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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge;
The Honorable Maite Murphy
and
The Honorable Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2022-001132
Case No. 2019-CP-07-1666

Stevens Builders, LLC, Appellant,

v.

Michael C. Garraway, Alicia M. Garraway, and TD Bank, N.A., Defendants,

Of Whom TD Bank, N.A. is the Respondent.

INITIAL BRIEF OF RESPONDENT, TD BANK, N.A.

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STATEMENT OF ISSUE ON APPEAL

- I. Whether the trial court correctly granted TD Bank, N.A. (“**TD Bank**”)’s Motion to Set Aside Entry of Default when TD Bank, in its Motion, provided a satisfactory explanation for its failure to timely respond to the Complaint, requested relief from the entry of default as soon as it realized its error, had several meritorious defenses to Stevens Builders LLC (“**Stevens Builders**”)’s claims, and relieving TD Bank from default did not prejudice Stevens Builders?
- II. Whether the trial court correctly denied Stevens Builders’s Motion for Entry of Default Judgment when TD Bank timely filed a Motion to Dismiss and, following the trial court’s denial of its Motion to Dismiss, timely filed an Answer, and when South Carolina policy favors disposition on the merits over technicalities?
- III. Whether the trial court correctly granted TD Bank’s Motion for Summary Judgment on Stevens Builders’s breach of contract claim against TD Bank, when the trial court found that there was no genuine issue of material fact that the unambiguous language of the contract required the borrowers, Defendants Michael and Alicia Garraway (collectively, the “**Garraways**”), to present proper written demand to TD Bank for any disbursement made to Stevens Builders, and it was undisputed that the Garraways never presented such a demand for the amount at issue?

STATEMENT OF THE CASE

The heart of this action is a dispute between a building contractor, Stevens Builders, and two of its customers, the Garraways, concerning amounts Stevens Builders and the Garraways respectively claim the other owes them for work Stevens Builders did or did not complete on the Garraways’ home.

TD Bank was only involved as the Garraways’ lender under a construction loan agreement (“**CLA**”). Nonetheless, looking for a deep pocket, Stevens Builders manufactured a breach of contract claim, attempting to argue that TD Bank was obligated to release construction loan funds to Stevens Builders based on a single allegation – *that Stevens Builders “demanded payment.”* Compl. ¶ 11.¹ This allegation directly contradicts the plain language of the CLA which controls such disbursements.

¹ Emphasis added throughout unless indicated to the contrary.

In an attempt to avoid having to prove its meritless claim against TD Bank, Stevens Builders repeatedly asserted defaults in this action. The trial court in each instance rejected Stevens Builders's requests for default and ultimately, ruled in favor of TD Bank on the merits. Stevens Builders now appeals two orders concerning defaults it sought, and one concerning a summary judgment order, which correctly ruled on the merits that Stevens Builders's breach of contract claim against TD Bank fails as a matter of law.

There are three reasons why this Court should affirm the trial court's rulings:

First, the trial court properly granted TD Bank's Motion to Set Aside Entry of Default because TD Bank satisfied the "good cause" standard for seeking relief from default;

Second, the trial court properly denied Stevens Builders's Motion for Default Judgment because TD Bank complied with the trial court's March 9, 2020 Order and defended against the Complaint; and

Third, the trial court correctly granted TD Bank's Motion for Summary Judgment given the clear and unambiguous CLA and undisputed fact that the Garraways never presented written demand to TD Bank directing payment to Stevens Builders.

I. Statement of the Facts

In 2016, the Garraways contracted with Stevens Builders for the construction of a new home in South Carolina. Compl. ¶ 7. After the Garraways and Stevens Builders made their construction contract, they both entered into the CLA with TD Bank. Compl. ¶ 10. Specifically, on February 6, 2017, the Garraways, Stevens Builders and TD Bank entered into the CLA, under which TD Bank agreed to lend \$280,000 to the Garraways, with the loan proceeds to be disbursed in accord with the terms of the CLA. *See generally* CLA.

The CLA states several clear and unambiguous terms about TD Bank's rights and obligations concerning construction loan disbursements. *Id.* Importantly, the CLA states that TD

Bank would make construction loan disbursements only if certain conditions were met.

Specifically, *construction loan disbursements*:

- *Were not to be made “unless and until . . . the Borrower presents proper written demand from the Contractor”;*
- Were to be made “only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price”; and
- Were to be made “only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender’s benefit only), and only provided that there are no violations of any terms of this document or any other documents signed in connection with this loan.”

CLA, Sect. III, ¶ 1.

The CLA further states that *TD Bank “retain[ed] the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule established by or in connection with this loan . . . The method by which it disburses the money shall be at the discretion of the Lender, based upon the percentage of work completed.”* CLA, Sect. III, ¶ 1.

TD Bank properly disbursed funds to Stevens Builders in compliance with the CLA. It is undisputed that TD Bank was never presented with a written demand from the Garraways to pay Stevens Builders the amount Stevens Builders seeks to recover in this action. *See* Defendants Michael C. Garraway and Alicia M. Garraway’s Answers to Defendant’s TD Bank, N.A. Requests to Admit, ¶¶ 2, 3 (“*Admit[ting] that [the Garraways] never presented TD Bank with a written demand for Stevens Builders to be paid the amount Stevens Builders seeks to recover in this Litigation*” and that the Garraways “never signed a draw request for the amount Stevens Builders seeks to recover in this Litigation”). *See also* Plaintiff’s Responses to TD Bank N.A.’s First Set of Requests for Admission Directed to Plaintiff, ¶ 3 (failing to explain how Stevens Builders met these conditions precedent in the CLA). Per the CLA, TD Bank was unable to disburse funds until

this prerequisite was met. CLA, Sect. III, ¶ 1 (“The advances will not be made unless and until, in addition to meeting the other requirements of this Agreement, the Borrower presents proper written demand from the Contractor.”).

Further, the Construction Loan Agreement provided that an inspector, of TD Bank’s choosing, would periodically inspect the property to determine the progress of the work, and that such inspections were for TD Bank’s benefit only:

The advances will be paid out only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price. *The advances will be paid out only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender’s benefit only)* The Lender retains the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule established by or in connection with this loan. *In order to determine whether adequate progress has been made, an individual selected by the Lender will visit the site to determine that the project is being completed according to plans and specifications (as determined by the Lender in its sole discretion, and for the Lender’s benefit only).*

Id.

The agreement does not specify any particular worksheet to be used in determining or tracking the progress made. *See generally id.* To the contrary, the CLA clearly and unambiguously states that ***TD Bank retains the option, “in its sole discretion, to change the timing and amounts of disbursements provided in any schedule.”*** *Id.*

TD Bank had several inspections completed throughout the project. *See, e.g.,* Stevens Builders Documents Produced 020-025, Construction Progress Inspection Report, dated January 3, 2019. The inspection, dated January 3, 2019, showed construction as 54.5% complete. *Id.* Through that date, Stevens Builders had received payments from the Garraways, totaling \$261,818.99, in addition to a \$72,000 disbursement from TD Bank, for total payments to Stevens

Builders of \$333,818.99. *See* Stevens Builders Documents Produced 058-059, Jan. 11, 2019 Email from Michael Garraway to Donna Courchesne at TD Bank, copying Stevens Builders. On January 8, 2019, TD Bank sent Stevens Builders the inspection report showing the work as 54.5% complete, and explained that, based on the percentage complete and total amount of money Stevens Builders had received so far, TD Bank was not able to release funds until more work was completed. Stevens Builders Documents Produced 070-071, Jan. 8, 2019 Email from Donna Courchesne, TD Bank, to Buddy, Stevens Builders.² Additionally, not only did the Garraways not present a written demand that Stevens Builders be paid the amount Stevens Builders requested, but they actually *opposed* TD Bank releasing any additional funds to Stevens Builders until it completed additional work. *See, e.g.*, May 23, 2022 Hr’g Tr. 21:10-24:2 (“the borrower not only did not ask for an advance to be made, the borrower sought not to give further advances to the contractor”).

Stevens Builders sued the Garraways, alleging that that they failed and refused to pay Stevens Builders \$93,575.27 for labor and materials supplied, asserting claims for breach of the Construction Contract, quantum meruit, and foreclosure of a mechanic’s lien. Compl. ¶¶ 9, 12-15, 20-23, 24-32. The foreclosure claim was dismissed on March 2, 2020. *See* Release Of *Lis Pendens* filed on March 2, 2020; Consent Order/Dismissal of 4th Cause of Action with Prejudice on March 2, 2020.

² The cost to construct was \$540,000, 54.5% of which would be \$294,300. *Id.* *See also* Plaintiff’s Responses to TD Bank N.A.’s First Set of Interrogatories to Plaintiff at ¶ 16 (cost to construct was \$540,000). But Stevens Builders had already received more than that (\$338,819.09), as of that date. *See* Stevens Builders Documents Produced 070-071, Jan. 8, 2019 Email from Donna Courchesne, TD Bank, to Buddy, Stevens Builders. Thus, based on this inspection report, Stevens Builders had already received more funds than the percentage of work completed, and an additional disbursement would have put Stevens Builders even further ahead of the percentage of work completed.

Against TD Bank, Stevens Builders alleged that it “demanded payment from TD as required by the CLA, but TD has failed and refused to disburse the same.” Compl. ¶ 11. On that allegation alone, Stevens Builders asserted that TD Bank breached the CLA. *Id.* at ¶¶ 16-19.

II. Procedural History

A. The trial court found good cause for relieving TD Bank from default and allowing the case to be litigated on the merits.

On or around July 18, 2019, Stevens Builders filed a *Lis Pendens* Summons and Complaint against the Garraways and TD Bank. *See generally* Compl. According to its affidavit of service, Stevens Builders served the registered agent for TD Bank, N.A. on September 30, 2019. Aff. of Service. Stevens Builders filed a Motion for Default Judgment on December 2, 2019. Mot. for Default J., Dec. 2, 2019. TD Bank filed a Motion to Set Aside Entry of Default on February 7, 2020, explaining that the reason why it did not timely respond to the Complaint was because it inadvertently and unintentionally overlooked the Complaint due to the “high volume of mechanics’ lien cases” that are served on TD Bank, the majority of which “do not require an answer because S.C. Code Ann. § 29-5-70 provides that a mechanics’ lien and resulting foreclosure is junior to a properly perfected mortgage lien.” TD Bank’s Memo. Supporting Its Mot. to Set Aside Entry of Default, Feb. 7, 2020, p. 3.

TD Bank also argued that it should be relieved from default because the “good cause” factors for being relieved from a default weighed in its favor. *Id.* Specifically, (1) TD Bank’s counsel immediately filed the motion once engaged; (2) TD Bank had several meritorious defenses to Steven Builders’s claims, including that TD Bank’s interest in the subject property was superior to and could not be extinguished by Stevens Builders’s lien foreclosure, and Stevens Builders’s breach of contract claim was barred by the terms of the parties’ agreement; and (3) there was no

prejudice to Stevens Builders in allowing TD Bank to answer or otherwise respond to the Complaint. *Id.* at pp. 3-4.

A hearing was held on TD Bank's motion on February 26, 2020, at which TD Bank again explained that TD Bank is served a high volume of mechanic's lien actions, which normally do not require any response because it is well-settled that a bank with a mortgage has a priority interest over any subsequently filed mechanic's lien, but inadvertently failed to timely respond to this matter when it did not recognize that Stevens Builders's complaint also contained a cause of action for breach of contract. Feb. 26, 2020 Hr'g Tr. 3:1-24. TD Bank also argued that it filed a request for relief from default immediately, had a meritorious defense to the contract claim and that there would be no prejudice to Stevens Builders, given the case was in its infancy, if TD Bank were relieved from the default and permitted to litigate on the merits. *Id.* at 3:25-4:11.

On March 9, 2020, the Court granted TD Bank's motion, relieving TD Bank from the default and ordering TD Bank to answer or otherwise plead within fifteen days from the date of the Order. Order Granting Feb. 7, 2020 Mot. to be Relieved from Default, p. 3. The trial court explained that TD Bank was entitled to relief from default because ***“TD Bank ha[d] shown that ‘good cause’ exists ... as to why an answer to the Complaint was not filed.”*** *Id.* at p. 2. The trial court also found that the “good cause” factors weighed in favor of relieving TD Bank from default where “(1) even though no default has been entered, upon being referred the action, TD Bank's counsel immediately filed this Motion, (2) a meritorious defense exists and (3) there would be no prejudice to the Plaintiff in allowing TD Bank to answer or otherwise response to the Complaint.” *Id.*³

³ On March 16, 2020, Stevens Builders filed a Motion to Reconsider the trial court's order granting TD Bank relief from default, which the court denied by Order issued on March 18, 2020. Mot. to Recons., Mar. 16, 2020; Order Denying Mar. 16, 2020 Mot. to Recons.

B. TD Bank timely defended against Stevens Builders's claim and the trial court rejected Stevens Builders's repeated attempts to default TD Bank.

On March 24, 2020, within 15 days of the trial court's order, TD Bank timely filed its Motion to Dismiss the Complaint. Mot. to Dismiss.⁴ On June 8, 2020, the trial court issued an Order denying TD Bank's Motion to Dismiss. Order Denying Mot. to Dismiss, p. 2. TD Bank then timely filed its Answer and Affirmative Defenses on June 23, 2020. Answer and Affirmative Defenses.

On June 5, 2020, Stevens Builders filed its third Motion for Default Judgment & Affidavit of Default, arguing that TD Bank was in default for timely filing a motion to dismiss, instead of an answer, in response to the trial court's March 9, 2020 Order. Mot. for Default J. & Aff., June 5, 2020, p. 2. TD Bank filed its Opposition to Stevens Builders's Third Motion for Default Judgment on August 17, 2020, arguing that entry of default judgment would be expressly contrary to Rule 55, because default may only be entered when a defendant has failed to plead or otherwise defend, and TD Bank defended by timely filing a motion to dismiss. TD Bank further argued that, even if TD Bank could be found to have failed to plead or otherwise defend by virtue of filing a motion to dismiss instead of an answer, the trial court should deny Stevens Builders's request because well-settled South Carolina policy favors disposition on the merits, not technicalities. Opp'n to Third Mot. for Default J., Aug. 17, 2020, pp. 4-5. A hearing was held on Stevens Builders's Motion for Default Judgment on September 22, 2020. Sept. 22, 2020 Hr'g Tr. On October 22, 2020, the trial court issued an Order denying Stevens Builders's Motion for Default

⁴ On April 10, 2020, Stevens Builders filed a second Motion for Default Judgment & Affidavit of Default, which it later withdrew. Mot. for Default J. & Aff., Apr. 10, 2020.

Judgment, finding that “the Court favors disposition on the merits and the Plaintiff’s aren’t prejudiced.” Order Denying Aug. 17, 2020 Mot. for Default J., p. 1.⁵

C. TD Bank moved for summary judgement on Stevens Builders’s breach of contract claim and the trial court found that TD Bank was entitled to summary judgment under the clear terms of the CLA and based on the undisputed record.

On December 1, 2021, TD Bank filed a Motion for Summary Judgment arguing that Stevens Builders’s breach of contract claim failed, among other reasons, because the clear and unambiguous terms of the CLA required that, before TD Bank could make a disbursement, the borrower must present written demand for payment to TD Bank, and the undisputed record showed that the Garraways never made such a demand for the amount at issue. Mot. for Summ. J., pp. 8-10.⁶ A hearing on TD Bank’s Motion for Summary Judgment was held on May 23, 2022, at which TD Bank reiterated that the CLA required written demand for payment from the Garraways, and it is undisputed the Garraways never made such demand. May 23, 2022 Hr’g Tr. 3:23-5:3; 21:10-24:2.

On May 27, 2022, the trial court issued an Order granting Summary Judgment in favor of TD Bank, finding that *the CLA was unambiguous and that the Garraways were required to “present a proper written demand to TD Bank for any disbursement to Stevens Builders, and there [wa]s no evidence in the record that the Garraways presented such a demand on TD Bank*

⁵ Stevens Builders filed a Motion for Reconsideration of the trial court’s October 22, 2020 Order. Mot. for Recons., Nov. 2, 2020. TD Bank filed an Opposition. Opp’n to Mot. for Recons, Jan. 20, 2021. On January 27, 2021, the trial court issued an Order denying Stevens Builders’s Motion for Reconsideration. Order Denying Nov. 2, 2020 Mot. for Recons., p. 1.

⁶ When the case actually proceeded on the merits, Stevens Builders failed to participate in discovery. TD Bank timely served discovery on Stevens Builders and granted Stevens Builders additional time after Stevens Builders failed to respond. TD Bank Memo. of Law in Opp’n of Plaintiff Stevens Builders’s Mot. to Compel, dated Jan. 28, 2022. Stevens Builders also served late discovery on TD Bank and the Garraways, well after the discovery deadline had passed. *Id.*

for the amount Stevens Builders seeks in this action.” Order Granting Mot. for Summ. J., p. 5. The trial court held that “[v]iewing the facts in a light most favorable to the non-moving party, Stevens Builders has failed to submit evidence that TD Bank breached any contractual provision in this case. Because there [wa]s no genuine issue of material fact regarding Stevens Builders’s breach of contract claim, TD Bank [wa]s entitled to judgment as a matter of law.” *Id.*⁷

On August 22, 2022, Stevens Builders filed a Notice of Appeal of the: (1) March 6, 2020 Order granting TD Bank’s Motion to be Relieved from Entry of Default; (2) October 22, 2020 Form 4 Order denying Stevens Builders’s Motion for Default Judgment; and (3) May 27, 2022 Order granting TD Bank’s Motion for Summary Judgment. Notice of Appeal.

ARGUMENTS

I. Standard of Review

A. **The trial court’s decision setting aside the entry of default should not be disturbed absent a clear showing of abuse of discretion.**

The decision whether to set aside an entry of default lies solely within the sound discretion of the trial court. *Regions Bank v. Owens*, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013). The trial court’s decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Id.* An abuse of discretion in setting aside a default 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.*

⁷ On June 6, 2022, Stevens Builders filed a Motion for Reconsideration of the trial court’s May 27, 2022 Order. Mot. for Recons., June 6, 2022. TD Bank filed its Opposition. Opp’n to June 6, 2022 Mot. for Recons. On July 28, 2022, the trial court issued an Order, denying Stevens Builders’s Motion for Reconsideration. Order Denying June 6, 2022 Mot. for Recons.

B. The trial court’s decision granting summary judgment should be affirmed where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRPC, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (internal citations omitted). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Id.* at 653.

II. The Trial Court Properly Granted TD Bank’s Motion to be Relieved from Entry of Default Because TD Bank Satisfied the “Good Cause” Standard for Seeking Relief from Default.

Under South Carolina Rule of Procedure 55(c), the court may set aside entry of default for mere “good cause” shown. SCRPC 55(c); *Regions Bank v. Owens*, 402 S.C. 642, 647-48, 741 S.E.2d 51, 54-55 (Ct. App. 2013). “Good cause” exists where a party seeking relief provides “a[n] explanation for the default and give[s] reasons why vacation of the default entry would serve the interests of justice.” *Regions Bank*, 402 S.C. at 648. In assessing whether vacation of the default entry serves the interests of justice, “the trial court must also consider: (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.” *Id.* Further, Rule 55(c) should be “liberally construed to promote justice and dispose of cases on the merits.” *Dixon v. Besco Eng’g, Inc.*, 320 S.C. 174, 177, 463 S.E.2d 636, 638 (Ct. App. 1995).⁸

⁸ Courts routinely grant relief from default where a reasonable explanation is provided and the interests of justice are served by allowing the case to be litigated on the merits. *See, e.g., Ricks v.*

Here, the trial court’s March 6, 2020 decision was correct and should be affirmed on appeal because the trial court had discretion to set aside entry of default, an explanation for the default was provided and the remaining factors weighed in favor of allowing this case to be litigated on the merits. As TD Bank explained in its February 7, 2020 Motion to Set Aside Entry of Default, “TD Bank is served with a high volume of mechanics’ lien cases due to mortgages and the majority of these do not require an answer because S.C. Code Ann. § 29-5-70 provides that a mechanics’ lien and resulting foreclosure is junior to a properly perfected mortgage lien.” Mot. to be Relieved from Default, Feb. 7, 2020, p. 3. Further, TD Bank explained that the failure to file a timely response was “inadvertent and unintentional.” *Id.* At the hearing on the motion, TD Bank reiterated that “it’s served with a high number of mechanic’s lien actions . . . because it does a lot of construction loans,” and is typically not required to respond. Feb. 26, 2020 Hr’g Tr. 3:1-24.⁹ Having considered TD Bank’s motion to be relieved from entry of default, and holding a hearing

Weinrauch, 293 S.C. 372, 375, 360 S.E.2d 535, 537 (Ct. App. 1987) (finding “no abuse of discretion” and that “trial court properly vacated the entry of default,” finding respondent “acted reasonably by contacting her attorney and her insurance agent and, again, contacting her attorney upon discovering problems with her insurance agent” even though she delayed in getting papers to her attorney); *AJG Holdings LLC v. Dunn*, 2007 WL 6870161 (S.C. Com. Pl. 2007) (granting plaintiffs’ motion to set aside entry of default where motion was made shortly after reply was due, “plaintiffs ha[d] meritorious defenses to the defendants’ counterclaims”, and “defendants did not take any action in reliance on the plaintiffs’ default[.]”); *Vanness, III v. Eckerd Corp.*, 1999 WL 34968246 (S.C. Com. Pl. 1999) (granting defendant’s motion to set aside entry of default where complaint was sent to defendant’s insurer’s team leader, who was out of the office with a sick child, the team leader’s adjusters were also out of the office for an unusual amount of days that month, and, after the team leader forwarded the complaint to South Carolina counsel, he immediately requested an extension of time to respond to the complaint, which plaintiff’s counsel was unable to respond to due to his own unavailability and defendant’s motion “was served by mail three days after default”, “[d]efendant [] posed meritorious defenses to each of the [p]laintiff’s causes of action”, and plaintiff would not be prejudiced by the court granting defendant’s motion).⁹ The Initial Brief incorrectly states that the trial court acknowledged during the hearing that TD Bank’s reasons for failing to file an answer were not a good explanation. Initial Br. of Appellant at p. 14. The court instead stated merely that it did not think it a “great explanation” that the damages hearing notice went to corporate headquarters, instead of TD Bank’s registered agent in South Carolina. Feb. 26, 2020 Hr’g Tr. 9:20-23.

on the motion, the trial court found that TD Bank’s explanation as to why it missed its deadline to respond to the Complaint was satisfactory. Order Granting Feb. 7, 2020 Mot. to be Relieved from Default, p. 2 (“TD Bank has shown that ‘good cause’ exists here as to why an answer to the Complaint was not filed.”).

The trial court also found that the remaining factors weighed in favor of granting TD Bank relief from the default. Order Granting Feb. 7, 2020 Mot. to be Relieved from Default, p. 2. *First*, “upon being referred the action, TD Bank’s counsel immediately filed” the motion to be relieved from default. *Id.* *Second*, “a meritorious defense exists” to Stevens Builders’s claims against TD Bank. *Id.* *Third*, there “would be no prejudice to [Stevens Builders] in allowing TD Bank to answer or otherwise respond to the Complaint.” *Id.* The trial court’s decision to allow the case to be decided on the merits was correct and should not be disturbed.

Stevens Builders’s Initial Brief provides no authority for its argument that, in order for a court to consider whether to set aside a default, the moving party must submit affidavits or oral testimony. *See generally* Initial Br. of Appellant. Instead, the Initial Brief cites inapplicable rules and cases. The Initial Brief cites South Carolina Rule of Civil Procedure 43(e), which addresses motions made at trial, not motions for relief from entry of a default. *Id.* at 12. It also cites a series of cases that do not even address a motion to set aside a default.¹⁰ The balance of cases actually

¹⁰ *See Bowers v. Bowers*, 304 S.C. 65, 66, 403 S.E.2d 127, 128 (S.C. Ct. App. 1991) (denying father’s motion to set aside a portion of a “maintenance and support order that found him to be the father of the child born during the parties’ marriage,” where father did not provide any evidence to support his defense to mother’s claim of paternity); *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 474 (1933) (reversing order granting judgment for respondent against insurance association, which judgment would allow bank to levy association’s bank account, because respondent provided no evidence that funds in bank were held in trust for her benefit); *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (S.C. Ct. App. 1986) (disregarding testimony of plaintiff’s counsel, during a hearing on plaintiff’s motion for summary judgment, about the substance of depositions taken in the litigation because the deposition had not been properly entered into the record); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 292-93,

addressing a motion to set aside a default are factually distinct, and none address the scenario presented to the trial court here, where a defendant explained that its failure to respond was inadvertent, due to receipt of a large volume of complaints to which no response is typically required and where vacation of default served the interests of justice.¹¹ Moreover, not a single one states that an affidavit or testimony is required for a court to set aside a default.¹²

701 S.E.2d 742, 751 (2010) (affirming summary judgment for respondent because it adequately provided evidence to establish its defense); *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011) (court affirmed denial of motions for relief from default judgment because petitioners did not preserve issue of whether they had a meritorious defense with the circuit court).

¹¹ See *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, 383 S.C. 601, 609-10, 681 S.E.2d 885, 889 (2009) (affirming entry of default judgment, reasoning that respondent could “not be relieved from the entry of default solely because it relied to its detriment on a negligent insurance agent” and because it failed to show “good cause as to why the [a second copy of the] summons and complaint ... was not answered in a timely manner.”); *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (S.C. Ct. App. 1994) (per curium) (affirming denial of motion to set aside default because appellants “never requested their attorney answer the Complaint[.]”); *Richardson v. P.V., Inc.*, 383 S.C. 610, 619, 682 S.E.2d 263, 267 (2009) (affirming denial of motion to set aside default because “[n]egligence of an insurance company is imputed to a defaulting litigant and cannot constitute good cause to relieve Appellants from the entry of default” and where appellants failed to “assert[] a meritorious defense or argue[] that [r]espondent will not be prejudiced if the entry of default is lifted.”); *Campbell v. City of N. Charleston*, 431 S.C. 454, 462, 848 S.E.2d 788, 790-91 (S.C. Ct. App. 2020) (affirming denial of motion to set aside entry of default where respondent “provided no explanation” for failure to open and forward complaint to respondent’s liability claims handler); *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 11-12, 753 S.E.2d 537, 542-43 (2014) (affirming denial of motion to set aside default because respondent “provided no reasonable explanation for why it failed to respond to the initial complaint[,]” and that respondent “lost the pleadings” was insufficient); *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 144-46, 719 S.E.2d 703, 706-07 (S.C. Ct. App. 2011) (affirming denial of motion to set aside entry of default because: (1) appellant’s argument that it “did not recall ever personally receiving a copy of the summons and complaint” was not good cause for setting aside an entry of default; (2) “more than a year elapsed between the time [appellant] was served with the summons and complaint and when it moved for relief”; (3) appellant acknowledged that it had no meritorious defense to liability; and (4) it was undisputed that respondent would be prejudiced if the matter was further delayed while [appellant] conducted discovery on an issue such as liability).

¹² See FN9 and FN10 (and cases cited therein).

Here, after considering TD Bank’s motion, Stevens Builders’s opposition, and oral argument by counsel for both parties, the trial court, in its discretion, correctly granted TD Bank’s request to be relieved from default, and the trial court’s ruling should be affirmed.

III. The Trial Court Properly Denied Stevens Builders’s Motion for Default Because TD Bank Complied with the Trial Court’s March 9, 2020 Order and Defended Against the Complaint By Filing a Motion to Dismiss.

The trial court’s March 9, 2020 Order granted TD Bank’s Motion to be Relieved from Default and ordered TD Bank “to file an answer or other pleading to the Complaint within fifteen (15) days from entry of this Order.” Order Granting Feb. 7, 2020 Mot. to be Relieved from Default, p. 3. TD Bank complied with the trial court’s order by filing a Motion to Dismiss within fifteen days. Mot. to Dismiss. On June 8, 2020, the trial court issued an Order denying TD Bank’s Motion to Dismiss. Order Denying Mot. to Dismiss. On June 23, 2020, fifteen days later, TD Bank timely filed an Answer to the Complaint. Answer and Affirmative Defenses. The Initial Brief incorrectly argues that the lower court should have granted Stevens Builders’s motion for default because TD Bank timely filed a motion to dismiss, instead of an answer. *See* Initial Br. of Appellant, pp. 15-17.¹³

¹³ *United Machine Works, Inc. v. Williams*, 268 S.C. 600, 235 S.E.2d 711 (1977), which Stevens Builders’s cited in footnote 101 in its Initial Brief, is distinguishable. In that case, the defendants initially filed a demurrer to the complaint. After the demurrer was overruled, the court issued two separate orders: (1) “to answer or otherwise plead to the complaint” within ten days and to (2) answer and/or answer and counter-claim and/or answer, counter-claim and cross-complaint. The defendants thereafter “served a notice of motion to make more definite and certain and to strike from the complaint.” The court denied defendants’ motions, explaining that “[i]f one could demur and lose, and then move to make more definite and certain and/or strike from the complaint, he could thereafter demur again on the basis of the corrected complaint. If one desires to ‘straighten out’ a complaint, he must do so before demurring or answering...”. Here, TD Bank had not yet filed a demurrer or motion to dismiss when the trial court issued its March 9, 2020 Order relieving TD Bank from default and allowing TD Bank fifteen days to file an answer or to otherwise plead. Therefore, the concerns the appellate court expressed in *United Machine Works, Inc.* are not applicable to this case, because this is not a scenario where TD Bank tried to file repeated demurrers.

The trial court correctly denied Stevens Builders’s motion for default for two reasons. **First**, entry of default would have been expressly contrary to South Carolina Rule of Civil Procedure 55(a). *Rule 55(a) permits entry of default only “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules* and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book).” Here, there is no dispute that TD Bank did “otherwise defend” against the Complaint by filing a motion to dismiss. *See Stark Truss Co., Inc. v. Superior Const. Corp.*, 360 S.C. 503, 509 n.1, 602 S.E.2d 99, 102 n.1 (Ct. App. 2004) (citing 10A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2682, at 16–17 (3rd ed. 1989) (“The words ‘otherwise defend’ refer to the interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading.”); *Vista Investments, LLC v. Tompkins & McMaster, LLP*, 2013-001385, 2015 WL 5248737, at *1 (Ct. App. Sept. 9, 2015) (“Specifically, we find Respondents’ filing of a motion for summary judgment was sufficient to withstand default under the South Carolina Rules of Civil Procedure.”).

Second, even if TD Bank could be deemed to have failed to plead or otherwise defend, which it cannot when it timely filed a motion to dismiss, the trial court correctly considered and applied South Carolina’s well-settled policy of favoring the disposition of cases “on their merits rather than on technicalities” when denying Stevens Builders’s motion. *Micronics, Inc. v. South Carolina Dep’t of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). “It is the policy of the law to favor trial of cases on the merits” over default judgments, which are considered a “harsh and drastic action.” *Petty v. Weyerhaeuser Co.*, 272 S.C. 282, 288, 251 S.E.2d 735, 738

(1979). Rule 55(c) should be “liberally construed to promote justice and dispose of cases on the merits.” *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995).

It is well-settled law in South Carolina that “where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief.” *Micronics, Inc.*, 345 S.C. at 511; *Columbia Pools, Inc. v. Galvin*, 288 S.C. 61, 339 S.E.2d 525 (Ct. App. 1986). In *Microtronics*, the trial court dismissed Microtronics’s lawsuit because it did not appear at a hearing because its president thought that the hearing was scheduled for a different day. *Micronics, Inc.*, 345 S.C. at 508. The president wrote to the court immediately after he received a copy of the order to explain what happened and asked that the matter be reopened, but the court denied his request. *Id.* On appeal, the appellate court reversed the trial court’s decision and ordered that the trial court decide the case on its merits. *Id.* at 512. The appellate court explained that the appellee would “suffer no prejudice should th[e] case proceed for a determination on the merits.” *Id.* Furthermore, the appellate court found that “[g]iven Micronics’ good faith mistake, its swift action to try to remedy the situation, the existence of a meritorious defense, and the lack of prejudice to [appellee]...the [trial court] abused his discretion by refusing to reopen the case.” *Id.*

Here, TD Bank complied with the trial court’s March 9, 2020 Order by filing its Motion to Dismiss within fifteen days of the Order, and then filing its Answer within fifteen days of the June 8, 2020 Order denying TD Bank’s Motion to Dismiss. *See* Mot. to Dismiss; *see* Answer and Affirmative Defenses. However, even assuming, *arguendo*, that TD Bank did not comply with the trial court’s March 9, 2020 Order, TD Bank’s failure was due to a technicality, *i.e.*, TD Bank understood the trial court’s March 9, 2020 Order requiring TD Bank “to file an answer or other pleading to the Complaint” as consistent with South Carolina Rule of Civil Procedure 12, which would allow TD Bank to file a motion to dismiss before filing an answer. *See* Order Granting Feb.

7, 2020 Mot. to Set Aside Entry of Default, p. 3. The trial court further confirmed this understanding of the order was reasonable by ruling on the merits on TD Bank's Motion to Dismiss, instead of denying it simply because TD Bank filed a motion to dismiss instead of an answer. Order Denying Mot. to Dismiss.

In sum, TD Bank, in filing a motion to dismiss, was defending against Stevens Builders's claims, making entry of default inapplicable, and, even if the trial court's order required TD Bank to file an answer, the trial court correctly denied Stevens Builders's motion for default because defaulting TD Bank for filing a motion instead of an answer would violate South Carolina's policy of disposition on the merits instead of based on a technicality.

IV. The Trial Court Correctly Granted TD Bank's Motion for Summary Judgment Given The Clear and Unambiguous CLA and Undisputed Fact That The Garraways Never Presented Written Demand to TD Bank Directing Payment to Stevens Builders.

The trial court correctly dismissed Stevens Builders's breach of contract claim against TD Bank at summary judgment for two reasons. *First*, the clear and unambiguous CLA required the Garraways present TD Bank with proper written demand for disbursement to Stevens Builders, and it is undisputed that such demand was never presented. It is black letter contract law in South Carolina that, if the language of a contract is unambiguous, then "the contract's language determines the instrument's force and effect." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). The *language of a contract is to be construed according to the "plain and ordinary meaning"* attributed to it at the time of execution. *Boies v. Lanier*, 2017-002557, 2020 WL 4671620, at *3 (Ct. App. Aug. 12, 2020). *See also Cullen v. McNeal*, 390 S.C. 470, 481, 702 S.E.2d 378, 384 (Ct. App. 2010) ("The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the contract. If a contract's language is clear and capable of legal construction, this court's function is to interpret

its lawful meaning and the intent of the parties as found in the agreement.”) (internal citations omitted).

Courts “are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms . . .” South Carolina Dept. of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 13 (Ct. App. 2008) (internal citations omitted). Under South Carolina law, construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment. Lyles v. BMI, Inc., 292 S.C. 153, 157, 355 S.E.2d 282, 284 (Ct. App. 1987).

Further, “[a] *condition precedent* to a contract is ‘any fact other than the lapse of time, which, unless excused, *must exist or occur before a duty of immediate performance arises.*’” *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct. App. 2005) (citing *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994)). “The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ.” *Id.* (internal quotations and citations omitted). “*If a contract contains a condition precedent, that condition must either occur or it must be excused before a party’s duty to perform arises.*” *McGill v. Moore*, 381 S.C. 179, 187, 672 S.E.2d 571, 575 (2009).

Under the clear and unambiguous language of the CLA, TD Bank was only to disburse construction loan funds to Stevens Builders, if, among other things, the Garraways presented TD Bank “proper written demand” for payment to Stevens Builders. CLA at Sect. III, ¶ 1 (loan disbursements are not to be made “unless and until . . . the Borrower presents proper written demand from the Contractor”). It is undisputed that the Garraways never presented written

demand to TD Bank for the \$93,575.27 disbursement at issue. To the contrary, Stevens Builders’s Complaint actually admits that *the Garraways “failed and refused to pay” Stevens Builders*, despite Stevens Builders’s demand. Compl. ¶ 9. In discovery, the Garraways admitted that they made no such demand to authorize payment. *See* Defendants Michael C. Garraway and Alicia M. Garraway’s Answers to Defendant’s TD Bank, N.A. Requests to Admit at ¶¶ 2, 3 (“Admit[ting] that [the Garraways] never presented TD Bank with a written demand for Stevens Builders to be paid the amount Stevens Builders seeks to recover in this Litigation” and that the Garraways “never signed a draw request for the amount Stevens Builders seeks to recover in this Litigation”). *See also*, Plaintiff’s Responses to TD Bank N.A.’s First Set of Requests for Admission Directed to Plaintiff at ¶¶ 3-4 (failing to explain how Stevens Builders met these conditions precedent in the CLA). At the summary judgment hearing, the Garraways’ counsel reconfirmed that the Garraways did *not* give TD Bank permission to release any more funds to Stevens Builders. May 23, 2022 Hr’g Tr. at 21:10-24:2; 30:14-16 (“the borrower not only did not ask for an advance to be made, the borrower sought not to give further advances to the contractor”). Accordingly, given the clear and unambiguous language of the CLA requiring TD Bank receive from the Garraways proper written demand for payment before making a disbursement to Stevens Builders, and the undisputed fact that the Garraways never provided such written demand, the trial court correctly granted summary judgment in favor of TD Bank.¹⁴

¹⁴ Stevens Builders likewise failed to produce any evidence showing that Stevens Builders satisfied any of the other conditions precedent to TD Bank making an additional disbursement of construction loan funds, namely, that such demand was “based upon the percentage of work completed,” “only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price,” and that construction was “progress[ing] in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the lender’s benefit only), and . . . there [we]re no violations of any terms of this document or any other documents signed in connection with this loan.” CLA, Sect. III, ¶ 1. To the contrary, the record showed that

Stevens Builders's makes a straw man argument that the CLA was ambiguous, claiming the CLA, on the one hand, required no duty to disburse funds on the part of TD Bank, while, on the other hand, the worksheet laid out TD Bank's duty to pay Stevens Builders. Initial Br. of Appellant, p. 20. This is a false characterization of the CLA. Under the clear and unambiguous terms of the CLA, TD Bank did have duties to disburse funds, but only upon the receipt of written demand from the Garraways. CLA at Sect. III, ¶ 1. There is no ambiguity as to that precondition for TD Bank making disbursements, and it is undisputed that that precondition never occurred, as the trial court found in correctly granting TD Bank's Motion for Summary Judgment. Order Granting TD Bank's Mot. for Summ. J., p. 5.

Second, the trial court correctly found there was no other basis for a finding that TD Bank breached the CLA. Under South Carolina law, the elements of a breach of contract claim are: (1) a contract existed; (2) a breach of that contract; and (3) that breach caused plaintiff damages. *Maro v. Lewis*, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010). It is the plaintiff's burden to establish "defendant's breach of one or more of the contractual terms." *Stanley v. Computer Scis. Corp.*, No. 3:12-CV-00280-MGL, 2014 WL 6473703, at *12 (D.S.C. Nov. 18, 2014) (granting defendants' motion for summary judgment where plaintiff failed to show a breach of contract).

It is common sense that a party cannot breach a contract where the alleged obligation under the contract does not exist. *See Allegro, Inc. v. Scully*, 418 S.C. 24, 35, 791 S.E.2d 140, 146 (2016). This is equally true with respect to construction loan agreements – where construction loan distribution provisions are for the benefit of the lender, a claim against the lender for breaching

the amount requested exceeded the percentage of work completed. *See Stevens Builders Documents Produced 070-071*, Jan. 8, 2019 Email from Donna Courchesne at TD Bank to Buddy at Stevens Builders (TD Bank notifying Stevens Builders that more progress was needed for further disbursements, since Stevens Builders received 62.7% of construction costs and only 54.5% of work was completed).

such provisions fails as a matter of law. *See Carew v. RBC Centura Bank*, No. 2010CP3200442, 2012 WL 10861828, at *4 (S.C. Com. Pl. May 17, 2012) (granting lender’s motion for summary judgment and dismissing borrower’s breach of contract claim because the construction loan contract provision that served as the basis for the complaint did not “place any obligations on [the lender to plaintiffs regarding the distribution of loan proceeds], and, therefore, cannot support a claim for breach of contract.”).

Here, Stevens Builders failed to identify a single term of the CLA that TD Bank breached. Stevens Builders’s Complaint alleged that TD Bank must make a distribution simply because Stevens Builders “demanded payment,” *see* Compl. ¶ 11, but that is inconsistent with the plain language of the CLA setting forth the numerous conditions precedent to payment. *See* Section I, *supra*. It would also defy common sense if a lender were obligated to pay a contractor based on the contractor’s demand alone, especially where the borrower objects to such payment, as here.

Stevens Builders incorrectly argues in its Initial Brief that TD Bank breached the CLA by using more than one worksheet to track the progress of work, which Stevens Builders claims “modified” the CLA. *See* Initial Br. of Appellant, p. 18. However, there is no contract term included in the CLA that requires a particular worksheet be followed. *See* CLA, Sect. III, ¶ 1. To the contrary, the CLA states that ***TD Bank “retain[ed] the option, in its sole discretion to change the timing and amounts of disbursements provided in any schedule*** established by or in connection with this loan.” *Id.* In other words, what Stevens Builders claimed was modified was expressly permitted to be modified under the terms of the agreement, and thus is no breach of the CLA. Further, even if a different worksheet were considered during construction, this does not alter, nor does Stevens Builders explain why this would alter, the conditions precedent required for TD Bank to make a disbursement, under any schedule. Stevens Builders’s Initial Brief does

not even try to argue that there was a modification of the requirement for the borrower to present written demand for payment, which undisputedly did not occur here.

Accordingly, because Stevens Builders has failed to identify a single contract term that TD Bank breached, and the undisputed record shows that conditions precedent to payment were not met, Stevens Builders's breach of contract claim must be dismissed under SCRCP 56. *See Scully*, 791 S.E.2d at 146 (affirming dismissal of breach of contract claims because, in part, no material terms were alleged).

CONCLUSION

TD Bank requests that this Court affirm the (1) March 6, 2020 Order granting TD Bank's Motion to be Relieved from Entry of Default; (2) October 22, 2020 Form 4 Order denying Stevens Builders's Motion for Default Judgment; and (3) May 27, 2022 Order granting TD Bank's Motion for Summary Judgment for three reasons:

First, the trial court properly granted TD Bank's Motion to Set Aside Entry of Default because TD Bank satisfied the "good cause" standard for seeking relief from default;

Second, the trial court properly denied Stevens Builders's Motion for Default Judgment because TD Bank complied with the trial court's March 9, 2020 Order and defended against the Complaint; and

Third, the trial court correctly granted TD Bank's Motion for Summary Judgment given the clear and unambiguous CLA and undisputed fact that the Garraways never presented written demand to TD Bank directing payment to Stevens Builders.

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