SUMMARY
May 16, 2024

2024COA55

No. 23CA1498, *Gestner v. Gestner* — Appeals — Court of Appeals — Jurisdiction — Default Judgment — Final Appealable Order — Preservation

A division of the court of appeals addresses the extent to which a default judgment is reviewable on appeal when no motion to set aside the default judgment has been filed and ruled upon in the district court. The division holds that, although the court of appeals has jurisdiction over a direct appeal from a default judgment, the normal rules of preservation apply. Thus, when the appellant did not appear or present any arguments in the district court before the default judgment was entered, an appeal of the default judgment generally will not be reviewable on the merits because the appellant's arguments will ordinarily be unpreserved.

COLORADO COURT OF APPEALS **2024COA55**

Court of Appeals No. 23CA1498
City and County of Denver District Court No. 23CV30861
Honorable Mark T. Bailey, Judge

Bruce Allen Gestner and Mary Jean Gestner,

Plaintiffs-Appellees,

v.

Bruce Michael Gestner,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE SCHOCK
Navarro and Kuhn, JJ., concur

Announced May 16, 2024

Belzer Law, Aaron B. Belzer, Ashlee N. Hoffmann, Boulder, Colorado, for Plaintiffs-Appellees

James E. Freemyer P.C., James E. Freemyer, Robert K. Reimann, Denver, Colorado, for Defendant-Appellant

¶ 1 When the district court enters default judgment against a party who fails to answer or otherwise respond to the complaint, the normal process for challenging the default judgment is through a motion to set aside the default judgment in the district court and then, if necessary, an appeal of the ruling on that motion. But no Colorado case has decided whether this standard procedure is *required*. In other words, can a party simply appeal the default judgment itself in lieu of first challenging it in the district court?

¶ 2 We hold that although we have jurisdiction over a direct appeal of a default judgment, the normal rules of preservation apply. As a practical matter, this means that the appellant's failure to appear in the district court before default judgment was entered will generally preclude consideration of the merits of such an appeal because the appellant's arguments will ordinarily be unpreserved.

¶ 3 That is the scenario in this case. Defendant, Bruce Michael Gestner, appeals the default judgment in favor of plaintiffs, Bruce Allen Gestner and Mary Jean Gestner. But he did not appear or present any arguments in the district court before the default judgment was entered. Thus, because none of the arguments raised on appeal were preserved for review, we affirm the judgment.

I. Background

¶ 4 Bruce Allen, Mary Jean, and Bruce Michael are the owners in joint tenancy of a single-family residence (the property), which has been Bruce Michael's home for most of the last thirty-plus years.[1] Bruce Allen[2] and Mary Jean are Bruce Michael's parents.

¶ 5 The property was purchased in 1989 in the name of Bruce Allen and Rebecca Gestner, Bruce Michael's then wife. In 2005, as a result of Rebecca and Bruce Michael's divorce, Rebecca sold her interest in the property to Bruce Allen, making him the sole owner. Later that year, Bruce Allen added Mary Jean to the title as a joint tenant. In 2009, as part of their estate planning, Bruce Allen and Mary Jean added Bruce Michael to the title as a third joint tenant.

¶ 6 In March 2023, with the parties' relationship having deteriorated, Bruce Allen and Mary Jean filed a lawsuit to partition

---

[1] Because the parties in this case share the same last name, and two parties share the same first and last name, we refer to the parties by their first and middle names, intending no disrespect.

[2] The record indicates that Bruce Allen passed away on July 24, 2023 — after default judgment was entered but before the notice of appeal was filed. No party filed a motion for substitution of parties or a suggestion of death in this appeal. *See* C.A.R. 43(a)(1), (3). Bruce Allen's death has no effect on the resolution of this appeal.

the property, naming Bruce Michael as the defendant. Alleging that the property could not be partitioned in kind without manifest prejudice to the rights of the parties, they sought an order directing the sale of the property and distribution of the net proceeds under sections 38-28-107 and 38-28-108, C.R.S. 2023.

¶ 7 Bruce Michael was served with the complaint on April 6, 2023. Despite communicating with plaintiffs' counsel and participating in mediation, Bruce Michael did not answer or otherwise respond to the complaint. Nor did he appear in the case at all. On May 15, 2023, the clerk entered his default under C.R.C.P. 55(a).

¶ 8 Two weeks later, plaintiffs filed a motion for default judgment, seeking an order that the property be listed for sale with a real estate agent of their choosing and that each joint tenant receive one-third of the proceeds of the sale. They again asserted that, as a single-family residence, the property could not be partitioned in kind without manifest prejudice. They also requested that Bruce Michael be required to cooperate with the real estate agent and that he be restrained from damaging or devaluing the property. Bruce Michael did not respond to the motion for default judgment.

¶ 9 On July 12, 2023, the district court entered default judgment as requested by plaintiffs in their motion. The default judgment ordered that (1) each joint tenant is apportioned a one-third interest in the property; (2) plaintiffs shall hire a real estate agent to sell the property; (3) Bruce Michael shall cooperate with the real estate agent and allow access to the property; (4) Bruce Michael shall not do anything to damage or devalue the property; and (5) each joint tenant shall receive one-third of the net proceeds of the sale.

¶ 10 Shortly after the entry of default judgment, plaintiffs filed a forthwith motion for possession of the property, including the right to evict Bruce Michael. The district court granted that motion.

¶ 11 Apparently prompted by that order, counsel for Bruce Michael entered an appearance on August 4, 2023, and filed a motion to reconsider the order granting plaintiffs possession of the property. In the motion to reconsider, Bruce Michael argued that the default judgment was erroneous because it did not include a specific finding that a partition in kind would result in manifest prejudice.

¶ 12 A week later, Bruce Michael filed an answer and counterclaim, along with a motion for relief from the default judgment under C.R.C.P. 60(b)(2). But before the district court had ruled on either

the motion to reconsider or the motion for relief from judgment, Bruce Michael filed his notice of appeal of the default judgment. As a result, the district court concluded that it lacked jurisdiction to rule on the pending motions, and it took no action on them.

II. Appealability of Default Judgment

¶ 13 As noted, the typical course for challenging a default judgment based on a failure to respond to the complaint[3] is to move to set aside the default judgment in the district court, and then, if the motion is denied, to appeal that denial. *See* C.R.C.P. 55(c); C.R.C.P. 60(b); *McMichael v. Encompass PAHS Rehab. Hosp., LLC*, 2023 CO 2, ¶ 10; *Sebastian v. Douglas County*, 2016 CO 13, ¶¶ 2, 18.

¶ 14 But Bruce Michael opted for a different approach. Although he filed a motion to set aside the default judgment under C.R.C.P. 60(b), he did not await a ruling on that motion. Instead, he appealed the default judgment itself. He then did not seek an order from this court remanding the case to the district court to resolve

---

[3] This opinion only addresses default judgments entered after a party does not respond to the complaint. We do not address default judgments entered on other grounds after a party has appeared, including as a sanction for discovery violations. *See, e.g.*, *Pinkstaff v. Black & Decker (U.S.) Inc.*, 211 P.3d 698, 703-04 (Colo. 2009).

the Rule 60(b) motion, as he could have done. *See Molitor v. Anderson*, 795 P.2d 266, 270 (Colo. 1990). Thus, we must address a question not yet resolved in Colorado: Is a default judgment directly appealable in the absence of a motion to set aside the default judgment (and a ruling on that motion) in the district court?

¶ 15 Other jurisdictions are split on this question under similar federal and state rules. 12 James W. Moore et al., *Moore's Federal Practice* § 60.03[6] & n. 22.1 (3d ed. 2024) (noting circuit split); *Stelly v. Duriso*, 982 F.3d 403, 406-07, 407 n.4 (5th Cir. 2020). Some courts hold categorically that a default judgment is not directly appealable. *See, e.g.*, *Consorzio Del Prosciutto Di Parma v. Domain Name Clearing Co.*, 346 F.3d 1193, 1195 (9th Cir. 2003); *Aloia v. Gore*, 506 P.3d 34, 39 (Ariz. Ct. App. 2022); *Golmon v. Latham*, 643 S.E.2d 625, 626 (N.C. Ct. App. 2007) (citing cases). Others hold that it is. *See, e.g.*, *Stelly*, 982 F.3d at 407; *Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 170-71 (2d Cir. 2001). Still others allow for only limited review. *See, e.g.*, *Robertson v. Rosner*, 641 S.W.3d 436, 443 (Mo. Ct. App. 2022) (limiting direct appeal from default judgment to challenges to subject matter jurisdiction);

Wisan v. City of Hildale, 2014 UT 20, ¶ 19 (noting "very limited" circumstances warranting direct appeal from default judgment).

¶ 16 We conclude that we have jurisdiction over a direct appeal from a default judgment. A default judgment is a final judgment. *See State Farm Mut. Auto. Ins. Co. v. Brekke*, 105 P.3d 177, 185 (Colo. 2004) ("As a general rule, a default judgment has the same effect as [a] final judgment after a formal trial."); *Sumler v. Dist. Ct.*, 889 P.2d 50, 55 (Colo. 1995) (holding that default judgment was a final judgment "because it left the court with nothing to do but execute upon the judgment"). And as a final judgment, it falls squarely within the scope of our appellate jurisdiction. *See* § 13-4-102(1), C.R.S. 2023 (providing that the court of appeals "shall have initial jurisdiction over appeals from final judgments"); C.A.R. 1(a)(1) ("An appeal to the appellate court may be taken from . . . a final judgment of any district . . . court in all actions.").

¶ 17 But jurisdiction aside, there are two significant obstacles to appellate review of a default judgment against a party who did not appear in the district court. First, the record will rarely be sufficiently developed to permit an adequate review of any disputed factual issues. *See Winesett v. Winesett*, 338 S.E.2d 340, 341 (S.C.

1985); Restatement (Second) of Judgments § 78 cmt. e (Am. L. Inst. 1982) ("[A]ppeal is an effective remedy only if the matter in question has been made part of the record . . . ."). One way for a party to develop that record is through a motion to set aside the default judgment in the district court. *See Stelly*, 982 F.3d at 407; Restatement (Second) of Judgments § 78 cmt. e. The lack of such a motion precludes the party from raising any issues on appeal that require further factual development. *See Stelly*, 982 F.3d at 407.

¶ 18 Second, even when the issues raised on appeal are purely legal and require no development of the record, those issues necessarily will not have been raised in the district court. In civil cases, issues not raised in or decided by the district court generally will not be addressed for the first time on appeal. *Melat, Pressman & Higbie, L.L.P. v. Hannon L. Firm, L.L.C.*, 2012 CO 61, ¶ 18; *see also Pinnacol Assurance v. Laughlin*, 2023 COA 9, ¶ 22 (noting that review of unpreserved claim of error in civil cases is "exceptionally rare"); *Sisneros v. First Nat'l Bank of Denver*, 689 P.2d 1178, 1181 (Colo. App. 1984) (declining to consider argument to set aside default judgment that was not raised in the district court).

¶ 19 When a default judgment is entered before a party has appeared or made any arguments in the district court, the most natural vehicle for that party to preserve their arguments is a motion to set aside the default judgment. *See Expert Pool Builders, LLC v. Vangundy*, 224 N.E.3d 309, 314 (Ind. 2024). Absent such a motion, the party almost certainly will not have raised the issues in the district court, and the district court will have had no opportunity to rule on them. *See, e.g.*, *Wood v. Alkhaseh*, 666 S.W.3d 87, 94 (Ark. Ct. App. 2023); *cf. Statewide Env't Servs., Inc. v. Fifth Third Bank*, 352 S.W.3d 927, 930 n.6 (Ky. Ct. App. 2011) ("[A]n inherent characteristic of a direct appeal from a default judgment is that the appellant has failed to preserve his claim of error.").

¶ 20 Thus, when a party has not appeared or presented any arguments in the district court before default judgment is entered, the party's challenges to the default judgment generally will not be reviewable on the merits — not as a matter of jurisdiction, but as a matter of preservation. In other words, while we have jurisdiction over such an appeal, the party's failure to develop the record or

preserve any arguments in the district court will almost invariably prevent appellate review of the issues raised on appeal.[4]

¶ 21 We recognize, as Bruce Michael asserts, that this places a party against whom default judgment is entered in a bind because an appeal of the denial of a C.R.C.P. 60(b) motion is more limited than an appeal of the judgment itself. First, the grounds for a Rule 60(b) motion are themselves limited. *See* C.R.C.P. 60(b) (listing five grounds for such a motion); *McMichael*, ¶ 13; *SR Condos., LLC v. K.C. Constr., Inc.*, 176 P.3d 866, 869, 871 (Colo. App. 2007) ("An erroneous application of the law is . . . insufficient for a court to grant relief under C.R.C.P. 60(b)(5)."). Second, an appeal of the denial of a Rule 60(b) motion "does not bring up the underlying judgment for review" but raises only the question of whether the district court abused its discretion in denying the motion. *People in Interest of J.A.U. v. R.L.C.*, 47 P.3d 327, 331 n.6 (Colo. 2002).

---

[4] One exception to this general rule is a challenge to the district court's subject matter jurisdiction, which may be asserted at any time, including for the first time on appeal. *See Colo. Dep't of Pub. Health & Env't v. Caulk*, 969 P.2d 804, 807 (Colo. App. 1998). We do not address other exceptions that might apply in another case.

¶ 22 But these limitations are not unique to default judgments. In any case, a party who appeals the judgment is subject to the fundamental appellate tenet of issue preservation. *See Melat, Pressman & Higbie*, ¶ 18 ("Our judicial system depends upon the orderly presentation and preservation of issues."). And a party who files a Rule 60(b) motion and appeals that ruling is subject to the limitations of that rule. A party faced with a default judgment for failing to respond may likewise choose between those two options. The only difference is that, by definition, such a party will have no preserved arguments to raise in a direct appeal of the judgment.

III. Preservation

¶ 23 Having determined that the ordinary rules of preservation apply to an appeal of a default judgment, we conclude that Bruce Michael did not preserve any of the arguments he raises on appeal.

¶ 24 Bruce Michael challenges the default judgment on four grounds, none of which implicates the district court's subject matter jurisdiction. He asserts that the district court erred by (1) ordering the sale of the property without a finding that the property could not be partitioned in kind without manifest prejudice; (2) granting relief that differed in kind from the relief

requested in the complaint; (3) failing to hold a hearing on damages; and (4) granting default judgment without supporting affidavits.

¶ 25 All of these issues were fairly presented by plaintiffs' motion for default judgment, which requested the exact relief the district court ordered. Bruce Michael had notice of that motion. Plaintiffs' counsel conferred with him before filing the motion and mailed him a copy. And the district court waited six weeks to rule on the motion after it was filed. Yet, in those six weeks, Bruce Michael did not appear or assert any arguments in opposition to the motion.

¶ 26 Bruce Michael concedes that he did not raise the last three of his arguments in the district court. He asserts that he preserved the first argument in his motion to reconsider the order granting plaintiffs possession of the property. But he filed that motion three weeks after entry of the default judgment. Because this appeal is limited to the default judgment, we look to the arguments before the district court at the time of that ruling. *See Bd. of Med. Exam'rs v. Duhon*, 867 P.2d 20, 23 (Colo. App. 1993) (noting that we must "look[] solely to the record that was before [the district court] at the time it entered [the order being appealed]"), *aff'd*, 895 P.2d 143 (Colo. 1995); *Lorenzen v. Pinnocol Assurance*, 2019 COA 54, ¶ 18

n.3 (declining to consider arguments first raised in motion for reconsideration). And there is no dispute that Bruce Michael did not raise this argument *before* default judgment was entered.

¶ 27 Thus, because Bruce Michael failed to preserve his arguments in the district court, we will not address them for the first time on appeal.[5] *See Melat, Pressman & Higbie*, ¶ 18. We note, however, that nothing in this opinion precludes Bruce Michael from pursuing his motion to set aside the default judgment in the district court or from subsequently appealing the ruling on that motion.

IV. Appellate Attorney Fees

¶ 28 Plaintiffs seek their appellate attorney fees and costs under section 13-17-102(4), C.R.S. 2023, and C.A.R. 38(b), asserting that the appeal is frivolous and was brought for purposes of delay.

¶ 29 We deny that request. Bruce Michael's appeal of the default judgment raised an issue of first impression, and although we have ruled against him, we do not view his arguments as so frivolous or lacking in substantial justification as to warrant an award of

---

[5] Bruce Michael repeatedly points out that the filing of a post-trial motion is not a condition precedent to appeal. *See* C.R.C.P. 59(b). That is true, but it does not obviate the general rule that arguments raised on appeal must be preserved *somewhere* in the district court.

attorney fees. *See Glover v. Serratoga Falls LLC*, 2021 CO 77, ¶ 70 (noting that the purpose of an award of attorney fees under C.A.R. 38(b) is to deter egregious conduct); *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 962 P.2d 335, 338-39 (Colo. App. 1998) ("Claims involving novel questions of law for which no determinative authority exists are not frivolous, groundless, or vexatious.").[6]

V. Disposition

¶ 30 The judgment is affirmed.

JUDGE NAVARRO and JUDGE KUHN concur.

---

[6] This conclusion does not prevent plaintiffs from recovering their costs under C.A.R. 39(a)(2).