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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley Price, Circuit Court Judge

Appellate Case No.

INITIAL BRIEF OF APPELLANT

Basem Al Khtaebeh.....Appellant

v.

Tammy Moore.....Respondent

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STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR WHEN IT ENTERED AN ENTRY OF DEFAULT AGAINST THE APPELLANT WHEN APPELLANT WAS NOT PROPERLY SERVED UNDER SCRCP RULE 4.**

2. **DID THE TRIAL COURT ERR WHEN IT ENTERED AN ENTRY OF DEFAULT AGAINST APPELLANT SINCE SERVICE OF PROCESS WAS INSUFFICIENT AND THE COURT DID NOT HAVE JURISDICTION OVER THE APPELLANT.**

3. **DID THE TRIAL ERR WHEN IT FAILED TO GRANT APPELLANT'S MOTION TO SET ASIDE DEFAULT.**

4. **DID THE TRIAL COURT ERR IN AWARDING TWO-HUNDRED THOUSAND 0/100 ($200,000.00) IN DAMAGES TO THE RESPONDENT FOR DEFAMATION PER SE AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WHEN THESE FEES ARE DEEMED EXCESSIVE AND UNJUSTIFIED DUE TO THE LACK OF SUPPORTING EVIDENCE FOR THE ALLEGATIONS.**

STATEMENT OF JURISDICTION

This case originated in the Court of Common Pleas for the County of Charleston. Jurisdiction was improper as Appellant resides in Dorchester County. Appellant appealed the court of common pleas' entry of default judgment to the South Carolina Court of Appeals. This Court has jurisdiction over this controversy as the Court of Appeals shall have appellate jurisdiction over cases and controversy that do not lie within the seven classes of cases in which the South Carolina Supreme Court exercises exclusive jurisdiction. The Supreme Court of South Carolina has exclusive jurisdiction over cases involving the (1) death penalty, (2) public utility rates, (3) significant constitutional issues, (4) public bond issues, (5) election laws, (6) an order limiting the investigation by a state grand jury; and (7) an order issued by a family court relating to an abortion of a minor. Rule 203(d)(1), SCAC. Therefore, the South Carolina Court of Appeals has jurisdiction over this controversy since this case does not lie within the aforementioned classes of cases

STATEMENT OF THE CASE

Tammy Moore (hereinafter "Respondent") filed her Summons and Complaint with the Charleston County Court of Common Pleas on September 01, 2022, in which she asserted (1) Specific Performance (2) Defamation Per Se and (3) Intentional Infliction of Emotional Distress based on failure to close a real estate contract. Respondent attempted to serve Appellant on September 8 at 4983 Lake Palmetto Drive in North Charleston. However, the Respondent instead served someone they thought was "Tracey Khtaebeh" but was in fact Tracy Robers. When Appellant failed to file an Answer due to lack of notice, Respondent filed a Motion for Entry of Default on November 11, 2022. On November 16, 2022, the Clerk of Court for Charleston County entered an Entry of Default against Appellant, and a Motion for Damages Hearing was filed the same day. However, no damages hearing was scheduled or held prior to January 11, 2023. On January 11, 2023, Appellant filed a Motion to Set Aside Entry of Default & Motion to Dismiss asserting "no final judgment has been entered because the Complaint is not verified and sets forth damages in an unliquidated amount." (**See Exhibit A**). Appellant attached two affidavits to his Motion, including the Appellant's personal Affidavit and the Affidavit of "Tracy Robers". On July 18, 2023, Respondent filed a Memorandum in Opposition to the Appellant Motion to Set Aside Entry of Default and Motion to Dismiss. The case was to appear on the Motions Roster for Thursday July 20, 2023, but was continued until the next term because Counsel for the Respondent had an Order of Protection on said date.

On August 4, 2023, Appellant filed an Amended Motion to Set Aside Entry of Default, and an Answer and Counterclaim asserting over sixteen affirmative defenses and counterclaims

for (1) Recission (2) Civil Conspiracy (3) Fraud (4) Breach of Contract and (5) Money Had & Received. On October 18, 2023, The Honorable Bentley Price signed an Order awarding Respondent One-Hundred Thousand ($100,000.00) Dollars. On October 27, 2023, Appellant filed a Motion to Alter or Amend (Motion to Reconsider) to Order signed by The Honorable Bentley Price on October 18, 2023. On November 13, 2023, The Court filed an Order Denying Appellant's Motion to Reconsider. On December 13, 2023, Appellant filed a Certificate of Technical Failure or Technical Difficulties. On January 24, 2023, Appellant filed a Motion to Deposit Judgment Funds in the Office of the Clerk.

FACTS

On or about June 25, 2022, Appellant had attended an auction hosted by JG Blocker Auction & Realty, INC (hereinafter "Auction"). On aforementioned date, Appellant and Respondent entered into a real estate contract of sale (hereinafter "Contract") for the sale of property located at 10234 Hwy 78 Ladson, SC, TMS # 242-00-02-050, located in Berkeley County, South Carolina (hereinafter "Real Property"), for Eight-Hundred Eighty Thousand 0/100 ($880,000.00) Dollars. Appellant and Respondent entered into the Contract after the Appellant emerged as the highest bidder at the Auction. The Contract was executed, and Appellant made a down payment of Eighty-Eight Thousand 0/100 ($88,000.00) Dollars with the balance of Seven Hundred Ninety-Two Thousand ($792,000.00) Dollars to be paid in cash at closing which was set for August 26, 2022, "The Real Estate Contract of Sale" is attached hereto as **Exhibit B.**

Following the auction of the Real Property, Appellant was informed that the trailer that appeared to be attached to the real property was not included in the sale. Appellant was unaware that the trailer was not included, and therefore overbid and agreed to overpay for the property.

Following the date of the auction, but prior to the scheduled closing date on the Real Property, Appellant was informed that all furniture and equipment was stolen from the subject Real Property. Appellant demanded a return of his payment which he made for the furniture and equipment, since he was unable to ever obtain possession of the trailer and furniture. Respondent refused to return the payment. Following the Auction, Appellant was very surprised to learn that employees and or other agents of the auction company had not only attended the Auction, but also bid in the Auction. It is upon information and belief that Respondent had bidders place bids on the subject properties to drive up the prices without them having any intention of being the final purchaser. Prior to Appellant placing his bid for the subject properties, Appellant was unaware that trailer and furniture were not included with the Real Property, or that employees of the auction company were present and bidding on the Real Property. For the foregoing reasons, Appellant decided to not close on the Real Property. Respondent alleged that Appellant engaged in conduct including texting, emailing, and harassing the Respondent about the Real Property.

STANDARD OF REVIEW

The standard of review focuses on the deference an appellate court affords to the decisions of a District Court, jury, or Trial Court. The power to set aside a default judgement is addressed to the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Frank Ulmer Lumber Co. v. Patterson*, 272 S.C. 208, 250 S.E.2d 121 (1978); *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997). "An abuse of discretion in setting aside a default judgement occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual,

as distinguished from legal conclusions, is without evidentiary support." *Estate of Weeks,* 329 S.C. at 251, 495 S.E.2d at 459.

A trial court's finding of fact regarding validity of service of process are reviewed under an abuse discretion standard. *Graham L. Firm, P.A. v. Makawi*, 396, S.C. 290, 721 S.E. 2d 430 (2012). "An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." *State v. Allen*, 370 S.C. 88, 634 S.E.2d 653 (2006).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED AN ENTRY OF DEFAULT AGAINST APPELLANT BECAUSE THE AFFIDAVIT OF SERVICE WAS FACIALLY DEFECTIVE AND APPELLANT WAS NOT PROPERLY SERVED UNDER SCRCP RULE 4.

When the civil rules on process are followed there is a presumption of proper service. *Graham L. Firm, P.A. v. Makawi*, 396 S.C. 290, 721 S.E.2d 430 (2012). Rules governing service of process serve at least two purposes: they confer personal jurisdiction on court and assure the defendant of reasonable notice of the action. *Fassett v. Evans*, 364 S.C. 42, 610 S.E.2d 841 (Ct. App. 2005).

The purpose of these rules is to safeguard defendants' constitutional rights; failure to adhere to them undermines the very purpose they were designed to uphold.

Under Rule 4(d)(1), SCRCP service shall be made as follows: Upon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process. *BB & T v. Taylor*, 369 S.C. 548, 633 S.E.2d 501 (2006).

First, Respondent has failed to properly complete service of process under the SCRCP Rule 4. The Affidavit of Service filed with the Court in this case is defective and does not comply with Rule 4(d)(1) of SCRCP. The Affidavit of Service filed lists service was completed on a "Tracy Khtaebeh", at the property located at 4983 Lake Palmetto Drive in North Charleston, SC. An individual by the name of "Tracy Khtaebeh" does not exist. The resident who accepted service was named of Tracy Robers, and has never had the last name "Khtaebeh." Tracy Robers' Affidavit is incorporated and attached hereto as (**Exhibit C**). Tracy Robers has never been married to Appellant and has never used his last name. Tracy Robers and Appellant were not in a committed relationship, nor residing in the same abode at the time of service. Tracy Robers stated in her Affidavit that starting in early August of 2022, "Basem Al Khtaebeh did not live or reside at 4983 Lake Palmetto Drive in North Charleston, SC." (Robers Aff. ¶ 4). "Instead, he moved out in early August 2022, and his dwelling house and usual place of abode was located at 509 East Owens Street, Summerville, Dorchester County, SC 29483. Following early August 2022, he does visit the home located at 4983 Lake Palmetto Drive in North Charleston, SC in order to visit his children, but he does not live at this home." *Id.*

Second, Ms. Robers did not know the importance of the documents being served upon her. When the process served delivered the summons and complaint, the process server failed to explain the significance of the papers that were being delivered. In addition, Tracy Robers did not feel the need to notify the process server that Appellant was no longer a resident in the dwelling (especially since she was unaware why the process server came to the house). If Ms. Robers had known the significance of the documents, she might have potentially discussed the misunderstanding with the process server.

The trial court erred in entering entry of default against Appellant as service did not comply with Rule 4(d)(1). Therefore, Appellant did not receive sufficient notice of the pending action. This failure undermines the essence of due process by depriving the Appellant of notice and opportunity to be heard.

II. THE TRIAL COURT ERRED WHEN IT ENTERED AN ENTRY OF DEFAULT JUDGMENT AGAINST THE APPELLANT BECAUSE SERVICE WAS INSUFFICIENT AND THE COURT DID NOT HAVE JURISDICTION OVER THE APPELLANT.

"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." SCRCP Rule 55(a). 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, 602 S.E.2d 99 (Ct. App. 2004). "The entry of default is an official recognition of the failure to appear or otherwise respond but is not a judgment by default." *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241–42, 246 S.E.2d 880, 882 (1978). "By suffering a default, the defaulting party is deemed to have admitted the truth

of the plaintiff's allegations and to have conceded liability." *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 319 (Ct. App. 2004) (quoting *Roche v. Young Bros., Inc.*, 332 S.C. 75, 81 1998). The trial judge has sole discretion whether to set aside an entry of default or a default judgment. *Id.* The trial court's decision whether to set aside an entry of default or a default judgment will not be reversed absent an abuse of discretion. *Sundown Operating Co. v. Intedge Indus., Inc.,* 383 S.C. 601, 681 S.E.2d 885 (2009).

As previously stated in this brief, on September 8, 2022, the Summons and Complaint was served on Tracy Robers at 4983 Lake Palmetto Drive in North Charleston, SC. The location where service was effectuated was not the Appellants residence, which contributed to the insufficient service. At the time of service, Appellant was residing at 509 East Owens Street in Summerville, SC. On November 11, 2022, Respondent filed a Motion for Entry of Default with along with an Affidavit in support. Subsequently, regardless of the improper service, the Clerk of Court for Charleston County entered an Entry of Default Against the Appellant on November 16, 2022. If Appellant had been properly served, Appellant would have received sufficient notice and therefore had the opportunity to file a responsive pleading.

The Complaint alleges that the Court has jurisdiction over Appellant and that venue is proper because Appellant is a resident of Charleston County. However, at the time of the filing of the lawsuit and thereafter, Appellant has resided in Dorchester County. The Real Property that is subject of this litigation is not located in Charleston County, but Berkeley County. Therefore, the Clerk of Court for Charleston County lacked jurisdiction or authority to enter default.

III. THE TRIAL COURT ERRED WHEN FAILING TO GRANT THE APPELLANT'S MOTION TO SET ASIDE ENTRY OF DEFAULT BECAUSE APPELLANT SHOWED GOOD CAUSE FOR NOT RESPONDING TO THE SUIT.

Under Rule 55(c), SCRCP, the standard for granting relief from entry of default is "good cause shown." Rule 6(b) and 55(c), SCRCP. In determining the issue of relief from entry of default, the court should exercise a "broader, more liberal discretion than otherwise would be exercised under Rule 60(b)." *Top Value Homes, Inc. v. Harden*, 319 S.C. 302, 306, 460 S.E.2d 427, 429 (Ct. App. 1995). Relief granted at the point of entry of default is within the equitable power of the court and excuses previous failure to act promptly. *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987). Further, according to the South Carolina Supreme Court, Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits." *In re Moore*, 342 S.C. 1, 45, fn 7, 536 S.E.2d 367, 369 fn. 7 (2000). In determining whether to grant relief from default, South Carolina courts have consistently recognized that "where there is a good faith mistake of fact, and no attempt to thwart the judicial system, there is a basis for relief." *Williams v. Watkins*, 384 S.C. 319, 681 S.E.2d 914 (Ct. App. 2009). The trial court's decision whether to set aside an entry of default or a default judgment will not be reversed absent an abuse of discretion. *Sundown Operating Co. v. Intedge Indus., Inc.,* 383 S.C. 601, 681 S.E.2d 885 (2009).

An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *Roberson v. S. Fin. of S.C., Inc.,* 365 S.C. 6, 615 S.E.2d 112 (2005). The other factors the trial court should consider in determining "good cause" include (1) the timing of the defendant's motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is not granted. *White Oak Manor, Inc. v. Lexington Ins. Co.,* 407 S.C. 1, 753 S.E.2d 537 (2014).

When Appellant failed to file an Answer due to lack of notice, Respondent filed a Motion for Entry of Default on November 11, 2022. On November 16, 2022, the Clerk of Court for Charleston County entered an Entry of Default against Appellant, and a Motion for Damages Hearing was filed the same day. Subsequently on January 11, 2023, Appellant filed a Motion to Set Aside Entry of Default, citing several factors which set forth good cause for failure to file responsive pleadings, or otherwise respond to the suit. As mentioned several times in this brief, Appellant did not receive proper service, nor did the Court have jurisdiction over the Appellant. As well as stating those two facts, Appellant also discussed how the three other factors that courts typically consider when granting relief from default judgment applied to his situation.

When Appellant filed his Motion to Set Aside Entry of Default, Appellant attached an Affidavit in support citing had various difficulties, such as COVID-19, having to engage multiple attorneys, and lack of familiarity with the U.S. court system (**See Exhibit D**). Furthermore, in the Appellant's Amended Motion to Set Aside Entry of Default filed on October 18, 2023, Appellant asserted multiple meritorious defenses and counterclaims against Respondent (**See Exhibit E**). There is no evidence in the current case that shows Appellant was trying to thwart the judicial system or engage in unjust delay. For the foregoing reasons the trial court erred when failing to grant Appellant's Motion to Set Aside Entry of Default.

IV. THE TRIAL COURT ERRED IN AWARDING TWO-HUNDRED THOUSAND 0/100 ($200,000.00) IN DAMAGES TO THE RESPONDENT FOR DEFAMATION PER SE AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BECAUSE THIS AWARD IS DEEMED EXCESSIVE AND UNJUSTIFIED DUE TO THE LACK OF SUPPORTING EVIDENCE FOR THE ALLEGATIONS.

Under Rule 55, if the damages are unliquidated, the court must hold a damages hearing to ascertain the amount of damages to be awarded. *H.W. Carriker Co., Inc. v. Johnson*, 277 S.C.

280, 286 S.E.2d 140 (1982). At the damages hearing, the prayer for relief in the complaint is not a substitute for showing proof of the damages at the hearing. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978). The non-defaulting party must prove its damages by a preponderance of competent evidence. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978); *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988); *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 90, 757 S.E.2d 557, 558 (Ct. App. 2014). Relief is limited to that which is supported by the allegations of the complaint and the proof submitted at the damages hearing. *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988).

The rationale of these rules is that a party in default has the right to assume that any judgement against them will be limited to that which is supported by the allegations of the complaint, the prayer for relief, and the proof of damages. *Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc.*, 275 S.C. 556, 274 S.E.2d 287 (1981); *Hopkins v. Hopkins*, 266 S.C.23, 221 S.E.2d 113 (1975); *Mauro v. Clabaugh*, 299 S.C. 184, 383 S.E.2d 244 (Ct. App. 1989). The defaulting party also has the right to rely on these limitations in deciding whether to go to the expense and trouble of appearing and defending the claim. However, an exception does exist to the rule of limiting relief to that which is demanded in the complaint, where the complaint demands judgement for actual damages but specifies no amount. In that case, the relief available is not limited by the absence of a specific prayer. *Wiggins v. Todd*, 296 S.C. 432, 373 S.E.2d 704 (Ct. App. 1988). Awards in this situation, however, remain limited by the allegations of the complaint, even if the proof submitted exceeds that alleged in the complaint. *Id.* If a default judgement order awards damages exceeding the allegations of the complaint, the appellate court will often modify the award to conform to the complaint. *Id. Solley v. Navy Fed. Credit Union,*

Inc. is the seminal case in which these rules are explained. However, Solley relied heavily on the verdicts rendered in *Renney v. Dobbs House, Inc.,* and *Howard v. Holiday Inns*. Renney and Howard are among the most recent in a line of cases in which our supreme court criticized trial courts for awarding default damages in the inflated amounts sometimes found in the prayer for relief in a complaint. The supreme court in Howard stated, "It is common knowledge that . . . in a tort action the amount stated in the prayer for relief often bears little relation to the amount which the plaintiff is entitled to recover. The prayer in the action may not serve as substitute for proof." *Howard v. Holiday Inns, Inc.,* 271 S.C. 240, 246 S.E.2d 881 (1978). The court in Renney also concluded that, "This case is one more in a series of cases which has given the court great concern. They involve large awards in default claims involving unliquidated damages." *Renney v. Dobbs House, Inc.,* 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981).

Since the Respondent pled for an unliquidated amount of damages, a damages hearing was required under the rules in order to award a judgement to the Respondent. At the damages hearing the Respondent would have been required to prove to a preponderance of evidence the amount of damages they deserved. The party in default may also participate in the damages hearing following a default by objecting to or cross examining the evidence put forth by the plaintiff. *Doe v. S.B.M.*, 327 S.C. 352, 488 S.E.2d 878 (Ct. App. 1997); *Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998). However, the Appellant was not afforded this option since the damages hearing was never held.

Since no damage hearing was held to make the Respondent submit the proof of their allegations from the complaint, and the Appellant got no chance to object to or cross-examine the evidence, an award of damages was not able to be properly determined. This left the allegations of the Respondent's complaint unsupported. Therefore, since the allegations were for an

unliquidated amount, there was no hearing and no proof provided, the trial court erred in granting the Respondent damages in the amount of $200,000.

CONCLUSION

For all the stated reasons, the lower court erred in entering a Default Judgment against the Appellant. First, Appellant requests that the Court set aside any default because Appellant has shown the service was insufficient. Second, the Clerk of Court did not have the authority to enter the Entry of Default as service was insufficient and jurisdiction was improper. Third, the Judge failed to hold a damages hearing prior to entering an Default Judgment which is improper under Rule 55 of SCRCP. Fourth, Appellant has shown good cause for the requested relief, and the merits of the case have never been argued in front of a judge. Lastly, regardless of an Entry of Default, the Respondent is required to submit proof of their allegations in a damages hearing to determine the amount of their award, and the Appellant can challenge the evidence in a hearing. There has been no hearing scheduled to date, and the trial court abused their discretion to award damages to the Respondent without it. Therefore, under the circumstances, the award of damages is excessive and unsupported. Accordingly, Appellant respectfully requests that the lower court's Order be overturned and that the Court grant such other and further relief as the Court deems just and proper.

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