RECEIVED
Oct 19 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Special Referee

Appeal No. 2023-00173

Mark McAuley.....Respondent,

v.

Sunshine 11, LLC d/b/a Relax Inn, Usha Patel and Anjan Patel..... Defendants,

Of Whom

Sunshine 11, LLC d/b/a Relax Inn is the …… Appellant.

**RESPONDENT'S RETURN TO
APPELLANT'S MOTION TO STRIKE PORTIONS
OF INITIAL BRIEF OF RESPONDENT AND
RESPONDENT'S DESIGNATION OF MATTER**

Respondent hereby replies to Appellant's Motion to Strike Portions of Initial Brief of Respondent and Respondent's Designation of Matter. Appellant argues that since the exhibit to the motion to remand that was filed in federal court was inadvertently left off the email to the special referee, then the exhibit should be excluded from the record on appeal. First, although Appellant is technically correct that the exhibit to the Motion to Remand filed in federal court was inadvertently omitted from the email to the special referee, the exhibit will still be included in the record on appeal because the exhibit, as clearly referenced in the Motion to Remand, *is the filed*

Summons and Complaint that has already been designated by both parties to be included in the record.

Second, the Motion to Remand specifically references the filed civil action as the exhibit to the motion and the special referee found in his order being appealed that "Northfield was made aware of the filed Summons and Complaint in that legal filing and there was no evidence presented or allegation made that Northfield did not actually receive notice of the lawsuit through their legal counsel in the declaratory judgment action." Exhibit A, Order of Special Referee, page 6. There was no argument from opposing counsel that the document was not what it was represented to be or that it should not be submitted to the special referee. The fact that the actual exhibit was inadvertently left off, an exhibit referenced in the body of the motion and already reviewed by the special referee because it was the filed summons and complaint, should not require its exclusion in the record on appeal.

Third and finally, even if the Court finds that the exhibit should not be included in the record on appeal, Respondent can certainly rely on the Motion to Remand as well as the special referee's order in arguing that the insurance company had notice of the lawsuit. Appellant cannot simply ignore that fact based on the exhibit being inadvertently excluded from the email, especially when the special referee's ruling specifically relied on Appellant's lack of evidence to support its claim that the insurance company was not aware of the lawsuit.

For all of the above reasons, Respondent respectfully requests that Appellant's motion be denied. Alternatively, if the Court finds that the exhibit should not be included in the record on appeal, the remainder of Appellant's motion seeking to strike portions of Respondent's brief and precluding reference to the exhibit should be denied.

[SIGNATURE ON FOLLOWING PAGE]

/s Bradley L. Lanford
Bradley L. Lanford S.C. Bar No. 70223
Kenneth E. Berger S.C. Bar No. 77511
LAW OFFICE OF KENNETH E. BERGER, LLC
5205 Forest Drive
Columbia, South Carolina 29206
803-790-2800
Attorneys for Respondent

October 19, 2023
Columbia, South Carolina

Exhibit “A”

STATE OF SOUTH CAROLINA COUNTY OF DILLON Mark McAuley, Plaintiff, vs. Sunshine 11, LLC d/b/a Relax Inn, Usha Patel and Anjan Patel, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT Case No.: 2022-CP-17-00356 **ORDER DENYING DEFENDANTS' MOTION TO SET ASIDE DEFAULT JUDGMENT AS TO SUNSHINE 11, LLC d/b/a RELAX INN AND DISMISSING INDIVIDUAL DEFENDANTS WITH PREJUDICE**

This matter came before the undersigned Special Referee on the Defendants' Motion to Set Aside the Default Judgment entered November 3, 2022. A hearing was held via Zoom on May 23, 2023. Present on behalf of the Plaintiff were the Plaintiff and his attorney, Bradley L. Lanford. Sterling Davies was present on behalf of the Defendants. After reviewing the Stipulation of Facts and other filed exhibits, all of which were accepted into evidence, briefs filed by both parties, all court filings, and arguments of counsel, together which make up the entire record in this case, I find the Defendants' motion must be denied. I also find it reasonable at this juncture, by agreement of the parties, to dismiss the individual defendants from this case.

RELEVANT FACTS AND PROCEDURAL HISTORY

This case arises out of an accidental shooting of one guest by another guest at Defendants' hotel in Dillon County on October 17, 2021. On March 22, 2022, a Summons and Complaint seeking declaratory judgment ("the Declaratory Judgment Action") was filed against Northfield Insurance Company ("Northfield"), Sunshine II, LLC d/b/a Relax Inn, Usha Patel, Anjan Patel, and Rodrick Lavan Drawhorn. No responsive pleading was made by any of the defendants in that case until Northfield removed the case to federal court on July 22, 2022, after

being served on June 24, 2022. On July 29, 2022, Plaintiff filed a separate Summons and Complaint against the above-named Defendants ("the Tort Action"). In the Complaint in the Tort Action, it was alleged on October 17, 2021, Plaintiff stopped at the Relax Inn, a hotel in Dillon, South Carolina, and was checked in as a guest and given a room key. Complaint ¶¶ 7-8. However, that room had already been rented to another guest. Complaint ¶¶ 9-10. When Plaintiff attempted to open the door to the room, the occupant of the room was apparently frightened and fired his weapon at the door in self-defense. Complaint ¶ 14. The bullet struck Plaintiff in the shoulder, injuring him. Complaint ¶ 15.

The Complaint in the Tort Action alleged Defendants were negligent in a number of particulars, including: renting a guest a room that was already occupied by a different guest, issuing a room key to a new guest for a room already occupied by a different guest, failing to create adequate policies and procedures, failing to exercise due care in checking in and renting a room to a guest, and failing to act as a reasonable hotel and staff would under similar circumstances. Complaint ¶ 18.

On August 4, 2022, all the Defendants were personally served via process server in the Tort Action, including Usha Patel as the registered agent of Sunshine 11, LLC d/b/a Relax Inn. On August 16, 2022, Plaintiff filed a Motion to Remand in the Declaratory Judgment Action, attaching the filed Tort Action as an exhibit to the motion. Defendants in the Tort Action failed to timely answer or appear and on September 8, 2022, default was entered and this matter was referred to the undersigned pursuant to Rule 53, SCRCP, "to take testimony and direct entry of final judgment in this action under Rule 53 of the South Carolina Rules of Civil Procedure, and all matters arising from or reasonably related to such action." Defendants were properly served in accordance with Rule 4, SCRCP, and were properly notified of the upcoming damages hearing

on September 23, 2022. The damages hearing was held on October 25, 2022, in which evidence was presented and testimony was taken. Defendants were not present at that hearing. On November 3, 2022, an Order of Default Judgment was filed. Defendants received notice of the Order on November 25, 2022. On December 20, 2022, Defendants filed a Motion to Set Aside Default Judgment.

APPLICABLE LAW

Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. 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). *Ricks v. Weinrauch,* 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App.1987). 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), SCRCP. "The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later, than a clerk's entry of default." *Sundown Operating Co. v. Intedge Indus. Inc.,* 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009).

The good cause standard for setting aside a default judgment requires, as a threshold burden, a party to put forth an explanation for the default and give reasons for which vacation of the default entry would serve the interests of justice. *Id.* "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider the "Wham factors": (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Id.* (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)). If a defendant does not put forth a

satisfactory explanation for the default – in other words, does not show good cause for failing to answer the complaint – then the analysis ends there, and the court does not consider the Wham factors. *See Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct. App. 2013) ("Because we find the master did not err in finding Owens failed to show good cause for failing to answer the complaint, we need not consider the Wham factors."); *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888 (holding a court need only consider the Wham factors "[o]nce a party has put forth a satisfactory explanation for the default").

What constitutes good cause is limited. *See, e.g., Richardson v. P.V., Inc.*, 383 S.C. 610, 618-19, 682 S.E.2d 263, 267 (2009) ("Negligence of an insurance company is imputed to a defaulting litigant and cannot constitute good cause to relieve Appellants from the entry of default."); *Sundown*, 383 S.C. at 609-10, 681 S.E.2d at 889 (holding "the law is clear that an attorney or insurance company's misconduct is imputable to the client"); *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994) ("whether the attorney was negligent in failing to answer, however, is not critical, because even if the attorney were negligent in failing to answer the Complaint, his negligence would be imputed to the [defendants]."). *Owens*, 402 S.C. 642, 649, 741 S.E.2d at 55 ("If reliance on one's own attorney is insufficient to show 'good cause,' then reliance on another defendant and his attorney is equally insufficient."); *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 145-46, 719 S.E.2d 703, 706-07 (Ct. App. 2011) (it is not good cause where defendant's agent did "not recall ever personally receiving a copy"); *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 11-12. 753 S.E.2d 537, 543 (2014) ("losing a summons and complaint is never 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) (same).

CONCLUSIONS OF LAW AND RULING

Because this matter is post-judgment, the more stringent standards set forth in Rule 60(b), SCRCP, apply. Rule 60(b) provides five (5) separate reasons for which a judgment may be set aside. In this case, there is only one applicable category, Rule 60(b)(1), providing for setting aside the judgment based on sufficient mistake, inadvertence, surprise, or excusable neglect.

The gravamen of Defendants' argument for setting aside this default judgment is the defendants were confused about the pleadings. In their view, the new documents were similar to previous pleadings that had been filed in a declaratory judgment arising out of the same incident and Defendants thought the papers were proceedings in the old case. As a result, they thought their attorney in the initial case would take care of the matter. The undersigned finds in this situation simply being confused about pleadings is not good cause for the following reasons. First, the defendants were personally served with the new lawsuit, an unusual manner of delivery that should have alerted the defendants this was a new proceeding and not something they had already received. Second, even a cursory review of the pleadings, including the summons, should have distinguished the new complaint from the prior litigation and alerted the defendants to the fact that this was a new lawsuit that required attention. Third, if the defendants already had counsel for the declaratory judgment action, it would have required little effort to discuss the papers with that attorney for clarification. Fourth, even after receiving notice of the damages hearing, the defendants failed to take any action even though this notice should have alerted the defendants to do so. In fact, it is apparent from the evidence the defendants did nothing in response to the pleadings and hearing notice. A simple phone call or inquiry at any point in the process would have provided clarification to the defendants if that was needed.

As to defendants' argument the judgment should be set aside because the defendants' insurance carrier was not given notice of the lawsuit, evidence was presented at the hearing that defendants' insurance carrier, Northfield Insurance Company ("Northfield"), in fact did receive written notice of the lawsuit by way of a legal filing made in the declaratory judgment action. It appears although a courtesy copy of the lawsuit was not sent to Northfield, Northfield was made aware of the filed Summons and Complaint in that legal filing and there was no evidence presented or allegation made that Northfield did not actually receive notice of the lawsuit through their legal counsel in the declaratory judgment action. Further, assuming Northfield did receive notice of the lawsuit and failed to take action, Northfield's negligence would be imputed to its insured and would not be good cause to set aside the judgment. *See Sundown*, 383 S.C. at 609-10, 681 S.E.2d at 889.

Therefore, for all the above-stated reasons,

IT IS HEREBY ORDERED that Defendants' Motion to Set Aside Default Judgment is denied as to Sunshine 11, LLC. It is further Ordered, by agreement of the parties, the previously entered Default and Default Judgment are hereby withdrawn and shall be marked as satisfied as to the individual defendants Anjan Patel and Usha Patel, who are also hereby dismissed with prejudice from this lawsuit going forward and have no further personal responsibility or obligations with regard to the default judgment. The judgment entered against Sunshine 11, LLC d/b/a Relax Inn shall remain in force and effect.

AND IT IS SO ORDERED.

J. Michael Baxley
Special Referee

June 26, 2023

RECEIVED
Oct 19 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Special Referee

Appeal No. 2023-00173

Mark McAuley.....Respondent,

v.

Sunshine 11, LLC d/b/a Relax Inn, Usha Patel and Anjan Patel..... Defendants,

Of Whom

Sunshine 11, LLC d/b/a Relax Inn is the …… Appellant.

PROOF OF SERVICE

I certify that I have served the Return to Appellant's Motion to Strike Portions of Initial Brief of Respondent and Respondent's Designation of Matter on Sunshine 11, LLC d/b/a Relax Inn by emailing a copy to its attorneys of record, as follows:

Helen F. Hiser
McAngus Goudelock & Courie, LLC
735 Johnnie Dodds Blvd, Suite 200
Mount Pleasant, South Carolina 29465
Email: helen.hiser@mgclaw.com

[SIGNATURE ON FOLLOWING PAGE]

LAW OFFICE OF KENNETH E. BERGER, LLC

s/ Bradley L. Lanford
Bradley L. Lanford, S.C. Bar No.: 70223
Kenneth E. Berger, S.C. Bar No.: 77511
5205 Forest Drive
Columbia, South Carolina 29206
803-790-2800
Attorneys for Respondent

October 19, 2023
Columbia, South Carolina