaintiff's counsel.

Neither are we persuaded by defendants' argument, in reliance on California law, that we should recognize an ethical duty to warn opposing counsel in one proceeding of a default sought in another proceeding. The Colorado Supreme Court recently rejected a similar argument in *Goodman Associates*, 222 P.3d at 323. There, the defendant against whom a default judgment had been entered complained that, "aside from service [on the defendant's employee], [the plaintiff] failed to give any indication that this suit was instituted or that a default judgment was sought and granted." *Id.* The court observed that, as in this case, the plaintiff had forewarned the defendant that it would file suit and held that "notice of an application for default judgment is *only* required '[i]f

---

federal case. OneWest was represented in the federal action by the same counsel representing both defendants in these proceedings.

the party against whom judgment by default is sought has appeared in the action.'" *Id.* (emphasis added) (quoting C.R.C.P. 55(b)). Thus, because the defendant made no appearance, no notice was required. *Id.*

Similarly, we cannot conclude that defendants appeared in the underlying action for the purposes of C.R.C.P. 55(b). Although defendants argue that plaintiff and his counsel knew that OneWest and FHLMC were "zealously defending" the related cases, another division of this court has concluded that "[a] plaintiff's knowledge that a defendant intends to defend a lawsuit is, by itself, insufficient to constitute an 'appearance' under C.R.C.P. 55(b)." *Plaza del Lago Townhomes Ass'n v. Highwood Builders, LLC*, 148 P.3d 367, 370 (Colo. App. 2006). The division explained, "To be entitled to notice . . . it is essential that the defendant have somehow communicated with the court." *Id.* We agree with the *Plaza del Lago* division's reasoning, and, thus, defendants were not entitled to notice of the default pursuant to C.R.C.P. 55(b).

Accordingly, we conclude that the district court did not abuse its discretion in denying defendants' motion for relief from the final judgment based on plaintiff's counsel's alleged misconduct.

2. Failure to Comply with C.R.C.P. 11

We next reject defendants' contention that, because plaintiff's counsel violated C.R.C.P. 11(a) by allegedly misrepresenting both the facts and the law to obtain the default judgment, the district court abused its discretion in failing to grant defendants relief from that judgment.

Defendants did not raise this argument in their original motion for relief from the final judgment. That motion did not refer to C.R.C.P. 11 and asserted a single argument – that "[p]laintiff and his counsel misrepresented their efforts to serve OneWest and FHLMC, by failing to inform the Court they had not attempted to serve defendants' counsel in the federal case." However, defendants added several additional arguments in their reply brief, at the hearing on the motion, and in a supplemental brief submitted after the hearing.

The Rule 11 argument, however, was not raised until after the district court denied the motion for relief for judgment when defendants filed their motion to reconsider that ruling. Asserting an argument for the first time in a motion to reconsider a C.R.C.P. 60(b) motion – which is itself a type of motion to reconsider – does

not preserve the issue for appeal. *See Ogunwo v. Am. Nat'l Ins. Co.*, 936 P.2d 606, 611 (Colo. App. 1997) ("a court need not entertain new theories on a motion to reconsider following the grant of summary judgment"); *Flagstaff Enterprises Constr. Inc. v. Snow*, 908 P.2d 1183, 1185 (Colo. App. 1995) (court of appeals will not address arguments first raised in a reply brief in support of C.R.C.P. 59 motion and not addressed by the trial court); *see also Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 404 (7th Cir. 1986) ("a motion for reconsideration [of an order denying a motion to vacate a default judgment] is an improper vehicle to . . . tender new legal theories"); *Bob Blake Builders, Inc. v. Gramling*, 18 P.3d 859, 865 (Colo. App. 2001) (declining to consider an argument first raised in a post-trial motion that was not argued in the pleadings or at trial). We therefore decline to consider this issue.

3. Equities

Finally, we reject defendants' argument that permitting plaintiff to quiet title in his name does not promote substantial justice and that the district court abused its discretion in failing to consider the "equitable repercussions of its decisions when making its rulings."

Equitable considerations must be weighed when excusable neglect is the asserted ground for relief from a default judgment. *Goodman*, 222 P.3d at 319; *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112, 1116 (Colo. 1986); *Plaza del Lago*, 148 P.3d at 374. Here, however, defendants expressly disavow any reliance on excusable neglect and, as found by the district court, they failed to provide any evidence of excusable neglect. The district court therefore properly concluded that, although "some equity may favor the [d]efendants," it would not set aside the default judgment on an excusable neglect ground.

Assuming that equitable considerations also apply to a motion for relief from a default judgment under C.R.C.P. 60(b)(2), the district court was not obligated to reach such considerations here because, as discussed above, defendants failed to carry their burden of proving by clear and convincing evidence that plaintiff or his counsel engaged in misconduct. Nor have defendants presented any evidence that the alleged misconduct caused their defaults. Defendants point to no evidence in the record regarding the relevant circumstances surrounding their omitting to respond to the complaint. They submitted no affidavits or other evidence in

support of their motion for relief from the judgment explaining why they failed to respond or establishing reliance on any alleged misrepresentation or nondisclosure. Thus, defendants have failed to meet their burden of establishing these grounds for relief by clear and convincing evidence, and we conclude that the district court did not abuse its discretion in declining to find that the equities favor setting aside the default judgment in the interest of substantial justice.

C. C.R.C.P. 60(b)(3) Claim

Defendants contend that the default judgment was procedurally void because the district court failed to (1) require plaintiff to make proof of his claim pursuant to C.R.C.P. 55(f) and (2) make sufficient findings as to the basis for the court's decision to enter default judgment. We are not persuaded.

Pursuant to C.R.C.P. 60(b)(3), the court may set aside a final judgment that is void. A judgment is void where the court that rendered it lacked jurisdiction or acted in a manner inconsistent with due process of law. *First Nat'l Bank v. Fleisher*, 2 P.3d 706, 713 n.5 (Colo. 2000). Relief under C.R.C.P. 60(b)(3) is mandatory because a void judgment is a complete nullity from its inception

and without legal effect. *Id.* at 714. "A void judgment may be challenged at any time . . . and must be vacated upon request." *McGuire v. Champion Fence & Constr., Inc.*, 104 P.3d 327, 329 (Colo. App. 2004). Accordingly, we review de novo a district court's decision to deny relief under C.R.C.P. 60(b)(3). *Goodman*, 222 P.3d at 314; *First Nat'l Bank*, 2 P.3d at 714.

1. Proof of Plaintiff's Claim

Defendants rely on C.R.C.P. 55(f), under which the district court must "require proof to be made of the claim" before entering a default judgment in actions where service of the summons was by personal service out of state, and they argue that the district court failed to do so here. According to defendants, this failure violated their right to due process of law and the default judgment is thus procedurally void. However, defendants cite to no case – and we are aware of none – holding that a deviation from state procedural rules amounts to a violation of due process rendering the judgment void. To the contrary, federal courts have concluded that "[a] violation of state law . . . is not a denial of due process, even if the state law confers a procedural right." *Wallace v. Tilley*, 41 F.3d 296, 301 (7th Cir. 1994) (quoting *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir.

1993)); *see also Bills v. Henderson*, 631 F.2d 1287, 1299 (6th Cir. 1980) ("[E]very deviation from state procedures cannot be viewed as a federal constitutional violation.").

Here, plaintiff's motion for entry of default was supported by two affidavits, one of which sets forth in reasonable detail the facts supporting his claim that OneWest lacked an interest in the property at issue. (Contrary to defendants' contention, this affidavit was made by plaintiff, not his counsel.) The affidavits provide all of the information required by C.R.C.P. 121 § 1-14(1). While C.R.C.P 55(f) requires "proof to be made of the claim," it does not set forth any specific requirements. Defendants' quarrel with the degree of particularity of the affidavits amounts to a challenge to the sufficiency of the evidence, rather than a due process challenge.

We conclude that the proof submitted by plaintiff meets the requirements of C.R.C.P. 55(f) and 121 § 1-14(1) and that the judgment is not void for noncompliance with those rules.

2. Sufficiency of Findings

In reliance on *Norton v. Raymond*, 30 Colo. App. 338, 340, 491 P.2d 1403, 1404 (1971), defendants argue that it is "the duty of the trial court to make sufficient findings to enable the appellate court

to clearly understand the basis of the trial court's decision and to enable it to determine the ground on which it rendered its decision." According to defendants, because the district court's order granting plaintiff's motion for default judgment stated only that the court had reviewed the motion and the pleadings on file, found that venue was proper, and found that plaintiff's motion was "well taken," the judgment is procedurally void. We disagree for two reasons.

First, the circumstances in *Norton* differ significantly from those in this case. The complaint there contained only one claim for relief in a single sentence: "That the Defendant is indebted to the Plaintiff in the sum of $28,500, plus interest at the rate of 6% Per annum from October 26, 1967, upon a Colorado transaction." *Id.* at 339, 491 P.2d at 1404. The affidavit in support of the default consisted of

> basically a form statement to meet the requirements of the Soldiers' and Sailors' Civil Relief Act of 1940 . . . and had only one phrase relating to the plaintiff's claim for relief, which stated:
>
> > ". . . that there are no set offs, credits or counter claimed items in this action, and the amount owing, with interest is $30,210 to the date of judgment."

Id. at 340, 491 P.2d at 1404. By contrast, plaintiff's amended complaint in this case extends for six pages of factual allegations and assertions of claims and attaches numerous exhibits. Both the pleadings and the affidavits submitted in support of the default judgment provided much greater detail than the division had before it in *Norton*. The division there emphasized that effective review of the default judgment was made impossible because the dearth of evidence in the record at the time judgment was entered failed to provide "the basis of any appropriate findings." *Id.* at 341, 491 P.2d at 1404. Here, however, plaintiff's affidavit explains the theory of his claims and articulates supporting facts. The district court's finding that the motion for entry of default judgment "is well taken" must be read in light of that affidavit, as well as the pleadings, which the order states the court reviewed before ruling.

Second, the division in *Norton* did not describe the insufficiency of the findings in that case as a violation of due process, nor did it hold that the judgment was void. The words "due," "process," and "void" do not appear in the opinion. Defendants do not cite any other cases concluding that a default judgment denies due process or is void if the trial court's findings

are not more specific than those in the judgment here, read in light of the affidavits and pleadings, and we are aware of none.

Accordingly, defendants have not established a right to relief under C.R.C.P. 60(b)(3) based on a void judgment.

III. Attorney Fees

Plaintiff requests an award of attorney fees and double costs associated with this appeal under C.A.R. 38. Paragraph (d) of that rule provides that if an appeal is frivolous, the appellate court may award "just damages and single or double costs to the appellee," including attorney fees. *See Martin v. Essrig*, 277 P.3d 857, 862 (Colo. App. 2011). Plaintiff argues that the appeal is frivolous as filed, in that "the district court's judgment is so plainly correct and the legal authority so clearly against the appellant's position that there is really no appealable issue." *Id.*

However, a claim is not frivolous "if it is meritorious but merely unsuccessful; if it is a legitimate effort to establish a new theory of law; or if it is a good faith effort to extend, modify, or reverse existing law." *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 299 (Colo. App. 2009). We conclude that

defendants' arguments were not frivolous under this standard. Accordingly, plaintiff's request is denied.

The district court's order is affirmed.

JUDGE FOX and JUDGE NEY concur.