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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
The Honorable Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2024-000245

ANGELEE MEDVE……………………………………………………………Respondent,

v.

MICHAEL'S WHOLESALE FLOORING……………………………………Appellant.

BRIEF OF RESPONDENT

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April 30, 2024
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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court use the wrong standard of review?
2. Is it error for a party to invoke Rule 60(b) where it could have pursued the issues on appeal?
3. May a Court deny a continuance when an attorney is ill?
4. Did the Magistrate Court properly exercise its discretion in denying Respondent's Motion for Relief From Judgment pursuant to Rule 60(b)?
5. Should the appeal be dismissed as interlocutory?

STATEMENT OF THE CASE

This case was filed in Magistrates Court by the Respondent in 2018. In May of 2023, the case had still not been called to trial (apparently due to COVID and other delays outside of Respondents' control). In May of 2023, Appellant and another Defendant, Prolex Flooring, filed motions for summary judgment. The hearing was scheduled on these motions for June 21, 2023 at 9:30 AM.

On the morning of the hearing, Respondent's counsel awoke with COVID symptoms and began calling the court early that morning to report her illness and verbally request a continuance. There was no voice mail at the court, and finally, counsel for Respondent was able to reach the Court to inform the Court that she was ill.

The Court did not entertain the request for continuance; instead, the person answering the phone said she "would ask the judge." The person who answered the phone came back a short while later, stating that the Judge was not going to entertain a motion for continuance, but instead, was moving forward with the hearing.

Instead of granting the motions for summary judgment, the Magistrate Court dismissed the case two days later and mailed the Notice of Dismissal to all parties.

At this time, Respondent abandoned its claim against Prolex Flooring. Prolex Flooring had been added as a Defendant only at the insistence of Appellant. Prolex Flooring is NOT a necessary party to the underlying case, or to this Appeal.

Respondent's counsel considered all applicable Rules and concluded that the correct method to oppose such an action by the Magistrate's Court was a Rule 60(b) motion, which was timely filed.

The Circuit Court denied the Respondent's Rule 60(b) motion. Respondent timely filed its Notice of Appeal. Appellant, who claims it was a "pro se" party to this appeal, was required to be served with the Notice of Appeal by the Circuit Court.

The Circuit Court, Judge Alex Kinlaw, at the hearing on Respondent's Appeal of the Magistrate's ruling, stated on the record that not granting a continuance for attorney illness, given the lessons learned by COVID, was improper and "despicable." The Circuit Court then appropriately granted the Respondent's Rule 60(b) Motion and remanded the case to Magistrate's Court for a hearing on the merits where all parties would be present.

Somehow, despite Appellant's claim that it was a "pro se" party not properly served, Appellant "learned of the hearing" after the hearing was already held. Appellant, now apparently not a "pro se" party, filed a motion to reconsider, which was denied by the Circuit Court. This appeal followed.

STANDARD OF REVIEW

The Appellant has stated the wrong Standard of Review for this Court. Instead of stating the Standard of Review for this Court, the Appellant has erroneously stated its idea of the standard of review for the Circuit Court. Even that standard of review is stated incorrectly.

The actual standard of review for this Court on appeal is stated:

Whereas a circuit court maintains a broad scope of review in deciding an appeal of a **magistrate**'s order, an appellate court, when reviewing a circuit court's adjudication of an **appeal** of a proceeding in **magistrate**'s court, does so under a more limited standard, under which (1) findings of fact are to be upheld if there is any supporting evidence; and (2) absent an error of law, the circuit court's holding is to be affirmed. *Hadfield v. Gilchrist*, 343 S.C. 88, 538 S.E.2d 268 (Ct. App. 2000), citing *Burns v. Wannamaker*, 281 S.C. 352, 315 S.E.2d 179 (Ct. App.1984).

ARGUMENT

I. Did the Circuit Court use the Wrong Standard of Review?

The Circuit Court did not "use the wrong standard of review" in the proceedings below. Rather, it is the Appellant that has argued the wrong standard. The Appellant has failed to argue the applicable statute. The standard of review to be applied by a Circuit Court in an appeal of a magistrate's judgment is prescribed by S.C. Code Ann. § 18-7-170 :

> Upon hearing the appeal, the appellate [Circuit] court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.
>
> S.C. Code Ann. § 18-7-170 (1976).

As is readily apparent, Section 18-7-170 confers authority upon the Circuit Court to reverse a magistrate's findings of fact when exercising appellate jurisdiction in an appeal from a magistrate's judgment. *See, Dingle v. Northwestern R. Co.*, 112 S.C. 390, 99 S.E. 828 (1919); *Redfearn v. Douglass*, 35 S.C. 569, 15 S.E. 244 (1892); cf. *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, [280 S.C. 232], 312 S.E.2d 20 (Ct. App. 1984)

There is no evidence that the Circuit Court did not apply the correct standard of review. The Circuit Court's Order denying the Appellant's Motion to Reconsider should be AFFIRMED on this ground.

II. Is it error for a party to invoke Rule 60(b) where it could have pursued the issues on appeal?

Again, the Appellant's argument is wholly without merit. There is no requirement that an appeal be brought prior to or in lieu of a Rule 60 motion in South Carolina. Rather, the case law establishes that "[a]bsent an appeal **or a proper motion under**

court's] order is binding." *Rivers v. Smith*, 440 S.C. 183 889 S.E.2d 254, 440 S.C. 183, (Ct. App. 2023) (emphasis added).

Appellant cites only one case in support of its argument on this issue. That case is *Tench v. South Carolina Dept. of Education*, 347 S.C. 117, 553 S.E.2d 451 (2001). *Tench* is completely inapposite. First, *Tench* involved the erroneous dismissal of an appeal, not a trial court ruling. in the present case, the Respondent filed her Rule 60 motion under Rule 60(b)(1), based on mistake, inadvertence, surprise, or excusable neglect. Further, *Tench* involved a motion under this same rule, **but the motion was filed more than a year after the order in question**. The *Tench* court quite correctly held that the Rule 60(b)(1) motion was thus untimely. The Court went on to hold that Rule 60(b)(5) could not be invoked if that particular ground was not asserted by appeal.

The case law is actually stated as follows, in *Smith Cos. v. Hayes*, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993): "Relief from judgment under Rule 60 should not be considered a substitute for appeal from a final judgment, particularly when it is clear the party seeking relief could have litigated **at trial and on appeal** the claims he now makes by motion." This is precisely the reason that Rule 60 was the only appropriate vehicle for overturning the Magistrate's failure to grant a continuance, i.e., because the ruling **denied the Plaintiff the right to present anything at all at the trial court level** in response to dispositive motions.

Rule 60 was an appropriate vehicle for the Plaintiff to employ. There is accordingly no error of law in the Circuit Court's Order. The Circuit Court should be AFFIRMED on this ground.

III. May a Court deny a continuance when an attorney is ill?

Appellant's contains many arguments about the facts of counsel's illness. However,

> . . . unless there is no evidence of facts supporting the Circuit Court's ruling, this court may not rule reverse the Circuit Court. We are bound by the factual findings under review as long as they are supported by any evidence. *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct. App. 1984).

The transcript of the hearings established sufficient evidence of illness to provide evidence of "mistake, inadvertence, surprise, or excusable neglect." Again, the standard of review of the Circuit Court is essentially *de novo*, where findings of fact and conclusions of law may be reviewed. The Circuit Court exercised this standard of review with sufficient evidence to support its Order.

IV. Did the Magistrate Court properly exercise its discretion in denying Respondent's Motion for Relief from Judgment pursuant to Rule 60(b)(1)?

Rule 60(b)(1) provides that "on motion and upon such terms as are just, the court may relieve a party from a final judgment, order or proceeding for the following reasons:

(1) Mistake, inadvertence, or excusable neglect.

Under S.C. R. Civ. P. 60(b)(1), a party may be relieved from a final order for mistake, inadvertence, surprise, or excusable neglect. In determining whether to grant a motion under S.C. R. Civ. P. 60(b), the trial judge 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.

In this case, South Carolina case law is clear that illness of an attorney is good grounds for continuance. In fact, in the South Carolina Bench Book for Summary Court, Section C., Civil Procedure in Magistrate's Court, it is stated that: "A continuance may also be granted on motion by a party to the suit, but the motion must be made for reasonable cause and at the earliest practical moment after circumstances justifying the continuance arise. Circumstances which might justify a continuance are **illness of a witness or party (or attorney for one of the parties),** or the unexpected absence of a witness at the time for trial, or the agreement of the parties to a continuance, or if one of the attorneys has another trial set for the same time."

Also, Respondent meets the case law requirements for Rule 60(b)(1) relief. Respondent made a prompt request for relief, within fifty-four (54) days of the judgment.

Also, the Respondent made her argument on "meritorious defenses" in her Motion for Relief from Judgment, p. 2. The argument was as follows: The Court's Order did not allow the Plaintiff to submit her response to the improper and inaccurate arguments submitted by opposing counsel, i.e., that he "had not heard from the Plaintiff's counsel in years." (not proper grounds for dismissal or summary judgment); that Prolex was a "necessary party" (legally deficient); and that the "doctrine of laches" (inapplicable in this case) applied to allow summary judgment. The Court's order, based on these incorrect legal arguments by opposing counsel, accordingly, deprived the Plaintiff of her due process rights to her opportunity to be heard. Motion for Relief from Judgment, p. 2.

Finally, there is no prejudice to the other party in requiring a full and fair hearing on the merits of this case. Rather, the Respondent is the party that was prejudiced by not being allowed a hearing on the merits. The Court should AFFIRM the Circuit Court's judgment on this ground.

V. Should this Appeal Be Dismissed as Interlocutory?

This appeal is interlocutory under South Carolina law and should be dismissed. The Order in question is not a final order or judgment; rather, it simply overturns the Magistrate's Judgment and remands the case for a determination on the merits. Order, p. 1. Interlocutory judgments are those which do not finally determine a substantial matter forming the whole or part of a cause of action." *Thornton v. S.C. Elec. & Gas Corp.*, 39` S.C. 297, 705 S.E..2d 475 (Ct. App. 2011). In order to be immediately appealable, an order must affect a substantial right and prevent a judgment from which an appeal may later be taken. *Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529 (2006).

Interlocutory orders such as the one in the present case is directly appealable only if it falls within the purview of S.C. Code Ann. § 14-3-330(1) or S.C. Code Ann. § 14-3-330(2). S.C. Code Ann. § 14-3-330(1) provides that intermediate judgments may be appealed only if they "involve the merits" or constitute a "final judgment." S.C. Code Ann. § 14-3-330(1) (1991). Section 14-3-330(2) allows appeals of orders only if the order "affects a substantial right" and either (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, or (b) grants or refuses a new trial. In the present case, the Order appealed from is not a final judgment, but rather, a remand for a determination on the merits of the case. Nor does the Order grant a new trial. New trials are granted only under Rule 59(a). The present Order overturned a ruling under Rule 60. These are discrete and dissimilar rules. Orders setting aside judgments do not come within any exceptions enumerated in S.C. Code Ann. § 14-3-330. *Pioneer Assoc., Inc. v. Ticor Title Ins. Co*., 300 S.C. 346, 387 S.E.2d 711 (Ct. App. 1989). Specifically, Orders granting motions to vacate under Rule 60 are not immediately appealable where: (1) there has not been a trial; and (2) avoidance of trial is the only consequence of the Order. *Posick v. Sea Coast Constr*., 380 S.C. 584, 671 S.E.2d 98 (Ct. App. 2008).

Under these authorities, this appeal must be DISMISSED.

CONCLUSION

Because the appeal herein is interlocutory, it must be dismissed. Alternatively, the court should AFFIRM the Circuit Court order remanding the case to the Magistrate for a determination on the merits.

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RULE 211(B) CERTIFICATE

I certify, as counsel for Respondent, Angelee Medve in this matter, that the Brief of the Respondent was filed and served according to the South Carolina Appellate Court Rules, and that, to the extent it applies, this brief complies with Rule 211(b).

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CERTIFICATE OF FILING AND SERVICE

I certify that, on April 30, 2024, the Brief of Respondent was filed and served on Appellant and Appellant's counsel, via email and by mailing a copy via certified mail in the U.S. Mail, in envelopes addressed as follows:

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