IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-CA-01227-SCT

TM WOOD PRODUCTS, M WOOD PRODUCTS, INC., MARTY WOOD, AND KIM WHITLOW

v.

MARIETTA WOOD SUPPLY, INC., AND MARIETTA DRY KILN, LLC

DATE OF JUDGMENT:	07/08/2019
TRIAL JUDGE:	HON. JOHN R. WHITE
TRIAL COURT ATTORNEYS:	CASEY LANGSTON LOTT THOMAS ORVILLE COOLEY LEROY DAVIS PERCY KATHLEEN ELIZABETH CARRINGTON PHIL B. ABERNETHY ARTHUR D. SPRATLIN, JR.
COURT FROM WHICH APPEALED:	PRENTISS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	ARTHUR D. SPRATLIN, JR. KATHLEEN ELIZABETH CARRINGTON
ATTORNEYS FOR APPELLEES:	CASEY LANGSTON LOTT THOMAS ORVILLE COOLEY
NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	REVERSED AND REMANDED - 11/12/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, P.J., MAXWELL AND GRIFFIS, JJ.

KING, PRESIDING JUSTICE, FOR THE COURT:

¶1. TM Wood Products, M Wood Products, Inc., Marty Wood, and Kim Whitlow (collectively, "TM Wood") appeal the trial court's denial of their motion to set aside the judgment under Mississippi Rule of Civil Procedure 60(b)(6). TM Wood argues that its right to a jury trial was violated, that it failed to receive notice of the bench trial, and that the

judgment was excessive. Because the circuit clerk failed to send notice of the impending trial to TM Wood in accordance with Mississippi Rule of Civil Procedure 40(b), we reverse the trial court's decision.

FACTS AND PROCEDURAL HISTORY

¶2. Marietta Wood Supply, Inc., and Marietta Dry Kiln, LLC (collectively, "Marietta"), contracted with TM Wood to sell lumber. TM Wood acted as broker and agreed to sell Marietta's green lumber and dry kiln for a $10-$40 commission per thousand feet. Under the agreement, TM Wood also hired or employed various trucking companies to haul the lumber after it was sold.

¶3. On August 28, 2014, Marietta filed a complaint against TM Wood alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty, as well as fraudulent inducement, concealment, misrepresentation, and negligence. Marietta alleged that TM Wood had been wrongfully billing both the purchaser and the seller for shipping costs. It also alleged that TM Wood had been charging and receiving extra commissions on the lumber units TM Wood sold for Marietta from 2004 to 2012.

¶4. Marietta filed its third amended complaint on April 6, 2015. TM Wood answered in December 2015 and served discovery requests on Marietta. The case then became inactive until September 2016. At that time, TM Wood's attorney, Roy Percy, was appointed as the United States Magistrate Judge for the Northern District of Mississippi and filed a motion to withdraw as counsel. The trial court granted the motion and stayed the case for sixty days

to allow TM Wood to seek new counsel. The order stated, "[p]ending the appearance of new counsel of record for said defendants, service of any papers upon said defendants shall be made by mailing a copy to them at their respective addresses as follows: . . . ."

¶5. The case again became inactive until October 2017, when Marietta requested non-jury-trial dates from the court. Marietta claimed that on November 17, 2017, it sent a proposed order to the trial court and sent copies of the proposed order to Wood, owner of TM Wood, and Whitlow, TM Wood's employee and bookkeeper, at their listed addresses provided in the Agreed Order Allowing Withdrawal of Counsel. Marietta attached as an exhibit a letter addressed to the First Circuit Court District of Mississippi that stated that the proposed order of setting was enclosed. The bottom of the letter stated, "pc: Marty Wood, M Wood Products, Inc. d/b/a TM Wood Products, Kim Whitlow." On November 21, 2017, the trial court set the case for a bench trial to occur on January 10, 2018. Marietta again alleged that it had sent notice of the order to Wood and Whitlow at their last known addresses. TM Wood had not retained new counsel at that point.

¶6. The bench trial occurred on January 10, 2018. TM Wood did not answer or appear at trial. Marietta's attorney informed the court that he had not had any communication with TM Wood after the court had allowed Percy to withdraw and said that "[s]ince that time, every other pleading that we've filed with the Court has been mailed to them in accordance with the Court's order entered on September 3, 2016, including a copy of the order setting that the Court entered on November 21, 2017." The trial proceeded, and Marietta called one witness, its president Craig Farr. Farr testified that TM Wood had been double billing for freight from

both Marietta and its purchasers. Farr also testified that TM Wood had been charging commissions in excess of the agreement. He stated that Marietta and TM Wood had agreed on a commission of $40 per thousand feet on dry kiln. However, Marietta had discovered that TM Wood occasionally had been collecting a $250-per-thousand feet commission on dry kiln. Farr testified that Marietta believed that it had been damaged "in the neighborhood of $100,000 a year" for eight years.[1] On January 22, 2018, the trial court entered a final judgment in favor of Marietta in the amount of $800,000. The trial court found that TM Wood had been properly served at the addresses provided in the Agreed Order Allowing Withdrawal of Counsel.

¶7. Marietta alleged that it sent a copy of the final judgment to Wood and Whitlow the following day. Marietta then hired an attorney in Arkansas to collect the judgment. The judgment was enrolled in Arkansas on March 16, 2018. Wood alleged that he first learned of the bench trial and judgment on March 16, when he received a copy of the judgment. TM Wood retained new counsel the following business day and served its motion to set aside judgment on March 21, 2018. TM Wood requested relief under Mississippi Rule of Civil Procedure 60(b)(6), which allows a court to set aside a judgment for "any other reason justifying relief . . . ." M.R.C.P. 60(b)(6). Wood submitted an affidavit stating that he knew Percy had withdrawn from the case but that he believed that another attorney in Percy's law firm would be handling the case moving forward. Wood stated that he had misunderstood that he needed new counsel since the case had been inactive for so long. TM Wood argued

[1]Marietta had requested punitive damages but withdrew its request at the bench trial.

that the judgment should be set aside because TM Wood had no knowledge of the trial before it had occurred and no opportunity to present its defense. Further, TM Wood argued that the judgment was excessive.

¶8. Marietta responded and asserted that TM Wood had signed the agreed order that specifically stated that the case would be stayed for sixty days to allow it to seek new counsel. Because TM Wood had not retained new counsel, Marietta claimed that it had sent all documents to the addresses provided in the agreed order. Therefore, it argued that no special or compelling circumstances existed to justify setting aside the judgment. Marietta attached the affidavit of Susan Miller, a paralegal at Langston and Lott, that stated that after Percy withdrew in September 2016, she had "served all necessary documents via U.S. Mail to the Defendants, pursuant to the Order of the Court" to the addresses listed in the agreed order. Miller later issued an amended affidavit stating that after Percy had withdrawn, she had served "all further pleadings and papers on Defendants pursuant to the Order of the Court via U.S. Mail, postage prepaid, at the following addresses . . . ." That included, "but [was] not limited to, the Order setting the case for trial dated November 21, 2017 and the Judgment entered on January 22, 2018." Miller stated that she had "included a Certificate of Service for all pleadings, with the exception of the Order of Setting signed by the Court. I did not feel it was my place to unilaterally insert a Certificate of Service on an Order signed by a Circuit Judge." Miller also stated that none of the documents had been returned as undeliverable.

¶9. Wood submitted a second affidavit that amended his previously executed affidavit. Wood stated that he had learned that Percy had been a solo practitioner and did not have another attorney in the office to represent TM Wood. He stated that he had elected not to retain new counsel because he had not wanted to incur the expense of hiring a new attorney unless and until the case became active.

¶10. Whitlow filed an unsworn declaration stating that she had first received notice of the lawsuit when her former employer, Marty Wood, informed her that she had been named in the lawsuit along with him and TM Wood.

¶11. Because TM Wood did not have a copy of the trial transcript at the time of its initial motion, it submitted a supplement to the motion to set aside the judgment. TM Wood argued that the judgment was wholly unsupported and that Marietta had failed to support its breach-of-contract claim. TM Wood also alleged that it had upheld the terms of the contract with Marietta and that Marietta had not shown that TM Wood was precluded from entering into its own agreement with end purchasers independent of the contracts between it and Marietta. TM Wood contended that Marietta had failed to offer sufficient evidence to support an $800,000 damages award.

¶12. On June 14, 2019, the parties had a hearing on the motion to set aside the judgment. The trial court found that Marietta had presented credible evidence that notice of the proposed order setting trial and signed order setting trial were mailed to TM Wood, prepaid, properly addressed, and timely delivered. It found that TM Wood had presented no evidence to rebut that presumption. The trial court noted Wood's contradictory statements in his

affidavits and took into account that Wood's first affidavit was in direct opposition of the plain language of the agreed order. The trial court found that "the affidavits presented by the Defendants themselves demonstrate that they knew the case was ongoing but that they took the calculated risk to ignore the suit in order to avoid financial obligations." Therefore, no extraordinary and compelling circumstances existed to justify relief from the judgment.

¶13. TM Wood appealed and raised three issues:

I. Whether the circuit court abused its discretion by finding that TM Wood's right to a trial by jury was not violated.

II. Whether the circuit court erred by finding that TM Wood had notice of the bench trial.

III. Whether the judgment should be set aside pursuant to Rule 60(b)(6).

Because the lack-of-notice issue is dispositive, we solely address that issue.

ANALYSIS

¶14. Mississippi Rule of Civil Procedure 60(b)(6) provides that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . (6) any other reason justifying relief from the judgment." M.R.C.P. 60(b)(6). Rule 60(b)(6) is a "grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses [of Rule 60], or when it is uncertain that one or more of the preceding clauses afford relief." ***Mitchell v. Moore***, 237 So. 3d 681, 689 (Miss. 2017) (alteration in original) (internal quotation marks omitted) (quoting ***Bryant, Inc. v. Walters***, 493 So. 2d 933, 939 (Miss. 1986)). Rule 60(b)(6) motions are reviewed under an abuse-of-discretion standard. ***Briney v. U.S. Fid. & Guar. Co.***, 714 So. 2d 962, 966 (Miss. 1998).

¶15. TM Wood asserts that Marietta failed to put forth sufficient evidence showing that it had notified TM Wood of its intent to set the case for trial. The trial court found that Marietta had presented credible evidence that the proposed order setting trial and signed order setting trial had been mailed to TM Wood, prepaid, properly addressed, and timely delivered.

¶16. Mississippi Rule of Civil Procedure 40(a) states, "[c]ourts shall provide for placing of actions upon the trial calendar . . . (2) upon request of a party and notice to the other parties . . . ." M.R.C.P. 40(a)(2). TM Wood argues that the circuit clerk failed to notify it of the trial setting as required by Mississippi Rule of Civil Procedure 40(b). Rule 40(b) provides that

> The clerk shall within three (3) days after a case has been placed on the trial docket notify all parties who were not present personally or by their attorney of record at the docket setting as to their trial setting. Notice shall be by personal delivery or by mailing of a notice within said three (3) day period.

M.R.C.P. 40(b). Thus, "Rule 40(b) requires the clerk to mail or personally deliver notice of the date and time of trial within three (3) days to all parties not present at the setting." ***King v. King***, 556 So. 2d 716, 719 (Miss. 1990). This written notice is mandatory. ***Id.***

¶17. The trial court did not substantively address this issue. It stated that it found no merit in TM Wood's argument. However, we find that the absence of notice by the clerk requires reversal. The primary responsibility of notice rests upon the court acting through the circuit clerk. TM Wood submitted as evidence a copy of the docket sheet. The docket sheet contained in the record does not reflect that the clerk mailed notice of the trial setting to TM Wood. Additionally, at the hearing on the motion to set aside the judgment, counsel for

Marietta stated, "[n]ow, they try to distinguish ***Powell***[2] by saying, well in ***Powell*** the circuit clerk mailed the order and in this case the circuit clerk didn't mail the order. But that's a distinction without a difference, Your Honor, notice is notice. . . . It doesn't say due process requires the circuit clerk to mail the order." Marietta did not attempt to argue that the circuit clerk did in fact send notice to TM Wood. Therefore, TM Wood submitted evidence that the circuit clerk failed to send the mandatory notice of the impending trial in accordance with Rule 40(b), and Marietta failed to present evidence to the contrary. Due to the clerk's failure to comply with statutory requirements in providing notice, we find that the trial court abused its discretion by denying TM Wood's motion to set aside judgment.

¶18. Marietta argues that the circuit clerk's failure to notify TM Wood is irrelevant because of the notice provided by Marietta. We disagree. In light of the circuit clerk's failure to send the required notice, Miller's affidavits were insufficient to show that TM Wood received notice of the impending trial. Miller's amended affidavit stated that she had sent the order setting the case for trial and the judgment by United States mail. Marietta cites ***Fowler v. White*** and its holding that "[t]here is a presumption that mail deposited, postage prepaid and properly addressed is timely delivered to the person addressed." ***Fowler v. White***, 85 So. 3d 287, 291 (Miss. 2012) (internal quotation marks omitted) (quoting ***Thames v. Smith Ins. Agency, Inc.***, 710 So. 2d 1213, 1216 (Miss. 1998)).However, ***Fowler*** is unpersuasive. Unlike here, the issue in ***Fowler*** was statutory presuit notice. Here, the complaint had been filed and

[2]***Miss. Baptist Med. Ctr., Inc. v. Powell ex rel. Powell***, 101 So. 3d 694 (Miss. Ct. App. 2012).

the parties had been involved in litigation; therefore, the clerk of court was required to notify TM Wood of the date and time of trial.

¶19. In ***Thames***, the clerk mailed notice of a trial setting to an address containing an error in the last digit of the zip code. ***Thames***, 710 So. 2d at 1214. The attorney claiming that he had not received the notice had been told by the judge on a telephonic conference "that discovery was concluded, the docket was to be set, and the matter was going to trial . . . ." ***Id.*** The judge informed the attorney that the docket call would occur the following day and yet the attorney did not attend. ***Id.*** Because the parties were notified of the impending trial well in advance, this Court stated that it was "not prepared to hold that a minor deviation by the clerk from the three-day rule [was] sufficient to vitiate the trial setting without a showing of actual prejudice occasioned by the deviation." ***Id.*** at 1217.

¶20. While a minor deviation from Rule 40 was insufficient to invalidate the trial in ***Thames***, in this case, the docket sheet does not reflect that the required notice was sent from the clerk at any point. And, as stated previously, Marietta's counsel did not argue against TM Wood's assertion that the clerk had failed to send notice during the hearing on the motion to set aside the judgment. As a result of TM Wood's failure to appear, Marietta obtained an $800,000 judgment with only one witness and no experts. Therefore, the clerk's failure to send notice of the impending trial crossed into a showing of actual prejudice. Because the parties were not notified well in advance of trial, the absence of the clerk's notice was a major deviation from the mandatory language of Rule 40.

¶21. Although, as Marietta argues, there is an "implicit burden on the party and counsel to make 'periodic inquiries' into the course of the proceedings[,]" this case had been stagnant for more than a year. ***Hartford Underwriters Ins. Co. v. Williams***, 936 So. 2d 888, 894 (Miss. 2006) (quoting ***Jones v. Estelle***, 693 F.2d 547, 549 (5th Cir. 1982)). Additionally, the order setting the case for trial was signed on November 21, 2017, and the trial was set for January 10, 2018. Therefore, the time between when the case was set for trial and when the trial occurred was only fifty days.

¶22. We do not intend to encourage TM Wood's decision to delay hiring an attorney. However, regardless of TM Wood's decision regarding representation, the clerk was required to send notice of the trial setting to both Wood and Whitlow even while Wood and Whitlow were proceeding pro se.

¶23. TM Wood additionally argues that Miller's affidavits were insufficient to create a presumption that TM Wood received notice because the affidavits failed to state when the pleadings and papers were mailed to TM Wood. This Court previously has found that the failure "to present any witness to attest that the notice letter was actually stamped and placed in the mail" was insufficient notice under Mississippi Rule of Civil Procedure 5. ***Brewer v. Wilcher***, 22 So. 3d 1188, 1191 (Miss. 2009). In that case, the attorney's testimony regarding his usual practice of preparing and mailing letters did not create a presumption that the particular notice letter in question had been stamped and mailed. ***Id.*** at 1189.

¶24. In this case, Miller's affidavit stated that she had served "all further pleadings and papers on Defendants in pursuant [sic] to the Order of the Court via U.S. Mail." That

affidavit is more specific than the affidavit at issue in ***Brewer***. However, Miller's affidavits do not overcome the circuit clerk's lack of notice. Because the order setting trial did not include a certificate of service nor did a cover letter accompany the signed order, TM Wood also argues that Miller's affidavits were insufficient to support a presumption that TM Wood was on notice of the bench trial. In light of the circuit clerk's failure to send notice, the lack of a certificate of service supports reversing the trial court's decision.

¶25. The record does contain photocopies of two envelopes addressed to Wood and Whitlow mailed on January 23, 2018. Marietta asserts that the envelopes show that Wood and Whitlow were mailed the order of judgment and that TM Wood failed to appeal the judgment. This issue has no merit. "Rule 60(b) is for extraordinary circumstances, for matters collateral to the merits . . . ." ***Bruce v. Bruce***, 587 So. 2d 898, 903 (Miss. 1991). TM Wood is not attacking the merits of the underlying judgment in its argument that it failed to receive notice of the trial date.

¶26. Because Rule 40(b) mandates that the circuit clerk must send notice of the trial date and because the clerk did not do so in this case, we reverse the decision of the trial court and remand this case for a trial on the merits.

CONCLUSION

¶27. Notice of the impending trial was required to be sent by the circuit clerk within three days after the case was placed on the trial docket. Because the clerk failed to give notice in this case, we find that the trial court abused its discretion by denying TM Wood's motion to

set aside the judgment. We reverse the judgment of the trial court and remand this case for a trial on the merits.

¶28. **REVERSED AND REMANDED.**

KITCHENS, P.J., COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR. RANDOLPH, C.J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION.