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Nov 16 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM COLLETON COUNTY AND DORCHESTER COUNTY
Court of Common Pleas

Patrick R. Watts, Special Referee

Appellate Case No. 2020-001489

John Murray Gibbs,.....Respondent,

vs.

Henderson Gibbs, Jr.,..... Appellant.

PETITION FOR REHEARING

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ARGUMENT FOR REHEARING

Appellant Henderson Gibbs, Jr. hereby moves the Court of Appeals pursuant to Appellate Court Rule 221 for reconsideration of the Court's November 02, 2022, opinion affirming the lower court's denial of Appellant's Motion to Set Aside Judgment on the grounds that the Court of Appeals overlooked and misapprehended certain facts and arguments of Appellant's counsel.

I. The Court Overlooked or Misapprehended Facts Regarding Appellant's Argument about an Evidentiary Hearing.

In affirming the Special Referee's denial of Appellant's Motion to Set Aside Judgment, this Court found that "Henderson's argument the special referee should have conducted an evidentiary hearing to address the special referee's concerns about Henderson's credibility is not preserved because Henderson did not raise this issue to the special referee." Gibbs v. Gibbs, Op. No. 2022-UP-400 (S.C. Ct. App. filed November 02, 2022) (citations omitted). However, this issue was not raised during the hearing because Appellant was not aware of the issue until the Order denying Appellant's motion was filed.

The Court of Appeals overlooked or misunderstood the argument in Appellant's brief regarding an evidentiary hearing, which was made in response to the language of the Special Referee's Order issued after the hearing. See Order filed October 07, 2020, p. 7-8. There was no indication from the initial motion or hearing that Appellant's credibility about the existence of a medical emergency or the sufficiency of Appellant's Exhibits was a concern for the Special Referee. Appellant in his motion, presented an Affidavit as well as a letter from a doctor at the hospital where Appellant's wife was treated for open heart surgery. See Def. Mot. to Reconsider Ex. A and B. The credibility issue was not raised by Appellant at the hearing on the Motion to Set Aside Judgment because it was not known to be an issue at that time and no competing evidence

or testimony was presented to contradict the basis for Appellant's motion or challenge his accompanying exhibits.

Within the Special Referee's Order, he discusses in detail the actions of Appellant throughout the litigation of this case. See Order filed October 07, 2020, p. 6-8. Using this background to explain his ruling, the Special Referee states that "the Court cannot escape the consideration of . . . certain additional matters *that weigh heavily on the Court's assessment of the Defendant's argument and credibility.*" See Order filed October 07, 2020, p. 6 (emphasis added). This was not brought up as an issue in the Motion to Set Aside Judgment in any filed pleadings or memoranda by either party and it does not address the exhibits provided to the Special Referee or authenticity of the medical emergency that was the basis for Appellant's Motion. Instead, the Special Referee based his ruling on the Motion to Set Aside Judgment on prior unrelated actions and perceptions of Appellant, and ought to have held an evidentiary hearing to address any credibility concerns related to the existence of a medical emergency.

The Court of Appeals misapprehended or misunderstood that the credibility concerns were not raised within the Motion to Set Aside Judgment because they were not known by Appellant to be an issue that needed to be addressed until the Special Referee issued his order denying Appellant's motion. Without an evidentiary hearing, the Order issued by the Special Referee is based on unrelated prior actions of Appellant that do not disprove or relate to the existence of a medical emergency, or contradict the affidavit and doctor's letter provided, and, in the absence of any contrary evidence, draw "factual conclusions . . . without any evidentiary support." Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (citations omitted); see also Def. Mot. to Reconsider Ex. A and B. To rule on this basis, in the absence of the evidentiary hearing to address

these claims raised in the Special Referee's order, is an abuse of discretion and was not addressed in the Court of Appeals' opinion.

II. The Court Overlooked or Misapprehended Facts Regarding Appellant's Argument Demonstrating an Abuse of Discretion.

The Court of Appeals overlooked or misunderstood the argument surrounding the Special Referee's abuse of discretion in that he raised credibility concerns and claims about Appellant in his Order that were not addressed in Court or raised in the filings by the parties in the case. Using this basis to deny Appellant's motion illustrates that the Special Referee, who, as the record on appeal reflects, granted Respondent a continuance prior to the final hearing date, had an apparent predisposition against Appellant and denied Appellant's attempt at requesting a continuance on date of the final hearing. Appellant was a *pro se* litigant in this case up through the final hearing. See Order filed October 07, 2020, p. 6. The apparent perception by the Special Referee of Appellant's actions during the course of litigation leading up to Appellant's Motion to Set Aside Judgment, is discussed throughout his Order but was not brought up in Appellant's motion and does not prove or disprove the existence of a medical emergency. See Order filed October 07, 2020, p. 6-8. Allowing that perception of the Appellant, based on prior unrelated actions, to weigh into his decision regarding the medical emergency arguably led to a ruling based on factual conclusions without evidentiary support. Furthermore, this reliance on factual conclusions without evidentiary support was not addressed in the Court of Appeals opinion.

By ruling in this manner, without evidence to base the order on, the Special Referee abused his discretion. "An abuse of discretion 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." Sundown Operating Company, Inc. v. Intedge Industries, Inc., 383 S.C. 601, ___, 681 S.E.2d 885, 888 (2009). The Court of Appeals decision fails to address bringing

in factual claims relating to Appellant's behavior and credibility without evidentiary support, which did not address or relate to Appellant's medical emergency claims, the Special Referee abused his discretion in his Order denying the Motion to Set Aside Judgment.

CONCLUSION

Appellant's request throughout his Motion and this Appeal has simply been for an opportunity to have a hearing held on the merits of the case where all parties can be present. Based upon the above arguments, the Court of Appeals should reconsider the facts and arguments presented by Appellant and reverse its ruling affirming the special referee's ruling denying Appellant's motion to set aside judgment.

RESPECTFULLY SUBMITTED,

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PROOF OF SERVICE FOR APPELLANT’S PETITION FOR REHEARING

I certify that I have served a copy of *Appellant’s Petition for Rehearing* by e-mail on Respondent, John Murray Gibbs counsel, Andrew Shepherd, Esq at andrew@sheplawfirm.com on November 16, 2022.

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