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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, ... Plaintiff/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.

INITIAL REPLY BRIEF OF APPELLANT

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Appellant, Sunshine 11, LLC d/b/a Relax Inn ("Appellant"), hereby replies to the Brief of Respondent Mark McAuley ("Plaintiff").

ARGUMENT

Despite Plaintiff's arguments to the contrary, the facts demonstrate the Special Referee abused his discretion when he refused to set aside the default judgment against Appellant.

I. There Was Good Cause to Set Aside the Default Judgment.

There is no dispute in this case that (1) Plaintiff previously had instituted a declaratory judgment action (the "Declaratory Judgment Action") against substantially the same parties and concerning the same event; (2) that Appellant understood the Declaratory Judgment Action was being defended on Appellant's behalf; (3) that Appellant believed that this action (the Tort Action") was part of the ongoing Declaratory Judgment Action and did not recognize or realize it was a new and separate lawsuit; (4) that Appellant believed that its insurance company and/or the lawyer retained by that insurance company was handling any required responses and/or appearances; and (5) that Appellant believed the damages hearing notice in the Tort Action was related to the Declaratory Judgment Action and that its insurance company and/or the lawyer retained by that insurance company was handling any required responses and/or appearances. Accordingly, Appellant's confusion and failure to timely respond to the new tort action was understandable, justified and demonstrates good cause.

Plaintiff flippantly dismisses Appellant's reasonable confusion due to Appellant being a "sophisticated entity." However, Plaintiff does not dispute that Usha Patel, the individual actually served with the Tort Action at this so-called "sophisticated entity," had limited understanding of the English language and utterly lacked experience with regard to legal matters. Plaintiff attempts to brush aside these issues by relying on *Hill v. Dotts*, 345 S.C. 304, 547

S.E.2d 894 (Ct. App. 2001) to suggest that the failure to understand legal processes is insufficient to set aside default judgment. However, the defendant in *Hill* had sufficient command of the English language to understand the nature of the legal process being instituted against him. 345 S.C. at 306, 547 S.E.2d at 895 (the defendant's mother wrote a letter on his behalf concerning the subject accident to the plaintiff's attorney). Moreover, unlike this case, there was no indication that the defendant in *Hill* was actively engaged in a prior similar lawsuit by the same plaintiff. 345 S.C. at 306, 547 S.E.2d at 895.

Here, it was not simply that Appellant was not proficient in legal matters, Appellant reasonably believed the documents served upon it were part and parcel of the existing legal matter actively being defendant on behalf of Appellant. This justifiable confusion was compounded by the fact that Usha Patel, who received the complaint, was not sufficiently proficient with the English language to be able to read and understand the documents served on her. Thus, she did not have the linguistic capacity to know there was a separate legal action instituted, to know to contact her attorney for clarification, or to understand there was a damages hearing in a separate matter.

Plaintiff relies on the Special Referee's finding that the personal service on Usha Patel "an unusual manner of delivery … should have alerted Appellant that this was a new document." (Resp. Br. pp. 4-5). However, what both the Special Referee and Plaintiff fail to acknowledge is that Appellant presumably was personally served with the initial Declaratory Judgment Action, which contributed to Usha Patel's confusion and Appellant's failure to timely respond to the Tort Action. Because there was no distinction in the manner of service of these two lawsuits involving substantially the same parties and precisely the same event, the confusion is both understandable and excusable.

Although Plaintiff takes issue with Appellant's reliance on *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987), he fails to even attempt to distinguish either *Melton v. Olenik*, 379 S.C. 45, 664 S.E.2d 487 (Ct. App. 2008), which also involved service on a person with limited English, or *Sears, Roebuck & Co. v. Ramey*, 170 Ga. App. 873, 318 S.E.2d 740 (Ga. App. 1984), on which *Ricks* relied. While no two cases are exactly alike factually, the rationale in *Ricks*, *Melton* and *Sears* applies here and support a finding of good cause.

Attempting to circumvent the signed Stipulation that was entered into the record in this case, Plaintiff argues that it is no different from "live testimony." However, while live testimony can be either believed or not believed, and even challenged in court, stipulations "made in judicial proceedings by the parties or their attorneys [are] binding upon those who make them" and courts "must accept stipulations as binding upon the parties." *McCrea v. City of Georgetown*, 384 S.C. 328, 332, 681 S.E.2d 918, 921 (Ct. App. 2009). Thus, Plaintiff has stipulated that Defendants, including Appellant "understood and believed that the prior declaratory judgment action (Exhibit A) was being defended by an attorney retained by their insurance company," that the Tort Action "was part of the ongoing declaratory judgment action and did not recognize or realize it was a new and separate lawsuit. Therefore, Defendants believed that their insurance company and/or the lawyer retained by that insurance company was handling any required responses and/or appearances," and that "the damages hearing notice in the tort action was related to the declaratory judgment action and that their insurance company and/or the lawyer retained by that insurance company was handling any required responses and/or appearances." Stipulation of Facts and Agreement as to Certain Parties and Issues at at ¶¶ 4-6.

Finally, Plaintiff does not, because he cannot, dispute Appellant's argument that the *Wham* factors all favor setting aside default judgment. *See Turner v. South Carolina Dept. of Health & Envtl. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008), *citing First Union Nat'l Bank of S.C. v. FCVS Communications*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997) ("if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct"). There is no dispute that Appellant promptly sought relief from the default judgment, that Plaintiff will not suffer any prejudice by having the default judgment set aside, or that Appellant has a meritorious defense.

II. There Is No Evidence that Northfield Was Aware of the Lawsuit.

Citing to the Special Referee's statements, Plaintiff argues that Appellant's insurance carrier, Northfield, was aware of the lawsuit prior to default judgment being entered against Appellant. The statement by the Special Referee that Northfield had received "written notice of the lawsuit by way of a legal filing made in the declaratory judgment action" is not based on any fact or piece of evidence in the record, and Plaintiff does not cite to any. *See Germain v. Nichol*, 278 S.C.508, 509, 299 S.E.2d 335, 335 (1983) (the Court must be provided with a sufficient record upon which it can make a decision). Rather, it appears the Special Referee's conclusion was based solely on arguments by counsel for Plaintiff without any evidentiary support being presented to the lower tribunal. *See* Transcript of May 23, 2023 Hearing at p. 34. Statements or arguments of counsel are not a substitute for factual evidence. *See Historic Charleston Foundation v. Krawcheck*, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n.7 (Ct. App. 1994) (arguments of counsel generally cannot be considered as evidence when deciding factual issues);

Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986) (holding the statements of counsel are not considered factual evidence).

Finally, Plaintiff relies on the absence of evidence presented that Northfield did not receive notice of the lawsuit. It should go without saying that Appellant does not, and did not, have an obligation to prove a negative. Regardless, Northfield is not a named party to the Tort Action. Appellant's counsel in the Tort Action is different from counsel representing Northfield in the Declaratory Judgment Action. Thus, any expectation that Appellant would proffer proof as to Northfield's knowledge of the Tort Action is unwarranted.

Put simply Appellant has met its burden to show excusable neglect and/or misconduct, along with the other *Wham* factors. The Special Referee abused his discretion in denying relief from the default judgment. Accordingly, this Court should reverse the decision of the Special Referee and remand this case for adjudication on its merits.

CONCLUSION

For the reasons stated in its Brief and herein, this Court should reverse the decision of the Special Referee, grant Appellant relief from the Default Judgment, and remand this case for adjudication on its merits.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

December 8, 2023

s/Helen F. Hiser

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Of Whom

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

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Appellant** on Mark McAuley by emailing a copy to his attorneys of record, as follows:

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Respectfully submitted,

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s/*Elizabeth Nettles*

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RE: Mark McAuley vs Sunshine 11, LLC d/b/a Relax Inn, Usha Patel and Anjan Patel
Civil Action No.: 2022CP1700356 (Dillon)
Date of Incident: October 17, 2021
Carrier Claim No.: F3D6620
MGC File No.: 21027.22023
Appeal No.: 2023-00173

Dear Ms. Kitchings:

Enclosed for filing is the Initial Reply Brief of Appellants, along with the Proof of Service.

Please let us know if you have any questions. Thanking you in advance for your assistance, I am

Yours truly,

Helen F. Hiser

cc: Bradley L. Lanford, Esquire (via E-mail only)
Kenneth E. Berger, Esquire (via E-mail only)