REL: January 10, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180216

James Cochran

v.

Pilar Engelland

Appeal from Calhoun Circuit Court
(CV-14-19)

MITCHELL, Justice.

James Cochran, the plaintiff in an unsuccessful personal-injury action, challenges the Calhoun Circuit Court's order setting aside a $2,000,000 default judgment entered against

Pilar Engelland ("Pilar") after she initially failed to respond to his complaint. We affirm.

Facts and Procedural History

On April 16, 2012, Cochran was riding his motorcycle westbound on U.S. Highway 278 in Calhoun County when he struck a horse that had entered the road. Cochran suffered significant injuries in the accident, and he states that he has incurred hundreds of thousands of dollars in medical expenses as a result of those injuries.

Cochran thereafter retained attorney James Shelnutt to pursue legal remedies against any parties responsible for the presence of the horse in the road. Cochran and Shelnutt concluded that the horse struck by Cochran had escaped from a parcel of property extending into both Calhoun and Cherokee Counties that was adjacent to the accident site ("the farm"). The owner of the farm was ultimately identified as Pilar. In approximately May 2013, Shelnutt had telephone conversations with Pilar, her son Joseph Jorge Engelland ("Jorge"), and Jerry Coley, who was leasing the farm from Pilar at the time of Cochran's accident. It appears that the primary purpose of those conversations was to determine whether any insurance

policies existed that might provide coverage for Cochran's accident. No such policies were identified, and there is no evidence that there was any more communication between Cochran and Pilar or Jorge after May 2013.

On April 16, 2014, Cochran sued Pilar and Coley in the Calhoun Circuit Court, alleging that their negligence had caused the April 2012 accident. Cochran attempted to serve Pilar by certified mail sent to the mailing address for the farm on U.S. Highway 278 in Piedmont, but the notice was returned that same month marked "return to sender, not deliverable as addressed, unable to forward." It appears from the case-action summary in the record that Coley was served and that he filed an answer denying liability for Cochran's injuries. Cochran proceeded to litigate his claim against Coley for approximately the next two years until May 31, 2016, when the claim against Coley was dismissed with prejudice. The dismissal of Cochran's claim against Coley is not an issue in this appeal.

On July 13, 2016, after the case against Coley had been dismissed, Cochran moved the trial court for permission to serve Pilar by publication under Rule 4.3, Ala. R. Civ. P.

Cochran supported his motion with an affidavit from one of his attorneys stating that "[Cochran] has unsuccessfully attempted to serve and thereafter locate [Pilar]. Under information and belief, [Pilar] avoided service and her whereabouts are currently unknown." The trial court granted Cochran's motion, and legal notice of his claim against Pilar was published in The Anniston Star, a newspaper of general circulation in Calhoun County, for four consecutive weeks in August and September 2016. Cochran thereafter moved the trial court to enter a default judgment in his favor, and, on March 20, 2017, the trial court granted his motion and entered a $2,000,000 judgment against Pilar.

In March 2018, Cochran obtained a writ of execution based on that default judgment. After Cochran delivered the writ of execution to the Cherokee County Sheriff's Office, the sheriff sent a copy to Pilar at her home in Florida. It is not clear from the record how the sheriff obtained Pilar's Florida address. Pilar promptly obtained counsel and moved the trial court to quash the writ of execution and to set aside the default judgment under Rule 60(b)(4), Ala. R. Civ. P. On June 7, 2018, the trial court conducted a hearing on Pilar's motion

at which she argued that the default judgment should be set aside as void because, she claimed, she had not been properly served. See generally Cameron v. Tillis, 952 So. 2d 352, 354 (Ala. 2006) (explaining that the failure to effect proper service on a defendant deprives the court of jurisdiction and renders a default judgment void). Pilar specifically argued that service by publication should not have been available to Cochran in her case because, she claimed, she had taken no action to avoid service and Cochran had not exercised reasonable efforts to locate her.

The trial court also heard ore tenus testimony from Jorge and Shelnutt at the June 7 hearing. Jorge testified that he had handled the finances for the farm since 1994 when his father died. Jorge further testified that Pilar had moved from the farm to Florida in approximately 2001 or 2002 to live with him and that they had since moved within Florida several times, but that they had always notified the revenue commissioners in both Calhoun County and Cherokee County of their change of address to ensure they received property-tax notices for the farm. Jorge acknowledged having a telephone conversation with Shelnutt in 2013 during which he was told

about Cochran's accident and was asked about the insurance coverage for the farm, but Jorge states that he and Pilar were never told about a lawsuit being filed and that they had never taken any steps to avoid service. Rather, he testified, they first learned that Cochran had filed a lawsuit in April 2018 when they received a notice from the Cherokee County Sheriff's Office at their address in Florida -- the same address on file with the Cherokee County Revenue Commissioner.

Shelnutt confirmed during his testimony that he had spoken with Jorge in May 2013 to ask about the insurance coverage for the farm. Shelnutt stated that Jorge denied having knowledge of any insurance policies that might provide coverage for Cochran's accident but that Jorge identified Coley as the tenant of the farm at the time of the accident and provided Shelnutt with Coley's telephone number. Shelnutt testified that he then contacted Coley, who was generally uncooperative and who also disclaimed any knowledge of insurance coverage for the farm. Shelnutt stated that he telephoned Jorge again, who gave him Pilar's telephone number and told him that he should talk to her.

Shelnutt testified that he then called Pilar, informed her of Cochran's accident, and inquired about any insurance coverage she might have on the farm. Shelnutt stated that, after Pilar indicated there was no insurance coverage, he told her that a lawsuit would be filed and that she should obtain an attorney. Shelnutt testified that the conversation quickly came to an end at this point and that Pilar refused to disclose her address or location. Finally, Shelnutt testified that before the lawsuit was filed he searched the Alacourt database and "several" Web sites that compile public information looking for contact information for Pilar but was unsuccessful. On cross-examination, Shelnutt acknowledged that he never tried to contact Pilar or Jorge again by telephone because he "didn't see the need for it," since they had been told in May 2013 that a lawsuit would be filed.

On June 8, 2018, the trial court granted Pilar's motion to set aside the default judgment and to quash the writ of execution. Pilar subsequently filed an answer denying the allegations in Cochran's complaint and moved the trial court to enter a summary judgment in her favor. On October 23, 2018, the trial court granted her motion and entered a final

judgment in the underlying case. On December 4, 2018, Cochran filed this appeal, specifically challenging the trial court's order setting aside the default judgment entered against Pilar.

Standard of Review

In Allsopp v. Bolding, 86 So. 3d 952 (Ala. 2011), this Court considered a similar appeal in which a party challenged a trial court's ruling on a Rule 60(b)(4) motion seeking to set aside a judgment as void because the defendant was allegedly not properly served. Citing Insurance Management & Administration, Inc. v. Palomar Insurance Corp., 590 So. 2d 209, 212 (Ala. 1991), the Allsopp Court stated that, "if the underlying judgment is void because the trial court lacked subject-matter or personal jurisdiction or because the entry of the judgment violated the defendant's due-process rights, then the trial court has no discretion and must grant relief under Rule 60(b)(4)." 86 So. 3d at 957. Accordingly, the Allsopp Court explained that its review of a trial court's decision on a Rule 60(b)(4) motion to set aside a judgment as void was de novo because the validity of a judgment is a question of law. Id. Nevertheless, the Allsopp Court

recognized that in many cases a trial court considering a Rule 60(b)(4) motion will make factual findings based on the presentation of oral testimony and that those findings are entitled to deference under the ore tenus rule. Id. The Allsopp Court thus summarized the applicable standard of review as follows:

> "[T]he trial court heard oral testimony concerning the sufficiency of service of process on [the defendant]. In accordance with our well settled standard regarding a Rule 60(b)(4) motion challenging a judgment as void, our de novo standard of review applies. However, because the trial court heard oral testimony regarding disputed facts involved in the service of process, the ore tenus rule applies to our review of its factual findings."

86 So. 3d at 958. We apply this same standard to Cochran's appeal.

Analysis

Cochran argues that the trial court erred in setting aside the default judgment entered against Pilar because, he argues, she was properly served by publication in accordance with Rule 4.3, and, therefore, he asserts, the default judgment was valid. Pilar argues in response that service by publication under Rule 4.3 was inappropriate because, she

says, she never avoided service. For the reasons that follow, we agree with Pilar that service by publication was improper.

Rule 4.3(a)(2) provides generally that a defendant "who avoids service of process" may be served by publication.[1] Rule 4.3(d)(1) requires a plaintiff seeking to effect service by publication to submit an affidavit to the trial court "averring facts showing such avoidance," and Rule 4.3(c) reiterates that this affidavit "must aver specific facts of avoidance" (emphasis added) and cautions that "[t]he mere fact of failure of service is not sufficient evidence of avoidance."

The affidavit submitted by Cochran to support his motion requesting service by publication contained only a conclusory statement that, "[u]nder information and belief, [Pilar] avoided service." That statement does not meet the requirements of Rule 4.3, and Alabama appellate courts have universally held similar statements to be an insufficient

[1]We note that Rule 4.3 also provides for service by publication in certain equitable cases where the location of a party is unknown, as well as in certain proceedings that are governed by statutes specifically authorizing service by publication. Those options are inapplicable in this case, however, because Cochran has asserted a claim against Pilar for money damages and the underlying proceeding is not governed by such a statute.

basis upon which to request service by publication. See, e.g., Wachovia Bank, N.A. v. Jones, Morrison & Womack, P.C., 42 So. 3d 667, 688 (Ala. 2009) (holding insufficient a bare assertion in the Rule 4.3(d)(1) affidavit that "[t]he defendant has been avoiding service"); Kanazawa v. Williams, 838 So. 2d 392, 395 (Ala. Civ. App. 2002) (holding that "conclusory assertions" in the Rule 4.3(d)(1) affidavit that the defendant "concealed himself" were "insufficient as a matter of law"); Vaughan v. O'Neal, 736 So. 2d 635, 638 (Ala. Civ. App. 1999) ("The affidavit recites no facts that would establish that [the defendant] was attempting to avoid personal service so as to make service by publication proper. We cannot find the conclusory statement in the motion for service by publication -- that [the defendant] was avoiding service -- sufficient to satisfy the requirement of Rule 4.3(d)(1). Thus, we conclude that the service by publication was not proper."). Additionally, we note that the trial court heard testimony at the June 2018 hearing from which it could have found that Pilar had not avoided service, and, under the ore tenus standard of review, we must defer to any factual findings made by the trial court. For these reasons, we hold

that service by publication was not proper in this case and that the trial court correctly set aside the default judgment entered against Pilar in March 2017.

Conclusion

The trial court entered a $2,000,000 default judgment against Pilar after Cochran served her by publication with notice of his complaint and she failed to appear and file a response. When Pilar learned of the default judgment, she successfully moved the trial court to set it aside under Rule 60(b)(4), arguing that service by publication was not proper because she had taken no steps to avoid service of process. After a final judgment was entered in favor of Pilar, Cochran filed this appeal challenging the trial court's decision to set aside the default judgment. For the reasons explained above, we affirm the judgment of the trial court because service by publication under Rule 4.3 was improper.

AFFIRMED.

Parker, C.J., and Wise and Stewart, JJ., concur.

Bolin, Shaw, Bryan, Sellers, and Mendheim, JJ., concur in the result.