RECEIVED
Dec 19 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Lexington County

Court of Common Pleas

The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2023-001005

Dennis Gallipeau,

Appellant,

v.

D. Ryan McCabe and Marion J. Smith,

Respondents.

INITIAL BRIEF OF RESPONDENTS

Stephanie Trotter Kellahan (SC Bar 77680)
McCabe Trotter & Beverly, PC
4500 Fort Jackson Blvd., Suite 250
Columbia, SC 29209
Office: (803) 724-5000
Fax: (803) 724-5001
Email: stephanie.kellahan@mccabetrotter.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Administrative Orders

STATEMENT OF ISSUES ON APPEAL

1. Did The Trial Court Correctly Hold That S.C. Code § 16-9-10 Does Not Create A Private Cause Of Action?

2. Did The Trial Court Appropriately Enter Default Judgment Against Appellant On Respondents' Counterclaims?

STATEMENT OF THE CASE

Appellant filed his Summons and Complaint in this matter on January 11, 2023 alleging a civil cause of action for perjury against both Respondents. (Compl.) Respondent McCabe filed an Answer and Counterclaim on March 3, 2023 alleging a counterclaim for violation of the S.C. Frivolous Proceedings Act. (Countercl. of McCabe.) Respondent Smith filed an Answer and Counterclaim on March 3, 2023 alleging counterclaims for violation of the S.C. Frivolous Proceedings Act and Abuse of Process. (Countercl. of MJS.) Each Respondent served his Answer and Counterclaim on Appellant by certified mail on March 3, 2023. (Def. Certificate of Service.) Counsel for Respondents also emailed a copy of the responsive pleadings to Appellant that same day. (Id.) Respondents filed a Certificate of Service for the responsive pleadings on March 24, 2023. (Id.)

On May 1, 2023 ("Dismissal Order"), The Honorable William P. Keesley dismissed Appellant's Complaint against Respondent. (Order, May 1, 2023.) Appellant served his Notice of Appeal for the Dismissal Order on May 30, 2023. (Notice of Appeal, May 30, 2023).

On June 13, 2023, counsel for Respondents filed an Affidavit of Default averring that Appellant had failed to answer or otherwise plead in response to Respondents' counterclaims. (Aff. of Default.) At that time Respondent also filed a Motion for Default Judgment. (Mot. for Default Jmt.) A hearing on Respondents' Motion for Default Judgment was scheduled for August 1, 2023 at 9:30 am. The Lexington County Clerk of Court mailed noticed of said hearing to all parties on June 26, 2023. (Notice of Hr'g.)

Appellant did not attend the default judgment hearing. The Honorable Walton J. McLeod entered an Order of Default Judgment against Appellant on August 3, 2023. (Order, August 3, 2023.) Thereafter, on August 10, 2023, Appellant filed a Motion to Set Aside Judgment by Default. (Mot. to Set Aside Judgment by Default.) A hearing on Appellant's motion was held September 21, 2023. Judge McLeod entered an order denying Appellant's Motion to Set Aside Judgment by Default on October 2, 2023 ("Rule 55 Order"). (Order, October 2, 2023.) Appellant served his Notice of Appeal for the Rule 55 Order on October 17, 2023. (Notice of Appeal, October 17, 2023.)

STANDARD OF REVIEW

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007). Accordingly, the appellate court considers whether, in the light most favorable to the plaintiff, and with every doubt resolve doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief. Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008).

The power to set aside default lies solely within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion. Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263 (2009). An abuse of discretion occurs when the judge issuing the order was controlled by some error of law. Hill v. Dotts, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001).

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT S.C. CODE § 16-9-10, ET SEQ. DOES NOT CREATE A PRIVATE CAUSE OF ACTION.

A. Appellant Abandoned This Argument By Failing to Provide Any Supporting Authority For His Assertion

"Mere allegations of error are not sufficient to demonstrate an abuse of discretion." First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). A bald conclusion alleging an error of law by the trial court is insufficient to argue the exception, thus abandoning the argument. Solomon v. City Realty Co., 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974)

Appellant argues that the trial court incorrectly found that S.C. Code § 16-9-10 does not create a civil cause of action. In support of this argument, Appellant does not cite any authority, instead merely stating "Appellant respectfully disagrees" and "[i]t is Appellant's position that Section 16-9-10, et seq. does indeed create a civil remedy for any person . . .". (Br. of App., p. 3.) Therefore, Appellant has abandoned this argument and this Court should affirm the Dismissal Order.

B. S.C. Code § 16-9-10 et seq. Was Created for the Welfare of the Public and Does Not Give Rise to a Private Cause of Action.

"In determining whether a statute creates a private cause of action, the main factor is its legislative intent." Doe v. Marion, 373 S.C. at 398, 395 S.E.2d at 249. "[T]he general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability." Whitworth v. Fast Fare Markets of S.C., Inc., 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985). "When a statute does not create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party." Citizens of Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992).

There is no indication from the text of the statutes themselves that the Legislature intended to create a private cause of action. Significantly, Title Sixteen is titled "Crimes and Offenses" and Chapter Nine is titled "Offenses Against Public Justice." The inclusion of the statutes relating to perjury under the criminal statues, and specifically under those offenses against public justice and not private individuals, demonstrates the Legislature did not intend to create a private cause of action Section 16-9-10 et seq.

II. THE TRIAL COURT CORRECTLY HELD THAT APPELLANT WAS NOT ENTITLED TO RELIEF FROM DEFAULT UNDER RULE 55(C).

A. Appellant Abandoned This Argument By Failing to Provide Any Supporting Authority For His Assertion

"Mere allegations of error are not sufficient to demonstrate an abuse of discretion." First Sav. Bank v. McLean, 314 S.C. at 363, 444 S.E.2d at 514. A bald conclusion alleging an error of law by the trial court is insufficient to argue the exception, thus abandoning the argument. Solomon v. City Realty Co., 262 S.C. at 201, 203 S.E.2d at 436.

While Appellant's Statement of Issues on Appeal lists three issue regarding the default judgment, the entirety of Appellant's argument regarding the Rule 55 Order is limited to two statements: (1) the trial court held the hearing for default judgment via WebEx without Appellant's consent; and (2) the trial court improperly heard Respondents' Motion for Default Judgment without any previous entry of default. (Br. of App., p. 4.) In support of these arguments, Appellant does not cite to any rule, statute, or case. Additionally, Appellant does not make any argument or further statements regarding the alleged error related to service of the motion for default judgment.

Accordingly, Appellant has abandoned these exceptions and this Court should affirm the Rule 55 Order.

B. The Trial Court Was Not Required To Obtain Appellant's Consent To Hold A Hearing Via Enhanced Remote Communication Technology.

Appellant argues that the August 1, 2023 hearing was improper because he did not consent to the court holding the hearing via WebEx. However, Appellant's consent was not required. Our Supreme Court has ruled that the trial judge has the discretion to decide that certain pretrial proceedings, including hearings on motions, may be held by remote communication technology. Admin Order 2021-09-21-01(d)(14).

C. Appellant Was in Default For Failure to Plead in Response to Respondents' Counterclaims Even Where Clerk Had Not Entered Default.

A plaintiff must serve his reply to a counterclaim within 30 days after service of the answer. Rule 12(a), SCRCP. When a party fails to "plead of otherwise defend as provided by the [rules of civil procedure] and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book)." Rule 55(a), SCRCP. "Entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party." Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 509, 602 S.E.2d 99, 102 (Ct. App. 2004). "[W]hether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by affidavit. . ." Thynes v. Lloyd, 294 S.C. 152, 153–54, 363 S.E.2d 122, 123 (Ct. App. 1987).

As the trial court held, and Appellant failed to challenge in his appeal, each Respondent served Appellant with his Answer and Counterclaim on March 3, 2023. (September Order, p. 1). On June 13, 2023, counsel for Respondents filed an Affidavit of Default averring that Appellant had failed to answer or otherwise plead in response to Respondents' counterclaims. At that time the Clerk was required to enter default pursuant to Rule 55(a), SCRCP. Accordingly, there was no error by the trial court in hearing Respondents' Motion for Default Judgment.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request this court affirm the trial court's rulings.

Respectfully submitted,

December 19, 2023

s/ Stephanie Trotter Kellahan
Stephanie Trotter Kellahan (SC Bar 77680)
McCabe Trotter & Beverly, PC
4500 Fort Jackson Blvd., Suite 250
Columbia, SC 29209
Office: (803) 724-5000
Fax: (803) 724-5001
Email: stephanie.kellahan@mccabetrotter.com
ATTORNEYS FOR RESPONDENTS