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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.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE SPECIAL REFEREE ERRED IN DENYING APPELLANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT?

This is a case in which a party, unsophisticated in legal matters, was denied the right or ability to contest the merits of claims asserted against it. When Appellant, Sunshine 11, LLC d/b/a Relax Inn ("Appellant"), Usha Patel and Anjan Patel (collectively the "Patels") were served with a second lawsuit concerning the exact same events, they were unaware that it was distinct from a first lawsuit in which they were parties and was actively being defended. Accordingly, they failed to answer and default judgment was entered against them without an adjudication on the merits.

STATEMENT OF THE CASE

On or about October 17, 2021, Plaintiff, Mark McAuley ("Plaintiff" or "McAuley") visited the Relax Inn owned and operated by Appellant. R pp 19-22 at ¶ 7. McAuley was given a room key by Usha Patel, who was working at the front desk. R pp 19-22 at ¶ 8. However, the room key was for a room that was already occupied by Roerkick Lavan Drawhorn ("Drawhorn"). R pp 19-22 at ¶¶ 9-10. When McAuley went to open the door to the room, Drawhorn fired a gun through the door, striking McAuley. R pp 19-22 at ¶ 14.

Appellant discussed the incident with its insurer Northfield Insurance Company ("Northfield"). R pp 34-36 at ¶ 3. On March 22, 2022, McAuley filed a declaratory judgment action in the Dillon County Court of Common Pleas with case number 2022-CP-17-00126 (the "Declaratory Judgment Action") against Appellant, the Patels, Northfield and Drawhorn. In the Declaratory Judgment Action, McAuley argued that, as a result of the negligence of Appellant and the Patels, he sustained serious injuries from the gunshot. R pp 43-47 at ¶ 11.

While the Declaratory Judgment Action was pending, McAuley filed a second lawsuit against Appellant and the Patels in the Dillon County Court of Common Pleas with case number

2022-CP-17-00356 (the "Tort Action"). R pp 19-22. Similar to the Declaratory Judgment Action, the Tort Action alleged that, as a result of the negligence of Appellant and the Patels, McAuley has sustained serious injuries from a gunshot. R pp 19-22 at ¶ 18.

Appellant and the Patels were properly served with a copy of the Summons and Complaint in the Tort Action on August 4, 2022. R pp 23 & 24. Usha Patel, who does not read or write in the English language, was the individual served on behalf of all three defendants. R pp 23, 24 & 34-36 at ¶ 8. However, because Usha Patel did not realize the documents she received were distinct from the Declaratory Judgment Action, she did not communicate to her son, Anjan Patel, that a new lawsuit had been filed, and the Patels did not understand that Northfield was not provided a copy of those documents. R pp 34-36 at ¶¶ 6-10. Accordingly, neither Appellant nor the Patels filed a timely answer in the Tort Action. R pp 34-36 at ¶ 9.

Despite knowing that Appellant and the Patels were insured by Northfield, R pp 37-38, Plaintiff's counsel did not notify or provide a copy of the second Complaint to Appellant's insurer.

On September 8, 2022, McAuley filed a motion for entry of default and referral to a special referee. R p 31. On that same day, the Court entered default against Appellant and the Patels, and appointed J. Michael Baxley ("Baxley") as the special referee to direct entry of a final judgment and to retain jurisdiction over any motions or actions to set aside the entry of default or default judgment. R pp 1-3.

On October 25, 2022, the Special Referee took testimony from McAuley and heard arguments from his counsel. R pp 4-11. Neither Appellant nor the Patels appeared before the Special Referee. R pp 4-11. On November 3, 2022, the Special Referee filed a judgment of

default against Appellant and the Patels awarding McAuley $1,500,000 in actual damages. R pp 4-11.

On December 20, 2022, Appellant and the Patels, through counsel, filed a motion for relief from default judgment pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. R pp 32-33. Appellant and the Patels argued that their confusion concerning the existence of a second, new but substantively similar lawsuit constituted mistake, inadvertence, and/or excusable neglect, which entitled them to relief from the default judgment. R pp 32-33. Further, the Patels argued the default judgment was improper as to them individually as no allegations were made in the Tort Action that would subject them to personal liability. R pp 32-33. Put simply, Appellant and the Patels asked that their liability be determined at trial and not on a procedural technicality. R pp 32-33.

On May 16, 2023, McAuley, Appellant and the Patels filed a stipulation of facts and agreements as to certain parties and issues. R pp 39-52. The parties stipulated as follows:

1. The same parties in this action are also involved in a declaratory judgment action filed by Plaintiff in the Dillon County Court of Common Pleas with case number 2022-CP-17-00126 (hereinafter, the "declaratory judgment action"). (Filing attached as Exhibit A). As can be seen in Exhibit A, that declaratory judgment action was filed March 22, 2022.

2. This action bearing Civil Action Number 2022-CP-17-00356 (the "tort action") was filed on July 29, 2022. (Filing attached as Exhibit B).

3. Defendants were properly served with a copy of the Summons and Complaint in the tort action and received proper notice of the default damages hearing.

4. Defendants understood and believed that the prior declaratory judgment action (Exhibit A) was being defended by an attorney retained by their insurance company.

5. Defendants believed 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.

6. Defendants believed 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.

7. Plaintiff and Defendants agree that Usha Patel and Anjan Patel, individually, will be dismissed from this suit with prejudice; however, Plaintiff preserves the ability to assert that the actions and/or inactions of the Patels, as registered agent and/or employees, subject Sunshine 11, LLC to default and tort liability.

8. Plaintiff and Defendants agree that Usha Patel and Anjan Patel will have no further personal financial responsibility pertaining to the default judgment. Plaintiff will dismiss the Patels from the tort lawsuit and any related judgment. Plaintiffs will not attempt to collect (whether partially or fully) on the judgment from Usha Patel and/or Anjan Patel, individually. Plaintiff and Defendants will submit an Order to the Special Referee to file with the Court that fully and completely dismisses and/or sets aside the claims, suit, default and judgment as to Usha Patel and Anjan Patel, but only as individual Defendants and with the understanding that Plaintiff shall continue to proceed against Sunshine 11, LLC and/or its insurance carrier(s).

9. In lieu of taking live testimony and with the intention that this paragraph is considered written testimony to be included in the Record for purposes of this hearing and any subsequent hearing and/or appeal, Plaintiff and Defendants agree that Usha Patel and Anjan Patel

testify to the following, but Plaintiff disputes and denies that these statements constitute mistake or inadvertence for purposes of setting aside the default judgment:

a. they mistakenly believed the tort action was part of the declaratory judgment and was being handled by Sunshine's insurance carrier and/or a lawyer retained by Sunshine's carrier;

b. they mistakenly believed the damages hearing notice was part of the declaratory judgment action and was being handled by Sunshine's insurance carrier and/or a lawyer retained by Sunshine's carrier;

c. their inaction and mistaken beliefs were based on the similarity of the pleadings, similarity of the parties, same venue and their admittedly incorrect understanding of the same; and

d. their inactions were due to mistake and/or inadvertence.

R pp 39-52.

After briefing by the parties, and hearing argument on May 23, 2023, the Special Referee entered an order denying Appellant's motion to set aside default judgment on July 11, 2023. R pp 12-17. The Special Referee opined that Appellant's confusion that it was a defendant in two distinct lawsuits did not meet the threshold for mistake, inadvertence or excusable neglect. R pp 12-17. Further, the Special Referee ordered, pursuant to an agreement among the parties, that the entry of default and default judgment were withdrawn and marked satisfied as to the Patels, who were also dismissed from the Tort Action with prejudice. R pp 12-17.

On July 27, 2023, Appellant timely filed a notice of appeal.

STANDARD OF REVIEW

"Relief under [Rule 60(b)(1)] rests within the sound discretion of the trial court, whose conclusions will not be disturbed on appeal absent a showing of an abuse of discretion." *Thompson v. Hammond*, 299 S.C. 116, 382 S.E.2d 900, 902-903 (1989) *citing Goodson v. American Bankers Insurance Company of Florida*, 295 S.C. 400, 368 S.E.2d 687 (Ct. App. 1988); *Ledford v. Pennsylvania Life Insurance Co.*, 267 S.C. 671, 230 S.E.2d 900 (1976). Thus, the standard of review is an abuse of discretion standard.

ARGUMENT

The Special Referee abused his discretion when he refused to set aside the default judgment against Appellant. A "court may relieve a party…from a final judgment, order or proceeding for…(1) mistake, inadvertence, surprise or excusable neglect." S.C. R. Civ. Proc. 60(b)(1). In considering a motion for relief under Rule 60(b), a court also should consider "(1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party." *Mictronics, Inc. v. South Carolina Dep't of Rev.*, 345 S.C. 506, 510-511, 548 S.E.2d 223, 226 (2001). "It is generally recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action." *Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc.*, 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981). Moreover it is the clear and robust policy of South Carolina courts "to favor the trial of cases on the merits." *Id.*; *see also Colleton Prep. Acad., Inc. v. Hoover Universal*, 616 F.3d 413, 417 (4th Cir. 2010) (noting that "[w]e have repeatedly expressed a strong preference that … defaults be avoided and that claims and defenses be disposed of on their merits").

In *Melton v. Olenik*, 379 S.C. 45, 664 S.E.2d 487 (App. 2008), the Court of Appeals determined good cause and excusable neglect existed under Rule 55(c), SCRCP, to set aside default where the defendant, who was not proficient in English, was properly served but simply did not look at the papers. Instead, she placed them in her purse and it was subsequently stolen. Here, Usha Patel at least looked at the papers she was served with but, understandably, did not comprehend that they were not part of the same proceeding that previously had been filed by McAuley and which already was being defended by the Insurer.

In *Ricks*, the plaintiff received the summons and complaint, called her attorney and hand-delivered a copy to her insurance agent, which closed under bankruptcy. By the time the plaintiff learned of the issues with the insurance agent, the papers, which she had placed in the trunk of her car during "the busy holiday season," and which was being serviced, the time to answer had run. Nonetheless, this Court held the court properly granted her relief from the default, 293 S.C. at 375, 360 S.E.2d at 537, citing *Sears, Roebuck & Co. v. Ramey*, 170 Ga. App. 873, 318 S.E.2d 740 (Ga. App. 1984) for the proposition that excusable neglect was shown where the defendant believed the case was being defended. There, the Georgia Court of Appeals reasoned that "any neglect by [Sears] in following the progress of the case was excusable," such that relief should be granted form the default, "*particularly* where no innocent party will suffer if the default is opened." 170 Ga. App. at 875, 318 S.E.2d at 742. This Court held in *Ricks* that, "[w]hile leaving the suit papers in the trunk of her car would not, alone, meet the requisite showing for good cause, we hold all of the factors considered together are sufficient for such a showing." 293 S.C. at 375, 360 S.E.2d at 537; *see also Thompson*, 299 S.C. at 121, 382 S.E.2d at 904 (South Carolina Supreme Court held excusable neglect pursuant to Rule 60(b)(1) existed when landowner demonstrated some level of involvement in litigation).

The same is true here, where it was the combination of Usha Patel's limited understanding of the English language, her lack of sophistication with regard to legal matters, and the previously pending Declaratory Judgment Action lawsuit filed by the same Plaintiff—McAuley—against substantially the same parties, that led her to reasonably and understandably believe this was simply another filing in the same lawsuit that already was being defended by Appellant's Insurer. This confusion is particularly understandable in light of the Patels' understanding that Northfield and Plaintiff were communicating with regard to Plaintiff's claims related to the October 2021 event. R pp 34-36 at ¶ 6 & 37-38. Usha Patel's understandable confusion concerning the existence of a second similar lawsuit constitutes excusable neglect. Clearly, Appellant's failure to answer the lawsuit did not arise out of or exhibit apathy toward litigation surrounding the incident involving McAuley.

Moreover, McAuley stipulated that "Defendants understood and believed that the prior declaratory judgment action (Exhibit A) was being defended by an attorney retained by their insurance company." R pp 39-41 at ¶ 4. McAuley also stipulated that "Defendants believed 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." R pp 39-41 at ¶¶ 5-6. And, while McAuley disputed and denied that the stipulated testimony that Usha and Anjan Patel would provide, as set forth in Paragraph 9, "constitute mistake or inadvertence for purposes of setting aside the default judgment," R pp 39-41 at ¶ 9, he also

stipulated to the above referenced Paragraphs 4-6, which are binding on him. *See, e.g.*, *McCrea v. City of Georgetown*, 384 S.C. 328, 332, 681 S.E.2d 918, 921 (App. 2009) (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").

The course of on-going attempts between Plaintiff's counsel and Northfield to resolve this dispute raise concerns that Plaintiff intentionally withheld information regarding the second lawsuit law suit from Northfield, ostensibly in the hope that they could obtain a default judgment against Appellant, raising serious *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), concerns. In *McClurg*, the Court of Appeals held that, based on the plaintiff's prior conduct and actions in attempting to settle with the defendant's insurer, it was reasonable for the insurer "to believe that any suit filed would include [it] as a defendant or, at the very least that counsel would provide [insurer] a copy of any pleadings in the matter when filed." 380 S.C. at 573, 671 S.E.2d at 92-93. Similarly, here the course of conduct between the parties—including the ongoing lawsuit between Plaintiff and Appellant and Northfield concerning the very same incident—raises serious concerns and satisfies the misconduct standard in Rule 60(b).

As to the other factors this Court is to consider, Appellant sought relief from the default judgment less than two months after it was entered. Thus, it acted promptly upon discovering its excusable mistake. Additionally, McAuley will not suffer any prejudice by having his claims adjudicated at trial by a jury as our judicial system intends. *Lewis*, 275 S.C. at 560, 274 S.E.2d at 289; *see also Colleton Prep.*, 616 F.3d at 417.

Finally, Appellant has a meritorious defense. To establish a meritorious defense, a party is not required to show an absolute defense. *See Thompson*, 299 S.C. at 120, 382 S.E.2d at 903; *Graham v. Town of Loris*, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978) ("a meritorious

defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence."). Here, there is a valid question as to whether it was reasonably foreseeable that McAuley would suffer injuries from a gunshot when he was given the key to an already occupied room. *See Mellen v. Lane*, 377 S.C. 261, 278-279, 659 S.E.2d 236, 245 (App. 2008) (internal citations omitted) ("It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's conduct….Proximate cause requires proof of both causation in fact and legal cause….Legal cause is proved by establishing foreseeability….Legal cause is ordinarily a question of fact for the jury.")

Appellant has met its burden to show excusable neglect and/or misconduct, and that 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 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,

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s/*Helen F. Hiser*

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CERTIFICATE OF COUNSEL

I certify the final **Brief of Appellant** complies with Rule 211(b), SCACR.

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