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Aug 24 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

Teasa K. Weaver, Circuit Court Judge

Appellate Case No. 2021-000480

Jimmy Shaver,

Respondent,

v.

Donald Shaver,

Appellant.

PETITION FOR REHEARING

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STATEMENT OF THE CASE

The Respondent DONNIE SHAVER sued the Appellant JIMMY SHAVER for \$9,500.00, alleging,

first, instruction by an insurance agent to begin repair work on a mobile home that had belonged to the mother of the Appellant JIMMY SHAVER, [RECORD ON APPEAL, Complaint, Para. 5]

payment by the insurance company to the Appellant for such work, [RECORD ON APPEAL, Complaint, Para. 7]

an ownership interest in the mobile home by the Appellant, [RECORD ON APPEAL, Complaint, Para. 10]

failure by the Appellant to pay for the value of such work [RECORD ON APPEAL, Complaint, Para.16]; and

second, a *quo warranto* claim “to the extent not inconsistent with the allegations of [the] complaint” [RECORD ON APPEAL, Complaint, Para.s 13, 19] for value added to the mobile home, in which the Appellant had an ownership interest.

After service, the *pro se* Appellant contacted the office of counsel for Plaintiff and left a letter from the insurance agent denying coverage of the Plaintiff’s claim. [RECORD ON APPEAL, p.____] He did not file a formal responsive pleading nor serve such a document on counsel. [RECORD ON APPEAL, p.____]

Counsel for Respondent filed a standard default affidavit stating, in relevant part, that “no answer, . . . or other pleading, and no appearance of notice thereof has been served upon [Counsel] by or on behalf of said Defendant”. [RECORD ON APPEAL, p.____]

At trial, the Defendant was told by the Court that he was in default and limited to cross-examination. [RECORD ON APPEAL, p.____] The Respondent was allowed to testify that he was authorized to proceed by the insurance agent and the Appellant, Donald Shaver. [RECORD ON APPEAL, Transcript of Hearing, p.8, ll. 1-3; 34-25; p.9, l.23-25].

The Circuit Court entered its Order of Default against the Appellant. The Appellant filed his Motion to Alter or Amend, which was denied. This Appeal followed.

ARGUMENT

I. THE APPELLANT'S FAILURE TO RESPOND TO THE COMPLAINT CAN ONLY AFFECT THOSE MATTERS WELL-PLEADED.

A Defendant in default has admitted all well-pleaded allegations of the complaint. *Gadsden v. Home Fertilizer & Chem. Co.*, 89 S.C. 483, 72 S.E. 15 (1911); *Masters v. Rodgers Development Group*, 283 S.C. 251, 321 S.E.2d 194 (Ct.App. 1984). Default does not preclude an argument on points that are not well-pleaded. The Court of Appeals in *Masters* stated:

A party seeking a default judgment is entitled to only such relief as is framed by his pleading It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error. *Mutual Savings & Loan Association v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980).

[*Id.*, 283 S.C. 251, 321 S.E.2d 196.]

The original Reporters on our Rules concluded their Note Concerning Reporter's Notes, located in the discussion of Rule 1, S.C.R.C.P., as follows:

"The reporters caution that guidance as to interpretation and application of the rules is much better sought in the wealth of precedent found in the decisions of the federal courts and in the courts of the many states which have adopted similar rules of procedure since 1938."

Masters, supra, makes it clear that a default will not preclude arguments on points that are not well-pleaded; there is Federal precedent to the same end. Thus, in *Thomson v. Wooster*, 114 U.S. 104, 110, 5 S.Ct. 788, 29 L.Ed. 105 (1885). the United States Supreme Court stated:

The defendants are concluded by that decree [of default], so far at least as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these

allegations, and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill [*i.e.*, the Complaint] itself.

[*Id.*, 114 U.S. at 110, 5 S.Ct. at ____, 29 L.Ed. at ____; *matter in brackets and underlining added.*]

The Complaint in was premised on, and alleged, a failure to turn over insurance proceeds for work the Respondent claimed to have done. [RECORD ON APPEAL, p.16 – 18.] At trial, the Respondent presented a completely different theory, claiming a personal agreement with the Appellant. [RECORD ON APPEAL, Transcript of Proceedings, p.45, l.23 - 24.]

The Appellant could have been held in default as to the allegations plead (withholding insurance proceeds). He cannot be held in default for an allegation, and a theory, which was not plead before he appeared for trial.ppellant. [RECORD ON APPEAL, Transcript of Proceedings, p.45, l.23 - 24.]

The Appellant could have been held in default as to the allegations plead (withholding insurance proceeds). He cannot be held in default for an allegation, and a theory, which was not plead before he appeared for trial.

II. AFTER THE CLAIMED DEFAULT THE TRIAL COURT FAILED TO ALLOW THE APPELLANT TO PRESENT HIS DEFENSES ON MATTERS OUTSIDE THOSE PLEAD BY THE RESPONDENT.

The Plaintiff, as recited above, plead two causes: authorization and payment by the insurance company, and *quo warranto* “to the extent not inconsistent with the allegations of [the] complaint”. [RECORD ON APPEAL, Complaint, Para.s 13, 19] Both are based upon a claimed agreement with the insurance agent.ppellant. [RECORD ON APPEAL, Transcript of Proceedings, p.45, l.23 - 24.]

The Appellant could have been held in default as to the allegations plead (withholding insurance proceeds). He cannot be held in default for an allegation, and a theory, which was not plead before he appeared for trial.

At trial, the Defendant was informed by the Court that he was in default and limited to cross-examination. [RECORD ON APPEAL, Transcript of Proceedings, p.22, l.9–14; p.59, l.8-11.]

The Respondent, as Plaintiff, testified that he was authorized to proceed by the insurance agent and the Appellant, Donald Shaver. [RECORD ON APPEAL, Transcript of Hearing, p.8, ll. 1-3; 34-25; p.9, l.23-25] This testimony directly contradicts the allegations in the Plaintiff's Complaint, which made no reference to authorization by, or contract with., the Appellant Donald Shaver.

The Appellant was not in default as to the evidence presented by the Respondent. The Trial Court should have allowed him to present his defenses in full. The holding of this Court that he did not raise this issue at trial does not address the fact that the Trial Court wrongly held the Appellant in default on allegations that were unplead in the Complaint.

The present Opinion states that the issues above “are not preserved for review because Donald [the Appellant] failed to object to Jimmy Shaver's (Jimmy's) [the Respondent] testimony at the default damages hearing.” [UNPUBLISHED OPINION NO. 2023-UP-287, Section 1.]

For the reasons above, the Appellant disputes that the hearing, as conducted, can be characterized as a “default hearing.”

The Appellant also argues that his statements to the Trial Court and the colloquy which resulted is more than sufficient to raise the issues which the present Opinion refuses to consider. [RECORD ON APPEAL, Transcript of Hearing, p.59, l.9 – p.69, l.6; p.61, l.12-21.] Even for a pro se defendant, there can be no requirement that he state a legal theory for the relief he seeks.

The Appellant also argues that the determination of whether, or how far, a proceeding is a matter of default is a legal question. Once raised, the duty of the Judge is to apply the law properly. In this case, and for the reasons stated, that was not done.

III. THE REFUSAL OF RULE 60(B) RELIEF WAS BASED UPON A MISTAKE OF LAW, AND IS THUS AN ABUSE OF DISCRETION.

For the reasons stated above, and in Appellant's Brief, the treatment of this matter as one in default was a mistake of the law cited above, and thus an abuse of discretion on the part of the Trial Court. The Appellant is entitled to relief under Rule 60(b) and on the grounds argued.

CONCLUSION

The Appellant was not represented in this case until after rendition of judgment. Owing to the Trial Court's ruling, he was unable to raise the defenses of a lack of proper LLR license by the Respondent for the work claimed, or the Respondent's failure to file any claim in the Probate Court. He was not in default as to the matters actually tried, and the Respondent's actions give strong evidence of extrinsic fraud.

The Appellant is entitled to a re-hearing or reconsideration of the Opinion of this Court affirming the Trial Court.

August 24, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, counsel for Appellant in the civil appeal above, hereby certifies that, on the date written below, he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

Petition for Rehearing and this Certificate of Service,

by service to the opposing lawyer's primary e-mail address listed in the Attorney Information System (AIS), as authorized by Section (b)(2) of the Order of the Supreme Court dealing with Electronic Filing and Service issued May 6, 2022.

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