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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 Hon. Marvin H. Dukes, III, Circuit Judge
The Hon. Russ Keep, Magistrate Judge
Trial Case No. 2022CP0700884

Appellate Case No. 2022-001784

Gator Northridge Partners, LLC ..... Appellants,

v.

Ocean Woods Landscaping Company, Inc. ……..... Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The lower court abused its discretion in denying Gator Northridge Partners, LLC's ("Gator") relief from default because Gator can show mistake, inadvertence and/or excusable neglect.

STATEMENT OF THE CASE

This is an appeal from the Circuit Court's affirmance of a Magistrate Court entering default judgment against Gator.

Respondent filed this action in Beaufort County Magistrate Court on February 14, 2022. Gator was served through its registered agent on February 21, 2022. The registered agent emailed the Summons and Complaint to Heather Hedges, Executive Secretary at Gator. Ms. Hedges was on maternity leave from January 5 to April 5, 2022 and she returned to work two days a week after April 5. Ms. Hedges did not receive the email in a timely manner; thus, the complaint was not assigned to local counsel for handling.

On March 28, 35 days after service, Ocean Woods moved for Entry of Default but did not send a copy of its motion to Gator. The Magistrate Court set a hearing for April 28 and mailed notice of the hearing to Gator. During this period Ms. Hedges was still working on a part-time basis and did not become aware of the notice. Gator did not appear at the hearing and a judgment was entered on behalf of Ocean Woods on April 29, 2022. On May 6, 7 days after the entry of the judgment, Gator moved to be relieved from default. That motion was denied on the same day. Gator timely appealed the Magistrate Court's decision by filing its Notice of Appeal on May 18,

2022[1].

A hearing on Gator's Motion to be relieved from default was held on November 16 in front of Judge Dukes. On November 17, Judge Dukes entered a Form 4 Order affirming the Magistrate Court's Default Judgment (Form 4 Order). Appellant timely filed its Notice of Appeal on December 15, 2022.

STATEMENT OF FACTS

This is a collection action. Respondent filed its complaint seeking payment for its ill-performed services on February 11, 2022 (Complaint). Gator was served through its South Carolina registered agent on February 21, 2022. (Affidavit of Service). Unfortunately, Heather Hedges, the Executive Assistant in charge of administering cases filed against Gator was on maternity leave at the time Gator received the Summons and Complaint from its registered agent in South Carolina and she did not assign the case to local counsel (Affidavit of Heather Hedges). Consequently, Respondent filed a Motion for Entry of Default on March 28, 2022, 35 days after service of the complaint (Motion and Affidavit for entry of default). On April 4, 2022, the Magistrate Court set a hearing on the Motion for Entry of Default for April 29. On April 18, 2022, the Magistrate Court mailed a copy of the hearing notice to Gator (Magistrate Return and Respondent Memorandum in opposition of relief from default). Following maternity leave, Ms. Hedges returned to work on a part-time basis two days a week. Ms. Hedges did not become aware of the notice until she returned to work on April 28 as she was only working two days a week. (Affidavit of Heather Hedges). Ms. Hedges did not retain local counsel and Gator did not appear at the hearing. A judgment was entered in favor of Plaintiff.

[1] As explained in Plaintiff's Memorandum in Support of Relief from Default, a copy of the Notice of Appeal was properly emailed to Judge Keep.

On May 6, 2022, 7 days after the entry of judgment, Gator moved to be relieved from default and submitted affidavits explaining that its failure to answer the complaint and attend the hearing was a mistake and not a pattern. (See affidavits of Heather Hedges and Marc Shandler). The Magistrate denied Gator's motions on the same day, finding there was no excusable neglect because Gator was on notice of the hearing. Gator timely appealed the Magistrate's decision on May 17, 2022.

The Circuit Court affirmed the default judgment on November 17, 2022, made no findings, and issued a Form 4 Order. This appeal ensued.

ARGUMENT

STANDARD OF REVIEW

The decision of whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989); *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989). This decision will not be reversed absent an abuse of that discretion. *Thompson*, 299 S.C. at 119, 382 S.E.2d at 902-903; *In Re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). An abuse of discretion occurs when the order was controlled [**102] by an error of law or when the order is without evidentiary support. *Id. Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 101-02 (Ct. App. 2004).

I. The lower court abused its discretion in denying Gator Northridge Partners, LLC's ("Gator") relief from default because Gator can show mistake, inadvertence and/or excusable neglect.

Rule 60(b)(1) S.C.R.C.P. provides as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . .

Rule 60(b)(1) applies to any final judgment. See H. Lightsey, J. Flanagan, *South Carolina Civil Procedure*, 398-399 (2nd Ed. 1985). Relief under this section is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of that discretion. *Id*. at 399. Such an abuse arises when the judge issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is **without evidentiary support**. *Goodson v. Am. Bankers Ins. Co*., 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988)(emphasis added).

As the Supreme Court succinctly noted in *Morris v. BB&T Corp*., No. 28131, 2023 S.C. LEXIS 11, at *3-4 (Jan. 25, 2023)

> We cannot better explain our reasoning for reversal than the court of appeals itself explained in a different case, decided approximately a year after it decided this case. See *Jordan v. Hartford Fin. Grp., Inc*., 435 S.C. 501, 868 S.E.2d 400 (Ct. App. 2021) (explaining "the commission's summary denial of [a] motion to reinstate without rational analysis of the good cause standard was arbitrary and an abuse of discretion," 435 S.C. at 507, 868 S.E.2d at 403, and reinstating the appeal). At oral argument before this Court, Justices questioned counsel for the commission as to how Jordan does not resolve the question before us here. Counsel responded by arguing the commission made a discretionary decision and this Court should defer to the commission's decision. We publish this decision to clarify that no court is entitled to the deference associated with the discretion [*4] standard of review until that court has earned deference by fulfilling the responsibility of exercising its discretion according to law.

Here, while the more stringent standard of excusable neglect applies, the lower court is not excused from failing to consider the evidence in front of it when asked to reconsider its decision to issue a default judgment. The lower court summarily ruled that Gator had notice of the hearing and thus did not meet the mistake, inadvertence, or excusable neglect standard required by rule

"60(c)". Clearly, the court misstated the rule here, and in doing so appears to have only considered the fact that a notice of hearing was received by Gator and no appearance was made.

The court failed to consider the totality of the circumstances showing that the one person responsible for retaining legal counsel in situations where Gator had been sued was on maternity leave at the time Gator was served with the complaint and did not timely receive a copy, and thus did not assign this matter to local counsel. The court also ignored the fact that Ms. Hedges only learned of the hearing on April 26, 2022, three days before the hearing (Affidavit of Heather Hedges). Given that Gator is an out-of-state corporation and its offices are located in Miami, Florida, Ms. Hedges was not able to retain counsel in time to attend the hearing. General Counsel for Gator also attested that he was not aware Ms. Hedges' replacement was not familiar with the well-established procedure set by Gator for situations where it is served with a complaint (Affidavit of Marc Shandler). There is no evidence that the lower court considered either Ms. Hedges' or Mr. Shandler's affidavits in reaching its conclusion to uphold the default.

The criteria for obtaining relief from judgment mandates a showing, inter alia, of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." Rule 60(b), SCRCP. "The promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant." Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985) (citation omitted). The decision to set aside a default is within the discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion. *N.H. Ins. Co. v. Bey Corp*., 312 S.C. 47, 50, 435 S.E.2d 377, 378-79 (Ct. App. 1993).

Mis-calendaring is not always good cause. But a reflexive refusal to consider that a calendaring mistake could be good cause is an abuse of discretion. *Jordan v. Hartford Fin. Grp., Inc.*, 435 S.C. 501, 506, 868 S.E.2d 400, 403 (Ct. App. 2021)

Public policy favors the disposition of cases "on their merits rather than on technicalities." *Mictronics, Inc. v. South Carolina Department of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct .App. 2001) citing Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986).

In *Jordan*, even under an arbitrary and capricious standard of review, the SC Court of Appeals found that not recognizing a human honest mistake is an abuse of discretion and reinstated the appeal.

Here, we have a case where Gator's employee responsible for calendaring the answer and any other legal deadline was on maternity leave and when she returned, she only worked part-time and did not calendar the hearing timely. (See affidavit of Heather Hedges). The Magistrate Court summarily dismissed Gator's motion to dismiss within hours of filing.

As to the promptness of seeking relief, Gator moved for relief from the default judgment seven days after the judgment had been entered.

As to the reasons for the failure to act promptly, while Gator's general counsel learned of the complaint timely, his affidavit explains that the well-established procedure was for Ms. Hedges to forward the complaint to local counsel. (Affidavit of Marc Shandler). Gator does not dispute that the neglect of its general counsel is imputed to it but contends that the neglect is excusable as required by Rule 60(b)(1).

Additionally, Plaintiff faces no more burden of prejudice to its interests by setting aside

the default than it would have faced if Gator had timely answered. Plaintiff merely has to prove its case. No South Carolina case has defined the breadth of prejudice in setting aside a default, but the federal courts have explored it to a greater degree. Rule 55 (c) and Rule 60(b) are similar to the comparable federal rules. *Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 437, 361 S.E.2d 340, 340 (Ct. App. 1987). In federal court it has been held that, generally, there is no cognizable prejudice in requiring a plaintiff to prove a defendant's liability. See *Lacy v. Sitel Corp.*, 227 F.3d 290, 293 (5th Cir.2000) (indicating that delay, or requiring a plaintiff to prove his case does not

constitute prejudice).

Here, as the Magistrate Court recognizes in its order, Gator has meritorious defenses. Upholding the default would only thwart Gator's ability to have the case heard on the merits and give Plaintiff an advantage when it cannot show any prejudice.

Lastly, the Magistrates' Return appears to contend that the appeal to Circuit Court was not properly perfected because a copy of the **mailed** notice of appeal was dated June 20, 2022. This is in error. Gator filed its Motion to be relieved from default and exhibits as advised by the Clerk by emailing a copy of the Motion and Exhibits to BluftonCivil@bcgov.net on May 6, 2022, at 12:59:00 pm (See **Exhibit 1**). At 3:06 pm, Gator's Counsel was provided by email a copy of Judge Keep's Order denying Gator's Motion to be relieved from Default, holding that "Negligence or mistake is not enough for relief, SCRCP 60(c)." Clearly the Court did not consider any of the evidentiary support provided by Appellant with its motion for relief.

Gator filed its Notice of Appeal and served it on opposing counsel on May 18, 2022, with a copy to John Castellano, Senior Judicial Assistant, Bluffton Magistrate Court, the person who transmitted the order to Defendant on behalf of Judge Keep (Exhibit 1). Defendant also emailed a

copy of the notice to BluftonCivil@bcgov.net for filing in keeping with the clerk's instructions obtained at the time of the filing of the Motion. The Magistrate Court cannot on one hand accept filings of motions by email but refuse to accept notices of appeal by email.

CONCLUSION

For the reasons stated above, the lower courts should be reversed, and the case should be remanded for further proceedings.

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This 20th day of March
Charleston, South Carolina