Cite as 2011 Ark. App. 498

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA11-65

GEORGE NICHOLAS STOKES II and GLOBAL GRAIN & EXPORT COMPANY, LLC
APPELLANTS

V.

MANGUM CONSTRUCTION COMPANY
APPELLEE

Opinion Delivered September 7, 2011

APPEAL FROM THE DESHA COUNTY CIRCUIT COURT
[NO. CV-10-69-1]

HONORABLE SAM POPE, JUDGE

REVERSED and DISMISSED

LARRY D. VAUGHT, Chief Judge

Appellant George Stokes argues a single point on appeal. He claims that the default judgment entered against him in favor of appellee Mangum Construction was void, and consequently, the circuit court erred in its failure to set aside the judgment. Following our de novo review of the issue, we find merit in Stokes's claim and reverse and dismiss the judgment.

The facts of this case are not in dispute. Mangum sued Stokes for breach of contract, and Stokes responded by filing (pro se) a "Petition Requesting Abatement Pending Completion of Administrative Process for Set-Off, Settlement and Closure." Mangum moved for default judgment, claiming that Stokes had failed to file an answer.

After the circuit court set the matter for a hearing, Stokes requested a continuance. The continuance was not granted. Stokes did not attend the hearing, and the circuit court found him in default. Based on the testimony presented at the hearing, the circuit court awarded

Mangum $19,900, prejudgment interest, and attorney's fees. The judgment was entered on August 27, 2010.

Stokes filed a petition to vacate the default judgment, claiming he did appear by filing the petition requesting abatement. Stokes also filed an amended motion alleging that service was defective. On October 26, 2010, Stokes filed a notice of appeal. Subsequently, an order for a hearing on his motion was entered on November 1, 2010, setting a hearing for February 28, 2011. On November 15, 2010, Stokes filed an amended notice of appeal, based on the assumption his motion was denied because it was not timely decided by ruling. On appeal, Stokes presents a compelling argument that the trial court erred in its refusal to set aside the default judgment because he was not properly served.

Whether a default judgment is void is a question of law involving no discretionary rulings by the circuit court. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004). In cases where the appellant claims a default judgment is void, we review the circuit court's ruling de novo. *Id.* at 118, 186 S.W.3d at 726. Stokes argues that the default judgment entered against him is void because service of summons was deficient. The clerk issued only one summons, and it was served by certified mail. Under the rules of civil procedure, when service is by certified mail, delivery must be restricted to the addressee or the agent of the addressee. Ark. R. Civ. P. 4(d)(8)(A)(i); *Id.* at 121, 186 S.W.3d at 729.

As reflected in the record of this case, the certified-mail "green card" attached to Mangum's affidavit of service affirmatively shows that delivery was not restricted to Stokes or his agent. In fact, the box requesting restricted delivery was not checked at all. Without a doubt, this omission violated the requirement of Rule 4 and invalidated service. *Wilburn v.*

Keenan Cos., Inc., 298 Ark. 461, 768 S.W.2d 531 (1989). According to the *Wilburn* case, the requirement that the "restricted delivery" box be checked must be strictly construed and the compliance must be exact. *Id.* at 462–63, 768 S.W.2d at 532. Our supreme court reasoned that resulting judgments are void ab initio when they are based on improper service. *Id.*, 768 S.W.2d at 532.

Although Mangum claims that it properly completed service, it fails to explain how the method by which it served Stokes was proper. Instead, Mangum argues that Stokes waived the issue of service by not raising it in his "Petition Requesting Abatement." However, this position is contrary to the holding in *Nucor v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

In *Nucor*, the plaintiffs obtained a default judgment and served a writ of garnishment on the defendant's bank. *Id.* at 114–17, 186 S.W.3d at 724–26. After receiving notice of the writ, the defendant filed a motion to strike it. *Id.* at 118–19, 186 S.W.3d at 726–27. In its motion, the defendant did not raise any Ark. R. Civ. P. 12(b) defenses or otherwise answer the allegations of the plaintiff's complaint. *Id.* at 119–20, 186 S.W.3d at 727. However, in a subsequent motion to vacate the judgment, Rule 12 (b) defenses were raised. *Id.*, 186 S.W.3d at 722. As such, Nucor argued (just as Mangum has) that the defenses were waived because they were not raised in the initial pleading in the case (the "original responsive pleading"). *Id.*, 186 S.W.3d at 724–27.

In deciding whether the defendant's original motion to strike had been an "original responsive pleading," the court noted that a responsive pleading is "a pleading that replies to an opponent's earlier pleading." *Id.* at 120, 186 S.W.3d at 727–28. It further noted that an

"Answer" is defined as "a defendant's first pleading that addresses the merits of the case, usually by denying plaintiff's allegations." *Id.* at 119–20, 186 S.W.3d at 727–28. The court held that the defendant's motion to strike the writ of garnishment was not a responsive pleading because it failed to address the merits of plaintiff's case. *Id.*, 186 S.W.3d at 727–28. Instead, the purpose of the motion was to prevent garnishment of the defendant's bank account, and as such the service-of-process argument had not been waived and could be addressed on its merits. *Id.*, 186 S.W.3d at 727–28.

Here, Stokes's petition for abatement was neither an answer nor a response to the merits of Mangum's breach-of-contract claim. Specifically, the motion asked the court "to abate all proceeding in the above numbered Case, pending completion of an administrative process to privately set-off, settle, and close all outstanding claims among the parties, thereby making any responses or hearing regarding the matter, at this time in the above named Court, moot."

In fact, Mangum concedes that Stokes failed to "answer" the complaint, when it stated in its motion for default judgment that Stokes had not answered the complaint and noted that Stokes had not denied any of the averments of the complaint. Additionally, at the hearing on the motion, Mangum's counsel stated:

> In looking through this petition, Your Honor, we don't believe this represents an answer as there is no prayer for relief, there is no denial or admitting of any facts or of any of the allegations contained in our complaint.

The trial court agreed.

As such, because Stokes's petition was not a responsive pleading that addressed the merits of the complaint, his service-of-process argument was not waived and, as a matter of

law, the default judgment is void.

Reversed and dismissed.

HART and GLOVER, JJ., agree.