THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY

Teasa K. Weaver, Master-In- Equity

Appellate Case No. 2021-000480

Jimmy Shaver,

Respondent,

v.

Donald Shaver

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES iii

II. STATEMENT OF THE CASE 5

III. STANDARD OF REVIEW 6

IV. ARGUMENTS 7

I THE APPELLANT'S FAILURE TO RESPOND TO THE COMPLAINT DOES NOT ONLY AFFECT THOSE MATTERS WELL-PLEADED AND FURTHER THE ALLEGATIONS OF THE COMPLAINT ARE WELL-PLEADED. 7

II. THE TRIAL COURT DID NOT ERR IN PROHIBITING THE APPELLANT FROM PRESENTING DEFENSES ON MATTERS OUTSIDE THOSE PLEAD BY RESPONDENT. 9

III. THE REFUSAL OF RULE 60(B), SCRCP RELIEF WAS NOT BASED UPON A MISTAKE OF LAW AND THEREFORE WAS NOT AN ABUSE OF DISCRETION. 11

V. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502-503 (2006) 6
Chewning v. Ford Motor Co., 354, S.C. 72, 86, 579, S.E.2d 605, 612 (2003). 12, 13, 14
Crowe v. Domestic Loans, Inc. 242 S.C. 310, 313, 130 S.E.2d 845, 846, (1963) 8
Goodson v. Am. Bankers Ins. Co. of Fl., 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct.App. 1988) 9
Limehouse v. Hulsey, 397 S.C. 49, 723 S.E.2d 211 (S.C. App. 2011) 8, 9
Masters v. Rodgers Development Group, 283 S.C. 251, 321 S.E.2d 194 (Ct.App. 1984). 7
McClurg v. Deaton, 671 S.E.2d 87, 380 S.C. 563 (S.C. App. 2008) 6, 11
Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d. 157 8
Sanders v. Sanders, 431, S.C. 605, 848 S.E.2d 04 (S.C.App 2020) 11, 12
State v. Burton, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9. n. 5 (2003) 9
Sundown v. Intedge Industries, 681 S.E.2d 885, 888, 383 S.C. 601 (2009) 11

Rules

Rule 55(c), SCRCP 10
Rule 60, SCRCP 11
Rule 60(b), SCRCP 11
Rule 60(b)(1), SCRCP 11
Rule 60(b)(3), SCRCP 11
Rule 60(b), SCRCP 11

STATEMENT OF ISSUES ON APPEAL

I THE APPELLANT'S FAILURE TO RESPOND TO THE COMPLAINT DOES NOT ONLY AFFECT THOSE MATTERS WELL-PLEADED AND FURTHER THE ALLEGATIONS OF THE COMPLAINT ARE WELL-PLEADED.

II. THE REFUSAL OF RULE 60(B), SCRCP RELIEF WAS NOT BASED UPON A MISTAKE OF LAW AND THEREFORE WAS NOT AN ABUSE OF DISCRETION.

III. THE TRIAL COURT DID NOT ERR IN PROHIBITING THE APPELLANT FROM PRESENTING DEFENSES ON MATTERS OUTSIDE THOSE PLEAD BY RESPONDENT.

STATEMENT OF THE CASE

The Respondent filed a Summons and Complaint against the Appellant on March 11, 2020 seeking damages for work he performed at a trailer in which the Appellant had ownership interest but was not compensated. The Appellant was personally served with the Summons and Complaint on March 13, 2020. The Appellant did not file any responsive pleadings. The Respondent filed an Affidavit of Default on June 15, 2020. A damage hearing was held before the Honorable Teasa K. Weaver on September 10, 2020. The Appellant was present and represented himself *pro se.* The Defendant was represented by counsel. As a defaulting party, the Appellant was given the opportunity to participate in the damage hearing to the extent allowed by law and he did participate in the damages hearing. After the damages hearing, a judgment was entered on September 24, 2020 against the Appellant in the amount of $9,500.00. Respondent received a copy of such Order on October 3, 2020.

On October 13, 2020, Appellant, through newly hired counsel, filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP. The Appellant sought an order reopening the judgment, amending the findings of fact and conclusions of law or making new findings and conclusions of law, and directing the entry of a new order. A hearing was conducted by the Honorable Teasa K. Weaver and Appellant's Motion to Alter or Amend Judgment was denied. This appeal is based upon the denial of the Appellant's Motion to Alter or Amend Judgment.

STANDARD OF REVIEW

"The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." McClurg v. Deaton, 671 S.E.2d 87, 380 S.C. 563 (S.C. App. 2008) citing BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502-503 (2006). "Thus, this standard of review limits this court to determine whether the trial court abused its discretion." Id. "An abuse of discretion arises when the judge issuing the order was controlled by an error of law or where the order was not based on factual conclusions that are without evidentiary support." Id.

ARGUMENTS

I. THE APPELLANT'S FAILURE TO RESPOND TO THE COMPLAINT DOES NOT ONLY AFFECT THOSE MATTERS WELL-PLEADED AND FURTHER THE ALLEGATIONS OF THE COMPLAINT ARE WELL-PLEADED.

"A party seeking a default judgment is entitled only to such relief as framed by his pleadings" Masters v. Rodgers Development Group, 283 S.C. 251, 321 S.E.2d 194 (Ct.App. 1984). In Masters, the defendant conceded that due to his default he admitted the facts well pleaded in the complaint, but asserted that the facts pleaded must be sufficient to form a legal basis for judgment by default. The defendant argued that the court should take judicial notice of the contents of the deed because it was recorded and thus the complaint did in fact support a cause of action. The court declined to take judicial notice because the deed was not before them, and only indisputable matters could be noticed after a default. Id. The court ultimately denied the motion to dismiss.

The case before this Court differs from Masters for several reasons. First, the Appellant has brought to this Court's attention one section of the Complaint (Appellant's Brief p. 4, citing, Complaint Para. 5) which states that Respondent was "instructed by Mr. Taylor to commence work on the residence". However, this averment cannot be isolated from the entire Complaint. Paragraph 3 of the Complaint, indicates that the Respondent was contacted to perform construction work at the residence (R. p. 16 Para. 3). Paragraph 10 of the Complaint indicates that the Defendant had ownership in the residence (R. p. 17 Para. 10). It is obvious that Mr. Taylor did not randomly contact the Respondent seeking his services. The Appellant and Respondent are relatives and the Appellant is an owner of the residence. Furthermore, the Appellant has acknowledged that he was aware Respondent was performing the work and never made any objection. (R. p. 17 Para.11). In fact, the Appellant only

contested that the debt should be part of his mother's estate. (R. p. 17 Para. 11). It is reasonable to assume that the allegations in this Complaint are directed against the Appellant. In determining the sufficiency of the pleading "all factual allegations properly pleaded and the inferences reasonably drawn therefrom are deemed true". Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d. 157. When a fact is well pleaded, whatever inference of law or conclusions of fact that may properly arise therefore are to be regarded as embraced in such averment. Crowe v. Domestic Loans, Inc. 242 S.C. 310, 313, 130 S.E.2d 845, 846, (1963) The Appellant attempting to take the position that the Complaint fails to establish that he was the one who contacted and agreed for Respondent to perform the work is illogical. Furthermore, the Appellant testified that he had an "initial conversation" with the Respondent about the Respondent performing the work, and that the Appellant scheduled a time to meet with the Respondent. (R. p. 55, ll. 8-12, p. 56. ll. 12-14). The Appellant's testimony supports the allegation in the Complaint that he was the one that contacted the Respondent. (R. p. 16, Para. 3)

Appellant also takes exception to the trial court allowing the Respondent to testify that "he was authorized by the insurance agent and the Appellant, Donald Shaver" to perform the work. (R. p. 39, ll. 1-3, 24-25, p. 40). In Limehouse v. Hulsey, 397 S.C. 49, 723 S.E.2d 211 (S.C. App. 2011), an entry of default was entered against the Hulsey. Hulsey argued that the "entry of default is tantamount to admission of the allegations of the complaint, but nothing more". Id. 397 at 73. Hulsey argued that the trial court erred in allowing Limehouse to testify to new allegations outside of the complaint. The trial court held that "an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection". Id. Therefore, failure of

Hulsey to object to any testimony of new allegations outside the complaint prohibited the allegation of error from being preserved for this Court's review.

There is no dispute that Appellant was present at the damages hearing and was able to participate in a limited capacity, including objections. Based upon the transcript, there is no dispute that Respondent testified at the damages hearing that he and Appellant agreed that he would perform the work and could commence the work. There is no dispute that Appellant failed to object to this testimony. "A pro se litigant who knowingly elects to represents himself assumes full responsibility for complying with substantive and procedural requirements of the law." State v. Burton, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9. n. 5 (2003). "Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than applied to an attorney." Goodson v. Am. Bankers Ins. Co. of Fla., 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct.App. 1988) The first time this matter was addressed in Appellant's brief. At the motion hearing, counsel for Appellant specifically stated "Again, I don't know exactly what Mr. Jimmy Shaver said at trial" (R. p. 42. ll. 22-23), so it could not have been objected to during that hearing. As a result of the Appellant's failure to object, failing to raise this issue at motion hearing, it has not been preserved for appellate review.

II. THE TRIAL COURT DID NOT ERR IN PROHIBITING THE APPELLANT FROM PRESENTING DEFENSES ON MATTERS OUTSIDE THOSE PLEAD BY RESPONDENT.

As argued above, Respondent submits to this Court that there are no matters outside those of the pleading and even if there were matters outside of the pleadings the Appellant failed to object to those matters at the damages hearing and thus such issues are not preserved for appellate review. However, in the event this Court determines there were matters outside

those plead, the Respondent argues that denying the Appellant from presenting defenses was proper.

Appellant states that Respondents plead two causes of action: the first cause of action being payment and authorization by the insurance company and the second a *quo warranto* "to the extent not inconsistent with the allegations of [the] complaint". Appellant then wrongfully argues that both of these are based upon a claimed agreement with the insurance agent. As previously indicated, the Appellant has acknowledged that he contacted the Respondent to perform work and that he met the Respondent at the property to price the work. (R. p. 44, ll. 1-3, 24-25, p. 45). Logically, the Appellant was well aware that the Complaint was directed towards him. Paragraph 3 of the Complaint specifically states the date he was contacted. (R. p. 16) Obviously, someone would have had to make arrangements for the insurance adjuster to meet the Respondent at the premises to review the damage. Appellant testified that he was the person that met there because he had the key to the property. (R. p. 43, ll. 1-11, ll.. 19-25, R p. 44 1-3.) The exact facts that the Appellant is arguing are matters outside the pleadings are actually testimony that the Appellant presented.

The Appellant indicates that he was unrepresented. The Appellant chose to ignore the pleadings. The Appellant chose to represent himself at the damages hearing. It was not until the last minute did he hire an attorney who then proceeded to file a motion at the final hour. These were all decisions the Appellant made. He should not be given a second bite at the apple when he had ample opportunity, prior to judgment to promptly raise any issues and he did not. (R. p. 8-9)

Respondent brought this motion under Rule 55(c), SCRCP. However, since a judgment had already been issued, this was the improper rule to bring this Motion. Despite this error,

the trial court considered the argument as if it had been brought under Rule 60(b), SCRCP. Once a default judgment is entered, the party seeking relief under Rule 60(b), SCRCP must meet a more rigorous standard than "good cause". Sundown v. Intedge Industries, 681 S.E.2d 885, 888, 383 S.C. 601 (2009). In order to set aside a default judgment under Rule 60(b), SCRCP, the court must look to (1) the promptness to which the relief is sought (2) reasons for failure to act promptly (3) existence of a meritorious defense and (4) prejudice to other parties. Our courts have held that in order to obtain relief from a default judgment under Rule 60(b)(1) or Rule 60(b)(3), not only must the movant make a proper showing that he is entitled to relief based upon one of the specific grounds, he must also make a prima facie showing of a meritorious defense. McClurg v. Deaton, 671 S.E.2d 87, 93, 380 S.C. 563 (S.C.App 2008). A party cannot raise an issue in a motion to alter or amend a judgment that could have been presented prior to the judgment. Id. at 96.

The trial court found, under a Rule 60 analysis, that the Appellant had ample opportunity to raise any issues, but he did not. She also found that the Appellant failed to provide a satisfactory reason why he failed to do so. Lastly, the trial court found that the Appellant did not have a meritorious defense based upon the arguments presented to her nor presented in Appellant's motion. As a result, the motion was properly denied under Rule 60 and because there were no matters outside those plead, the trial court did not err.

III. THE REFUSAL OF RULE 60(B), SCRCP RELIEF WAS NOT BASED UPON A MISTAKE OF LAW AND THEREFORE WAS NOT AN ABUSE OF DISCRETION.

"The movant in a Rule 60(b) motion has the burden of presenting evidence proving facts essential to entitle him to relief. Sanders v. Sanders, 431, S.C. 605, 848 S.E.2d 04 (S.C.App 2020). A claim of fraud upon the court requires proof by clear and convincing evidence.

Sanders, 431 S.C. at 614, citing Chewning v. Ford Motor Co., 354, S.C. 72, 86, 579, S.E.2d 605, 612 (2003). "Fraud upon the court is a narrow and invidious species of fraud that 'subvert[s] the integrity of the [c]ourt itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.'... Sanders, 431 S.C. 605, 848 S.E.2d 604 (S.C. App. 2020) citing, Perry v. Heirs at Law of Gadsden , 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003)..." "Like all other types of fraud, proving fraud upon the court requires showing that the perpetrator acted with the intent to defraud, for there is no such thing as accidental fraud". Perry 590 S.E.2d at 504-505.

The Appellant alleges in his brief that he "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. Based upon these allegations, Respondent believes some factual information is needed to properly assess this issue.

Respondent filed a summons and complaint on March 11, 2020. Appellant was served but did not file a responsive pleading. Respondent subsequently filed an affidavit of default on June 15, 2020, 60 days after a responsive pleading was due indicating that "no answer, demurrer, motion or other pleading, and no appearance or notice thereof has been served...". Appellant brought to Respondent counsel's office three documents: a letter from Auto-Owners dated July 3, 2017 to Robert and Frances Coley, (R. p. 19-20), Termination of Appointment signed by the Honorable Carolyn W. Rogers dated March 11, 2016 and another Termination of Appointment signed by the Honorable Carolyn W. Rogers dated August 13, 2018. (R. __pp. 31-32). Appellant did not identify himself to staff. Appellant did not

indicate what these documents related to. He merely handed them to the receptionist and left. Counsel for Respondent is unaware as to when these documents were brought to his office. Counsel did not know what matter these documents related to and placed them to the side. Counsel did not intentionally conceal documents that he was unaware what they were pertaining to. Additionally, Appellant did not bring these documents to the trial courts attention at the damage hearing. Rather, after receiving the motion to alter or amend, wherein counsel for Appellant referred to the document, was the first time it was made known to counsel for Respondent that this was purported to be a defense to the claim. (R. p.27,) Appellant, in his motion, failed to set forth how these documents constituted a defense or were applicable to the case in any way. At this time, it has not been shown how these documents should constitute an appearance, demurrer, answer, motion or any pleading. Counsel for Appellant brought to the trial court's attention the Chewning case and argued that the Supreme Court found that an attorney at one level failed from ...discovery that could have ended the case in a different manner. (R. p. 74, ll.1-8) Counsel then proceeded to indicate that he was "not beginning to compare Mr. Schusterman's situation to this". (R. p. 74, ll. 1-8) Counsel for Respondents in response that if the trial court believed his conduct in receiving three pieces of paper that he was unaware of what they purported to be or who they were from rose to the level of Chewing, then the Appellant should be entitled to a new trial. (R. p. 74, ll. 22-25, p. 75, ll. 1-4). Despite the statement made at the motion hearing, counsel for Appellant is now presenting to this Court that fraud was committed and thus the Appellant is entitled to relief from default.

Additionally, unlike Chewning, counsel has failed to establish that the result, if these documents were considered, would have changed the outcome of the case. Counsel has

failed to establish that Respondent or counsel intended to defraud. Appellant has failed to establish that the Respondent committed fraud by clear and convincing evidence, failed to establish an intent and failed to establish that these documents would have changed the outcome of the case.

In support of the fraud element, Appellant also argues that Respondent changed his testimony. Respondent assumes that Appellant is referring to his testimony that he had an agreement with Appellant to perform the work. As previously argued, the Complaint sets forth that Respondent was contacted to perform construction. (R. p. 16) Appellant testified that he was the one who contacted the Respondent and met him at the residence. It is disingenuous to now argue that Respondent testifying to the same facts that Appellant testified to constitutes fraud or an intentional concealment of documents. (R. p. 55, ll. 8-12, p. 56, ll. 12-14).

Based upon the Appellant failing to establish by clear and convincing evidence that the Respondent committed fraud to allow the Appellant relief from the default, no error of law was committed.

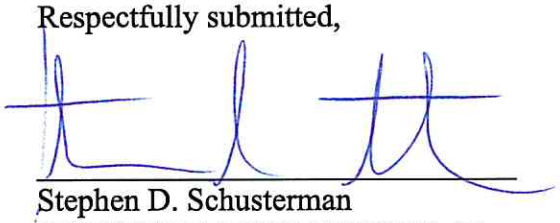
Lastly, the Appellant argues that the facts of the case show the existence of extrinsic fraud but does not set forth any specifics. "Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.'." Chewning, 354 S.C. at 81. Appellant has failed to allege how any facts of this case have induced him not to present his case or deprived him of his opportunity to be heard. The Appellant was limited in his opportunity to be heard by his own actions of allowing

himself to go into default. There was no contest before the court on the subject matter because upon default, the Appellant admitted liability.

CONCLUSION

Based upon the aforementioned arguments, Appellants submit to this the trial court did not err in denying the Appellant's Motion to Alter or Amend the Judgment and thus the trial courts decision should be affirmed.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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