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 and Special Circuit Judge

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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.

FINAL BRIEF OF APPELLANT

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II. **The trial court erred, in its Form 4 Order dated October 21, 2020, in denying Stevens Builders, LLC's Motion for Default Judgment based on its finding that "the Court favors disposition on the merits and [Stevens Builders, LLC is not] prejudiced."**

II. **The trial court erred, in its Order Granting TD Bank, N.A.'s Motion for Summary Judgment dated May 27, 2022, by finding that there was no genuine issue of material fact regarding Stevens Builders, LLC's breach of contract claim against TD Bank, N.A.**

STATEMENT OF THE CASE

I. Statement of Facts

In 2016, Michael C. Garraway and Alicia M. Garraway (hereinafter the "Garraways") entered into a contract with Stevens Builders, LLC (hereinafter "Stevens" or "Appellant") for the construction of a new home. After the Garraways and the Appellant entered into that contract, they both entered into a Construction Loan Agreement with TD Bank, N.A. (hereinafter "TD" or "Respondent"). Specifically, on February 6, 2017, the Garraways made a loan agreement with TD for a construction loan. The Appellant became a party and executed the Construction Loan Agreement as the "Contractor."[1]

Concomitantly with the execution of the Construction Loan Agreement, TD required the Appellant and the Garraways to execute an attachment to the Construction Loan Agreement entitled "Construction Loan Disbursement Worksheet" (hereinafter "Worksheet").[2] This document became the basis for the conduct of the parties during the course of the construction project.[3] The Worksheet required disbursements to be made upon the completion of certain tasks, which tasks, cumulatively, amounted to a certain percentage of project completion.[4] Percentages of project completion for individual tasks were not designated on the Worksheet.[5] However, over the course of the construction project, TD issued amended Worksheets and otherwise changed the requirements of the Construction Loan Agreement.[6]

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[1] *See* R. p. 107
[2] *See* R. p. 116
[3] *See* R. pp. 264-265
[4] *See* R. p. 107
[5] *Id*.
[6] *See* R. pp. 264-265

On or about April 6, 2018, TD began using a different Construction Loan Disbursement Worksheet (hereinafter "Worksheet 2") to determine the timing and amount of disbursements to the Appellant.[7] Worksheet 2 recognized that $540,000.00, not $585,000.00, was to be distributed over the course of the project.[8] It also amended the tasks to be completed prior to disbursements.[9] The parties loosely followed the guidelines of Worksheet 2 through the Third Disbursement.[10]

On or about June 11, 2018, TD sent the Appellant a Construction Progress Report to use as guidance for the timing of disbursements.[11] It assigned percentages of project completion to specific tasks, but those percentages did not directly reflect the percentages on the original Worksheet or Worksheet 2 and the tasks necessary for disbursements did not directly reflect those shown on the original Worksheet or Worksheet 2.[12]

Later, TD Bank generated a spreadsheet entitled Field Inspection Report.[13] It listed tasks and assigned monetary values, but not percentages of project completion, to those tasks. In late December 2018, the Field Inspection Report showed that 53% of the project had been paid for.[14]

On January 3, 2019, William R. Cobia, SRA, upon the request of TD, conducted an inspection of the project and provided TD Bank with a Construction Progress Inspection Report.[15] This was not in the same form as the Construction Progress Report referenced above and Mr. Cobia has stated that the form he used was his own, i.e., it was not Provided

[7] *See* R. pp. 264-265
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*., R. p. 278
[12] *See* R.116, R. pp. 264-265, R. p. 278
[13] *See* R. pp. 264-265 and R. p. 408
[14] *Id*.
[15] *See* R. pp. 264-265 and R. p. 278

by TD Bank and had no relation to either of the Worksheets, the Construction Progress Report, or the Field Inspection Report.[16] Indeed, the percentages of project completion on Mr. Cobia's report were different from those on any of the forms previously provided by TD Bank.[17] Mr. Cobia's report showed the project as being 54.5% complete.[18] However, when applying the percentages of project completion as shown on Worksheet 2 and the Construction Progress Report, as well as the percentages of project completion as derived from monetary values assigned to tasks on the Field Inspection Report to Mr. Cobia's findings, it is clear that a much higher percentage of the project was complete.[19]

In December 2018, TD failed to disburse funds according to the requirements it had, itself, set forth.[20] Soon thereafter, the Appellant, Michael Garraway, and Donna Courchesne, an agent of TD, engaged in correspondence concerning whether a disbursement should be made.[21] This correspondence culminated with Ms. Courchesne's recognizing that, based on TD's investigation of the matter, a $71,400.00 disbursement was due from TD to the Plaintiff.[22] However, TD failed to make this disbursement and, without the funding necessary to proceed with the construction project, progress stalled, and the underlying action was the result.[23]

[16] *See* R. pp. 264-265
[17] *See* R. pp. 264-265 and R. p. 278
[18] *Id*.
[19] *Id*.
[20] *See* R. pp. 264-265
[21] *See* pp. R. pp. 282-298
[22] R. pp. 286
[23] *See* R. pp. 264-265

II. Procedural History

A. Respondent's First Default

The Appellant filed a Summons and Complaint on July 18, 2019 alleging that TD was in breach of the Construction Loan Agreement by failing to pay the Appellant as required pursuant to the provisions of the Construction Loan Agreement.[24] TD was served by personal service on September 30, 2019.[25] TD failed to answer, raise defenses, assert counterclaims, or otherwise respond to the Complaint.[26] The Appellant filed an Affidavit of Default on December 2, 2019 and the Clerk of Court entered the Default on December 4, 2019.[27] The trial court issued a Notice of Hearing for a damages hearing to be held on January 31, 2020. On January 21, 2020, TD was given notice of the damages hearing on the Motion for Default Judgment by first class mail.[28]

The damages hearing was held as scheduled and TD did not attend or otherwise participate.[29] The Appellant offered evidence of its damages, totaling $110,550.18.[30] The court instructed counsel for the Appellant to give the court a proposed order which she would sign "as soon as you upload it."[31] On February 7, 2020, before the proposed order was uploaded and the court's judgment entered, TD filed a Motion to Set Aside Entry of Default.[32]

TD's motion and memorandum in support thereof claimed that its explanation for the default and the reasons why vacation thereof would serve the interests of justice were

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[24] *See* R. p. 66
[25] *See* R. p. 73
[26] *See* R. p. 74 and Entry of R. p. 1
[27] *Id*.
[28] *See* R. p. 75
[29] *See* R. pp. 123-139
[30] R. pp. 134-138
[31] R. p. 15, ll. 8-9
[32] R. p. 77

that (1) TD is "served with a high volume of mechanics' lien cases," (2) S.C. Code Ann. § 29-5-70 provides that a mechanics' lien and resulting foreclosure is junior to a properly perfected mortgage lien, and (3) "the failure to file a timely response was inadvertent and unintentional."[33] It asserted that it timely filed a motion for relief because its "counsel immediately filed this motion once engaged."[34] It claimed that it had meritorious defenses because its "interest in the subject property is superior to and cannot be extinguished by Plaintiff's lien foreclosure and the breach of contract claim against TD Bank is barred by the Construction Loan Agreement . . ."[35] It then stated that there would be no prejudice to the Plaintiff if the relief were granted, but offered nothing further in support of that statement.[36]

Prior to the hearing on its motion on February 26, 2020, TD did not file any affidavits in support of its motion or other items of evidence. Likewise, at the hearing, TD did not proffer any evidence in support of its motion.[37] In TD's counsel's argument in support of its motion, it acknowledged that TD's in-house legal team received the Summons and Complaint but failed to treat them with the seriousness they deserved.[38] The trial court acknowledged that TD's reasons for failing to file an answer were not a good explanation.[39] After counsel for TD had presented his argument and it became clear that TD would not be presenting any evidence in support of its motion, counsel for the Appellant objected to the court's consideration of any facts not in the record.[40]

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[33] R. p. 81
[34] R. p. 81-82
[35] *Id*.
[36] R. p. 82
[37] R. 347-360
[38] R. p. 353, l. 18 – p. 354, l. 9
[39] R. p. 355, ll. 20-23
[40] R. p. 357, ll. 4-13

On February 28, 2020, the court sent an email requesting that counsel for TD submit a proposed order. Counsel for TD submitted a proposed order which was used as the Court's Order Granting TD Bank's Motion to be Relieved from Entry of Default (hereinafter "First Default Order"), filed on March 9, 2020. That Order relieved TD from the Entry of Default on December 4, 2019 and required TD to "file an answer or other pleading to the Complaint within fifteen (15) days from entry of this Order."[41]

B. Respondent's Second Default

On March 24, 2020, fifteen days after the filing of the First Default Order, TD filed a Motion to Dismiss the claims against it.[42] However, it did not file an answer or other pleading. On April 10, 2020, TD had still not filed an answer or other pleading to the Complaint, so the Plaintiff filed an Affidavit of Default and Motion for Default Judgment.[43] However, that default was forgiven by Supreme Court Order 2020-04-03-01 (regarding operation of the trial courts during the coronavirus emergency) and, as such, the Affidavit of Default and Motion for Default were withdrawn by the Plaintiff.[44]

Supreme Court Order 2020-04-14-01, issued on April 14, 2020, stated that, "[i]n the event a party to a case or other matter pending before a trial court was required to take certain action on or after March 13, 2020, but failed to do so, that procedural default is hereby forgiven, and the required action shall be taken within thirty (30) days of the date of this order."[45] TD did not take the required action within thirty days of April 14, 2020, again failing to file an answer or other pleading on or before May 14, 2020.[46] The Plaintiff

[41] R. p. 8
[42] R. p. 94
[43] R. p. 118
[44] R. pp. 22
[45] R. p. 33
[46] R. p. 120

filed an Affidavit of Default and a Motion for Default Judgment reflecting this failure on June 5, 2020.[47] TD finally filed its Answer on June 23, 2020 – nearly nine months after the date on which it was served and nearly three months after the court ordered it to file an answer or other pleading after it was granted relief from the initial default.[48]

TD responded to the Plaintiff's Motion for Default Judgment by filing a memorandum in opposition on August 17, 2020.[49] In that memorandum, TD did not claim that it filed an answer or pleading as required by Judge Mullen's order and it did not seek relief from an entry of default.[50] Instead, it claimed that it was not in default because it filed a motion to dismiss.[51] Its arguments were (1) that it was not in default because it filed a motion to dismiss within 15 days of Judge Mullen's order and then filed an answer after the court ruled on its motion to dismiss, (2) that by filing a motion to dismiss it had not failed to plead or otherwise defend as required by Rule 55, SCRCP, and (3) that South Carolina favors disposition on the merits over technicalities.[52]

On September 17, 2020, the Appellant filed a Memorandum in Support of its Motion for Default Judgment.[53] It argued that TD was in default because it was subject to the provisions of the Court's Order Granting TD Bank's Motion to be Relieved from Entry of Default, filed on March 9, 2020, which were narrower than the provisions governing responses under the South Carolina Rules of Civil Procedure.[54] The court held a hearing on the Appellant's Motion for Default Judgment on September 22, 2020 during which

[47] R. p. 118 and p. 122
[48] *See* R. pp. 140-143
[49] *See* R. pp. 144-159
[50] *Id*.
[51] R. pp. 146-157
[52] R. pp. 146-149
[53] R. pp. 160-165
[54] R. p. 163

counsel for the Appellant and TD reiterated the arguments proffered in their memoranda to the court. On October 22, 2020, the Court filed a Form 4 Order denying the Plaintiff's Motion for Default Judgment (hereinafter "Second Default Order").[55] The one-sentence order stated that the motion was denied because "the Court favors disposition on the merits and the Plaintiff's [sic] aren't [sic] prejudiced."[56]

C. Respondent's Motion for Summary Judgment

On December 1, 2021, TD filed a Notice of Motion and Motion for Summary Judgment, claiming that there were no record facts which showed that TD was in breach of the Construction Loan Agreement.[57] The Court heard the motion, via Webex, on May 23, 2022.

During that hearing, the Appellant referenced Plaintiff's Responses to TD Bank N.A.'s First Set of Interrogatories to Plaintiff (hereinafter "Responses to Interrogatories") and Plaintiff's Responses to TD Bank N.A.'s First Request for Production of Documents to Plaintiff (hereinafter "Responses to Request for Production"), which had been made a part of the record as exhibits to the TD' Memorandum of Law Supporting TD Bank, N.A.'s Motion for Summary Judgment.[58] In particular, the Appellant called the court's attention to its response to interrogatory number five in its Responses to Interrogatories.[59] That response detailed the facts that gave rise to the Appellant's claim for breach of contract, as stated *supra*.[60] The Appellant also called the court's attention to the Responses to Request for Production, which included the documents which evidenced the factual allegations.[61]

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[55] *See* R. p. 48
[56] *Id*.
[57] *See* R. pp. 233-234
[58] *See* R. 260-275
[59] R. pp. 379-386
[60] R. pp. 379-386 and *see See* R. pp. 264-265
[61] *See* R. pp. 282-298

The Appellant argued that, due to TD's communications with the Appellants and the Garraways, including those which repeatedly called for changes to the duties and requirements of the parties pursuant to the Construction Loan Agreement, that it had been modified[62] and that it was ambiguous.[63] That is to say, there were questions not only with regard to whether TD had breached the Construction Loan Agreement, but also with regard to what, exactly, the actual agreement of the parties was. As such, there were genuine issues of material fact as to what the Construction Loan Agreement required of the parties and the ways in which TD had failed to meet those requirements.

The court issued an Order Granting TD Bank, N.A.'s Motion for Summary Judgment (hereinafter "Summary Judgment Order") on May 27, 2022.[64] That order found that the Construction Loan Agreement had not been modified by the parties and that it was not ambiguous.[65] The court found that TD was entitled to summary judgment because TD was only required to make disbursements pursuant to written demands of the Garraways, and that no such demand had been made.[66]

The Appellant filed a Motion for Reconsideration on June 6, 2022, which posited that the court had misapprehended the Appellant's arguments that the Construction Loan Agreement had been modified and that it was ambiguous.[67] On July 28, 2022, the court issued a Form 4 Order denying the Appellants Motion for Reconsideration.

[62] R. pp. 379, 380, and 389.
[63] R. pp. 381 and 387.
[64] *See* R. pp. 54-62
[65] *Id*.
[66] *Id*.
[67] *See* R. 321-329

STANDARD OF REVIEW

I. As to Relief from Entry of Default and Denial of the Appellant's Motion for Default Judgment

The decision whether to set aside an entry of default lies solely within the sound discretion of the trial court. The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.[68] 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.[69]

II. Summary Judgment

Summary judgment is available when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[70] A motion for summary judgment is a search of the record to determine if there is a genuine dispute of material fact.[71] Summary judgment is denied if a genuine a dispute exists, even if the court believes that the movant will eventually prevail at the trial on the merits.[72] Summary judgment is inappropriate even if the facts are undisputed, if the uncontested facts support different inferences.[73] When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.[74] Summary judgment is a drastic remedy to be invoked cautiously and must be

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[68] *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009)
[69] *Hill v. Dotts*, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2011); *In re Estate of Weeks*, 329 S.C. 251, 495 S.E. 2d 454 (Ct. App. 1997)
[70] Rule 56, SCRCP, *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007).
[71] *Higgins v. MUSC*, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997)
[72] *Hammond v. Scott*, 268 S.C. 137, 232 S.E.2d 336 (1977).
[73] *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994); *Dowling v. Home Buyers Warranty Corp.*, 303 S.C. 295, 400 S.E.2d 143 (1991).
[74] *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997).

denied if the non-moving party demonstrates a scintilla of evidence in support of its claims.[75]

ARGUMENTS

I. The trial court, in its Order Granting TD Bank's Motion to be Relieved from Entry of Default dated March 6, 2020, erred by relieving TD Bank, N.A. from an entry of default because its decision was based upon factual conclusions without evidentiary support.

A. TD Failed to Offer Evidence to Support its Motion

The First Default Order was based on factual conclusions which were without evidentiary support. TD filed a Motion to Set Aside Entry of Default and a memorandum in support of the motion, but filed no affidavits or other exhibits to support the averments of those documents.[76] Likewise, at the hearing, TD did not proffer any evidence in support of its motion.[77] Indeed, TD only provided its motion, it's memorandum in support of the motion, and argument of counsel in support of its motion.

Arguments of counsel are not evidence.[78] Likewise, a memorandum in support of a motion is not evidence.[79] When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but may direct that the matter be heard wholly or partly on oral testimony or depositions.[80] Since there were no affidavits submitted and no oral testimony was taken, there was no evidence before the court on which it could have based its decision. As such, the findings of its order were completely without any evidentiary support. The First Default Order reflects this. The

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[75] *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).
[76] *See* R. p. 77-83
[77] *See* R. pp. 347-360
[78] *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991); *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986)
[79] *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010); *McClurg v. Deaton*, 395 S.C. 85, 716 S.E.2d 887 (2011).
[80] Rule 43(e), SCRCP

court's only findings of fact were (1) that the Plaintiff filed a Summons and Complaint, (2) that TD was served, (3) that the Plaintiff filed a Motion for Default Judgment, (4) a damages hearing was held, and (5) TD filed its motion for relief.[81] None of these facts provide any basis for relief from default. As such, the lower court's decision to grant TD relief from entry of default must be reversed.

B. TD Was Not Otherwise Entitled to Relief from Entry of Default

Even if the statements of alleged fact made in TD counsel's argument had been supported by evidence, which they were not, there would still have been no evidentiary support for the court's decision to grant TD relief from the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere good cause.[82] This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.[83] If the court finds that there was a satisfactory explanation for the failure to respond, the court must then decide whether good cause exists to set aside the entry.[84] In determining whether good cause exists, the court must consider (1) the timing of the request for relief; (2) the existence of a meritorious defense; and (3) the prejudice to the opposing party.[85] A trial court is not required to make specific findings of fact for each factor if there is sufficient evidence in the record to support the trial court's decision.[86]

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[81] R. pp. 6-7
[82] Rule 55(c), SCRCP; *Sundown Operating Co. v. Intedge Indus. Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888

As a threshold matter, it is necessary for a defaulting party to provide a satisfactory explanation for its default.[87] However, there is no finding in the First Default Order that such an explanation was given or that the explanation was satisfactory. This reflects the trial court's acknowledgment during the hearing that TD's reasons for failing to file an answer were not a good explanation.[88] TD's explanation for failing to answer was that it is served with a high volume of cases and that its failure to file a timely response was inadvertent and unintentional.[89]

It is well settled that a party's neglect is not a satisfactory explanation for its default.[90] In *Campbell v. City of N. Charleston*, the City defaulted when it was served with a Complaint and the City employee receiving service failed to follow the City's usual protocol following service. [91] The Court of Appeals found that this was not a satisfactory explanation for the City's default.[92] In *White Oak Manor, Inc. v. Lexington Ins. Co.*, the Supreme Court found that there was no satisfactory explanation for default when the defaulting party blamed its failure to answer on the failure of its designated agent for service to communicate the service.[93] The Court of Appeals has also found that there was no satisfactory explanation when a Defendant explained that it failed to answer because its employee who received personal service did not recall being served.[94]

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[87] *Id.* at 383 S.C. at 608, 681 S.E.2d at 888
[88] *Id*. at p. 9, ll. 20-23
[89] R. p. 79
[90] *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994); *Richardson v. P.V., Inc.*, 383 S.C. 610, 618-19, 682 S.E.2d 263, 267 (2009); *Campbell v. City of N. Charleston*, 431 S.C. 454, 848 S.E.2d 788 (Ct. App. 2020);
[91] *Campbell v. City of N. Charleston*, 431 S.C. 454, 848 S.E.2d 788 (Ct. App. 2020)
[92] *Id*.
[93] *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 753 S.E.2d 537 (2014).
[94] *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 719 S.E.2d 703 (Ct. App. 2011).

It follows that TD's explanations are likewise unsatisfactory. As such, TD failed to offer a satisfactory explanation as required by *Sundown* and the lower court's decision to grant TD relief from entry of default must be reversed.

II. The trial court erred, in its Form 4 Order dated October 21, 2020, in denying Stevens Builders, LLC's Motion for Default Judgment based on its finding that "the Court favors disposition on the merits and [Stevens Builders, LLC is not] prejudiced."

The First Default Order, issued on March 9, 2020, required TD to "file an answer or other pleading to the Complaint within **fifteen (15) days** from entry of this Order."[95] As described *supra*, TD failed to file an answer or other pleading within that time (by March 24, 2020) and failed to file the same within the additional fifty-one (51) days (by May 14, 2020) afforded to it by Supreme Court Order 2020-04-14-01. Instead, TD ignored the order's requirement to file an answer or other pleading and, instead, filed a motion to dismiss.[96]

Rule 12(a), SCRCP allows a defendant to answer *or* file a motion permitted by Rule 12 within thirty days of service, but the First Default Order was narrower than the provisions governing responses under the South Carolina Rules of Civil Procedure.[97] It did not provide the same options as are available under Rule 12 and only allowed TD to file a pleading.[98]

A motion to dismiss is not an answer or other pleading. Rule 7, SCRP provides a very clear dichotomy between pleadings and motions. Pleadings include complaints, answers, replies to counterclaims, answers to cross-claims, third-party complaints, third-

[95] R. p. 8
[96] *See* R. pp. 94-95
[97] *See* R. pp. 6-9
[98] *Id*.

party answers, and court-ordered replies to answers.[99] Outside of those, "[n]o other pleadings shall be allowed."[100] On the other hand, a motion is not a pleading but simply is an application made for the purpose of obtaining an order from the court.[101]

The court below denied the Appellants Motion for Default Judgment for two reasons. First, because it "favors disposition on the merits" and second, because "the Plaintiff's [sic] aren't [sic] prejudiced."[102] It is South Carolina's policy to favor disposition of the issues on their merits rather than on technicalities.[103] The Court has applied the first portion of this policy here and ignored the second portion. If it were simply our courts' policy to dispose of cases on the merits, there would be no need to have Rules 12(a) and 55, SCRCP. If all that mattered were the merits of the case, there would be no need for a Defendant to file an answer and no need for rules about the procedure following a Defendant's failure to participate in litigation.

As such, the policy is to avoid disposition on mere technicalities. Here, TD's default is not the result of a technicality or good faith error. TD is a sophisticated party which has refused to participate in litigation and then failed to comply with the Court's Orders.

During the hearing on the Appellant's Motion for Default Judgment, the sole case cited by TD in support of its position was one in which a *pro se* party fully participated in a case but missed a hearing before an administrative law judge because of a misunderstanding about scheduling.[104] In *Mictronics,* because the *pro se* party missed the hearing, its case was dismissed by the lower court judge.[105] When the party found that it

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[99] Rule 7(a), SCRCP
[100] *Id*.
[101] Rule 7(b)(1), SCRCP; *United Machine Works, Inc. v. Williams*, 268 S.C. 600, 235 S.E.2d 711 (1977).
[102] *See* Form 4 Order dated October 21, 2020
[103] *Mictronics, Inc. v. S.C. Dep't of Revenue,* 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001).
[104] *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001)
[105] *Id.*

had missed its hearing, it immediately apologized but was not granted relief.[106] On appeal, the Court of Appeals found that, in a case like that, it was good policy to favor disposition on the merits.[107]

The facts in this case are very different from those in *Mictronics*. TD was the beneficiary of great leniency when it was relieved from its initial default by the Frist Default Order. However, despite that leniency, TD chose to ignore the requirement of the Court's order to file a pleading. This case does not involve a default resulting from a mere technicality, but rather a sophisticated party which simply refuses to follow the rules of procedure and the Court's orders. As such, the lower court's denial of the Appellant's Motion for Default Judgment must be reversed and the lower court must be instructed to enter a default judgment in favor of the Appellant.

III. The trial court erred, in its Order Granting TD Bank, N.A.'s Motion for Summary Judgment dated May 27, 2022, by finding that there was no genuine issue of material fact regarding Stevens Builders, LLC's breach of contract claim against TD Bank, N.A.

As discussed above, there were genuine issues of material fact as to what the Construction Loan Agreement required of the parties and the ways in which TD had failed to meet those requirements. The Appellant argued that these issues existed because of modification of the Construction Loan Agreement by the parties[108] and because of the ambiguity of the Construction Loan Agreement. [109]

The Worksheet was made a part of the Construction Loan Agreement because it was executed at the same time, by the same parties, for the same purposes, and in the course

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[106] *Id*.
[107] *Id*.
[108] R. pp. 379, 380, and 389.
[109] R. pp. 381 and 387.

of the same transaction as the Construction Loan Agreement.[110] As such, any subsequent modification of the Worksheet would be a modification of the Construction Loan Agreement on the whole.

A written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract.[111] In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.[112] A written contract may be modified by the parties thereto in any manner they choose.[113]

Here, the parties modified the Construction Loan Agreement on several occasions when TD sent the Appellant and the Garraways new worksheets and other documents detailing the parties' duties.[114] Once these documents were sent and received, the parties would abide by the terms of those documents.[115] So, in January 2019, the Appellant was abiding by the Construction Loan Agreement, as modified, when he sought payment from TD prior to continuing with construction.[116] TD acknowledged that the parties were bound by its modifications when Donna Courchesne sent the Appellant and Michael Garraway an email acknowledging that the Appellant had provided the labor and materials necessary for the disbursement of funds.[117] As such, there is a genuine issue as to a material fact and summary judgment is inappropriate.

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[110] *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977)
[111] *Florence City-County Airport Comm'n v. Air Terminal Parking Co.*, 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984)
[112] *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975)
[113] *Evatt v. Campbell*, 234 S.C. 1, 6-7, 106 S.E.2d 447, 450 (1959)
[114] R. p. 264-265
[115] *Id*.
[116] *Id*.
[117] R. p. 286

An interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.[118] Where one construction makes the provision unusual or extraordinary and another construction which is equally consistent with the language employed would make it reasonable, fair and just, the latter construction must prevail.[119]

If the Court reads the Construction Loan Agreement as placing no duties upon TD, then it would be totally meaningless and superfluous. The Appellant provided evidence that the intention of the parties was that the Worksheet and its successors be incorporated into the Construction Loan Agreement and that the parties were to be bound by the requirements of the same.[120]

A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation.[121] A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one or is unclear because it expresses its purpose in an indefinite manner.[122] Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity.[123]

Ambiguity exists in the Construction Loan Agreement because, on the one hand, it requires no duty to disburse funds on the part of TD while, on the other hand, the Worksheet, in its original and amended forms, which was made a part of the contract, clearly lays out the Appellant's duty to provide labor and materials as well as the

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[118] *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 756 S.E.2d 148 (2014)
[119] *Sanders v. General Motors Acceptance Corp.*, 180 S.C. 138, 185 S.E. 180 (1936)
[120] *See* Response 5 of Plaintiff's Responses to TD Bank N.A.'s First Set of Interrogatories to Plaintiff
[121] *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585 (Ct. App. 1997)
[122] *Farr v. Duke Power Co.*, 265 S.C. 356, 218 S.E.2d 431 (1975)
[123] *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 499-500, 649 S.E.2d 494, 502 (Ct. App. 2007)

Defendants' duties to pay the Appellant. Liberal construction in the Appellant's favor requires the court to determine that there is evidence in the record that tends to show that the parties were bound by the Worksheet and that there is a question of material fact as to whether TD breached the Construction Loan Agreement.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that the Court reverse the lower court's findings and overturn the First Default Order, the Second Default Order, and the Summary Judgment Order.

Respectfully submitted,

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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 and Special Circuit Judge

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

Stevens Builders, LLC……Appellant,

v.

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

Of whom TD Bank, N.A. is the……...Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of the Appellant complies with Rule 211(b), SCACR .

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February 21, 2023
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