Gibbons v. Cushnie, 8 ROP Intrm. 3 (1999)
YUTAKA M. GIBBONS,
Appellant,

v.

DOUGLAS CUSHNIE,
Appellee.

CIVIL APPEAL NO. 98-61
Civil Action No. 128-90

Supreme Court, Appellate Division
Republic of Palau

Argued: May 20, 1999
Decided: July 20, 1999

Counsel for Appellant: David Shadel

Counsel for Appellee: Pro Se

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

MILLER, Justice:

This appeal involves Appellant's challenge to a default judgment originally entered by the trial court on June 20, 1990, and subsequently modified. We AFFIRM in part and REMAND in part.

BACKGROUND

On March 13, 1990, Appellee Douglas Cushnie filed a complaint against Appellant Yutaka M. Gibbons to collect attorney's fees for work he had performed relating to several lawsuits against the Republic of Palau and other defendants. [1] The Clerk of Courts issued a summons the same day. On June 20, 1990, Appellee filed an affidavit requesting entry of default, in which he stated that ". . . [Appellant] [was] served personally with the Complaint and Summons on March 15, 1990." On the same day, the Clerk of Courts entered a default, and the trial court entered a default judgment against Appellant for the amount prayed in the complaint.

On July 20, 1990, Appellant made a motion to set aside the default judgment, relying exclusively on ROP Rule of Civil Procedure 60(b)(1), which permits such relief on the basis of "mistake, inadvertence, surprise or excusable neglect." Appellant's only argument was that he

[1] The complaint also named Alfonso R. Oiterong as a defendant. Mr. Oiterong has since died, and is not a party to this appeal.

did not have counsel until July 12, 1990.

On February 12, 1992, no ruling having been made on the first motion and Appellant having retained new counsel, he filed a further motion for relief from the default and default judgment. Appellant incorporated the grounds raised in his first motion, and also argued that he had not been served with the summons and complaint. In addition, Appellant argued that the summons was defective, and that the trial court erroneously failed to hold a hearing prior to the entry of the default judgment.

On January 11, 1995, the trial court vacated the default judgment, but only regarding the amount of damages. It stated, "[f]or now, it is clear to the Court that its order entering judgment was partially erroneous in that the amount of damages was ⊥4 not certain or susceptible of being made certain. Accordingly, the amount of the judgment entered is hereby vacated."

On January 18, 1995, Appellant filed a third motion for relief from the default judgment, citing his earlier motions on July 20, 1990 and February 20, 1992.

On December 18, 1996, the trial court held a hearing on damages. Appellee testified and presented documentary evidence supporting his attorney's fees and costs. Appellant did not cross-examine Appellee or offer his own testimony regarding the charges. However, after the hearing Appellant filed a memorandum opposing the amount of attorney's fees. The trial court issued an order on December 19, 1996, awarding Appellee fees and costs in the amount of $26,892.95, plus prejudgment interest from February 9, 1990. In this order, the trial court impliedly denied Appellant's motions for relief from default when it stated that "[t]he Court in 1990 entered a default judgment against defendants who failed to show any reason under the rules to justify relief from the judgment."

Appellee filed a motion asking the trial court to certify the December 19, 1996 order as final for the purposes of appeal. [2] The trial court ultimately granted the motion on October 21, 1998, and Appellant filed the instant appeal, challenging the original entry of default and default judgment, the trial court's failure to grant his motions for relief, and the award of damages.

ANALYSIS

JUNE 20, 1990 DEFAULT AND DEFAULT JUDGMENT

We dismiss the appeal to the extent Appellant seeks to make a direct challenge to the entry of the default and default judgment entered on June 20, 1990. No appeal was filed within thirty days of that judgment and the filing of Appellant's initial Rule 60(b) motion did not toll the deadline for filing a notice of appeal. *Doe v. Doe*, 6 ROP Intrm. 51, 54 (1997).

APPELLANT'S MOTIONS TO SET ASIDE THE DEFAULT

[2] The order was not otherwise final because Appellant had filed a third-party complaint on January 21, 1993, and the order did not resolve all of the claims between all of the parties. *See* ROP Rule of Civil Procedure 54(b).

Appellant's motions to set aside the default and default judgment were brought under ROP Rules of Civil Procedure 55(c) and 60(b). We review the Trial Court's decision under both rules under the abuse of discretion standard. *Tmilchol v. Ngirchomlei* , 7 ROP Intrm. 66, 68 n.3 (1998).

Appellant filed his first motion to set aside on July 20, 1990, relying exclusively on ROP Rule of Civil Procedure 60(b)(1), which permits such action on the basis of "mistake, inadvertence, surprise or excusable neglect." Appellant's only argument was that he did not have counsel until July 12, 1990. Appellant offered no explanation for his failure to retain counsel earlier, and absent some compelling reason, mere failure to obtain counsel does not constitute excusable neglect. *See United States v. A Single Story Double Wide Trailer* , 727 F. Supp. 149, 153-154 (D. Del. 1989) (defendant's failure to attempt a *pro se* ⊥5 appearance or to explain the situation to the opposing party or the court constitutes inexcusable neglect). [3] On the sparse record before us, we cannot say that the trial court's refusal to grant Appellant's first motion was an abuse of discretion.

Appellant's second motion was filed in February 1992. The crux of Appellant's argument the second time around was that the default and default judgment were void because he was not served with the summons and complaint. Appellant also argued that the summons was defective and that the trial court erroneously failed to hold a hearing on damages.

We easily dispose of Appellant's arguments that the summons was defective, and that the trial court erred in failing to hold a hearing on damages. As to the former, Appellant claims that the summons has to be directed to a particular named defendant, and that there must be a separate summons for each defendant. Appellee's summons was directed "to above named defendants," and did not state the individual's name. We see no infirmity in this format, which is consistent with federal practice in the United States. *See* 2 Wright & Miller, *Federal Practice and Procedure* § 1087 n. 4 (reprinting form).

Regarding Appellant's latter argument, a hearing is not a prerequisite to the entry of a default judgment. ROP Rule of Civil Procedure 55(b)(2) merely states that the court may conduct such hearings as it deems necessary and proper, and therefore the decision of whether a hearing is necessary is left to the discretion of the trial judge. *Ngeliei v. Rengulbai*, 3 ROP Intrm. 4 (1991). We see no abuse of discretion in the trial court's determination that, default having been entered, no hearing was necessary to establish liability. As to damages, the trial court ultimately determined that a hearing was necessary, and held one. Thus, Appellant's argument on that score is moot.

Appellant argues correctly, however, that "[i]n the absence of valid service of process, proceedings against a party are void," *Aetna Business Credit v. Universal Decor and Interior Design*, 635 F.2d 434, 435 (5th Cir. 1981), and that relief from a void judgment is available

[3] Rule 60(b) is derived from Federal Rule of Civil Procedure 60(b). It is therefore appropriate for this Court to look to United States precedent for guidance. *Secharmidal v. Tmekei*, 6 ROP Intrm. 83 (1997).

pursuant to ROP Civ. Pro. R. 60(b)(4). [4] Appellant offers two arguments as to why service was insufficient here. We reject Appellant's suggestion that service was invalid because no proof of service was filed. Appellant quotes ROP R. Civ. Pro. 4(g), but omits the most relevant provision that "[f]ailure to make proof of service does not affect the validity of the service." Consistent with the plain language of the rule, in *Malsol v. Ngiratechekii* , 7 ROP Intrm. 70, 72 (1998), we expressly rejected Appellant's argument that due process requires the filing of a proof of service:

> Due process is calculated to guarantee that a litigant receives notice of proceedings involving his life, liberty or ⊥6 property. It is not designed to allow a litigant to parlay an alleged technical miscue into a new trial when all indications are that the litigant had notice . . . and simply chose not to appear.

We believe, however, that Appellant's submissions to the trial court sufficiently raised the basic factual question as to whether service was validly effected. [5] Here, although Appellee filed an affidavit in conjunction with his request for entry of default asserting that Appellant was served personally on March 15, 1990, Appellant later filed an affidavit stating that he never received the summons and complaint. It is unclear whether the trial court resolved this conflict, [6] and we do not believe that it could have done so on the record presented. [7] Accordingly, we

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[4] Indeed, where a judgment is void, the trial court has no discretion; it must grant relief. *See e.g. Carimi v. Royal Carribean Cruise Line, Inc.*, 959 F.2d 1344, 1345 (5th Cir. 1992); *Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982).

[5] Although the absence of a proof of service is not dispositive for the reasons just stated, it considerably lessens defendant's burden in raising this issue. Where a return of service has been filed, it is regarded as *prima facie* evidence that "can be overcome only by strong and convincing evidence" to the contrary. *Hicklin v. Edwards,* 226 F.2d 410, 414 (8th Cir. 1955); *see generally* 1 *Moore's Federal Practice* § 4.100 (3d Ed. 1998) ("a mere allegation by defendant that process was not served, without some additional showing of evidence, is insufficient to refute the validity of an affidavit of service").

[6] The trial court had previously found appellant's counsel in contempt for having filed the motion that first raised this issue. We reversed that finding, concluding that the order that counsel was charged with violating did not clearly and expressly forbid the filing of future pleadings. *Cushnie v. Oiterong*, 4 ROP Intrm. 216, 220 (1994). Although we did not address the merits at that time, we now find that there was no basis for the court to forbid the filing of a second Rule 60(b) motion, particularly where it raised a new issue that potentially affected the court's jurisdiction. While we believe it preferable that all grounds for relief from judgment be raised at one time, and while we believe that a court may be entitled to view belated assertions of lack of service with a skeptical eye, we believe that Appellant was entitled to raise the issue, and the court required to give it due consideration.

[7] We note that there are deficiencies in both affidavits. Although Appellee's affidavit asserts that he "is personally familiar with the facts set forth below", we do not understand him to say that he actually effected service, which would have been invalid in any event. *Cf*. ROP Civ. Pro. R. 4(c)(prohibiting service, absent special appointment, by "a party to the action"). On the other hand, Appellant's assertion that he "never received" the summons and complaint, even if credited, is not sufficient to establish that service was not validly made. *See* ROP Civ. Pro. R. 4(d)(1) (permitting service on an individual by means other than personal delivery).

remand this matter so that the trial court may make a factual determination whether Appellant was served in compliance with ROP R. Civ. Pro. 4. If on remand, the trial court finds that Appellant was properly served, the judgment against Appellant may stand. On the other hand, if the trial court concludes that he was not properly served, the default and judgment must be vacated.

DECEMBER 18, 1996 ORDER AWARDING DAMAGES

The trial court found, after its hearing on December 18, 1996, that Appellee had proved his fees and costs in the amount of $26,892.95, and awarded that amount plus prejudgment interest as damages. The findings of fact underlying an award of ⊥7 damages are reviewed under the clearly erroneous standard. *E.g., Robert v. Ikesakes*, 6 ROP Intrm. 234, 241-42 (1997). We find no error here.

The trial court's award is supported by Appellee's testimony regarding his fees and costs, as well as Appellee's detailed invoices and receipts regarding the same. Appellant presented no contradictory evidence regarding the propriety of the amounts charged, and did not cross-examine Appellee. Rather, Appellant only argued in a motion submitted after trial that the amounts were unreasonable. Appellant here challenges the award on eight bases, none of which are persuasive.

First, Appellant claims that Appellee's time records are insufficient because he failed to prove that they are timely and complete. The records were admitted as an exhibit at the hearing, and they appear to be detailed, complete and contemporaneous. Appellant did not object to the introduction of the records during the hearing. Moreover, Appellant has offered no particular challenge to the records, other than the vague assertion that many of the time entries were in even hour allotments. This assertion is untrue, but even if it were true, it is irrelevant to the accuracy of the records. We reject Appellant's argument regarding insufficiency of the billing records.

Second, Appellant claims that the hourly fee was unreasonable. This argument is improper because the parties had a retainer agreement. *See* 7 Am. Jur. 2d, *Attorneys At Law* § 292 (an express contract specifying a stated compensation for an attorney's services is generally conclusive as to the amount of compensation). Unfortunately, the retainer agreement was not introduced into evidence. Appellee testified that his unsigned copy of the retainer agreement had been destroyed in a typhoon, and Appellant failed to produce the signed original. However, Appellee testified that the hourly rate in the retainer agreement was $125 per hour. Appellant did not challenge the existence of a retainer agreement, did not object to Appellee's testimony as to the agreed-upon rate, nor offer any testimony that that rate was anything other than $125 per hour. On these facts, the trial court did not err in awarding Appellant fees at the rate of $125 per hour.

Third, Appellant argues that travel expenses are not recoverable, mistakenly relying on case law and on 28 U.S.C. § 1920 that relate to post-judgment award of costs to a prevailing party. Here, charges for travel time and costs should be governed by the retainer agreement. *See*

7 Am. Jur. 2d, *Attorneys At Law* § 292. Unfortunately, there was no testimony from either party regarding how the agreement addressed this issue. Rather, there is only circumstantial evidence that they were permissible charges. Appellant's billing invoices contain charges for travel time and related expenses, supporting the inference that the parties had an agreement permitting them. That inference is further supported by Appellant's complete lack of objection to such charges until Appellee filed his collection action. Although the evidence is not overwhelming, we cannot say that it was clearly erroneous to allow Appellee to recover fees and costs relating to necessary travel to Palau.

Fourth, Appellant asserts that the fees should be reduced for unproductive results. This argument is completely without merit. "That the contract did not bring the results anticipated is not a ground for the client to ⊥8 avoid the contract." 7 Am. Jur. 2d, *Attorneys At Law* § 292. The case cited by Appellant, *Action On Smoking And Health v. C.A.B.* , 724 F.2d 211 (D.C. Cir.1984), relates only to the statutory award of attorney's fees, and is inapplicable to attorney/client fee disputes.

Appellant's fifth and sixth arguments are that Appellee failed to prove a basis for his fees, and that Appellee failed to segregate charges and fees. These arguments are only a shade different from Appellant's first argument discussed above. Again, Appellant relies on cases that relate to an award of attorney's fees to a prevailing party. For the reasons discussed above, we reject these arguments.

Seventh, Appellant claims that the award violates the statute of frauds. As a procedural matter, Appellant did not raise the statute of frauds argument below, and is therefore barred from raising it for the first time on appeal. *Ngerketiit Lineage v. Ngerukebid Clan* , 7 ROP Intrm. 38, 43 (1998). The argument fails on the merits in any event. The statute of frauds applies only to contracts that cannot, by their terms, be performed within one year. 39 PNC § 504(a). There was no evidence that the agreement between the parties could not have been performed within a year. The fact that the agreement lasted more than one year is irrelevant to the statute of frauds. *See* 7 Am. Jur. 2d, *Attorneys At Law* § 264 (retainer agreements that may be completed within a year are not subject to the statute of frauds).

Finally, Appellant argues that Appellee failed to prove entitlement to interest because there is insufficient proof that he received the invoices. Appellee testified that all of the invoices were sent to Appellant. Appellant failed to introduce any contrary evidence – and does not even assert – that he never received the invoices. Thus, we reject Appellant's argument against the award of interest. For the above reasons, we find no error in the trial court's award of damages.

CONCLUSION

For the foregoing reasons, the trial court's judgment is AFFIRMED in part and REMANDED in part.