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SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Petroleum & Franchise Funding, LLC,)
Plaintiff,)

Civil Action No. 2010-CP-42-6787

vs.

ORDER DENYING MOTION FOR
RELIEF FROM JUDGMENT AND
FOR STAY OF EXECUTION

Papa Oil, LLC; Bhavana Amin; Shanti
Pathak; Dass, Inc.; Anjay R. Patel;
Devang Amin; Gupteshwar Pathak,
Defendants.)

This matter is before the Court for purposes of hearing Shanti Pathak's and Gupteshwar Pathak's (the "Pathaks") Motion for Relief from the Default Judgment previously entered by the Court and a corresponding Motion to Stay Execution on judgment. The Court obtained extensive briefing from the Pathaks and the Plaintiff, Petroleum & Franchise Funding ("PFF"), on the issues raised in the Pathaks' Motion and heard extensive oral argument on this matter during a hearing on December 11, 2012. After reviewing additional briefing submitted by the parties and after the hearing on this matter, the Pathaks' Motions are **DENIED**.

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FINDINGS OF FACT

1. This case is based upon a series of Promissory Notes (the "Notes") executed by the predecessors of the current defendants. The money loaned by PFF was used to fund certain gas stations across the upstate of South Carolina.
2. Documents presented to the Court show that Papa Oil, LLC (a limited liability company of which the Defendants are members) assumed the Notes from the original borrowers.

3. As part of this assumption, the Pathaks executed certain personal guaranties (the "Personal Guaranties") to secure the debt to Papa Oil, LLC.
4. The summons and complaint naming the Pathaks were served upon them on January 14, 2011. (See Affidavit of Service of record in this matter). Thus, the Pathaks were required by Rule 12, SCRCF to file an answer or other response by February 13, 2011.
5. The parties have represented to the Court that Plaintiffs granted the Pathaks an extension of time to answer until March 1, 2011.
6. On March 11, 2011, the Plaintiff filed an affidavit of default stating that no answer or responsive pleadings were received from the Pathaks.
7. On March 23, 2011, the Plaintiff filed a Motion for Entry of Default Judgment. The Motion sought a judgment against the Pathaks, only, as the other defendants entered into a settlement agreement resolving the claims against each of them.
8. The parties agree that the Settlement Agreement specifically excluded the Pathaks from the settlement and preserved (or "carved out") the right for the Plaintiff to pursue claims against the Pathaks in this litigation.
9. Shortly after the filing of the Motion for Entry of Default, on June 2, 2011, the Pathaks began to transfer assets out of their names as evidenced by a Deed conveying their primary residence into a life estate. Plaintiff presented this deed to the Court for its consideration.
10. Following this transfer, the Pathaks contacted the Plaintiff, through counsel, to request participation in the settlement agreement that had been previously entered

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into with the other defendants, as evidenced by communications presented by the Plaintiff in opposition to the Motions.

11. Upon being denied the opportunity to join in the previous settlement, on December 19, 2011, the Pathaks filed the instant Motions that are before the Court.

LEGAL STANDARD

Rule 60(b), SCRCP provides that “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment.” When considering motions under Rule 60(b), the Supreme Court has explained:

[I]t is significant to note that when considering whether to grant relief from judgments, “a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute.” We recognized in Chewning [v. Ford Motor Co.], 354 S.C. 72, 579 S.E.2d 605 (2003)] both this Court’s longstanding policy towards final judgments and that “important benefits are achieved by the preservation of final judgments.”

Raby Constr., LLP v. Orr, 358 S.C. 10, 594 S.E.2d 478, 483 (2004) (quoting Chewning, 354 S.C. at 80, 86, 579 S.E.2d at 609, 613 (two internal citations omitted)). Because of the strong interests in preserving the finality of judgments, courts require a movant under Rule 60(b) to present evidence “proving the facts essential to entitle [them] to relief.” BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006).

In making a Rule 60(b) motion, the party “must show fraud, misrepresentation, or other misconduct within the intendment of 60(b)(3) and, normally, that he has a meritorious claim or defense, as the case may be. Fraud, misrepresentation, or other misconduct is not to be presumed; the burden of proof as to these charges is upon the moving party; and they must ordinarily be proved by clear and convincing evidence.” Bowers v. Bowers, 304 S.C. 65, 67-68, 403 S.E.2d 127, 129 (Ct. App. 1991) (citing 7 J. MOORE & J. LUCAS, MOORE’S FEDERAL PRACTICE § 60.24[5], at 60/217 (1990)). Thus,

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the court will examine the Pathaks' evidence in light of this "clear and convincing" evidence standard.

CONCLUSIONS OF LAW

1. The Pathaks' argument that they should be allowed to participate in the settlement agreement reached with the remaining defendants is without merit. Though the Court has been presented with evidence that the Pathaks were given the opportunity to participate in the settlement agreement—and did not, the Court need not reach this issue. The Pathaks have cited to no basis, in fact or law, that would "entitle" them to participate in a settlement agreement entered into with other parties to this lawsuit. The Court is unaware of any such legal authority and the Pathaks cite none.
2. The settlement of a portion of the debt at issue in this lawsuit does not entitle the Pathaks to be relieved of their joint and several obligations under the Personal Guaranties. Evidence presented during the hearing on this matter shows that the debt has not been presently, fully repaid all amounts due under the Notes. The judgment previously entered by this Court against the Pathaks is for Six Million, Four Hundred Thirty-Five Thousand, Seven Hundred Three and 36/100 (\$6,435,703.36) Dollars. The mere fact that a portion of this debt may be satisfied by future settlement payments from other defendants does not relieve the Pathaks of the judgment.
3. The Court notes, however, for clarity, that the Pathaks are entitled to offset the judgment against amounts *actually received* as settlement payments from the other defendants. As noted by the South Carolina Court of Appeals, "[a] non-settling defendant is entitled to *credit for the amount paid* by another defendant who settles." Rutland v. South Carolina Dept. of Transportation, 390 S.C. 78, 86, 700 S.E.2d 451,

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455 (Ct. App. 2010) (emphasis added); Welch v. Epstein, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000). “The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of *that part of the amount of damages sustained which has already been paid to him* In other words, there can be only one satisfaction for an injury or wrong.” Id. at 312-313, 536 S.E.2d at 425 (emphasis added and internal citations omitted). Therefore, as amounts are paid by the settling defendants, the Pathaks may seek to reduce the amount of the judgment against them, in accordance with Rutland.

4. Until those settlement funds are paid, however, the judgment remains valid as entered. No South Carolina case stands for the proposition that a partial settlement, especially one payable over time, wholly discharges a validly entered judgment as to non-settling co-defendants. The partial settlement of the debt with other debtors does not relieve the Pathaks of the judgment. Instead, they are merely entitled to a portion of the amounts paid by the settling defendants as they are received by Plaintiff.
5. The Court finds no basis, let alone clear and convincing evidence, for the Pathaks' claims that this judgment resulted from the negligent misrepresentation or fraud on the part of Plaintiff. The evidence presented to the Court shows that the Plaintiff specifically excluded claims against the Pathaks from the settlement agreement and that correspondence between the parties clearly indicates that the release in the settlement agreement will only apply to the “settling defendants.” It appears, upon the Court’s review of the evidence, that, until the Pathaks began transferring assets out of their names, they were given the opportunity to participate in the settlement, had they chosen to do so.

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6. At the hearing, the Pathaks raised an issue regarding the enforceability of the personal guaranty of Shanti Pathak. In an affidavit presented to the Court, Shanti Pathak represents that “[t]he obligations under [her] personal guaranty expired on November 2, 2007.” (Shanti Pathak Affidavit, ¶ 3). Counsel for the Plaintiff argued at the hearing that the Shanti Pathak guaranty had not expired due to an exception contained in the document. The Court allowed the parties to present additional argument as to this issue. As stated in the Shanti Pathak personal guaranty, the guaranty did not expire if the Notes were in default after the initial thirty-six (36) month term. Plaintiff has presented evidence that the Notes were in default as of that date and, therefore, the Shanti Pathak guaranty did not expire.
7. Not only does the Court reject the argument of Ms. Pathak that her personal guaranty expired, the Court believes this is a matter that could only be raised in an Answer to the Complaint. This allegation by Ms. Pathak does not meet the standards for setting aside a default judgment under Rule 60(b), SCRCF and does not rise to the level of “newly discovered evidence” or “misconduct of an adverse party.” Had Ms. Pathak wished to raise this issue and attempt to dispute this fact, she should have done so in the form of timely filed answer or responsive pleading.
8. The Court rejects the Pathaks’ arguments presented in its Motions and adopts, to the extent consistent with this Order, the Plaintiff’s arguments in opposition to the Motion. The Court finds that the Pathaks have not established, factually or legally, grounds to set aside the judgment pursuant to Rule 60(b), SCRCF.


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9. The Court does not reach the issues presented in the Motion to Stay Enforcement as the Court has found that the Judgment should stand, as entered previously. Thus, this motion is now denied as moot.

Based on the foregoing and the extensive arguments and briefing of counsel, it is hereby:

- (A) **ORDERED** that the Pathaks' Motion for Relief from Judgment is denied; and
- (B) **ORDERED** that the Pathaks' Motion to Stay Execution is denied as moot.

AND IT IS SO ORDERED

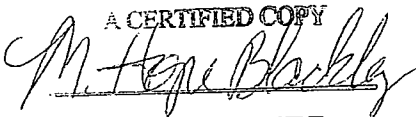



J. Derham Cole, Judge of the Seventh
Judicial Circuit

Date: _____

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