Rel: March 1, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1171171

Ex parte Alvin Bhones and Diane Bhones

PETITION FOR WRIT OF MANDAMUS

(In re: Alvin Bhones and Diane Bhones

v.

Travis Shawn Peete and Beech Brook Companies, LLC)

(Limestone Circuit Court, CV-15-900053)

WISE, Justice.

Alvin Bhones and Diane Bhones, the plaintiffs below, filed a petition for a writ of mandamus requesting that this

Court order the Limestone Circuit Court to vacate its August 2, 2018, order setting aside the default judgment it had entered in their favor on March 21, 2018, against Travis Shawn Peete and Beech Brook Companies, LLC, the defendants below. We grant the petition and issue the writ.

Facts and Procedural History

On February 12, 2015, the Bhoneses sued Beech Brook and Peete, the sole member of Beech Brook, based on their allegedly defective construction of the Bhoneses' new home. The complaint stated claims of breach of contract, breach of warranty, fraud, fraudulent misrepresentation, and negligence. The complaint was served on the defendants on February 19, 2015, but they did not file an answer. On March 13, 2018, the Bhoneses moved for a default judgment. On March 21, 2018, the trial court entered a default judgment in favor of the Bhoneses.

On May 22, 2018, the defendants filed a motion to set aside the default judgment pursuant to Rule 60(b)(1) and (6), Ala. R. Civ. P. On July 31, 2018, the Bhoneses file a response in opposition to that motion. On August 1, 2018, the

defendants filed an affidavit in support of the motion to set aside the default judgment.

On August 2, 2018, the trial court conducted a hearing on the motion and response and, afterward, entered an order setting aside the default judgment. This mandamus petition followed.

Standard of Review

"'Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.'" Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309-10 (Ala. 2003) (quoting Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)).

> "'A petition for the writ of mandamus is a proper method for attacking the grant of a Rule 60(b) motion.' Ex parte A & B Transp., Inc., 8 So. 3d 924, 931 (Ala. 2007). 'In general, the decision whether to grant or to deny a postjudgment motion filed pursuant to ... Rule 60 is within the sound discretion of the trial court, and the exercise of that discretion will not be disturbed ... unless the trial court [exceeded] its discretion.' Comalander v. Spottswood, 846 So. 2d 1086, 1090 (Ala. 2002). However, '[a] party seeking relief must both allege and prove one of the grounds set forth in Rule 60 in

> order to be granted relief under that rule.' Ex parte American Res. Ins. Co., 663 So. 2d 932, 936 (Ala. 1995). Thus, where a 'Rule 60(b) motion offer[s] no proper basis for granting relief from the judgment, ... the trial court's granting of that motion [exceeds its] discretion.' Ex parte Alfa Mut. Gen. Ins. Co., 681 So. 2d 1047, 1050 (Ala. 1996)."

Ex parte Wallace, Jordan, Ratliff & Brandt, L.L.C., 29 So. 3d 175, 177-78 (Ala. 2009).

Discussion

The Bhoneses argue that the trial court exceeded its discretion in granting the defendants' motion to set aside the default judgment pursuant to Rule 60(b), which provides, in part:

> "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reason[] (1) ... not more than four (4) months after the judgment, order, or proceeding was entered or taken."

Also,

> "[i]n considering whether to grant a Rule 60(b)(1) motion to set aside a default judgment, a trial court must not only consider whether the defendant has established excusable neglect, but it also must apply the factors outlined in Kirtland v. Fort Morgan Authority Sewer Service, Inc., 524 So. 2d 600 (Ala. 1988).[1] See Rooney v. Southern

Dependacare, Inc., 672 So. 2d 1 (Ala. 1995); and DaLee v. Crosby Lumber Co., 561 So. 2d 1086 (Ala. 1990).

> "'Under Kirtland, the trial court must first presume that cases should be decided on the merits whenever it is practicable to do so.... Second, the trial court must apply a three-factor analysis in determining whether to set aside a default judgment: it must consider "1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendant's own culpable conduct." Kirtland, 524 So. 2d at 605.'

"Sampson v. Cansler, 726 So. 2d 632, 633 (Ala. 1998) (emphasis added).

"_____

"[1]'Although Kirtland involved a Rule 55(c)[, Ala. R. Civ. P.,] motion to set aside a default judgment, we also apply the Kirtland analysis to Rule 60(b) motions to set aside default judgments.' Sampson v. Cansler, 726 So. 2d 632, 633 (Ala. 1998)."

Campbell v. Campbell, 910 So. 2d 1288, 1290-91 (Ala. Civ. App. 2005. Finally,

> "[t]he law is well settled in Alabama that the defaulting party has the initial burden of demonstrating the existence of the three Kirtland factors. Ex parte Family Dollar Stores of Alabama, Inc., 906 So. 2d 892, 899-900 (Ala. 2005); Phillips v. Randolph, 828 So. 2d 269, 278 (Ala. 2002); and Kirtland, 524 So. 2d at 605-08."

Carroll v. Williams, 6 So. 3d 463, 467 (Ala. 2008).

In the motion to set aside the default judgment, the defendants first argued that they were entitled to relief based on Rule 60(b)(1) and (6). They asserted that Peete had sought the advice of counsel on three occasions: 1) after a July 26, 2013, demand letter had been served on them; 2) after they received service of the complaint on February 19, 2015; and 3) in March 2018, when the default judgment was entered against them. Citing Rule 60(b)(1), the defendants argued that Peete had been mistaken about whether the attorney he had met with would represent them and that he would have sought alternative representation if he had known that the attorney from whom he had sought advice would not take any action on their behalf. The defendants also asserted that the Bhoneses had actually breached the contract and that, therefore, pursuant to Rule 60(b)(6), the entry of the default judgment should be set aside to accomplish justice.

In their motion, the defendants also asserted that, considering the factors set forth in Kirtland v. Fort Morgan Authority Sewer Service, Inc., 524 So. 2d 600 (Ala. 1988), the default judgment should be set aside. With regard to the

meritorious-defense requirement, they argued that an attached, unverified and unfiled proposed answer and counterclaim established that they were not the bad actors in this case and that, in fact, the Bhoneses were the ones who actually had breached the contract.[1] With regard to the requirement that the Bhoneses would not suffer substantial prejudice if the judgment was set aside, the defendants argued that nothing had happened in the case between the time they were served with the complaint in February 2015 and the time the Bhoneses moved for a default judgment in March 2018, and they further argued that allowing the case to proceed on the merits would not cause the Bhoneses any prejudice, much less substantial prejudice. Finally, with regard to the requirement that the default not be the result of their culpable conduct, the defendants argued that the default was not the result of willful or bad-faith conduct but, instead, was the result of a legitimate mistake. Specifically, the defendants contended that they thought that the case had been handled and resolved

[1]Although the defendants attached a proposed answer and counterclaim as an exhibit in support of their motion to set aside the default judgment, they did not actually file their answer and counterclaim with the circuit clerk until after the trial court had set aside the default judgment.

by the attorney Peete had consulted after they were served with the complaint in 2015 and that they retained counsel and responded to the Bhoneses' allegations as soon as the trial court entered a default judgment in the case.

In their response in opposition to the motion to set aside the default judgment, the Bhoneses first argued that the defendants did not support the factual allegations in their motion with evidence, such as affidavits or deposition testimony. They acknowledged that the defendants had attached a proposed answer and counterclaim to the motion, but they pointed out that neither one was verified. The Bhoneses also argued that the defendants' alleged reliance on the unidentified previous attorney was not reasonable under the circumstances.

On August 1, 2018, Peete filed an affidavit in support of the defendants' motion to set aside the default judgment. In that affidavit, Peete stated that he "sought the advice of counsel" after he received the July 26, 2013, demand letter. He also stated that he "met with an attorney about the legal action" immediately after he was served with the complaint on February 19, 2015, and that he "left the meeting with the

understanding that the attorney would handle [the] case." Peete further stated that he did not receive the motion for a default judgment and that he did not hear from the court or any party until March 2018, when the default judgment was entered. Finally, he stated that, if he "had known that the attorney [he] met with would not take any action on [the defendants'] behalf, [he] would have sought alternative legal representation."

The Bhoneses argue that the trial court should not have set aside the default judgment because, they assert, the defendants did not submit evidence to satisfy all three factors set forth in Kirtland. Specifically, they contend that the defendants did not submit any evidence to establish that they had a meritorious defense and that the defendants did not submit any evidence to show that the Bhoneses would not suffer substantial prejudice if the judgment was set aside. We agree with the Bhoneses.

In Ex parte Ward, [Ms. 1170142, May 18, 2018] ___ So. 3d ___, ___ (Ala. 2018), this Court held:

> "[T]he trial court has broad discretion ... in deciding whether to deny or to grant a motion to set aside a default judgment. In exercising that discretion, the trial court must apply the

three-factor analysis set forth in Kirtland. However, the law is well settled that '"'in order to trigger the mandatory requirement that the trial court consider the Kirtland factors, the party filing a motion to set aside a default judgment must allege and provide arguments and evidence regarding all three of the Kirtland factors.'"' Hilyer v. Fortier, 176 So. 3d 809, 813-14 (Ala. 2015) (quoting D.B. v. D.G., 141 So. 3d 1066, 1071 (Ala. Civ. App. 2013), quoting in turn Brantley v. Glover, 84 So. 3d 77, 81 (Ala. Civ. App. 2011)).

"In its motion to set aside the default judgment, the dealership averred that it had a good and meritorious defense to the allegations asserted in the complaint, but it failed to provide any evidentiary details to substantiate that assertion. It is well settled that bare legal conclusions unsupported by affidavit or other evidence do not suffice to demonstrate a meritorious defense under Kirtland. See Martin v. Robbins, 628 So. 2d 614, 617-18 (Ala. 1993) (noting that '[a] defaulting party has satisfactorily made a showing of a meritorious defense if the allegations in an answer or in a motion and its supporting affidavits, if proven at trial, would constitute a complete defense to the claims against the defaulting party or if sufficient evidence has been adduced either by affidavit or by some other means to warrant submitting the case to the jury'); see also Royal Ins. Co. of America v. Crowne Invs., Inc., 903 So. 2d 802, 808 (Ala. 2004) (noting that '[t]he existence of a meritorious defense is a "threshold prerequisite," Kirtland, 524 So. 2d at 605, because without a meritorious defense, a finding that the plaintiff would not be prejudiced and a finding that the defendant was not culpable would matter little'). Regarding the factor of prejudice, the dealership, without any supporting evidence, merely averred that Ward would suffer no undue prejudice by having the default judgment set aside. However, this Court has held that 'when a party files a

> motion to set aside a default judgment, the movant has the initial burden of making a prima facie showing that the plaintiff will not be unfairly prejudiced if the default judgment is set aside.' Phillips v. Randolph, 828 So. 2d 269, 278 (Ala. 2002). Here, the dealership offered no explanation as to why Ward would not be unfairly prejudiced if the default judgment were to be set aside."

(Emphasis added.)

The defendants contend that they have a meritorious defense and that they stated that defense in their proposed answer and counterclaim.

> "With regard to a meritorious defense in the context of a Kirtland analysis, this Court has stated:
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> > "'[A] defaulting party has satisfactorily made a showing of a meritorious defense when allegations in an answer or in a motion to set aside the default judgment and its supporting affidavits, if proven at trial, would constitute a complete defense to the action, or when sufficient evidence has been adduced either by way of affidavit or by some other means to warrant submission of the case to the jury....
> >
> > "'The allegations set forth in the answer and in the motion must be more than mere bare legal conclusions without factual support; they must counter the cause of action averred in the complaint with specificity -- namely, by setting forth relevant legal grounds substantiated by a credible factual basis. Such allegations would constitute a "plausible" defense.'

"Kirtland, 524 So.2d at 606 (emphasis added)."

Carroll, 6 So. 3d at 467-68.

In the motion to set aside the default judgment, the defendants' counsel made bare, unverified allegations that the proposed answer and counterclaim demonstrated that the defendants were not the bad actors and that it was actually the Bhoneses who had breached the contract. However, the proposed answer and counterclaim were not verified. See Metcalf v. Pentagon Fed. Credit Union, 155 So. 3d 256, 262-63 (Ala. Civ. App. 2014)(holding that an unverified answer did not constitute evidence that would warrant setting aside a summary judgment); Mims v. State, 650 So. 2d 619, 621 (Ala. Crim. App. 1994) ("Because the appellant's 'second answer' was unverified and was not accompanied by any supporting affidavit, the bare allegations contained therein cannot be considered as evidence or proof of the facts alleged."). Also, only the defendants' counsel signed the motion to set aside the default judgment. However, "[m]otions, statements in motions, and arguments of counsel are not evidence. Westwind Techs., Inc. v. Jones, 925 So. 2d 166, 171 (Ala. 2005)." Ex parte Merrill, [Ms. 1170216, May 18, 2018] ___ So.

3d ___, ___ n.4 (Ala. 2018). In light of the conclusory nature of the allegations in the motion to set aside the default judgment and the lack of evidence to support those allegations, the defendants did not satisfactorily make a showing that they had a meritorious defense that would have constituted a complete defense at trial. See Baker v. Jones, 614 So. 2d 450, 451 (Ala. 1993) ("[Baker] failed to submit any factual basis for his claims. The record contains no affidavits or supporting evidence to substantiate the bare legal conclusion" that Baker had a meritorious defense.); Ex parte Ward, supra; and Carroll, supra.

Likewise, the defendants contend that the Bhoneses would not be substantially prejudiced if the default judgment was set aside. As the Bhoneses correctly point out, in their motion to set aside the default judgment, the defendants made the bare allegation that "set[ting] aside the judgment will not prejudice [the Bhoneses] in any material way" based solely on the fact that very little had been done in the case since the complaint had been filed. However, the defendants did not make any attempt to support that conclusory allegation with evidence and, instead, apparently relied on their own inaction

as a basis for asserting that the Bhoneses would not be prejudiced if the default judgment was set aside.

> "Although common sense dictates that a plaintiff is usually in a far better position to know what prejudice might befall him from the delay, and more importantly how substantial that prejudice would be, we have placed upon the defendant the initial burden of demonstrating that the plaintiff will not be substantially prejudiced. As we have stated:
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> > "'We hold that when a party files a motion to set aside a default judgment, the movant has the initial burden of making a prima facie showing that the plaintiff will not be unfairly prejudiced if the default judgment is set aside. If the movant makes a prima facie showing that the plaintiff will not be unfairly prejudiced, the burden then shifts to the plaintiff to present facts showing that the plaintiff will be unfairly prejudiced if the default judgment is set aside.'
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> "Phillips v. Randolph, 828 So. 2d 269, 278 (Ala. 2002). Additionally, a defendant cannot simply state that the plaintiff will not be prejudiced if the motion to set aside the default judgment is granted. Phillips, 828 So. 2d at 275."

Royal Ins. Co. of America v. Crowne Invs., Inc., 903 So. 2d 802, 811 (Ala. 2004) (emphasis added). Therefore, the defendants did not satisfy their initial burden under Kirtland with regard to this factor. See generally Carroll, supra; see also Ex parte Ward, supra.

Because the defendants did not present evidence to support their allegations that they had a meritorious defense and that the Bhoneses would not be unduly prejudiced if the default judgment was set aside, they failed to satisfy their initial burden of alleging and demonstrating the existence of all the Kirtland factors. See Carroll, supra; DuBose v. McAteer, 238 So. 3d 43, 47 (Ala. Civ. App. 2017)("A defendant makes out a prima facie case to have a default judgment set aside when the defendant presents arguments and affidavits or other evidence to establish each of the three Kirtland factors. D.B. v. D.G., 141 So. 3d [1066,] 1071[(Ala. Civ. App. 2013)]."). Therefore, we conclude that the defendants were not entitled to have the default judgment set aside and that the trial court exceeded its discretion in setting aside the default judgment. See Ex parte Ward, supra. Cf. Bennett v. Mortgage Elec. Registration Sys., Inc., 966 So. 2d 935, 939 (Ala. Civ. App. 2007) ("Bennett has failed to make a showing as to each of the Kirtland factors. We therefore find that the trial court did not exceed its discretion in denying Bennett's motion to set aside the default judgment.").

Conclusion

For the above-stated reasons, the defendants failed to satisfy their initial burden of alleging and demonstrating the existence of all of the Kirtland factors. Therefore, the trial court exceeded its discretion in granting the defendants' motion to set aside the default judgment. Accordingly, we grant the petition for a writ of mandamus and direct the trial court to vacate its August 2, 2018, order setting aside the default judgment it had entered in their favor on March 21, 2018.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Shaw, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur.

Bolin, J., concurs in the result.

Stewart, J., dissents.