NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

Case No. 119,870

JAYSON ERNST and VICKI ERNST,

Plaintiffs/Appellees,

vs.

DARRYL F. ROBERTS,

Defendant/Appellant,

and

MONEYGRAM PAYMENT SYSTEMS, INC.,

Defendant.

APPEAL FROM THE DISTRICT COURT OF
CANADIAN COUNTY, OKLAHOMA

HONORABLE PAUL HESSE, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jack S. Dawson
MILLER DOLARHIDE, P.C.
Mustang, Oklahoma — For Plaintiffs/Appellees

Darryl F. Roberts
Tulsa, Oklahoma — *Pro Se*

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

Darryl F. Roberts appeals the denial of his motion to vacate both a liability-only summary judgment in favor of Jayson and Vicki Ernst and a later award of damages. We find no error in the court's refusal to vacate the summary

judgment. At the hearing on the motion to vacate, however, the trial court found that Roberts had waived his fraud claims regarding damages. But the record does not support the contention that Roberts waived the assertion that the Ernsts did not suffer the damages they were awarded at the damages hearing. As such we affirm the trial court's judgment as to liability but vacate the damages award and remand for additional proceedings consistent with this opinion.

BACKGROUND

This saga, which eventually lead to the Ernsts' malpractice claim against Roberts, began in 2011. Jayson and Vicky Ernst had a mortgage serviced by Ocwen Servicing. The monthly payment on the mortgage was $943.65. The Ernsts began paying their mortgage by sending Ocwen money orders through a company called MoneyGram. However, for reasons that remain unclear, Ocwen began rejecting these payments.[1] The Ernsts were purportedly not informed of this, and MoneyGram purportedly retained some $15,000 in rejected payments. In 2013, Ocwen filed a petition to foreclose the mortgage.

The Ernsts hired the appellant, Darryl Roberts, to oppose the foreclosure. Roberts answered the foreclosure petition and filed counterclaims in February 2013. In March of that year, Ocwen removed the case to federal court. In July, the federal court remanded the case for lack of federal jurisdiction. The docket sheet shows that litigation continued in a normal pattern until June 2014. There was then no activity until April 2016.

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[1] This was possibly because the Ernsts began making bi-weekly instead of monthly payments, sending a partial payment on the due date, then sending a second MoneyGram two weeks later to make up the balance.

Roberts testified that, in June 2014, he informed the Ernsts that his daughter had developed a serious medical condition that would require his assistance, that he would be unable to continue with the case, and that they would need to get another lawyer. He also testified that his original $2,500 retainer had long since been consumed, but he had not been paid anything further by the Ernsts. Roberts did not file a request to withdraw as the Ernsts' counsel, however.

In April 2016, Ocwen filed a motion for summary judgment. The motion included a certificate of mailing to the post office box address in Ardmore that Roberts had listed in his answer and counterclaim. No response was filed, and no counsel appeared for the Ernsts at the subsequent hearing. The District Court granted Ocwen summary judgment.[2]

In May 2017, the Ernsts sued Roberts and, in June 2017, added MoneyGram payment systems as a defendant. The petition alleged that the Ernsts had suffered damages "in excess of $75,000" because of Roberts' failure to answer the summary judgment motion.[3] The petition was served on Roberts by mail, with return receipt, at a street address in Ardmore. Roberts filed an answer in November 2017, listing the same Ardmore post office box as his service

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[2] The Ernsts appealed this judgment as Case No. 115,101. The appeal concentrated on standing issues as to the right to enforce the note and the sufficiency of the plaintiff's affidavit to support summary judgment. Division II of this Court affirmed, finding that the record was sufficient to support summary judgment.

[3] The suit against MoneyGram alleged that MoneyGram knew that Ocwen was rejecting the Ernsts' payments but did not return the money orders to the Ernsts or in any way inform them that they were being rejected.

address. In November 2018, the Ernsts dismissed their claim against MoneyGram.

In May 2019, the Ernsts filed a motion for summary judgment against Roberts. The motion was mailed to the same post office box that Roberts had listed in his answer. In October 2019, the court, noting that no response was filed and that Roberts had not appeared at hearing, granted the Ernsts' motion for summary judgment as to liability. The court set a hearing on damages for October 28. This hearing was later continued until November 13. Roberts did not appear at the hearing on damages. The court subsequently awarded damages of $102,077.09 against Roberts.

In October 2020, Roberts filed a petition to vacate this judgment pursuant to 12 O.S. § 1031, denying notice of either the summary judgment or the damages hearing, and alleging fraud as to the damages requested. The Ernsts responded with an argument that Roberts had been served by mail at "PO Box 1568" in Ardmore, which was the address listed on Roberts' last pleading, his November 2017 answer to their petition, and that his fraud claim was insufficiently pled. A non-jury trial on the petition to vacate was held on July 21, 2021. The court denied Roberts' petition to vacate, finding in the appealed order that Roberts had moved for vacation pursuant to § 1031 (2), (4), (7) and (9), and had failed to show grounds for vacation under any of these sections.

Roberts appealed. The Ernsts filed a motion to dismiss this appeal, arguing that Roberts had already voluntarily satisfied the judgment resulting from these

proceedings, and hence the appeal was moot. This motion was deferred to the decisional stage.

STANDARD OF REVIEW

The standard of review of an order granting or denying a petition to vacate is whether the trial court abused its discretion. *Ferguson Enters., Inc. v. H. Webb Enters., Inc.*, 2000 OK 78, ¶ 5, 13 P.3d 480, 482. An abuse of discretion involves a clearly erroneous conclusion and judgment, against reason and evidence. *Oklahoma Tpk. Auth. v. Horn*, 1993 OK 123, ¶ 6, 861 P.2d 304, 306.

ANALYSIS

The Motion to Dismiss

The first question is whether this appeal should be dismissed because Roberts voluntarily and unconditionally satisfied the Ernsts' judgment against him. Oklahoma Supreme Court Rule 1.6 does allow dismissal because of an "acquiescence in the judgment." The Ernsts alleged that Roberts acquiesced in the judgment because of the following events.

In November 2020, Roberts sold his family home in Ardmore. He placed the proceeds in an escrow account with Arbuckle Closing and Escrow LLC, purportedly for the benefit of the Ernsts to satisfy any final judgment. The Ernsts had previously filed a statement of judgment against Roberts in the county, pursuant to 12 O.S. § 706. In January 2021, the Ernsts wrote to both Arbuckle Closing and the buyers offering them an opportunity to "explain why the Ernsts' judgment lien was ignored by you," and threatening execution on the funds or

foreclosure on the property if no response to this letter was forthcoming within seven days.

As a result, Arbuckle Escrow sent the Ernsts a check for the judgment amount in August 2021. The Ernsts subsequently filed a "release and satisfaction of judgment" in the district court. They argue that Roberts' placing of the funds in the Arbuckle Closing Escrow account was voluntary, and Arbuckle Closing's payment of their lien claim before any suit was filed was also voluntary. Hence, they argue, there was a voluntary satisfaction by Roberts that moots his appeal.[4]

The argument presented by the Ernsts was rejected by the Supreme Court in *Grand River Dam Auth. v. Eaton*, 1990 OK 133, 803 P.2d 705, where the Court held: "We now reject any rule that we have previously espoused that would require dismissal of an appeal merely on the basis that a judgment debtor pays a final and appealable judgment that could subject his property to execution and ultimate sale. Our rejection applies whether or not execution has issued." *Id.* ¶12, 709. A party is not "prevented from appealing to this court by the fact he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal." *Id.* ¶ 13 (*citing Hayes v. Nourse*,

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[4] Although the Ernsts do not mention it in their motion to dismiss, the question of whether this series of events constituted a voluntary satisfaction of the Ernsts' judgment was previously litigated and decided in the district court. On August 3, 2021, eight days before Arbuckle Closing sent the Ernsts the judgment amount, Roberts filed a motion to stay and set an appeal bond. Hearing was held on September 22, and the Ernsts responded with the same argument they later presented to this Court—that no bond was necessary because "this case is over ... [i]t is dead" because the judgment had already been voluntarily satisfied. The trial court rejected this argument and the Ernsts did not raise this decision as error on appeal.

107 N.Y. 577, 14 N.E. 508, 508 (1887)). We find no indication of any intended compromise or agreement not to appeal here.[5] As such the Ernsts' motion to dismiss is denied.

The Motion to Vacate

Roberts relied on four sections of 12 O.S § 1031 as a basis for vacation. These were § 1031(2)—no actual notice; § 1031(4)—fraud; § 1031(7)—unavoidable casualty; and § 1031(9)—taking judgments upon warrants of attorney for more than was due to the plaintiff. He further alleged an irregularity in the Ernsts obtaining summary judgment based on a claim of "mental distress" without alleging accompanying physical injury because such a recovery was invalid as a matter of law.

Roberts' first argument is that he did not receive notice of the motion for summary judgment because he had given up ownership of Ardmore post office box 1568, and had left forwarding orders, but had received forwarded mail from it for only two months.

After an initial pleading has been served, and the opposing party has entered an appearance, the mailing address contained within that entry of appearance becomes the address of record for any attorney or party appearing in a case. 12 O.S. § 2005.2 (D). "The attorney or unrepresented party must, in all cases pending before the court involving the attorney or party, file with the court and serve upon all counsel and unrepresented parties a notice of a change

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[5] The "release and satisfaction of judgment" in the district court was unilaterally filed by the Ernsts and was not signed by Roberts.

of address." *Id.* An entry of appearance "serves the purpose of putting everyone on notice ... for purposes of future filings, notices and mailings." *Keith & Associates, Inc. v. Glenn*, 2011 OK CIV APP 119, ¶ 8, 268 P.3d 142, 145. Service by mail upon this address constitutes valid notice of a motion or order. *Matter of L.C.P.*, 2019 OK CIV APP 34, ¶ 24, 456 P.3d 1142, 1149.

Roberts' argument is not one of legally improper service or notice, but that he did not receive actual notice because his mail was not forwarded from his PO Box. If this argument has any validity, it will fall under the heading of unavoidable casualty—that Roberts had left forwarding instructions, but the post office did not follow them.

But "unavoidable casualty" must be just that—unavoidable. Unavoidable casualty is an eventuality that "human prudence or foresight cannot prevent." *Crawford v. Gipson*, 1982 OK 31, ¶ 12, 642 P.2d 248. It is a "happening against the will and without the negligence or default of a party." *Sabin v. Sunset Gardens Co.*, 1938 OK 574, ¶ 8, 85 P.2d 294. Title 12 O.S. § 2005.2 is clear that the proper practice is to file a new service address with the court, rather than rely on mail forwarding. We agree with the trial court that failure to follow the required procedure in this case was not unavoidable.[6]

Roberts next argued an "irregularity" in the courts grant of summary judgment. The alleged "irregularity" is this: the Ernsts' petition alleged

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[6] Roberts' family situation around this time warrants and has our sympathy. It appears to have consumed his entire attention and impaired his ability to personally give full attention to his legal affairs. This could have been dealt with, however, by hiring other counsel to conduct his defense, relieving Roberts of this responsibility. It was not unavoidable.

professional negligence, and "damages in excess of $75,000." It further sought individual damages "in excess of $75,000" on behalf of Jayson Ernst for "mental distress, mental pain and suffering, and mental anguish, fear, grief, humiliation, embarrassment, anger disappointment, worry and other types of emotional distress." Roberts argues that, as a matter of law, the court could not have granted summary judgment on this claim of emotional damages because there was no evidence to support it at summary judgment.

Before a court may properly grant a summary judgment motion it must clearly appear that the movant is entitled to judgment as a matter of law, viewing the supporting material in the light most favorable to the opponent. *Sholer v. ERC Mgmt. Grp.*, LLC, 2011 OK 24, ¶ 1, 256 P.3d 38, 40. This rule applies even when no response is filed.

> Even when no counterstatement has been filed, it is still incumbent upon the trial court to insure [sic] that the motion is meritorious. The trial court must examine the evidentiary materials supporting the motion and if all the material facts are addressed and are supported by admissible evidence, those facts are admitted and judgment for the movant is proper.

Spirgis v. Circle K Stores, Inc., 1987 OK CIV APP 45, ¶ 10, 743 P.2d 682, 685 (approved for publication by the Oklahoma Supreme Court).

Roberts is correct that neither the summary judgment motion nor its attached exhibits contain evidence of any emotional distress. The negligent infliction of emotional distress alleged by Jayson Ernst, however, constitutes *an item of damages*, not an independent claim. *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.*, 1996 OK 141, 916 P.2d 241, 243; *Gonzalez v. Sessom*, 2006 OK CIV APP 61, ¶ 15, 137 P.3d 1245, 1249. As such it was not a question

involved in a partial summary judgment on negligence. Proof of such damages, and the appropriate compensation, was a matter for the damages hearing.[7]

The unopposed motion for summary judgment was sufficient to establish that foreclosure had been filed against the Ernsts' property; that they had viable defenses to the foreclosure; that Roberts had a duty to present these defenses in response to the motion for summary judgment; and that Roberts breached that duty. As such, summary judgment was proper and was not subject to vacation for fraud, irregularity, or lack of notice.

Fraud in the Damages Determination

Roberts' verified amended petition to vacate the damages award alleged that the Ernsts had falsely represented a "nonexistent deficiency judgment" and "lost acquired equity" as damages resulting from foreclosure. R. 279. The Ernsts' reply did not dispute these allegations but argued that Roberts had failed to specify the fraud sufficiently. We disagree. These sworn allegations were sufficiently detailed to raise a claim that the judgment was obtained by a fraudulent representation of damages.

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[7] The rule from *Kraszewski* that emotional damages constitute an "item of damages" rather than a "claim," creates some ambiguity when a judgment is made "as to liability only." The judgment could be interpreted as carrying a finding that the defendant *had suffered* emotional damages, and only the question of appropriate compensation remained for later determination. Alternatively, it could be interpreted as making no finding at all on the question, requiring the plaintiff to prove both the *fact of, and the value of* such damages at a later hearing. The principle that emotional damages are "not a claim" may favor the latter interpretation, especially in the absence of evidence in the summary judgment phase that such injury occurred. We find no case law on this question, however, and do not attempt to decide it here. We further note that the order resulting from the damage hearing states that Vicki Ernst, but not Jayson Ernst, testified. How evidence of Ernst's internal mental and emotional state was introduced remains uncertain, as does the question of whether the court awarded such damages at all.

The court did not address these allegations either, finding in its order denying the motion to vacate that "Roberts testified that he did not believe fraud was committed on him by the Ernsts." It is on the basis of this purported waiver of the fraud claim that the court denied Roberts' motion to vacate the damages award. The Ernsts cite this purported testimony to the transcript of the June hearing. The cited page contains no testimony by Roberts but a summing up by the trial judge where he states:

> You have testified that you don't even believe that there was fraud committed on you by the Ernsts or the attorneys for the Ernsts. I think you characterized as what happens as unfair ....

Tr. (6/21/2021), pg. 106. Searching the record for evidence of this testimony, we find the following exchange between Roberts and the Ernsts' counsel:

> Q: You allege in this amended petition that you're entitled to have this judgment vacated for fraud practiced by the successful party in obtaining judgment or order. And I just want to know what fraud and by whom?
>
> A: Well, that's statutory language—
>
> Q: I know its statutory language, but you allege it.
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> A: Let me finish my answer if you would. Okay. It's statutory language. The word fraud in that instance is a little strong but it should have been apparent, particularly with the seriousness of the things that I was being accused of that I wasn't aware I would think of what was going on. And to not do more than mail to a mailbox, I wouldn't call that fraud, but I would call it an unfairness that I think the statute would address to.
>
> Q So you're saying that the fraud was a failure to give you notice?
>
> A No. I said that I thought the word was a little strong, there was an unfairness in me not being notified merely by sending to a Post Office box.

Id. at 71-72.

We read this testimony as only confirming that Roberts agreed that giving notice of summary judgment and the damages hearing by serving his post office box was not "fraud" but merely "unfair." It does not address the allegation of fraud in the damages proceeding, although the court, without the hindsight provided by the transcript, evidently remembered it as doing so. Rather than waive this claim, Roberts repeated his claim of fraud in the damages request at trial, testifying that the judgment "was based on a deficiency for which there was none in this case—in the mortgage case, and equity lost of $81,000. That didn't show. That's when I filed my amended petition." *Id.* at 94.

The court's apparent decision that Roberts testified against or waived his § 1031(4) fraud-as-to-damages claim at trial is contrary to the record. Because this was the sole stated ground for the refusal to vacate the damages award, we find that refusal to be an abuse of discretion. And, reviewing the record as a whole, we find no other evidence or arguments produced below that would allow us to affirm the decision on damages. We therefore reverse the trial court as to its order denying vacation of the damages award.

CONCLUSION

We find no error in the court's refusal to vacate the underlying summary judgment as to liability. We also find no error in the court's refusal to vacate the damages judgment on the grounds of a lack of notice. The decision that Roberts had waived his claim of fraud as to the damages award is not supported by any evidence in the record, however. As such, we reverse the trial court's order

denying the motion to vacate as to the damages award and remand for additional proceedings consistent with this opinion.

FISCHER, J., and HIXON, J. (sitting by designation), concur.

April 12, 2023