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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

Teasa K. Weaver, Circuit Court Judge

Appellate Case No. 2021-000480

Jimmy Shaver,

Respondent,

v.

Donald Shaver,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. THE APPELLANT'S FAILURE TO RESPOND TO THE COMPLAINT AFFECTS ONLY THOSE MATTERS WELL-PLEADED.

2. AFTER THE CLAIMED DEFAULT THE TRIAL COURT FAILED TO ALLOW THE APPELLANT TO PRESENT HIS DEFENSES ON MATTERS OUTSIDE THOSE PLEAD BY THE RESPONDENT.

3. THE REFUSAL OF RULE 60(B) RELIEF WAS BASED UPON A MISTAKE OF LAW, AND IS THUS AN ABUSE OF DISCRETION.

STATEMENT OF THE CASE

The Respondent DONNIE SHAVER sued the Appellant JIMMY SHAVER for $9,500.00, alleging,

first, instruction by an insurance agent to begin repair work on a mobile home that had belonged to the mother of the Appellant JIMMY SHAVER, [RECORD ON APPEAL, Complaint, Para. 5. p. 16.]

payment by the insurance company to the Appellant for such work, [RECORD ON APPEAL, Complaint, Para. 7, p. 17.]

an ownership interest in the mobile home by the Appellant, [RECORD ON APPEAL, Complaint, Para. 10, p. 17.]

failure by the Appellant to pay for the value of such work [RECORD ON APPEAL, Complaint, Para.16, p. 17.]; and

second, a *quo warranto* claim "to the extent not inconsistent with the allegations of [the] complaint" [RECORD ON APPEAL, Complaint, Para.s 13, 19, pp. 17, 18.] for value added to the mobile home, in which the Appellant had an ownership interest.

After service, the *pro se* Appellant contacted the office of counsel for Plaintiff and left a letter from the insurance agent denying coverage of the Plaintiff's claim. [RECORD ON APPEAL, p. 19, 22.] He did not file a formal responsive pleading nor serve such a document on counsel. [RECORD ON APPEAL,

p.8.]

Counsel for Respondent filed a standard default affidavit stating, in relevant part, that "no answer, . . . or other pleading, and no appearance of notice thereof has been served upon [Counsel] by or on behalf of said Defendant". [RECORD ON APPEAL, p. 21.]

At trial, the Defendant was told by the Court that he was in default and limited to cross-examination. [RECORD ON APPEAL, p. 58, ll. 9-14.] The Respondent was allowed to testify that he was authorized to proceed by the insurance agent and the Appellant, Donald Shaver. [RECORD ON APPEAL, Transcript of Hearing, p.44, ll. 1-3; 20 - p.9, l.25.].

The Circuit Court/entered its Order of Default against the Appellant. The Appellant filed his Motion to Alter or Amend, which was denied. This Appeal followed.

STANDARD OF REVIEW

Setting aside an entry of default lies solely within the sound discretion of the trial Court and that decision will not he overturned absent a clear showing of an abuse of discretion. *White Oak Manor, Inc*. v. *Lexington Ins. Co*., 407 S.C. 1, 10, 753 S.E.2d 537, 542 (2014). However,

> "In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law." [Citing to *Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct.App.2004).] "The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Id*.
>
> [*Consignment Sales, LLC* v. *Tucker Oil Co*., 391 S.C. 266, ___, 705 S.E.2d 73, 76 (Ct.App. 2011).]

The Appellant contends that any default which occurred affects only the Complaint's well-plead allegations and did not affect those matters placed in evidence and upon which the Default Judgment must rest. As such, the question of default is here a matter of law, requiring a *de novo* review by the Appellate Court.

As to relief sought under Rule 60(b), S.C.R.C.P., the standard is stated in *Gainey* v. *Gainey***,** 675 S.E.2d 792, 382 S.C. 414 (Ct.App. 2009):

> "The decision to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court." *Lanier* v. *Lanier*, 364 S.C. 211, 215-16, 612 S.E.2d 456, 458 (Ct.App. 2005) (*citing Coleman* v. *Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992)). Therefore, the decision can be reversed only if the family court abused its discretion. *Raby Constr., L.L.P.* v. *Orr*, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004). An abuse of discretion occurs when the judge issuing the order was controlled by an error of law or the order is based on factual conclusions that are without evidentiary support. *BB&T* v. *Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006) (*citing Tri-County Ice & Fuel Co*. v. *Palmetto Ice Co*., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).
>
> [*Id*., 675 S.E.2d at 796-797, 382 S.C. at ___]

The Appellant contends that abuse of discretion occurred in this case due to the decision of the trial Court being controlled by an error of law as to the extent of default.

ARGUMENT

I. THE APPELLANT'S FAILURE TO RESPOND TO THE COMPLAINT AFFECTS ONLY THOSE MATTERS WELL-PLEADED.

A Defendant in default has admitted all well-pleaded allegations of the complaint. *Gadsden* v. *Home Fertilizer & Chem. Co*, 89 S.C. 483, 72 S.E. 15 (1911); *Masters* v. *Rodgers Development Group*, 283 S.C. 251, 321 S.E.2d 194 (Ct.App. 1984). Default does not preclude an argument on points that are not well-pleaded. The Court of Appeals in *Masters* stated:

> A party seeking a default judgment is entitled to only such relief as is framed by his pleading .... It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error. *Mutual Savings & Loan Association* v. *McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980).
>
> [*Id*., 283 S.C. 251, 321 S.E.2d 196.]

The original Reporters on our Rules concluded their Note Concerning Reporter's Notes, located in the discussion of Rule 1, S.C.R.C.P., as follows:

"The reporters caution that guidance as to interpretation and application of the rules is much better sought in the wealth of precedent found in the decisions of the federal courts and in the courts of the many states which have adopted similar rules of procedure since 1938."

Masters, supra, makes it clear that a default will not preclude arguments on points that are not well-pleaded; there is Federal precedent to the same end. Thus, in *Thomson* v. *Wooster*, 114 U.S. 104, 110, 5 S.Ct. 788, 29 L.Ed. 105 (1885). the United Stated Supreme Court stated:

> The defendants are concluded by that decree [of default], so far at least as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill [*i.e.*, the Complaint] itself.
> [*Id*., 114 U.S. at 110, 5 S.Ct. at ___, 29 L.Ed. at ___; *matter in brackets and underlining added*.]

II. AFTER THE CLAIMED DEFAULT THE TRIAL COURT FAILED TO ALLOW THE APPELLANT TO PRESENT HIS DEFENSES ON MATTERS OUTSIDE THOSE PLEAD BY THE RESPONDENT.

The Plaintiff, as recited above, plead two causes: authorization and payment by the insurance company, and *quo warranto* "to the extent not inconsistent with the allegations of [the] complaint". [RECORD ON APPEAL, Complaint, Para.s 13, 19, p. 17, 18.] Both are based upon a claimed agreement with the insurance agent.

In the case at hand, the Defendant was unrepresented. He contacted the office of Plaintiff's Counsel and presented a letter from the insurance company referenced in Plaintiff's Complaint denying coverage of the damages to the Estate property the Plaintiff claimed to have repaired. [RECORD ON APPEAL, p.19, 22.]

At trial, the Defendant was informed by the Court that he was in default and limited to cross-examination. [RECORD ON APPEAL, Transcript of Hearing, p. 58, ll. 9-14.] The Respondent, as Plaintiff, testified that he was authorized to proceed by the insurance agent and the Appellant, Donald Shaver. [RECORD ON APPEAL, Transcript of Hearing, p.8, ll. 1-3; 34-25; p.9, l.23-25] This testimony directly contradicts the allegations in the Plaintiff's Complaint, which made no reference to authorization

by, or contract with., the Appellant Donald Shaver.

The Appellant was not in default as to the evidence presented by the Respondent. The Trial Court should have allowed him to present his defenses in full.

III. THE REFUSAL OF RULE 60(B) RELIEF WAS BASED UPON A MISTAKE OF LAW, AND IS THUS AN ABUSE OF DISCRETION.

Rule 60(b), S.C.R.C.P. provides, in relevant part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> . . .
> **(3)** fraud, misrepresentation, or other misconduct of an adverse party;

In *Chewning* v. *Ford Motor Co*., 354 S.C. 72, 579 S.E.2d 605 (2003), our Supreme Court was faced with claims of fraud on the Court involving subornation of perjury and the suppression of evidence. That Court held:

> The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney—an officer of the court—suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court.[5] These actions by an attorney constitute extrinsic fraud.
> [*Id*., 354 S.C. at 82, 579 S.E.2d at ___.]

The *pro se* Appellant was served with the Summons and Complaint on March 13th, 2020 according to the filed Affidavit of Service. [RECORD ON APPEAL, p. 1.] Thereafter, and before default, he contacted the office of counsel for Plaintiff and left the letter from the insurance agent denying coverage of the Plaintiff's claim. [RECORD ON APPEAL, p. 19, 22.] He did not file a formal responsive pleading nor serve such a document on counsel.

Counsel for Respondent filed a standard default affidavit dated June 15th, 2020. It states, in relevant part, that "no answer, . . . or other pleading, and no appearance of notice thereof has been served upon [Counsel] by or on behalf of said Defendant". [RECORD ON APPEAL, p. 22.]

As worded, that default affidavit is inaccurate. At the trial, counsel for the Respondent was asked about, and was allowed to offer testimony, differing from his Complaint and alleging the Appellant's personal agreement to allow the claimed repairs. [RECORD ON APPEAL, Transcript of Hearing, p.44, ll. 1-3; 20-25; p.9, l.23-25]. As stated above, such allegations were not subject to a finding of default, since the same was not contained in the Complaint. The Appellant was denied the opportunity to present defenses on matters not in default.

The existence of the insurance agent's letter was not disclosed to the Court at trial, and came to light only at the hearing to set aside the judgment. [RECORD ON APPEAL, p. 32.]

The Appellant notes that this change in the Respondent's evidence took place after his counsel's receipt of the insurance company letter denying coverage. The said letter was not presented in evidence to the Court at the original hearing. [RECORD ON APPEAL, Transcript of Hearing, p. 39-63.and generally]. The Appellant contends that his attempt at a response by production of the insurance letter should have been brought to the Court's attention by Respondent's counsel, in line with the standard set in *Chewning* v. *Ford Motor Co*., 354 S.C. 72, 579 S.E.2d 605 (2003).

As stated in *Chewning, supra*, the standard for proof of extrinsic fraud is that the same must be "clear and convincing". [*Id*., 354 S.C. at 86, 579 S.E.2d at ___.] The Appellant does not claim a showing of intentional perjury by the Respondent. He does claim, in light of the misleading Affidavit of Default and the changed basis of Respondent's testimony, an intentional concealment of documents.

It is submitted that the denial of Rule 60(b) relief was based upon an error of law, insofar as the Trial Court allowed matter outside the Respondent's pleadings, and denied the Appellant the right to present his defenses as to matters as to which he was not in default.

It is further submitted that the existing and uncontested facts in this case show the existence of extrinsic fraud and the Appellant is entitled to an order holding the existing judgment void for that reason.

CONCLUSION

The Appellant was not represented in this case until after rendition of judgment. Owing to the Trial Court's ruling, he was unable to raise the defenses of a lack of proper LLR license by the Respondent for the work claimed, or the Respondent's failure to file any claim in the Probate Court. He was not in default as to the matters actually tried, and the Respondent's actions give strong evidence of extrinsic fraud.

The Appellant is entitled to have the decisions of the Trial Court reversed and to present all of his defenses relating to this dispute.

August 9, 2022

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

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