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Feb 26 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
H. Steven DeBerry, Circuit Court Judge

Civil Case No. 2022-CP260-5492
Appellate Case No. 2023-001580

Rose Bernard,

Appellant

v.

Lucas Green; Aperture Investigations,

Respondent

AMENDED FINAL BRIEF OF APPELLANT

Rose Bernard
843-443-5825
830 Bay St., Apt. 2
Myrtle Beach, SC 29577
Pro Se Appellant

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B) STATEMENT OF ISSUES ON APPEAL

Did the trial Courts err in denying both Rule 55(c) and Rule 60(b) from a default judgement for non-compliance when multiple Responses had been filed, due to procedural rules?

C) STATEMENT OF THE CASE

1) Appellant filed a civil complaint on August 26, 2022 which is titled: Motion for Review of Fraud / Breach of Contract - Motion for Injunction. In response to the Complaint, Respondent filed an Answer with 9 counts of affirmative defenses. In the last two paragraphs of the Answer, I deduced that a counterclaim was to follow and that it would be based on the affirmative defenses contained in the Answer. In response, Appellant filed a Motion for Hearing and Exemption from ADR on Oct. 7, 2022.

2) The first hearing was on Jan 23, 2023 with the Honorable Judge DeBerry. Three motions were set to be heard: Appellant's Motion for Hearing and Exemption from ADR, Respondent's Motion to Remand to Magistrate Court and Motion to Dismiss.

3) On 03/01/ 23, Notice was filed and then sent to me via email that Respondent filed a Motion for Default Judgment w/ proposed order for failure to respond to his counterclaim. On March 8, I filed two motions; Motion to Dismiss / Set Aside Defendant's Default Request and Motion for Discovery / Set Time Limitations.

4) The Honorable Judge DeBerry signed Respondent's proposed order for default judgment on March 9. Judge DeBerry also signed Form 4 for a judgement amount of \$1,812.00 and said that the case had not ended. On page 2 of Form 4, the additional info confirms: "This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered".

5) I received notice from the courthouse that my two motions (Motion Dismiss/Set Aside & Motion Discovery / Set Time Limitations), were set to be heard on July 12 w/ the Honorable Judge Curtis.

6) However, on June 9, the Respondent filed a Motion for Continuance w/ proposed order. The Honorable Judge Seals signed the proposed order and permitted the continuance for an unknown future date. I filed a Motion to Compel Discovery w/ Proposed Order on Aug. 3.

7) My 3 motions, mentioned above, were set to be heard on Sept. 6, with the Honorable Judge Culbertson. They were: Motion to Dismiss / Set Aside Defendant's Default Request (filed 03/08-Dismissed 09/06), Motion for Discovery / Set Time Limitations, and Motion To Compel w/ proposed order.

8) I am appealing from the default judgment on 03/09/23, (R. p. 12) and the Order for dismissal of my motion to dismiss / set aside default on 09/06/23, (R. p. 17). Notice of appeal was served upon Counsel for the Respondent Mr. Green; Aperture Investigations on Oct. 11, 2023.

D) STANDARD OF REVIEW

1) Rule 55(b)(1): Judgment. Judgment by default may be entered as follows: Cases Involving

Liquidated Damages or Sum Certain Amounts. When the claim of a party seeking judgment by default is for a liquidated amount, a sum certain or a sum which can by computation be made certain, the judge, upon motion or application of the party seeking default, and upon affidavit of the amount due, shall enter judgment for that amount and costs against the party against whom judgment by default is sought, if that party has been defaulted for failure to appear and if such party is not a minor or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

2) Rule 55(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)

3) RULE 60(b) in part: "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc."

4) Court errs when a "court dismisses pro se litigant without instruction of how pleadings are deficient and how to repair pleadings." *Sims v. Aherns*, 271 SW 720 (1925) B.Platsley v. CIA, 953 F.2d 25, 26 28 (2nd Cir. 1991)

5) "allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. " *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) " *Marshall v. Brierley*, 461 F.2d 929, 930 (3d Cir. 1972)

6) "element of discretion given to the trial judge makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default. 10 C.

Wright, A. Miller and M. Kane, Federal Practice and Procedure, § 2685.” Ricks v. Weinrauch, 293 S.C.372, 375 (S.C. Ct. App. 1987)

7) "There can be no sanction or penalty imposed upon one because of his exercise of Constitutional Rights." Sherar v. Cullen, 481 F. 2d 946 (1973)

8) “Under S.C.R. CIV. P. 55(c), as under F.R. CIV. P. 55(c), the standard for granting relief from an entry of default is "good cause." Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (Ct.App. 1987); H. LIGHTSEY AND J. FLANAGAN, supra at 82. ” Wham v. Shearson Lehman Bros., 298 S.C. 462, 465 (S.C. Ct. App. 1989)

9) “An order based on an exercise of that discretion, however, will be set aside if it is controlled by some error of law or lacks evidentiary support. Ricks v. Weinrauch, supra.” Wham v. Shearson Lehman Bros., 298 S.C. 462, 465 (S.C. Ct. App. 1989)

ADDITIONAL AUTHORITIES

10) "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co., 303 U. S. 197." Conley v. Gibson, 355 U.S. 41, 48 (1957)

11) "...allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears `beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 355 U.S. 41, 45-46 [78

S.Ct. 99, 2 L.Ed.2d 80] (1957). See Dioguardi v. Durning, 139 F.2d 774 (CA 2 1944)." 92 S.Ct. at 595." Marshall v. Brierley, 461 F.2d 929, 930 (3d Cir. 1972)

12) "...statement by the Supreme Court of the United States in Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889, as follows, '* * * the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Missouri-Kansas-Texas R. Co. v. Shelton, 383 S.W.2d 842, 850-51 (Tex. Civ. App. 1964)

13) U.S. Supreme Court has instructed courts to "apply a more flexible standard in determining the sufficiency of a pro se complaint than they would in reviewing a pleading submitted by counsel. See e.g., Hughes v. Rowe, 449 U.S. 5, 9-10, 101 S.Ct. 173, 175-76, 66 L.Ed.2d 163 (1980) (per curiam); Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972) (per curiam); see also Elliott v. Bronson, 872 F.2d 20, 21 (2d Cir. 1989) (per curiam)." Platsky v. C.I.A., 953 F.2d 26, 28 (2d Cir. 1991)

E) ARGUMENT

1) Because procedure rules are created to promote fairness in court proceedings; they are lengthy and sometimes complicated but were never meant to exclude pro se litigants. The U.S. Supreme Court, in various ways, has ruled that courts should be lenient and observant to ensure that procedural rules don't take precedence over fundamental rights of pro se persons. Trial Courts erred when they didn't allow equal access and equal protections of constitutional and state laws.

2) RESPONDING TWICE TO RESPONDENT'S ANSWER / COUNTERCLAIM

a) All civil cases are sent to ADR. ADR and Common Pleas court are two different kinds of

proceedings. It was my impression that until a motion to be removed from ADR was approved, related matters about my case could only then be conducted and/or issues addressed by a court. For example, I began attempting discovery on Feb. 3 after my motion to be removed from ADR was granted in January (R. p. 56, showing discovery motion filed 03/08/23).

b) Even tho the Answer & Amended Answer/Counterclaim seemed more like a play on words, I did respond on two occasions.

3) FIRST RESPONSE

a) My Motion / Exemption from ADR was meant to serve a dual purpose. In the last two paragraphs of the respondent's Answer (R. p. 38), I deduced that a counterclaim was to follow and that it would be based on the affirmative defenses contained in the Answer.

b) From my understanding of what was being said in Respondent's Answer (R. pp. 34-38) and Amended Answer / Counterclaim (R. pp. 41-48; counterclaim: R. p. 45 para 24, p. 47 para 31-32), compared to the claims I already had made in my Complaint (R. pp. 23-25), my motion to be exempt from ADR filed on Oct. 7, 2022 (R. p. 39), was my response to the respondent. I didn't file an additional response because Respondents' Answer and Amended Answer / Counterclaim, are virtually the same and there was nothing said in the counterclaim that wasn't the exact opposite of my Complaint.

c) For example, Respondent's "affirmative defense by way of counterclaim" (R. pp. 45-46, para. 24-28), is saying that I am obligated by contract to pay the defendant a \$1500.00 retainer fee and only paid a deposit of \$700.00, thus, owing a remaining balance. In paragraph 5 of my Complaint (R. p. 24), it states

that due to the nature of that prior existing situation, Respondent Mr. Green accepted a \$700.00 retainer fee and I attached a copy of my cashed check, signed by Mr. Green, which notes 1/2 pay (R. p. 31).

d) The Respondent's other "affirmative defense by way of counterclaim" (R. p. 47 para. 31-35), follows in similar fashion, where I had already mentioned issues concerning the camera from my perspective in paragraphs 6-10 of my Complaint (R. p. 24).

e) My Complaint is titled fraud / breach of contract (R. p. 23) and throughout the Complaint attempts were made to express those concepts which culminated to a conclusion in paragraph 11 (R. p. 25) of my Complaint that states:

"11. Defendant knew he never had the proper equipment or ability to accept the job he was hired to do. He was made aware of my circumstances and the duress it causes but his actions were schematic; he betrayed my trust and came into my home under guise. He deprived me of the ability to hire services from another company that would've been able to be of assistance then put me in a position of having further hardship."

f) In paragraph 3 of my Motion for Hearing /Exemption from ADR that was filed Oct. 7, 2022 (R. p. 39), I stated: "In his response to the complaint, Defendant denies responsibility which is incongruent for the purposes of an ADR session." Respondent's position was the same in his Amended Answer/Counterclaim.

g) It appeared to be a "he said", "she said" situation that couldn't be properly addressed at that time and w/o evidence. I believed Respondent could reasonably deduce my response to be that he "doesn't feel responsible" due to the contents of my Complaint and that it already brought up the

issues in the counterclaim. It didn't make sense to me that actual paperwork stating, "I already denied your counterclaims and please read my Complaint" would have been sought.

h) "Under S.C.R. CIV. P. 55(c), as under F.R. CIV. P. 55(c), the standard for granting relief from an entry of default is "good cause." Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (Ct.App. 1987); H. LIGHTSEY AND J. FLANAGAN, supra at 82. " Wham v. Shearson Lehman Bros., 298 S.C. 462, 465 (S.C. Ct. App. 1989)

4) SECOND RESPONSE

a) The ADR hearing was on Jan 23, 2023 with Honorable Judge DeBerry presiding and 3 motions were set to be heard (R. p. 4 - Order): Appellant's Motion for Hearing and Exemption from ADR (filed 10/07/22), Respondent's Motion to Remand to Magistrate Court (ulterior motive for award request) and Motion to Dismiss (no cause of action-both filed 10/19/22).

b) The discussion was confusing because Respondent was moving forward with the two motions he filed to be heard (R, T. p 63, Lines 17-20), as well as, additional issues he brought up that I was not expecting. The additional issues included, "notice was not served to Respondent Mr. Green" (R, T. p 69, Lines 5-7), and "plaintiff did not respond to counterclaim" (R, T. p 75 lines 1-3).

c) I wasn't even aware that it was allowed for Respondent to move forward with his interests, at that particular time, due to the pending judgment on the ADR issue.

d) Respondent mentioned to the judge that I had not responded to his response/counterclaim; with an upward inflection to his tone. The judge replied by instructing me to respond to the counterclaim (R, T. p 75, Lines 9-12). This only heightened my confusion because I wasn't sure what was meant

by his instruction.

e) I began to wonder if the judge actually read the initial filings, as I didn't expect that he would because it was an ADR Motion hearing. I no longer could tell if Respondent's motions were denied based on asking too soon (as I first thought), or if it was based on the contents of my actual Complaint / his argument.

f) Following the judge's instruction, I figured it had to be a titled response and different from the ADR motion. I filed a response on 02/01/23 that states, Response to Counterclaim of Defendant (R. p. 49) and attached supporting evidence (R. p. 51) from my Complaint (R. p. 26/text msg #4, R. p. 31) regarding the status of the original contract that was voided per Respondent Mr. Green.

5) JUDGEMENTS: DEFAULT and DISMISSAL

Upon learning of the default request w/proposed order on March 1st, I filed my Motion to Dismiss / Set Aside Defendant's Default Request on March 8 (R. p. 53). I asked the clerks to give my motion to the judge who will get Respondent's default request. Outside of this effort, I didn't know how else to proceed.

6) DEFAULT

a) The Honorable Judge DeBerry signed the proposed order for default judgment on March 9 (R. p. 7). Form 4 was included stating the case had not ended and on page 2 of the Order, it confirms that a hearing was conducted and issues were heard before a decision was rendered (R. p. 13).

b) I hadn't recieved Notice of the hearing mentioned in the Order and, therefore, wasn't present. Due process and equal protection of laws are fundamental rights. If the "issues" mentioned in this Order

have anything to do with viewing evidence, it would then seem to not be an impartial decision.

c) The right to have access: “allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence.” Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) ” Marshall v. Brierley, 461 F.2d 929, 930 (3d Cir. 1972)

d) Eventually, I came to a conclusion that a judge signing a proposed default order only has to consider Rule 55(c) upon motion w/ proposed order from the aggrieving party (in this particular situation). Hence, the judge didn't get my Motion Dismiss / Set Aside Default because I filed it w/o a proposed order and he must have considered this as the "failure to appear" requirement of Rule 55(b)(1).

e) "There can be no sanction or penalty imposed upon one because of his exercise of Constitutional Rights." Sherar v. Cullen, 481 F. 2d 946 (1973)

f) “An order based on an exercise of that discretion, however, will be set aside if it is controlled by some error of law or lacks evidentiary support. Ricks v. Weinrauch, supra.” Wham v. Shearson Lehman Bros., 298 S.C. 462, 465 (S.C. Ct. App. 1989)

7) DISMISSAL

a) My Motion Dismiss/Set Aside Default, that was meant to be considered before the default judgment, was transitioned into becoming a motion for Rule 60(b) consideration. I didn't file additional paperwork because my motion asking not to allow default judgment was pending.

b) A hearing was conducted on 09-06-23 with the Honorable Judge Culbertson regarding three

motions I filed. Two were filed on 03-08-23; Motion Dismiss /Set Aside Defendant's Default Request (R. p. 53) and Motion Discovery / Set Time Limitations (R. p. 57). The third motion was filed 08-03-23; Motion to Compel Discovery w/ proposed order. Form 4 was signed by Judge Culbertson (R. p. 17), and in regard to Motion Dismiss / Set Aside, states:

c) "Plaintiff's Motion/Dismiss Default previously granted by Judge DeBerry does not comply with SCRPC and, therefore, is DISMISSED."

d) I'm not confident with my understanding for the decisions made by Judge Culbertson, but I don't have an Order stating that my Motion to Dismiss / Set Aside Defendant's Default Request was Granted.

e) Court errs when a "court dismisses pro se litigant without instruction of how pleadings are deficient and how to repair pleadings." Sims v. Aherns, 271 SW 720 (1925) B.Platsley v. CIA, 953 F.2d 25, 26 28 (2nd Cir. 1991)

8) RESPONDENT WOULD NOT BE PREJUDICED AGAINST

a) Counsel for Respondent Mr. Green had obtained a default judgment in which it is implied; from one perspective, that I abandoned my civil complaint. He prevailed on a contract that was voided by Respondent Mr. Green before he was hired. (R. p. 26/text msg #4, R. p. 31 & R. p. 51). He reinstated said contract for the purpose of getting more money from me, via a counterclaim, than the agreed upon amount and terms, at the time he was hired. He prevailed on the concept that I am supposed to pay his client money to have no responsibility other than make an effort to collect a check, after any agreement had been rendered.

b) “element of discretion given to the trial judge makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default. 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, § 2685.” Ricks v. Weinrauch, 293 S.C. 372, 375 (S.C. Ct. App. 1987)

F) CONCLUSION

For the reasons stated above, Appellant, Rose Bernard, asks reversal of the Rule 55 default judgement.

Date: Feb. 25, 2024

Respectfully submitted,

/s/ Rose Bernard

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Respondent

CERTIFICATE OF APPELLANT IN AMENDED FINAL BRIEF

The undersigned certified that this Amended Final Brief complies with Rule 211(b), SCACR.

Date: Feb. 25, 2024

/s/ Rose Bernard

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Rose Bernard,

Appellant

v.

Lucas Green; Aperture Investigations,

Respondent

PROOF OF SERVICE

I confirm that I have served the Amended Final Brief of Appellant, and the Amended Record On Appeal on Lucas Green; Aperture Investigations, by emailing a copy of the documents to his attorney of record, Luther O. McCutchen, thru his assistant J. G. Reynolds at jgr@lawyersatthebeach.com, on Feb. 25, 2024.

Date: Feb. 25, 2024

/s/ Rose Bernard

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