RECEIVED
Oct 04 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J. DERHAM COLE, CIRCUIT COURT JUDGE
THE HONORABLE SHANNON M. PHILLIPS, MASTER-IN-EQUITY

APPELLATE CASE NO. 2022-000348
CIVIL ACTION NO. 2021-CP-42-01163

Custom Performance Engineering, Inc.,

RESPONDENT-APPELLANT,

versus

AM Industrial Group, LLC,

APPELLANT-RESPONDENT.

FINAL APPELLANT'S BRIEF OF APPELLANT-RESPONDENT AM INDUSTRIAL GROUP, LLC

Carmen V. Ganjehsani (S.C. Bar No. 73515)
R. Wilder Harte (S.C. Bar No. 101228)
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com
wharte@richardsonplowden.com
ATTORNEYS FOR
APPELLANT-RESPONDENT
AM INDUSTRIAL GROUP, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

RULES

STATEMENT OF ISSUES ON APPEAL

I. **The Trial Court improperly denied Appellant-Respondent AMI's Motion to Set Aside Entry of Default because good cause existed to set aside the Entry of Default.**

II. **The Master-In-Equity erred in awarding damages inconsistent with South Carolina law and unsupported by the evidence because Respondent-Appellant Custom Performance failed to meet its burden for establishing lost profits damages and failed to adduce evidence in support of portions of its other purported damages.**

STATEMENT OF THE CASE

This action arises out of a dispute regarding Appellant-Respondent AM Industrial Group, LLC's ("AMI") delivery of a refurbished bender machine (the "Machine") to Respondent-Appellant Custom Performance Engineering, Inc. ("Custom Performance").

On April 13, 2021, Custom Performance filed a complaint against AMI in the Court of Common Pleas for Spartanburg County for breach of contract, breach of express warranty, and breach of implied warranty of merchantability related to a dispute about the purchase and performance of the Machine AMI sold to Custom Performance (the "Complaint"). [R.pp. 11-21; Compl.] As part of that transaction, Custom Performance agreed to pay $112,000.00 for the Machine and to also provide AMI with a new seam welder valued at $20,000.00 in order to obtain an invoice for $132,000.00. [R.pp. 105:13-106:20; 151; Damages Transcr., 13:13-14:20; Defendant's Exhibit 1.] The invoices AMI issued for the Machine contained terms which provided in part that "this sale of these items is on an as-is and with all faults basis, without any representation or warranties, expressed or implied, of any kind including safety, condition, or quality." [R.pp. 130; 151; Damages Transcr., Plaintiff's Exhibit 1 and Defendant's Exhibit 1.]

Custom Performance served AMI with the Summons and Complaint on June 9, 2021. [R.p. 25; July 1, 2021 Affidavit of Service.] With an agreed extension of time, the deadline to respond to the Complaint was August 9, 2021. [R.p. 89:6-13; Sept. 28, 2021 Transcr., 7:6-13.] Unfortunately, because of a series of events, AMI failed to timely answer or otherwise respond to the Complaint. Three days after the deadline, Custom Performance filed a Motion for Entry of Default on August 12, 2021. Six days later, on August 18, 2021, the Spartanburg County Clerk of Court granted the Motion for Entry of Default and entered default against AMI. [R.pp. 26-27; 8-9; Motion for Default; Order of Default.]

After becoming aware of the entry of default, AMI filed a Motion to Set Aside Entry of Default on September 8, 2021. [R.pp. 31-40; Motion to Set Aside.] On September 28, 2021, after a hearing before The Honorable J. Derham Cole, the Motion to Set Aside Entry of Default was denied, and the matter was referred to the Master-In-Equity for a hearing on damages. [R.p. 6; Sept. 28, 2021 Order on Motion to Set Aside, p. 2.]

A hearing on damages was held on December 20, 2021 before The Honorable Shannon M. Phillips, Master-In-Equity (the "Damages Hearing"). [R.p. 93; Damages Transcr., 1.] During the Damages Hearing, the Master-In-Equity ordered that Custom Performance submit certain purchase orders and other evidence of lost profits for the Master-In-Equity to review. [R.p. 128:7-9; Damages Transcr., 36:7-9.] After the Damages Hearing, Custom Performance submitted those documents to the Master-In-Equity along with Custom Performance's Proposed Order. [R.pp. 155-164; Post-Hearing Documents.]

The Master-In-Equity issued an Order dated February 21, 2022 awarding $398,667.80 in damages to Custom Performance consisting of the following:

- $132,000.00 for the price of the Machine;
- $8,694.00 for the "costs to Install and Tool [the] Machine";
- $257,680.00 for "Lost Profits"; and
- $293.80 in costs.

[R.p. 3; Damages Order, p. 3.]

AMI timely filed and served its Notice of Appeal on March 21, 2022. [R.pp. 73-76; Notice of Appeal.] Custom Performance filed and served its Notice of Cross-Appeal on March 25, 2022. [R.pp. 77-80; Cross-Appeal.] Pursuant to Rule 67 of the South Carolina Rules of Civil Procedure,

AMI deposited $398,667.80 with the Clerk of Court for Spartanburg County on April 26, 2022. [R.pp. 81-82; Deposit of Funds.]

STATEMENT OF FACTS

In the Complaint, Custom Performance alleged that in July and August of 2020 the parties contracted for AMI to refurbish and provide the Machine to Custom Performance. [R.p. 12; Compl., ¶¶ 7-8.] As part of that transaction, Custom Performance agreed to pay $112,000.00 for the Machine and to also provide AMI with a new seam welder valued at $20,000.00 in order to obtain an invoice for $132,000.00. [R.pp. 105:13-106:20; 151; Damages Transcr., 13:13-14:20; Defendant's Exhibit 1.] The invoices AMI issued for the Machine contained terms which provided in part that "this sale of these items is on an as-is and with all faults basis, without any representation or warranties, expressed or implied, of any kind including safety, condition, or quality." [R.pp. 130; 151; Damages Transcr., Plaintiff's Exhibit 1 and Defendant's Exhibit 1.]

It is undisputed that AMI did in fact deliver the Machine to Custom Performance, and Custom Performance did provide AMI with the seam welder. [R.p. 106:8-12; Damages Transcr., 14:8-12.] The Complaint alleges that the Machine was delivered to Custom Performance in September 2020, that Custom Performance "immediately" informed AMI that the Machine was not performing as warranted (despite the invoice terms that the Machine was sold "as is" and without any warranties), and that Custom Performance later rejected the Machine in January or February of 2021. [R.pp. 13-14; Compl., ¶¶ 11-12, 16-17, 23.] Custom Performance filed and served AMI with a Complaint on June 9, 2021. [R.p. 25; July 1, 2021 Affidavit of Service.]

A. Default is Entered Against AMI.

Upon its receipt of Custom Performance's Complaint, AMI forwarded the same to its insurer, and the insurer represented that it was coordinating with Custom Performance's counsel to secure an extension to answer or otherwise respond to the Complaint. [R.p. 32; Sept. 8, 2021

Motion to Set Aside, p. 2.] The insurance representative represented to AMI that "I will confirm once I received [sic] the extension." [R.p. 32; Sept. 8, 2021 Motion to Set Aside, p. 2.] However, AMI's insurer never confirmed the existence of any extension and never notified AMI of its deadline to answer or otherwise respond to the Complaint. [R.pp. 32-33; Sept. 8, 2021 Motion to Set Aside, pp. 2-3.] AMI's insurer subsequently denied insurance coverage for the claims raised in the Complaint via an e-mail sent to AMI on August 3, 2021. [R.p. 40; Aug. 3, 2021 e-mail.] In its denial of coverage, the insurer did not provide to AMI any guidance or explanation as to when a responsive pleading to the Complaint was due.

Having never been made aware of the deadline, AMI failed to timely answer or otherwise respond to the Complaint. AMI's then-attorney failed to apprise himself of AMI's answer deadline and failed to secure local South Carolina counsel until after the Entry of Default had been entered. [R.pp. 85:8-12; 89:23-25; Sept. 28, 2021 Transcr., 3:8-12; 7:23-25 ("[T]his attorney who received notice three times in Ohio should have known that his answer was due July 9th.").] Despite Custom Performance's counsel's knowledge of, and numerous discussions with, AMI's attorney and AMI's insurer, Custom Performance did not serve AMI with any notice of its Motion for Entry of Default. [R.pp. 88:6-89:7; Sept. 28, 2021 Transcr., 6:6-7:7.] On September 28, 2021, The Honorable J. Derham Cole issued an Order denying AMI's Motion to Set Aside Entry Default and referred the matter to the Master-In-Equity for a hearing on damages. [R.p. 6; Sept. 28, 2021 Order on Motion to Set Aside, p. 2.]

B. Custom Performance Fails to Introduce Adequate Evidence of Its Purported Damages at the Damages Hearing.

Custom Performance filed a Memorandum in Support of Damages on December 17, 2021, in which it requested damages in the following amounts:

- $132,000.00 for the price of the Machine;

- $123,087.00 in "cover" damages for the difference in price of a replacement machine;
- $8,694.00 for tooling for the Machine;
- $7,628.00 for tooling for the replacement machine;
- $6,950.00 for costs for installation of the Machine; and
- $226,482.00 for "[l]ost Revenue due to Machine not functioning as represented[.]"

[R.p. 72; Memorandum in Support of Damages, p. 2.]

At the Damages Hearing, Joseph Adams, Custom Performance's co-owner and Chief Financial Officer, testified as the sole witness on behalf of Custom Performance. [R.p. 95:12-18; Damages Transcr., 3:12-18.] Mr. Adams' testimony revealed a lack of evidentiary support for nearly every component of Custom Performance's claimed damages, including as follows:

- Mr. Adams testified that Custom Performance paid only $112,000.00 for the Machine, but also agreed to send AMI a new seam welder valued at $20,000.00 to secure an invoice from AMI in the amount of $132,000.00. [R.pp. 106:1-12; 151; Damages Transcr., 14:1-12 (Q: "AM Industrial sent CPE a One Hundred and Twelve Thousand ($112,000.00) Dollar Eaton Leonard machine; right?" A: "Correct."); see also Defendant's Exhibit 1 (invoice dated July 31, 2020 listing the purchase price of the Machine as $112,000.00).]
- Mr. Adams testified that the replacement machine Custom Performance purchased performed several functions that the Machine purchased from

AMI was not capable of performing. [R.pp. 111:2-112:16; Damages Transcr., 19:2-20:16.]

- Mr. Adams was unable to specify when Custom Performance first began its efforts to obtain a replacement machine. [R.p. 109:10-13; Damages Transcr., 17:10-13 ("I would not be able to - - I would need to check my records").]
- Mr. Adams failed to provide any documentation substantiating $3,380.00 of the purported tooling expenses for the Machine. [R.pp. 115:25-116:4; Damages Transcr., 23:25-24:4.]
- Mr. Adams failed to provide any documentation substantiating the $6,950.00 that Custom Performance requested as installation expenses for the Machine. [R.p. 117:9-13; Damages Transcr., 25:9-13.]

Mr. Adams' testimony was similarly deficient with regard to Custom Performance's claimed "lost revenues" damages. Mr. Adams testified that Custom Performance lost revenues, and therefore profits, due to the cancellation of three purchase orders (the "Eberspacher PO", "Blow-By-Racing PO", and "Saleen PO"; collectively, the "Lost POs"). [R.pp. 99:12-101:2; Damages Transcr., 7:12-9:2.] Mr. Adams did not provide any testimony regarding when the Lost POs were actually issued [R.p. 119:15-20; Damages Transcr., 27:15-20 ("I did not bring that documentation")], other than his statement that Custom Performance "had just engaged" Eberspacher. [R.p. 100:9-19; Damages Transcr., 8:9-19 (testifying that Custom Performance had provided Eberspacher samples and was a certified vendor for Eberspacher but "lost" the contract "due to tolerances and not being able to do with a new piece of equipment that we had purchased from [AMI] that we were trying to utilize our other machine[.]").] Nor did Custom Performance

enter any of the Lost POs into evidence for AMI to review or cross-examine Adams with. [R.p. 128:7-9; Damages Transcr., 36:7-9 (Master-In-Equity ultimately requested the Lost POs be submitted to the Court for post-hearing review).]

While Mr. Adams explained that the difference between revenue and profit is the costs of material, labor, and the manufacturing process [R.p. 117:20-25; Damages Transcr., 25:20-25], he testified that he was not prepared to provide anything other than an "[o]ff the fly" calculation of Custom Performance's lost profits under the Lost POs and he did not testify to or otherwise present any evidence establishing the costs of material, labor, and the manufacturing process. [R.pp. 118:1-8; 120:1-6; Damages Transcr., 26:1-8 ("Off the fly, that would be a difficult task without the spreadsheets in front of me ... each contract holds a different profit margin"); Damages Transcr., 28:1-6 ("I don't have that on me.").]. Instead, Mr. Adams testified regarding "the profit margin [Custom Performance] makes in general" on contracts. [R.p. 124:13; Damages Transcr., 32:13 (emphasis added).] Mr. Adams testified that *generally* Custom Performance "strive[s]" to obtain a profit margin around four times Custom Performance's total costs for "lower volume" work. [R.p. 124:14-16; Damages Transcr., 32:14-16.] As to higher volume work such as Custom Performance's purported arrangement with Eberspacher, Adams testified that "if I had to guess" the profit margins would "probably" be two-and-a-half times Custom Performance's costs. [R.p. 124:17-18; Damages Transcr., 32:17-18.] Mr. Adams then performed "rough estimates" of Custom Performance's alleged lost profits damages, without the benefit of any additional documentation, using his phone calculator while on the witness stand. [R.p. 125:1-20; Damages Transcr., 33:1-20.] Mr. Adams did not testify regarding Custom Performance's actual costs for any of the Lost POs but nonetheless testified that his "estimate" of Custom Performance's lost profits damages was $257,680.00. [R.p. 125:14-23; Damages Transcr., 33:14-23.]

C. The Post-Hearing Documents Submitted by Custom Performance Demonstrate that AMI Did Not Cause Any Lost Profits Damages.

At the Damages Hearing, AMI's counsel raised the issue of the speculative nature of Custom Performance's claimed lost profits damages. [R.pp. 127:5-128:3; Damages Transcr., 35:5-36:3.] In response, the Master-in-Equity ordered that Custom Performance submit the Lost POs to the Court for further review. [R.p. 128:7-9; Damages Transcr., 36:7-9.] Without yet having the benefit of that review, however, the Master-In-Equity also expressed an intention to award Custom Performance lost profits damages in the amount estimated by Adams. [R.p. 128:4-9; Damages Transcr., 36:4-9 ("I'm going to allow [Custom Performance] to get lost profits at the profit margins that [Adams] said.").]

After the hearing, Custom Performance submitted the Lost POs, a purchase order cancellation (the "Eberspacher Cancellation"), and a spreadsheet in support of its purported lost profits damages (collectively, the "Post-Hearing Documents"). [R.pp. 160-164; Post-Hearing Documents.] None of those documents identified the actual costs to Custom Performance of performing under the Lost POs. [R.pp. 160-164; Post-Hearing Documents.] Nor did any of the Post-Hearing Documents establish that the Blow-By-Racing PO or the Saleen PO were ever in fact cancelled. [R.pp. 160-164; Post-Hearing Documents.] The Post-Hearing Documents did establish, however, that Custom Performance entered into each of the Lost POs after having received the Machine and provided the seam welder to AMI in return. [R.pp. 160-164; Post-Hearing Documents.] In fact, Custom Performance entered into the Eberspacher PO and the Blow-By-Racing PO after Custom Performance alleges it rejected the Machine. [R.pp. 162; 161; Eberspacher PO (dated Aug. 26, 2021); Blow-By-Racing PO (dated Apr. 2, 2021).] The Eberspacher Cancellation, which is dated September 22, 2021, also established that Custom Performance did not sign the financing agreement to secure the replacement machine until over a

month after the Eberspacher purchase order was cancelled. [R.pp. 163; 131-140; Eberspacher Cancellation (dated Sept. 22, 2021); Plaintiff's Exhibit 2 (Financing Agreement for replacement machine dated Nov. 1, 2021).]

D. Custom Performance is Awarded Nearly $400,000.00 in Damages.

Custom Performance filed a Proposed Order on damages on Friday, February 18, 2022, and on the following business day, the Master-In-Equity granted the Proposed Order and awarded damages as requested by Custom Performance (the "Damages Order"). [R.pp. 1-4; Feb. 21, 2022 Damages Order.] The Damages Order awarded $398,667.80 in damages to Custom Performance consisting of the following:

- $132,000.00 for the price of the Machine;
- $8,694.00 for the "Costs to Install and Tool [the] Machine";
- $257,680.00 for "Lost Profits"; and
- $293.80 in costs.

[R.p. 3; Damages Order, p. 3.]

AMI now appeals the Trial Court's error in failing to set aside the entry of default as well as, in the alternative, the Master-in-Equity's award of damages without a proper evidentiary basis for such award.

STANDARD OF REVIEW

Whether to set aside an entry of default or a default judgment lies within the discretion of the trial judge, subject to review upon a clear showing of an abuse of discretion. Roberson v. S. Fin. of S.C., Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005) (citations omitted). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal

conclusions, is without evidentiary support." Id. at 9, 615 S.E.2d at 114 (quoting In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)).

Furthermore, in an action at law referred to a master or a special referee for final judgment, the appellate courts will correct errors of law and will not disturb the master's or referee's factual findings unless no evidence reasonably supports these findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by* In re Estate of Kay, 423 S.C. 476, 816 S.E.2d 542 (2018). Therefore, the appellate court may reverse the ruling of the master if the master's findings of fact are wholly unsupported by the evidence or controlled by an erroneous conception or application of the law. Maddux Supply Co. v. Safhi, Inc., 316 S.C. 404, 406, 450 S.E.2d 101, 102 (Ct. App. 1994); see also Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 546, 633 S.E.2d 497, 500 (2006) (reversing master's award of default damages as unsupported by the evidence in the record).

ARGUMENT

I. The Trial Court improperly denied Appellant-Respondent AMI's Motion to Set Aside Entry of Default because good cause existed to set aside the Entry of Default.

The Trial Court erred by denying AMI's Motion to Set Aside Entry of Default pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure because the totality of the circumstances giving rise to AMI's default demonstrated the existence of good case. Good cause sufficient to set aside an entry of default exists where the totality of the circumstances leading to the default demonstrate that the defaulting party acted reasonably in seeking to timely respond to a complaint. Ricks v. Weinrauch, 293 S.C. 372, 373-75, 360 S.E.2d 535, 536-37 (Ct. App. 1987) (finding good cause to set aside entry of default where party in default timely contacted attorney and insurer but subsequently learned that insurer was unavailable and was thereafter unable to facilitate her attorney's timely response to the complaint). Other factors bearing on whether an entry of default

should be set aside include (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989).

In opposing AMI's Motion to Set Aside Entry of Default, Custom Performance relied upon the case of Sundown Operating Co. v. Intedge Indus., 383 S.C. 601, 681 S.E.2d 885 (2009). Unlike the defaulting party in Sundown, AMI did not unreasonably delay providing its insurance agent with the Complaint until after the time to answer had expired. Id. at 609, 681 S.E.2d 889 (holding that "a defendant may not be relieved from the entry of default *solely* because it relied to its detriment on a negligent insurance agent") (emphasis in original). Instead, as in Ricks, upon learning of Custom Performance's Complaint AMI promptly worked with its then-attorney and its insurer to secure insurance coverage and protect AMI's interests by timely answering or otherwise responding to the Complaint. [R.pp. 31-40; Motion to Set Aside Entry of Default.] AMI's insurer secured an extension of time from Custom Performance's counsel to respond to the Complaint, but never notified AMI of the deadline to answer the Complaint despite AMI's requests for information. [R.pp. 31-40; Motion to Set Aside Entry of Default.] Ultimately, six days before the August 9, 2021 deadline for responding to the Complaint, the insurer denied coverage. [R.pp. 85:22-86:3; Sept. 28, 2021 Transcr., 3:22-4:3]. Neither AMI nor its counsel were informed by the insurer of the deadline for responding to the Complaint. [R.pp. 85:22-86:3; Sept. 28, 2021 Transcr., 3:22-4:3]. AMI attempted to work with its then-attorney to timely answer or otherwise respond to the Complaint, but the applicable time limitation ran before AMI was able to do so. [R.pp. 31-40; Motion to Set Aside Entry of Default.] Despite Custom Performance's familiarity with AMI's counsel and AMI's insurance representative, Custom Performance did not serve or otherwise inform AMI of Custom Performance's Motion for Entry of Default. [R.pp. 88:6-89:7;

Sept. 28, 2021 Transcr., 6:6-7:7.] Here, AMI's failure to timely answer or otherwise respond to the Complaint was not solely the result of the negligence of either AMI's then-attorney or AMI's insurer but was instead the result of a confluence of events which, in the totality of the circumstances, rendered AMI unable to secure timely legal services after AMI's insurer failed to notify AMI of the default deadline.

The other factors considered in determining whether an entry of default should be set aside also weigh in AMI's favor here. First, AMI filed its Motion to Set Aside Entry of Default within three weeks of the Entry of Default. Yoko Kim Melton v. Chong Olenik, 379 S.C. 45, 55-56, 664 S.E.2d 487, 492-93 (Ct. App. 2008) (reversing order denying motion to set aside entry of default for reconsideration by the trial court where defaulting party filed a motion for relief from the entry of default over a month after being notified of the entry of default). Second, AMI has a meritorious defense to the Complaint given the invoice terms sold the Machine "as is" and disclaimed any warranties, and Custom Performance accepted the Machine and the terms on the invoice. AMI never had the opportunity to present the defenses or otherwise defend itself in the litigation because of the default judgment. Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989) (a defense "need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.") (citation omitted). Finally, Custom Performance would have suffered no prejudice (other than those presented by the default). Custom Performance would simply have had to litigate the matter as it already expected to do. Custom Performance was already on notice that AMI disputed the claim and on notice that it needed to gather evidence against AMI to prosecute its case. Williams v. Watkins, 384 S.C. 319, 327, 681 S.E.2d 914, 918 (Ct. App. 2009) (concluding that "the degree of prejudice [plaintiff] will suffer if

relief is granted is not so high as to outweigh the other factors" where plaintiff was on notice of defendants' denials and had already gathered and preserved relevant evidence) (citation omitted).

The "law favors the resolution of disputes based upon all parties having their day in court," and Rule 55(c) is to be "liberally construed so as to promote justice and dispose of cases on the merits." Williams, 384 S.C. at 327, 681 S.E.2d at 918 (internal citation omitted); In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). Under this principle, the Trial Court erred in disregarding that the totality of the circumstances giving rise to AMI's default constituted good cause to set aside the Entry of Default. Accordingly, this Court should reverse the Trial Court's denial of AMI's Motion to Set Aside Entry of Default and remand the case for resolution on its merits.

II. The Master-In-Equity erred in awarding damages inconsistent with South Carolina law and unsupported by the evidence because Respondent-Appellant Custom Performance failed to meet its burden for establishing lost profits damages and failed to adduce evidence in support of portions of its other purported damages.

The portion of the Damages Order awarding Custom Performance $257,680.00 in lost profits damages should be reversed as based on an error of South Carolina law. In the alternative, this Court should remand the Damages Order as unsupported by the evidence in the record.

A. Custom Performance Failed to Establish Entitlement to Lost Profits Damages as a Matter of Law.

The Master-In-Equity erred in awarding Custom Performance lost profits to which it was not legally entitled. Custom Performance had the burden of proving damages. Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 546-47, 633 S.E.2d 497, 500 (2006). A party seeking lost profits damages must establish that (1) the profits were lost "as a natural consequence of" the breach of contract; (2) the profits "may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of the breach of it"; and (3) the profits have been "established with reasonable certainty, for recovery

cannot be had for profits that are conjectural or speculative." Drews Co. v. Ledwith-Wolfe Associates, Inc., 296 S.C. 207, 213, 371 S.E.2d 532, 535-36 (1988) (citations omitted) (holding trial judge erred in failing to rule that owner's testimony "based on nothing more than a sheet of paper reflecting...gross profits" was insufficient to merit submission of lost profits issue to jury). The proof of lost profits "must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." Id. at 213 (quoting 22 Am. Jur. (2d) *Damages* § 641 (1988)).

Here, Custom Performance failed to establish any of the elements necessary to secure lost profits damages and therefore, the Damages Order was based on an erroneous application of South Carolina law.

First, the record is devoid of any substantiated evidence indicating that AMI caused Custom Performance to lose profits. Custom Performance failed to produce evidence demonstrating (a) that all of the Lost POs were cancelled; or (b) that all of the Lost POs were cancelled because of the Machine. The Post-Hearing Documents do not contain any indication that the Saleen PO or Blow-By-Racing PO were ever cancelled. [R.pp. 160; 161; Saleen PO; Blow-By-Racing PO.] Adams addressed only the Eberspacher PO, testifying that Custom Performance "lost" the Eberspacher PO when Eberspacher cancelled its initial purchase order "due to tolerances and not being able to do with a new piece of equipment that we had purchased from [AMI] that we were trying to utilize our other machine[.]" [R.p. 100:9-19; Damages Transcr., 8:9-19.] Even as to the Eberspacher PO, Adams failed to articulate a nexus between the Machine, the "tolerances," and Eberspacher's cancellation. In fact, Adams testified that Custom Performance had previously "provided samples" to Eberspacher which were apparently sufficient inducement

for Eberspacher to issue an initial purchase order and certify Custom Performance as a certified vendor. [R.p. 100:17-19; Damages Transcr., 8:17-19.]

The Post-Hearing Documents definitively illustrate that the $257,680.00 awarded for "Lost Profits" cannot be "a natural consequence" of any breach by AMI. Drews, 296 S.C. at 213, 371 S.E.2d at 535; Morningstar Fellowship Church v. York Cty., No. 2018-UP-250, 2018 S.C. App. Unpub. LEXIS 253, at *4-5 (S.C. App., June 13, 2018) (finding the lack of evidence supported the lower court's ruling that appellant was not entitled to lost profits where appellant failed to present evidence showing that respondent specifically caused appellant damages). Each of the Lost POs is dated after Custom Performance secured possession of the Machine and "immediately" informed AMI that the Machine "was not performing as warranted." [R.pp. 13; 160-162; Compl., ¶¶ 11-12; Lost POs.] In fact, the Eberspacher PO and Blow-By-Racing PO are both dated after Custom Performance rejected the Machine. [R.pp. 162; 161; 14; Eberspacher PO (dated over six months after Custom Performance's rejection); Blow-By-Racing PO (dated at least two months after Custom Performance's rejection); Compl., ¶ 16.] AMI cannot have been the cause of cancellation for purchase orders that Custom Performance voluntarily entered into after becoming aware that the Machine did not perform as warranted.

The Post-Hearing Documents also demonstrate that Custom Performance failed to take reasonable or timely action to mitigate any potential damages caused by issues with the Machine. As a buyer claiming consequential damages as a result of seller's breach, Custom Performance is entitled to recover only losses "which could not reasonably be prevented[.]" S.C. CODE ANN. § 36-2-715(2)(a). However, Custom Performance's failure to secure financing for a replacement machine until one month after Eberspacher cancelled the Eberspacher PO (and over a year after Custom Performance first received the Machine) demonstrates that any damage Custom

Performance suffered as a result of losing the Eberspacher PO was due to the intervening cause of Custom Performance failing for over a year to secure a replacement machine. [R.pp. 163; 131-140; Eberspacher Cancellation (dated Sept. 22, 2021); Plaintiff's Exhibit 2 (Financing Agreement for replacement machine dated Nov. 1, 2021).]

Second, the Lost POs cannot "reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of the breach of it" where Custom Performance's agreements with third parties Saleen, Blow-By-Racing, and Eberspacher were not consummated until at least several months after AMI agreed to provide Custom Performance with the Machine. Drews, 296 S.C. at 213, 371 S.E.2d at 535; Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 138-40, 697 S.E.2d 644, 651-52 (Ct. App. 2010) (holding trial court did not err in finding lost profits were not in the contemplation of the parties because defendant attorney could not have reasonably foreseen that plaintiff investor would lose future investment and tax opportunities as a result of plaintiff's loan). The Eberspacher PO, for example, is dated August 26, 2021 – over a year after AMI's invoice to Custom Performance for the Machine. [R.p. 151; Defendant's Exhibit 1 (invoice dated July 31, 2020).] Tellingly, there is no evidence in the record, nor any allegation in the Complaint, that AMI was ever aware of the future possibility of the Lost POs or of any other future business opportunity for Custom Performance.

Third, Custom Performance failed to establish the $257,680.00 lost profits award with the requisite degree of certainty. "Neither the existence, causation[,] nor amount of damages can be left to conjecture, guess[,] or speculation." Gray v. S. Facilities, Inc., 256 S.C. 558, 570-71, 183 S.E.2d 438, 444 (1971). Estimates about damages unsupported by documentation are insufficient to warrant recovery. Drews, 296 S.C. at 214, 371 S.E.2d at 536 (owner's proof "failed to clear the

'reasonable certainty' hurdle" where owner's projections were based only on gross profits without corresponding figures for overhead or operating expenditures); Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 546-47, 633 S.E. 2d 497, 500-01 (2006) (reversing special master's award of pre- and post-judgment interest as unsupported by the evidence where bookkeeper testified only that they "thought" the interest rate was 18 or 19 percent but the actual information was stored electronically and was never entered into evidence).

Here, Custom Performance's witness "guessed" about Custom Performance's "probable" profit margins in order to provide an "off the fly" "rough estimate" of lost profits using the calculator on his phone. [R.pp. 118:1-8, 124:17-18, 125:1-23; Damages Transcr., pp. 26:1-8, 32:17-18, 33:1-23.] The Post-Hearing Documents do nothing to render Custom Performance's lost profits more certain because they fail to reflect Custom Performance's costs or actual profit margins. [R.pp. 160-164; Post-Hearing Documents.] See Drews, 296 S.C. at 210, 371 S.E.2d at 534 (observing lost profits are defined as "the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them") (internal citation omitted).

Even if the Post-Hearing Documents did provide information sufficient to form a more definitive calculation of Custom Performance's damages, the record reflects that the Master-In-Equity indicated that she would award Custom Performance $257,680.00 in lost profits damages without first reviewing the Post-Hearing Documents. [R.p. 128:4-9; Damages Transcr., 36:4-9 ("I'm going to allow [Custom Performance] to get lost profits at the profit margins that [Adams] said.").] As such, the Master-In-Equity erred in awarding lost profits based on proof that did not "consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." Drews, 296 S.C. at 213, 371 S.E.2d at 536 (citation omitted).

The Master-In-Equity misapplied South Carolina law regarding a party's entitlement to damages by awarding Custom Performance $257,680.00 in lost profits that were (a) not caused by AMI; (b) not reasonably within AMI's contemplation at the time the parties' contract was made; and (c) not established with reasonable certainty. The Damages Order should be reversed as contrary to South Carolina law.

B. The Evidence in the Record Does Not Support Other Portions of the Damages Order.

The Master-In-Equity also committed reversible error by awarding Custom Performance damages unsupported or directly contradicted by the evidence in the record. Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 633 S.E. 2d 497 (2006). The Master-In-Equity's award of $132,000.00 for the Machine is directly contrary to Custom Performance's testimony that it paid only $112,000.00 for the Machine. [R.pp. 106:1-12; 151; Damages Transcr., 14:1-12 (Q: "AM Industrial sent CPE a One Hundred and Twelve Thousand ($112,000.00) Dollar Eaton Leonard machine; right?" A: "Correct."); see also Defendant's Exhibit 1 (invoice dated July 31, 2020 listing the purchase price of the Machine as $112,000.00).] Custom Performance also failed to provide any documentation in support of $3,380.00 of its request for tooling expenses, or $6,950.00 of its request for installation expenses. [R.pp. 115:25-116:4; 117:9-13; Damages Transcr., 23:25-24:4, 25:9-13.]. With respect to these damages, the Master-In-Equity's Damages Order is flatly unsupported by the evidence and should be reversed or remanded for reconsideration.

CONCLUSION

For the reasons set forth herein, Appellant-Respondent AM Industrial Group, LLC respectfully requests this Court to reverse the Trial Court's denial of the Motion to Set Aside Entry of Default and remand the case for resolution on its merits. In the alternative, AM Industrial requests this Court to reverse the Master-In-Equity's Damages Order awarding Custom Performance lost profits damages and other damages not supported by the evidence, or to remand the Damages Order for further finding of fact as to Custom Performance's damages.

Respectfully submitted,

s/ Carmen V. Ganjehsani
Carmen V. Ganjehsani (S.C. Bar No. 73515)
R. Wilder Harte (S.C. Bar No. 101228)
Richardson, Plowden & Robinson, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com
wharte@richardsonplowden.com
ATTORNEYS FOR
APPELLANT-RESPONDENT
AM INDUSTRIAL GROUP, LLC

October 4, 2022.

RECEIVED
Oct 04 2022
SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Appellant's Brief of Appellant-Respondent AM Industrial Group, LLC complies with Rule 211(b), SCACR.

Respectfully submitted,

s/ Carmen V. Ganjehsani
Carmen V. Ganjehsani (S.C. Bar No. 73515)
R. Wilder Harte (S.C. Bar No. 101228)
Richardson, Plowden & Robinson, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com
wharte@richardsonplowden.com
ATTORNEYS FOR
APPELLANT-RESPONDENT
AM INDUSTRIAL GROUP, LLC

October 4, 2022.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellant-Respondent, AM Industrial Group, LLC, do hereby certify that I have this date served the foregoing Final Appellant's Brief of Appellant-Respondent, dated October 4, 2022, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

Adam C. Bach (S.C. Bar No. 74885)
Emily R. Godwin (S.C. Bar No. 103708)
ELLER TONNENSON BACH, LLC
1306 South Church Street
Greenville, South Carolina 29605
ATTORNEYS FOR RESPONDENT-APPELLANT
CUSTOM PERFORMANCE ENGINEERING, INC.

s/ Carmen V. Ganjehsani
Carmen V. Ganjehsani
S.C. Bar No. 73515
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
ATTORNEYS FOR
APPELLANT-RESPONDENT
AM INDUSTRIAL GROUP, LLC

Date: October 4, 2022.