8-11-2008

Order on Motion to Set Aside Final Judgment (JOHN BEASLEY)

Alice D. Bonner
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN BEASLEY, DANIEL CLAY, TED FELDMAN, HENRY R. HILLENMEYER, RAGWEED CORPORATION, a Louisiana Corporation, TOM R. STEELE, ANNE H. ZELLE, ROBERT K. ZELLE, individually and as Trustee For ROBERT K. ZELLE TRUST, and JEFF A. PERIN, for himself and on Behalf of all similarly situated former Salaried employees of Cooker Restaurant Corporation,

Plaintiffs,

v.

JERRY D. WETHINGTON, RIVER CAPITALPARTNERS IV, L.P., RIVER CAPITAL INVESTORS IV, L.P., RIVER GENERAL PARTNERS IV, LLC, and WAYNE N. BRADLEY,

Defendants.

Civil Action File No. 2005-CV-105368
(Business Case Division 1— ADB)

Order on Motion to Set Aside Final Judgment

Counsel appeared before the Court on July 24, 2008, to present oral argument on the Motion to Set Aside Final Judgment filed by Plaintiffs Henry R. Hillenmeyer and Robert K. Zelle. After reviewing the briefs submitted on the motion, the record of the case, and the arguments of counsel, the Court finds as follows:

Plaintiffs bring this Motion to Set Aside Final Judgment pursuant O.C.G.A. § 9-11-60 alleging that the Court failed to execute its duty to provide notice of a decision as required under O.C.G.A. § 15-6-21. Wal-mart Stores, Inc. v. Parker, 283 Ga. App. 708 (2007).

This case was originally filed in August, 2005, naming Thomas Nebel,

Tennessee counsel, D. Ashbrooke Tullus, Lousiana counsel,[1] and Bobby Lee Cook and Branch Connelly, local counsel, as attorneys for Plaintiffs.[2] In November, 2005, Defendants moved to dismiss the Complaint. Thereafter Fulton County Superior Court Judges Don A. Langham, Senior Judge; Constance C. Russell, Active Judge; and Christopher S. Brasher, Active Judge, entered scheduling orders in the case. On June 1, 2006, the case was transferred to the Business Court, where it remained until dismissed.

In August, 2006, this Court held an initial case management conference in this matter. During the case management conference, Mr. Nebel moved to withdraw from the case in open court. The parties and Court discussed representation issues and the subsequent Order entered by this Court, dated August 31, 2008, stated that (i) all motions to withdraw shall be filed by September 8, 2006, (ii) Plaintiffs had until October 16, 2006, to retain replacement counsel and notify the Court or file a voluntary dismissal without prejudice, (iii) Mr. Nebel was responsible for informing all other

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1. Mr. Tullis did not apply for pro hac vice admission.

2. Pursuant to Uniform Superior Court Rule 4.2, an attorney enters an appearance in a case by filing a signed pleading in a pending action with certain information to be included such as the bar number. The Complaint, the Case Information Form, and the Summons attached to the Complaint, each filed August 22, 2005, listed Messrs. Cook, Connelly, Nebel and Tullis as attorneys for Plaintiffs. The Complaint was signed by Messrs. Cook, Connelly, and Nebel, but not by Mr. Tullis. In addition, Mr. Tullis' bar number was not provided to the Court. Rule 4.2, however, provides the Court with some discretion with regard to appearances with the language "unless otherwise specified by the court." Here, in the August, 2006, case management conference, the Court addressed the pending withdrawals of Messrs. Nebel and Cook, but instructed Mr. Nebel to communicate withdrawal deadlines to other counsel for Plaintiffs. The only other attorney filing on behalf of Plaintiffs at that time was Mr. Tullis, thus, it is clear that the Court considered Mr. Tullis' participation in the case (listed as counsel of record on pleadings) sufficient to constitute an "appearance" under Rule 4.2 notwithstanding the omission of a bar number or signature.

plaintiffs' attorneys of record regarding the Order, and (iv) in the event that the case is not voluntarily dismissed, the Court would rule on the motions to withdraw and for judgment on the pleadings. The Order was sent to Messrs. Tullis, Nebel, Cook, and Connelly.

Thereafter, on August 31, 2008, Mr. Cook filed a motion to withdraw and on September 5, 2008, he filed an amended motion on behalf of himself and his law partner, Mr. Connelly. In Mr. Cook's motion to withdraw, he attached a notice letter to the Plaintiffs which stated that service would be made upon the individuals at the stated addresses after withdrawal. No other motions to withdraw were received by the Court. Thereafter the Court received no further communications from Plaintiffs or Plaintiffs' counsel regarding representation or dismissal of the case.

On December 11, 2006, the Court entered an Order granting Defendants' motion for judgment on the pleadings that simultaneously granted the motions to withdraw of Mr. Nebel and Mr. Cooks (the "Final Order"). The Final Order listed Messrs. Tullis, Nebel, Cook, and Connelly, as well as counsel for Defendants as the parties to receive notice, but did not list the individual Plaintiffs.

In April, 2008, Plaintiffs Henry Hillenmeyer and Robert Zelle filed this Motion to Set Aside Judgment claiming that as pro se Plaintiffs they had a right to receive notice of the Final Order, which they did not receive, and therefore that they were unable to exercise their right to appeal.

Under Georgia law a trial court has a duty to provide notice of a decision to the losing party. O.C.G.A. § 15-6-21. The failure of a court to satisfy its duty to provide notice is justification to set aside the earlier order and reenter it pursuant to O.C.G.A. §

9-11-60. Cambron v. Canal Ins. Co., 246 Ga. 147 (1980). Unrepresented Plaintiffs have a right to receive notice from the Court. See, e.g., Crenshaw v. Crenshaw, 267 Ga. 20 (1996).

Here, however, the Final Order dismissing the Complaint and granting withdrawal of counsel was sent to all four attorneys listed on the Plaintiff's Complaint. The August 31, 2008, Case Management Order specifically stated the deadlines for Plaintiffs' counsel to move to withdraw, the need to retain substitute representation, and the duty on the Plaintiffs to notify the Court of substitute counsel. In addition, the Order informed the parties of the Court's plan to address both the pending motions to withdraw and for judgment on the pleadings if substitute counsel was not retained and Plaintiffs did not file a voluntary dismissal. Thus, the Court acted consistent with its stated and published course of action and entered an order addressing both the motions for judgment on the pleadings and the motions to withdraw.

The Final Notice was sent to Plaintiffs' counsel, Messrs. Nebel, Cook, Connelly, and Tullis,[3] all of whom had a duty to relay the contents of the Order to their clients. In

3. At the inception of this Motion there was question as to whether either Mr. Cook or Mr. Nebel received the Final Order. Mr. Nebel submitted an affidavit, dated November 13, 2007, stating that he did not receive the Final Order and, after inquiry to Mr. Cook's office, was unable to determine whether or not Mr. Cook had received the Final Order. Mr. Cook submitted an affidavit, dated July 15, 2008, stating that upon searching his records he confirmed that (1) he had received the Final Order in the mail from the Court, and (2) his partner, Mr. Connelly, discussed the Final Order shortly thereafter with Mr. Nebel. Both Messrs. Cook and Nebel were listed on the Final Order for distribution of copies, at the last addresses provided to the Court, although there is evidence in the record that Mr. Nebel had changed his address without nofifying the Court of his new address. In the absence of evidence to the contrary, the presumption is that the Court acted with "regularity and legality [in] all proceedings in superior court; there is also a presumption that the clerk gave notice as required." Murer v. Howard, 165 Ga. App. 230 (1983).

addition, the attorneys granted withdrawal had a duty to initiate a final contact with their clients pursuant to Uniform Superior Court Rule 4.3.[4] Plaintiffs correctly argue that a duty placed upon counsel by a Court cannot trump a statutory duty imposed upon the Court. The Court, however, must be able to rely upon the procedures established in the very rules governing the Court's conduct. The Court concludes that counsel for the parties had notice of the Court's decision, and that counsel had a duty to notify the parties. At the time of the entry of the Final Order in this case, the Court had no duty to notify the parties themselves, and relied upon the duties of their counsel.

Moreover, the Court also sent a copy of the Final Order to Mr. Tullis, who filed the Complaint on behalf of Plaintiffs and who was listed on many (although not all) certificates of service entered by the Plaintiffs. Without evidence to the contrary, the Court assumes that Mr. Tullis, who had not moved to withdraw, and who per the Court's August 31, 2006 Order was to be informed of Court's deadlines, chose not to withdraw from the case and thus was acting as Plaintiffs' counsel when he was mailed the Final Order. See, Murer v. Howard, 165 Ga. App. 230 (1983).

The benefit of hindsight in light of the breakdown of communication between and among Plaintiffs and their attorneys reveals that notice to all attorneys and notice to the individual Plaintiffs would be the better practice for future circumstances, but is not the standard established in O.C.G.A. § 15-6-21. In Wilson Marine Sales and Service, Inc. v. Cranman Insurance Agency Inc., 147 Ga. App. 590 (1978), the Georgia Court of Appeals upheld a trial court's denial of a motion to set aside judgment where notice was

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4. "After the entry of an order permitting withdrawal, the client shall be notified by the withdrawing attorney of the effective date of the withdrawal; thereafter all notices or other papers may be served on the party directly by mail at the last known address of

provided to only one attorney each for the plaintiff and defendant. The Court of Appeals reasoned that notice to each and every counsel was "gratuitous," although more convenient, but nonetheless, unnecessary for the thirty day appeals window to run. Id.

In accordance with the foregoing analysis, the Court hereby **DENIES** Plaintiffs' Motion to Set Aside Judgment.

So Ordered this 11 day of August, 2008.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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the party until new counsel enters an appearance." Uniform Superior Court Rule 4.3.

Copies to:

Barry Goheen, Esq.
Michael Cates, Esq.
Catherine G. Lucas, Esq.
King & Spaulding LLP
1180 Peachtree Street
Atlanta, GA 30309
(404) 572-4618
(404) 572-5100 *fax*

Tony G. Powers, Esq.
Richard H. Sinkfield, Esq.
Kimberly L. Myers, Esq.
Catherine M. Bennett, Esq.
Rogers & Hardin LLP
2700 International Tower
229 Peachtree ST. NE
Atlanta, Georgia 30303-0601
404.420.4632
404.525.2224 *fax*

John G. Parker, Esq.
Paul, Hastings, Janofsky & Walker LLP
600 Peachtree Street, N.E., Suite 2400
Atlanta, GA 30308-2222
(404) 815-2400
(404) 815-2424 *fax*

Mr. John Beasley
508 Dekemont Lane
Brentwood, TN 37027

Mr. Daniel Clay
200 Walnut Street, No. 516
Kansas City, MO 64106

Mr. Ted Feldman
2046 Fransworth Drive
Nashville, TN 37205

Ragweed Corporation
512 Carrollton Avenue
Metairie, LA 70005

Mr. Jeff A. Perin
3718 Wyckliffe Pky.
Toledo, OH 43613

Mr. Tom R. Steele
4504 Millrace Lane
Nashville, TN 37205