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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Daniel John MacDonald, Sr.
Special Referee Horry County

Appellate Case No.: 2023-001920

RHH Land Investors, LLC,…….……...…...…… Respondent,

v.

Leonard R. Watts, The Plantation at Colonial Charters, LLC and Sago Plantation II Development, Inc., Defendants,

of whom Leonard R. Watts is the Appellant.…….……..….Appellants

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INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On September 13, 2016, Respondent filed a Summons and Complaint alleging causes of action for Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, Conversion, Violation of the South Carolina Uniform Securities Act, and Negligence. Appellant was personally served on October 29, 2016, as evinced by the Affidavit of Service filed November 14, 2016. (**October 29, 2016 Affidavit of Service**). Appellant made a *pro se* filing, dated "20 DEC 16" and titled "Answer", on December 20, 2016[1]. (**Appellant's "Answer").** On February 28, 2017, counsel for Appellant filed and served an "Affidavit of Default" as to all defendants. (**Affidavit of Default**). On May 25, 2017, Respondent filed and served a "Motion for Damages Hearing and Judgment by Default" as to all defendants. (**Motion for Default Judgment**). A hearing on Respondent's motion was held August 1, 2017. Following the August 1, 2017 hearing, Judge Culbertson granted Respondent's motion and entered a "joint and severable" Judgment against all defendants, including Appellant. (**Judgment**). On May 16, 2023, Respondent filed an Execution with the Clerk of Court, which was returned "nulla bona" on May 31, 2023. Respondent filed an Affidavit and Petition for Supplemental Proceedings on June 7, 2023. On June 8, 2023, Alan D. Clemmons, Master-in-Equity for Horry County, issued a Rule to Show Cause and Order of Attachment. An Amended Rule to Show Cause was issued August 9, 2023. On August 11, 2023, Appellant filed a Motion to Set Aside Default and Motion to Stay Supplemental Proceedings and Enforcement of Judgment. (**Motion for Relief**). On August 17, 2023, Respondent filed a Motion for Attachment of Shares and for a Charging Order, a Motion to Compel production of documents, as well as a Motion for the Appointment of a Receiver. An Order Of Reference *Nunc Pro Tunc*, was issued August 20, 2023. On August 24, 2023, following

[1] Watts used SCCA Form 703, a Magistrate's Court form Answer, in which he hand-wrote the caption, case number, and replaced "Magistrate" with "Common Pleas"

the identification of a conflict, a Form 4 Order remanding the case back to Circuit Court was issued. On September 1, 2023, a Second Amended Consent Order of Reference was issued, referring the matter to a Special Referee. On September 26, 2023, the Special Referee issued an Order Denying Motion to Set Aside Judgment. (**Order Denying Motion for Relief**). On September 29, 2023, Appellant filed a Motion to Reconsider Order Denying Motion to Set Aside Judgment and Motion to Stay Supplemental Proceedings and Enforce Judgment. (**Motion to Reconsider**). On November 9, 2023, the Special Referee issued a Consent Order for the Appointment of Receiver. On November 14, 2023, the Special Referee issued an Order Denying Appellant's Motion to Reconsider Order Denying Motion to Set Aside Default and Motion to Stay Supplemental Proceedings and Enforcement of Judgment. (**Order Denying Motion to Reconsider**). Appellant filed the Notice of Appeal on December 12, 2023.

STATEMENT OF FACTS

The underlying action was initiated over a land development deal gone bad. Appellant Watts was personally served with the Summons and Complaint on October 29, 2016, and did in fact make an appearance in the case. It is undisputed that his pro-se filing, captioned "Answer" was filed fifty-two (52) days after being served and was therefore in default. It is also undisputed that the next action that Appellant took in the case was the filing of the Motion to Set Aside Default and Motion to Stay Supplemental Proceedings and Enforcement of Judgment, filed almost Six and a half years (2,477 days) after being served with Respondent's Affidavit of Default.

STANDARD OF REVIEW

The movant in a Rule 60(b) motion has the burden of presenting evidence, usually provided by affidavits, proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991).

Relief from judgment under Rule 60, SCRCP, rests within the sound discretion of the trial court, and the court's findings will not be disturbed on appeal absent an abuse of discretion. Deidun v. Deidun, 362 S.C. 47, 606 S.E.2d 489 (Ct. App. 2004). Rule 60, SCRCP, "[p]rovides relief to a party from final judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect. To obtain relief from a default judgment, the movant must also show a meritorious defense. A motion for relief pursuant to this rule, is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. An abuse of discretion arises where the trial judge was controlled by error of law or where his order is based on factual conclusions that are without evidentiary support." Tri-County Ice and Fuel v. Palmetto Ice, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

ARGUMENTS

The trial court correctly denied both Appellant's Motion to Set Aside Default & Motion to Stay Supplemental Proceedings & Enforcement of Judgment, and Appellant's Motion to Reconsider Order Denying Motion to Set Aside Judgment & Motion to Stay Supplemental Procedings & Enforce Judgment. The Order follows existing precedent on both issues and in the analyses undertaken. On each issue, the trial court's analysis is correct, and this Court should affirm the lower court's decision after a review of the issues.

At the outset, it is important to note areas which are not subject to this appeal. The Special Referee's Order denied Appellant's Motion to Set Aside Default & Motion to Stay Supplemental Proceedings & Enforcement of Judgment in total, but did not contain a legal or factual basis for denying the stay of supplemental proceedings and enforcement of the judgment. Appellant did not move for a ruling on those issues in his Motion to Reconsider, so those issues are deemed abandoned. Also absent from Appellant's Motion to Reconsider is a request for a ruling on

whether Appellant demonstrated the existence of a meritorious claim or defense. As Appellant failed to present any evidence of that issue to the Special Referee, and it is absent from the Order, the issue is also deemed abandoned. "Issues on which the trial judge never ruled and which were not raised in post-trial motion are not properly before this court." Goddard v. Fairways Development General Partnership, 310 S.C. 408, 426 S.E.2d 828, 831 (Ct. App. 1993).

Further, Appellant's Motion to Set Aside Default & Motion to Stay Supplemental Proceedings & Enforcement of Judgment, and the memorandum that followed, were brought under Rule 60(b)(3), which allows relief from judgment based on the "fraud, misrepresentation, or other misconduct of an adverse party." (Order Denying Motion for Relief and Appellant's Memorandum in Support of Relief). Aside from a brief reference in Appellant's Memorandum in Support of Relief, Appellant focused his arguments on the contents and language of Respondent's Affidavit of Default. (Affidavit of Default). Those arguments have been abandoned by Appellant.

Additionally, Appellant sought to introduce a new argument into his Motion to Reconsider when he, for the first time, alleged that he had not been served with a copy of the August 1, 2017, Form 4 Order (Judgment) in this case. Such argument was not raised to the Special Referee in Appellant's initial Motion for Relief, and should therefore not be considered. A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial. Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc., 418 S.C. 186, 206, 791 S.E.2d 321, 332 (Ct. App. 2016).

I. **The Special Referee did not err in denying Appellant's Motion To Set Aside Default Judgment as Appellant presented no evidence that he was not served with notice.**

The trial court properly found that Appellant is not entitled to relief from the Default Judgment entered against him. While Appellant's Motion for Relief and argument for relief were almost exclusively focused on the technical wording of the Affidavit of Default, in an attempt to show "misrepresentation" on behalf of Respondent's counsel at the time, Appellant's Memorandum in Support of Relief devotes merely one (1) sentence to the argument that Appellant "never received notice of this motion for damages hearing and judgment by default from [Respondent]'s counsel." (Memorandum in Support of Relief at 4). There is no evidence in the record to support this contention, though. In fact, the only exhibits offered by Appellant in support of his motion were documents that were already part of the record. (Memorandum in Support of Relief) There is, in fact, evidence in the record that Appellant was properly served with the Motion for Damages Hearing and Judgment by Default, as evidenced by the certificate of service that accompanied the motion, which was filed May 25, 2017. (Motion for Default Judgment).

In his Motion to Reconsider, Appellant, for the third time, shifts his argument to allege that he was not served with notice of the hearing on Respondent's Motion for Damages Hearing and Judgment by Default. (Motion to Reconsider). The Appellant cannot meet his burden to show that relief is warranted because he submitted no evidence on the issue. If Appellant contended that he had not received service of the notice of hearing, the easiest thing in the world would have been for him to submit an affidavit to that effect. However, no such affidavit was submitted and the record is devoid of ANY evidence that Appellant was not served in accordance with the South Carolina Rules of Civil Procedure. The movant in a Rule 60(b) motion has the burden of presenting evidence, usually provided by affidavits, proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991).

II. **The Special Referee did not err in denying Appellant's Motion To Reconsider The Order Denying Motion Set Aside Default Judgment as there was no evidence properly in the record showing that Appellant was not properly served.**

The Special Referee correctly denied Appellant's Motion to Reconsider Order Denying Motion to Set Aside Judgment and Motion to Stay Supplemental Proceedings and Enforce Judgment. The Motion to Reconsider contained a mixture of issues that had been previously raised; which is permissible, as well as new arguments and evidence; which is not permissible. (Motion to Reconsider). Further, as was the case with the original Motion for Relief, there is no evidence in the record that Appellant did not receive notice of the hearing on Respondent's Motion for Damages Hearing and Judgment by Default. This argument is first raised in Appellant's Motion to Reconsider. (Motion to Reconsider).

Appellant sought to introduce an affidavit of Bridget Williamson, a staff member of the Horry County Clerk of Court's Office, as evidence that Appellant did not receive notice of the hearing on Respondent's Motion for Damages Hearing and Judgment by Default. Apart from being "new evidence" (Order Denying Motion to Reconsider), the affidavit is not evidence that Appellant did not receive notice. Rather, it only purports to show that Appellant didn't receive notice of the hearing from the Clerk of Court. Any notice or publication of a roster by the Clerk of Court does not negate the requirement on behalf of the moving party to provide opposing parties with service and notice of a motion for default judgment and any hearing on same.

> "If the party against whom judgment by default is sought has appeared in the action, the party shall be served with written notice of the motion or application for judgment at least 3 days prior to the hearing on such application…Pursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action."

Rule 55(b)(2), SCRCP.

Whether the Clerk of Court provided Appellant notice is irrelavent. Furthermore, the Appellant has still presented no evidence, by way of affidavit or otherwise, that Appellant was not properly served with notice of the hearing on Respondent's motion. "[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001). To believe that Defendant was not provided notice of the damages hearing is to believe that; (a) it is reasonable for a Defendant to make no inquiry on the scheduling of a dispositive motion for over six (6) years, and (b) Judge Culbertson, prior to issuing the judgment, failed to inquire as to whether Defendant received notice of the hearing, from the party moving for default judgment.

Appellant, seemingly based on the Williamson Affidavit, newly alleges in his Motion to Reconsider that he wasn't served with notice of the entry of the judgment issued by Judge Culbertson. (Motion to Reconsider). "A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial." Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc., 418 S.C. 186, 206, 791 S.E.2d 321, 332 (Ct. App. 2016). Not only is this new argument not proper, there is no evidence in the record that Appellant wasn't served with notice of entry of the Judgment. Rule 77(d), SCRCP, requires the Clerk of Court to serve notice of the entry upon the parties, but as stated in the rule, "any party may in addition serve a notice of entry on any other party in the manner provided in Rule 5 for the service of such papers." Without any evidence to the contrary, Appellant cannot satisfy its burden that he did not receive notice of the entry of the Judgment.

CONCLUSION

The Appellant has submitted no evidence to support his contention that he wasn't properly served with either the notice of the hearing on Respondent's Motion for Default Judgment or of the notice of entry of the Judgment. Even if Appellant had made such an argument during his initial Motion for Relief, the issue would simply fail due to Appellant's failure to satisfy his burden. When this Court considers the ever shifting and new arguments raised by Appellant, and failure to preserve the issues regarding meritorious defense and misrepresentation, it should be clear that the Special Referee correctly, and within his discretion, denied Appellant's Motion for Relief and Motion to Reconsider. This Court should affirm the findings of the Special Referee and deny Appellant the relief sought in his appeal.

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