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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

Case No. 2022-001784

Gator Northridge Partners, LLC

Appellant,

v.

Ocean Woods Landscaping Company, Inc.

Respondent.

RESPONDENT OCEAN WOODS LANDSCAPING COMPANY, INC.'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court properly affirm the Magistrate Court's ruling denying Gator Northridge Partners, LLP's ("Gator") Motion for Relief from the entry of a default judgment based on Gator's general counsel's office's failure to timely forward the lawsuit to local counsel pursuant to Rule 60(b), SCRCF?

STATEMENT OF THE CASE¹

This is an appeal of Beaufort County Magistrate Russ Keep's Order denying Appellant's Motion to be Relieved from Default ("Magistrate Order" – R. p. 29) and the subsequent Order by Beaufort County Special Circuit Court Judge Marvin H. Dukes III affirming the Magistrate Order ("Circuit Court Order" – R. pp. 15-17). The underlying suit is a collection action initiated by Respondent Ocean Woods Landscaping Co., Inc. ("OWL") for the collection of \$7,500.00 for work performed pursuant to the terms of its contract with Gator.² (R. pp. 62-68).

On or about January 5, 2022, a dispute arose regarding payment by Gator for services performed by OWL pursuant to the terms of the parties' March 13, 2017 contract. Subsequently, OWL instructed its attorneys to send a ten (10) day demand letter to Gator's Senior Vice President, Lisha K. Miller ("Miller"), in an attempt to resolve this matter without litigation. (R. pp. 80-114). Unfortunately, Gator did not respond to the ten (10) day demand letter, so OWL was forced to file suit.

On February 11, 2022, OWL filed the instant action with the Beaufort County Magistrate's Court ("Magistrate Court"). (R. pp. 59-68). Shortly thereafter, on February 21, 2022, the

¹ OWL's reading of Rule 208(b)(1)(C) SCACR is that disputed facts or matters should not be included in the Statement of Case. In order to avoid being bound by Gator's Statement of Case and Statement of Facts under Rule 208(b)(2) SCACR, OWL has set forth a brief factual summary.

² The record reflects that OWL was actually owed \$8,369.51, but OWL voluntarily reduced the total amount owed by Gator to satisfy the jurisdictional limit of the Magistrate court. (R. pp. 176).

Summons and Complaint were served on Gator's South Carolina Registered Agent as reflected on the South Carolina Secretary of State's Website, Corporate Creations Network, Inc., 6650 Rivers Avenue, North Charleston, SC 29406, as evidenced by that certain Affidavit of Service on file with the Magistrate Court. (R. pp. 115; 57-58). Despite being properly served, Gator failed to file any response to OWL's Complaint. Thus, on March 28, 2022 (thirty-five (35) days after Gator was served), OWL filed an Affidavit of Default and Motion for Default Judgment. (R. pp. 53-56). A copy of the Affidavit of Default and Motion for Default Judgment were emailed to Ms. Miller on March 28, 2022. (R. pp. 124-25). The Magistrate Court also served Gator with the Affidavit of Default, Motion for Default Judgment, and a Notice of Hearing set for April 29, 2022 ("Hearing") by mail to 7859 NW 146th Street, Columbia, SC 29201 on April 4, 2022 and again to 6650 Rivers Ave., North Charleston, SC on April 18, 2022. (R. pp. 47-48, 50). Gator and Ms. Miller did not respond to the Affidavit of Default, Motion for Default Judgment, or the Notice of Hearing.

In preparation for the Hearing, OWL also filed an Affidavit of Joseph P. Short on April 20, 2022. (R. pp. 176-78). A copy of Mr. Short's Affidavit was served on Gator via mail on April 20, 2022. (R. p. 45). Ultimately, Gator failed to attend the Hearing or contact anyone regarding this matter prior to the Hearing. Accordingly, the Magistrate Court granted OWL a judgment against Gator in the amount of \$7,570.00 on April 29, 2022 ("Default Judgment"). (R. pp. 42-43).

Thereafter, on May 6, 2022, Gator filed a Motion to be Relieved from Default asserting good cause existed to set aside the default ("Motion"), under Rule 12, SCRMC, based on the allegation that Gator's general counsel's office failed to forward the Summons and Complaint to local counsel due to an oversight. (R. pp. 30-41). That same day, the Magistrate Order was issued order denying Gator's Motion pursuant to Rule 60(b), SCRCP. (R p. 29). A copy of the Magistrate

Order was emailed to all parties by the Magistrate Court on May 6, 2022. (R pp. 141-42).

In response, Gator filed a Notice of Appeal to the Circuit Court on May 17, 2022 appealing the Magistrate Order. (R. pp. 25-27). The Magistrate Court filed its Return to the Appeal on June 30, 2022 (R. pp.18-72), and a hearing was held before Judge Marvin H. Dukes, III on November 16, 2022 (“Circuit Court Hearing”). At the Circuit Court Hearing, Gator presented a new argument, arguing that its Motion should be granted because its failure to timely respond was excusable neglect according to Rule 60(b), SCRPC. (R. pp. 136-143). This argument is entirely different from the argument Gator presented to the Magistrate Court – that Gator’s Motion should be granted for good cause shown.

After hearing arguments from both parties and reviewing the file, the Circuit Court Order, dated November 17, 2023, affirmed the Magistrate Order. (R. pp. 15-17). Subsequently, Gator filed the instant appeal with the South Carolina Court of Appeals on December 15, 2022 (R. pp. 1-5), and an Amended Notice of Appeal on March 20, 2023 (R. pp. 6-11), seeking to be granted relief from the Default Judgment based on the same new argument presented to the Circuit Court.

STANDARD OF REVIEW

The decision to grant or deny a motion made pursuant to Rule 60(b) is within the sound discretion of the trial judge. *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006). Thus, the appellate standard of review is limited to determining whether there was an abuse of discretion. *Id.* at 551, 633 S.E.2d at 502-03. An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support. *Gainey v. Gainey*, 382 S.C. 414, 423, 675 S.E.2d 792, 797 (Ct.App. 2009).

ARGUMENT

I. GATOR CANNOT ARGUE ITS AFFIDAVITS CONSTITUTE A SHOWING OF MISTAKE OR EXCUSABLE NEGLIGENCE.

Gator is barred from making any argument for relief from the Default Judgment other than “good cause” to any superior court as part of the appeals process because its Motion merely asserted that the Default Judgment should be overturned because “good cause exists to do so.” (R. pp. 30-31).

Gator’s Motion sought relief pursuant to Rule 12, SCRMC, but failed to assert any of the necessary grounds for relief, such as inadvertence or excusable neglect.³ (*Id.*). In the affidavits of Gator’s General Counsel, Marc Shandler, and his assistant, Heather Hedges (collectively “Affidavits”), Gator asserts that the “good cause” for overturning the Default Judgment lies in the fact that Gator was served with the Summons and Complaint, Notice of Hearing, and Motion for Default Judgment, but Ms. Hedges, who received these documents at Gator, was on maternity leave from January 5, 2022 through April 5, 2022, and did not have the opportunity to timely forward them to local counsel. (R. pp. 157-75, 179-97).

Because Gator’s Motion exclusively relied only on “good cause” and did not contain any arguments regarding mistake, inadvertence, or excusable neglect, it is barred from making any argument other than “good cause” to any superior court as part of the appeals process, including to the Circuit Court and the instant Court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (it is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved for appellate review.). A blanket

³ Rule 12, SCRMC is identical to Rule 60(b), SCRCP, and provides that the court may relieve a party from a final judgment based upon mistake, inadvertence, surprise, or excusable neglect. Rule 12, SCRMC.

assertion of “good cause” does not satisfy the requirement of a particularized showing of an outlined ground for relief as required by Rule 60(b), SCRPC. Accordingly, the Circuit Court properly affirmed the Magistrate Court’s denial of Gator’s Motion. Thus, the Circuit Court did not abuse its discretion and this Court should affirm the Circuit Court Order.

II. THE CIRCUIT COURT PROPERLY AFFIRMED THE MAGISTRATE COURT’S DENIAL OF GATOR’S MOTION PURSUANT TO RULE 60(b), SCRPC.

Even if Gator’s Motion timely raised the issue of “excusable neglect,” the Circuit Court properly affirmed the Magistrate Court’s denial of Gator’s Motion pursuant to Rule 60(b), SCRPC because Gator was seeking relief from the Default Judgment.⁴ (R. pp. 30-31).

It is well established under South Carolina law that once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRPC. *Sundown Operating Co Inc. v. Intedge Industries Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the “good cause” standard established in Rule 55(c). *Id.* Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or “other misconduct of an adverse party.” Rule 60(b), SCRPC.

Furthermore, in applying Rule 60(b), SCRPC, South Carolina courts have explicitly held that a company’s failure to forward a summons and complaint to counsel is not a ground to set aside a default judgment. *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 212, 456 S.E.2d 897, 900 (1995). In *Roche*, the plaintiff obtained a default judgment against the defendant company for failing to timely respond to the litigation. *Id.* The defendant company sought relief

⁴ It is clear that the Magistrate Court’s citation to Rule 60(c), SCRPC is merely a typographical error and the court meant to cite Rule 60(b), SCRPC. (R. p. 29). This error could have been corrected by a Motion to Reconsider, but none was filed in this matter.

from the default judgment alleging that the default was the result of inadvertence or excusable neglect. *Id.* The defendant company admitted it was properly served with the summons and complaint but alleged a secretary's failure to properly forward the summons and complaint to the proper parties within the company prevented a timely response. *Id.* The South Carolina Supreme Court ruled that these factual allegations did not meet the threshold of inadvertence or excusable neglect and upheld the plaintiff's default judgment. *Id.* This ruling is supported by numerous other cases with similar holdings. *See e.g. Campbell v. City of North Charleston*, 431 S.C. 454, 462, 848 S.E.2d 788, 792 (Ct. App. 2020) (the failure of a claims and insurance coordinator to forward a summons and complaint did not satisfy the good cause standard in Rule 55(c), SCRCPP); *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 342, 644 S.E.3d 793, 798 (Ct. App. 2007) (the neglect of the attorney is the neglect of the client, and no mistake, inadvertence, or neglect attributable to the attorney can be successfully used as a ground for relief from a default judgment, unless it would have been excusable if attributable to the client).

The actions of the *Roche* defendant are almost identical to those taken by Gator. It is hard to imagine a case more on point existing. Similar to the *Roche* defendants, Gator acknowledges in its Affidavits that it was properly served with the Summons, Complaint, Notice of Hearing, Motion for Default Judgment, and Affidavit of Default in this matter. (R. pp. 158-72; 179-95). In fact, both Gator's general counsel and his assistant explicitly state they received a copy of the Summons and Complaint on February 21, 2022 and received a copy of the Motion for Default Judgment, Affidavit of Default, and Notice of Hearing on April 26, 2022, but did nothing in response. (*Id.*). Gator's only explanation is that the general counsel's assistant failed to timely forward these documents to local counsel because she was on maternity leave from January 5, 2022 through April 5, 2022, and her replacement was not trained to handle routine litigation. (R.

pp. 158, 180). Gator's general counsel further admits that he learned of the Hearing on April 28, 2022, one day before the Hearing, but failed to contact opposing counsel or the Magistrate Court at that time. (R. p. 180). Just like in *Roche*, the actions of Gator's general counsel and his assistant do not satisfy the stringent standard established by Rule 60(b). Accordingly, the Circuit Court properly affirmed the Magistrate Court's denial of Gator's Motion. Thus, the Circuit Court did not abuse its discretion and the Circuit Court Order should be affirmed.

III. ASSUMING ARGUENDO, THAT GATOR'S AFFIDAVITS CONSTITUTE A SHOWING OF MISTAKE OR EXCUSABLE NEGLIGENCE, THE CIRCUIT COURT PROPERLY AFFIRMED THE MAGISTRATE COURT'S DENIAL OF GATOR'S MOTION.

Assuming arguendo, that the Affidavits submitted with Gator's Motion constitute a showing of mistake or excusable neglect as outlined in Rule 60(b)(1), the Circuit Court still properly affirmed the Magistrate Court's denial of Gator's Motion.

The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle it to relief. *BB&T* at 552, 633 S.E.2d at 503. In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: (1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. *Rouvet v. Rouvet*, 388 S.C. 301, 310, 696 S.E.2d 204, 208 (Ct. App. 2010).

As to the first factor, Gator did not promptly seek relief from the Default Judgment. Gator admits that it was properly served with the Summons and Complaint, Affidavit of Default, Motion for Default Judgment, and Notice of Hearing. (R. pp. 158-72; 179-95). Gator's general counsel explicitly states that he received a copy of the Summons and Complaint via email on February 21, 2022, but did not respond. (R. p. 179). Furthermore, Gator's general counsel and his assistant admit they received a copy of the Motion of Default Judgment on April 26, 2022 and discussed

this Motion on April 28, 2022, one day before the Hearing. (R. pp. 158, 180). However, Gator failed to contact opposing counsel or the Magistrate Court regarding the matter at that time. Instead, Gator waited until a week after the Hearing to seek relief from the Default Judgment. (R. pp. 30-41). Furthermore, as asserted in the Magistrate Court's Return, Gator's Notice of Appeal was not timely filed with the Magistrate Court pursuant to Rule 18(a), SCRMC. (R. p. 18). Finally, at no point has Gator provided an explanation as to why it did not take any action in response to the numerous documents mailed to it directly throughout this litigation. Thus, Gator failed to satisfy the first factor.

As to the second factor, as discussed above, it is well established that the neglect of the attorney is the neglect of the client, and no mistake, inadvertence, or neglect attributable to the attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. *Stearns Bank Nat'l Ass'n* at 342, 644 S.E.3d at 798. Furthermore, South Carolina Courts have explicitly held that a company's failure to forward a summons and complaint is not a mistake, inadvertence, or excusable neglect as outlined in Rule 60(b). *Roche* at 212, 456 S.E.2d at 900. Here, Gator acknowledges that it was promptly and correctly served with a copy of the Summons and Complaint, Affidavit of Default, Motion for Default Judgment, and a Notice of Hearing. (R. pp. 158-72; 179-95). The issue arose when Gator's general counsel and his assistant failed to timely forward the Complaint to local counsel. (*Id.*). This failure is clearly the neglect of an attorney that cannot be used as a ground for relief from the Default Judgment. Thus, Gator failed to satisfy the second factor.

As to the third factor, Gator's Motion did not include the assertion of a meritorious defense. Gator, as the party seeking to set aside the judgment, "has the burden of presenting evidence proving the facts essential to entitle it to relief." *ITC Commercial Funding, LLC v. Crerar*, 393

S.C. 487, 495, 713 S.E.2d 335, 339 (2011). In its Motion, Gator did not assert any meritorious defense and did not state that its proposed Answer attached as Exhibit 3 to the Motion contained a meritorious defense. (R. pp. 18-19). Thus, Gator is now prevented from arguing its proposed Answer asserts a meritorious defense because it is well established that a new issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved for appellate review. *Wilder Corp.* at 76, 497 S.E.2d at 733. Furthermore, Gator's Answer fails to provide any evidence to support its alleged meritorious defense. Accordingly, Gator failed to satisfy the third factor.

As to the fourth factor, Gator's Motion did not include any position regarding prejudice to OWL. (R. pp. 18-19). Thus, Gator is prevented from arguing that OWL would not be prejudiced by granting Gator relief from the Default Judgment. *Id.* However, it is clear that OWL would be prejudiced by the vacation of its default judgment. OWL complied with the Rules of Civil Procedure at every step of this suit and ultimately obtained a judgment against Gator for the full amount sought based on the testimony provided at the Hearing. (R. pp. 42-43). OWL should not be penalized based on Gator's failure to properly train its employees to handle routine litigation. Thus, Gator failed to satisfy the fourth factor.

Accordingly, for the reasons outlined above, assuming arguendo that Gator's Affidavits constitute a showing of mistake or excusable neglect, the Circuit Court properly affirmed the Magistrate Court's denial of Gator's Motion. Thus, the Circuit Court did not abuse its discretion and the Circuit Court Order should be affirmed.

CONCLUSION

For the reasons outlined above, this Court should affirm both the Circuit Court and the Magistrate Court and uphold OWL's default judgment against Gator for \$7,570.00.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCAR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, counsel for Appellant was served with a copy of the Respondent's Final Brief and Certificate of Counsel by E-Mail on the date set forth below. A copy of the E-Mail is attached hereto.

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