

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Common Pleas No. 2023-CP-40-04072

Michael L. Perry and Lonnie L. Long, Plaintiffs/Respondents,

v.

American International Industries; Atlas Turner Inc.; Avon Products, Inc.; Barretts Minerals Inc.; BlockDrug Company, Inc.; Brenntag North America, Inc.; Brenntag Specialties, LLC; Bristol-Myers Squibb Company; Buy-Low General Merchandise, Inc.; C&S Wholesale Grocers, LLC ; Calvin Klein Inc.; Chanel Inc.; Charles B. Chrystal Company, Inc.; Chattem, Inc.; Colgate-Palmolive Company; Color Techniques, Inc.; Cosmetic Specialties, Inc.; Coty Inc.; CVS Health Corporation; CVS Pharmacy, Inc.; EDC Drug Stores, Inc.; Estee Lauder Inc.; Estee Lauder International, Inc.; The Estee Lauder Companies Inc.; Food Lion, LLC; Genuine Parts Company ; Glamour Industries Co.; Himmel Management Co. LLC; Himmel Media LLC; Honeywell International, Inc.; Idelle Labs, Ltd.; IMI Fabi (Diana) LLC; IMI Fabi (USA) Inc.; IMI Fabi, LLC; Janssen Pharmaceuticals, Inc.; Johnson & Johnson; Johnson & Johnson Holdco (NA) Inc.; Kenvue Inc.; L’Oreal USA, Inc.; L’Oreal USA Products, Inc.; LLT Management LLC; Long’s Drugstores of South Carolina, Inc.; LTL Management LLC; Minerals Technologies Inc.; The Neslemur Company; Piggly Wiggly, LLC; Pneumo Abex LLC; Presperse Corporation; The Procter & Gamble Company; PTI Royston, LLC; PTI Union LLC; Ralph Lauren Corporation ; Rite Aid of South Carolina, Inc.; Shulton, Inc.; Specialty Minerals Inc.; Sumitomo Corporation of Americas; Union Carbide Corporation; Vi-Jon, LLC; Walgreen Co.; Walmart Inc. Defendants

Of which American International Industries is the Appellant.

MOTION TO HOLD APPEAL IN ABEYANCE

Appellant, American International Industries (A-I-I), respectfully requests this Court to hold the filing deadlines for the initial brief of appellant and its designation of matter to be included in the record on appeal in abeyance, pending resolution of post-trial motions that are still pending with the trial court. A hearing on those motions is scheduled for September 24, 2024, and counsel for A-I-I has already received transcripts from all other trial court proceedings. Absent this Court granting A-I-I's motion to hold this appeal in abeyance, its initial brief and designation of matter are due on October 14, 2024. *See* Rules 208(a)(1) and 209(a), SCACR. The peculiar posture of this case, however, requires A-I-I to file its notice of appeal prior to the resolution of its post-trial motions filed pursuant to Rules 50(b), 59(a), 60(b), and 62 of the South Carolina Rules of Civil Procedure.

Procedural Posture

Respondents, Michael Perry and Lonnie Long, filed their initial complaint on August 4, 2023. Assuming service was proper—which A-I-I has disputed throughout this litigation—A-I-I's answer was due by September 11, 2023. A-I-I struggled to secure local counsel and did not file its answer until September 29, 2023. Three days earlier, on September 26, Respondents filed a motion seeking entry of default against A-I-I. The trial judge granted Plaintiffs' motion for entry of default on October 3, 2023. (Ex. A, 10/3/23 Order). A-I-I remained an active participant in the litigation and filed a motion to set aside default on October 10, 2023, and an amended motion to set aside default on October 24, 2023.

The trial judge heard A-I-I's motion to set aside default on October 25, 2023, and denied the motion on November 2, 2023. (Ex. B, 11/2/23 Order). Respondents subsequently filed an

amended complaint on November 30, 2023, which A-I-I timely answered on December 8, 2023. Respondents then filed a second amended complaint on February 1, 2024, which A-I-I also timely answered on February 16, 2024. Respondents did not move to strike either of A-I-I's answers.

On May 22, 2024, Respondents filed a motion for a protective order in response to a discovery request by A-I-I and argued that A-I-I was still in default as to the initial complaint. A-I-I opposed on May 24, 2024. The trial judge granted Plaintiffs' motion and limited A-I-I's participation to the issue of damages only. (Ex. C, 5/29/24 Order).

At the pre-trial hearing, the trial judge was unclear as to how to proceed with A-I-I in default and made an oral ruling denying A-I-I's Motion to Stay at the conclusion of the hearing (Ex. D, relevant portions of pretrial hearing dated 7/29/24). Trial commenced on August 5, 2024, with both A-I-I and Johnson & Johnson entities (J&J) as defendants. The trial judge instructed the jury that A-I-I was in default and limited A-I-I's participation at trial to the issue of damages. Further, because of its default, the trial court determined that A-I-I's liability for punitive damages would be pre-marked on the verdict form. On August 15, 2024, the jury awarded \$32,656,250 in actual damages against A-I-I and J&J. (Ex. E, Final verdict). Additionally, the jury awarded \$760,000 in punitive damages against A-I-I. (*Id.*). The trial court entered its judgment on August 19, 2024.

A-I-I timely filed post-trial motions on August 26, 2024. Specifically, A-I-I filed a motion pursuant to Rules 50(b) and 59(a) for judgment notwithstanding the verdict, new trial absolute, and new trial nisi remittitur.

Because the trial court maintained that A-I-I was in default throughout trial, A-I-I additionally filed motions pursuant to Rules 60(b) and 62 to set aside entry of the default judgment and stay execution of the judgment. A-I-I also filed a motion for setoffs and production of

settlement agreements. Respondents have until September 13, 2024, to respond to these post-trial motions, and a hearing is scheduled for September 24, 2024.

Argument

Rule 203(b)(1) of the South Carolina Appellate Court Rules requires a notice of appeal to be filed within thirty days “after receipt of written notice of entry of the order or judgment.” However, this deadline is stayed by the timely filing of post-trial motions pursuant to Rules 50, 52, and 59. Conspicuously absent from Rule 203(b)(1), SCACR, are Rules 60 and 62, SCRCR, meaning that the time for filing the notice of appeal is not stayed by the filing of those post-trial motions.

Timely service of the notice of appeal is a jurisdictional prerequisite to appellate review by this Court. *See* Rule 263(b), SCACR (“The time prescribed by these Rules for performing any act except the time for serving the notice of appeal . . . may be extended”); *Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000) (“service of the Notice of Appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the Notice of Appeal must be served”).

Because of this Court’s decision in *Coward Hund Constr. Co. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), A-I-I has served and filed its notice of appeal before the resolution of its post-trial motions. Although the precise question presented in *Coward* was whether a successive post-trial motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure stayed the timelines for serving and filing the notice of appeal, this Court noted that, “[u]nlike timely Rule 59 motions, Rule 60 motions do not have any tolling effect on the right to appeal from the challenged judgment. Therefore, the time to appeal continues to run from the entry of the judgement that the Rule 60(b) motion challenges.” *Coward*, 336 S.C. at 5-6, 518 S.E.2d at 59

(quoting James W. Moore et al., *Moore's Federal Practice* (3d ed. 1999)); *Otten v. Otten*, 287 S.C. 166, 337 S.E.2d 207 (1985) (holding that post-trial motions pursuant to Rule 60(a), SCRCP do not toll the time for serving and filing the notice of appeal); *Williams v. Condon*, 347 S.C. 227, 251, 553 S.E.2d 496, 509 (Ct. App. 2001) (Shuler, J. dissenting) (“motions made pursuant to Rule 60, SCRCP do not affect the finality of the judgment under attack and thus do not toll the time for appeal”).

A-I-I filing its notice of appeal prior to resolution of the post-trial motions does not deprive the trial court of jurisdiction to hear and rule on those motions. *See Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986) (holding that “the service and filing of a Notice of Appeal before the filing of timely post-trial motions under Rule 59 by any party does not deprive the trial court of jurisdiction to consider the motions”). The Supreme Court in *Hudson* clarified that, if a Rule 59 motion is filed simultaneously with, or subsequent to, the filing of a notice of appeal, the proper course for the appellate court is to dismiss the appeal without prejudice and allow the subsequent filing of a notice of appeal within ten days of the trial court’s order disposing of the post-trial motion. *Id.* at 216, 349 S.E.2d at 341-42.

Although A-I-I has filed post-trial motions pursuant to Rules 50 and 59, SCRCP, the trial judge has ruled and reiterated that A-I-I is in default. If the judgment entered on August 19, 2024, is a default judgment, which is unclear because Respondents have yet to move for entry of default judgment (but the court entered judgment against A-I-I anyway), the post-trial motions pursuant to Rules 60 and 62 do not stay the timeline for serving the notice of appeal and the notice of appeal must be served by September 19, 2024. Otherwise, A-I-I’s right to appeal the outcome of those motions could be barred. Although A-I-I has, at all times in this litigation, disputed the legitimacy

of the trial judge's entry of default, A-I-I has served and filed its notice of appeal prior to the resolution of its post-trial motions in a good faith effort to preserve its access to this Court.

Conclusion

Based on the foregoing, A-I-I respectfully requests this Court grant its motion to hold the timelines for filing its initial brief and designation of matter to be included in the record on appeal in abeyance until the trial judge rules on all post-trial motions. That way, the issues presented in this appeal, which are likely to include issues related to the disposition of the post-trial motions, may be disposed of by this Court in a single appellate proceeding.

Respectfully submitted,



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