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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge
Joseph M. Strickland, Master-in-Equity
Casey L. Manning, Circuit Court Judge
Robert E. Hood, Circuit Court Judge

Appellate Case No. 2023-001996
Case No. 2018-CP-23-005208

Best Choice Roofing & Home Improvement, Inc., ...Appellant,

v.

Tyler Woods,.....Respondent.

MOTION FOR LEAVE TO FILE RULE 60 MOTION

This is an appeal from several related orders. One of the appealed orders is the "Order as to Damages," which awards the Respondent (Woods) $4,851,235.73 against the Appellant (BCR Inc.), including $4,340,000.00 in punitive damages. As required by Rule 60(a), SCRCP, BCR Inc. seeks leave of this Court to file a Rule 60 motion with the circuit court that requests the circuit court to vacate the "Order as to Damages" and hold a new damages hearing. A copy of the Rule 60 motion, supporting memorandum, and exhibits to be filed with the circuit court upon this Court's granting of leave is attached hereto as Exhibit 1 with its ten (10) exhibits, A-J, which are cited herein as Exh. 1(__). The grounds and arguments set forth in the attached Rule 60 motion are incorporated herein in support of the instant motion.

FACTUAL AND PROCEDURAL BACKGROUND

On April 21, 2017, Woods entered a written employment agreement with Best Choice Roofing Southeast, LLC (BCR Southeast), which is not a party to this litigation, to work in the Atlanta, Georgia area. (See Exh. 1(J) at 2). This agreement included a one-year non-compete covenant that Woods could not work for a competitor located within 100 miles of BCR's "present locations." (Id.).

Woods left Best Choice Southeast after one week, moved to Columbia, South Carolina, and accepted a job with Premiere Roofing. (See Exh. 1(J) at 2). On November 6, 2017, BCR Southeast's outside Georgia counsel sent a cease and desist letter to Premier, asserting that Woods was in violation of the covenant not to compete and was exposing Premier to potential liability. (See Exh. 1(I)). Premier apparently terminated Woods in response to this letter. Thereafter, BCR Southeast's Georgia counsel contacted a South Carolina attorney (Townes B. Johnson), and he commenced an action against Woods for breach of the convenant not to compete, but he mistakenly commenced it in the name of Best Choice Roofing & Home Improvement, Inc. (BCR Inc.) rather than BCR Southeast. (See Exh. 1(C) at 1, ¶ 4). Neither BCR Southeast nor BCR Inc. was aware of this mistake. (See Exh. 1(A) at 2, ¶¶ 9-10; Exh. 1(C) at 1-2, ¶¶ 5-6). Woods counterclaimed for tortious intereference with a contract and violation of the South Carolina Frivolous Civil Proceedings Act. (See Exh. 1(J) at 3).

An issue arose as to whether Premier's Columbia location was within 100 miles of a BCR location as prohibited by the covenant not to compete. Initially, it was believed that Premier was within 100 miles of a BCR location in Augusta, Georgia. (See Exh. 1(B) at 2, ¶ 11). Ultimately, it was determined that the Augusta location opened shortly after the date of the employment

agreement and Wood's departure from BCR Southeast. (Id. at ¶ 9). Accordingly, BCR sought to dismiss the claim – it is at this point that the "Rule 60" issues arose.

In late 2018 or early 2019, BCR Southeast believed the entire case had been dismissed. (See Exh. 1(A) at 2 and, ¶¶ 12, 21; Exh. 1(C) at 2, ¶¶ 7-8) Unbeknownst to BCR Southeast or BCR Inc., however, and without the consent or approval of either, the South Carolina counsel continued to pursue the litigation for the next 5½ years, including a prior appeal to this Court that was dismissed on procedural grounds, and ultimately resulting in the entry of a $4,851,235.73 judgment against BCR Inc. on March 27, 2023. South Carolina counsel, however, did not advise BCR Southeast or BCR Inc. of this judgment. Rather, he continued to pursue this litigation, including a motion to reconsider, a motion to stay execution without an appeal bond, and the commencement of the instant appeal to this Court on December 20, 2023, all without the knowledge or approval of either BCR entity. (See generally Exh. 1(A) at 2-3, ¶¶ 13-20, 23, 25; Exh.1(C) at 2, ¶¶ 8-15; Exh. 1(D) at 2-3, ¶¶ 7-13). [1]

Finally, on July 23, 2024, after losing all of the motions challenging the judgment, South Carolina counsel finally contacted BCR Southeast and BCR Inc. for the first time in 5½ years, and advised that a $4,851,235.73 judgment had been entered against BCR Inc., and it had to file a supersedeas bond of $5.7 Million Dollars to prevent execution during the pendancy of this appeal. (See Exh. 1(A) and Exh. 1(D) both *passim*). Shocked by all of this, BCR Inc. thereafter retained the services of undersigned counsel's Firm to investigate the matter, which resulted in undersigned

[1] The filing of a motion to reconsider under Rule 59(e) SCRCP tolls the timing for filing a Rule 60(b) motion until the court rules on the 59(e) motion. Therefore, the one year time period for filing a Rule 60(b) motion began upon entry of the order denying BCR Inc.'s motion for reconsideration on December 6, 2023. *See Se. Hous. Found. v. Smith*, 380 S.C. 621, 641, 670 S.E.2d 680, 691 (Ct. App. 2008)

counsel appearing in this appeal on August 12, 2023, after South Carolina counsel filed the Initial Brief of Appellant on June 3, 2024 (again without the knowledge or approval of either BCR entity).

BACKGROUND LEGAL PRINCIPLES

Relief under a Rule 60(b) motion lies within the sound discretion of the trial judge. *Paul Davis Sys., Inc. v. Deepwater of Hilton Head, LLC*, 362 S.C. 220, 225, 607 S.E.2d 358, 360 (Ct. App. 2004). In determining whether to grant relief under Rule 60(b)(1) for mistake, inadvertence, surprise, or excusable neglect, the court must 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. *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010). (Arguments to be presented to the circuit court on this issue appear at pages 13-23 of Exh. 1 to the instant motion and are incorporated herein in support of the instant motion).

To receive a new trial under Rule 60(b)(2) based on newly discovered evidence, the moving party must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) had been discovered since the trial; (3) could not have been discovered before the trial; (4) is material at issue; and (5) is not merely cumulative or impeaching. *Se. Hous. Found. v. Smith*, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (Ct. App. 2008). (Arguments to be presented to the circuit court on this issue appear at pages 13-15 and 23-26 of Exh. 1 to the instant motion and are incorporated herein in support of the instant motion).

Ordinarily, an attorney's negligence is imputed to their client to prevent the client from relying on the attorney's negligence as grounds for opening or vacating a judgment. *Graham v. Town of Loris*, 272 S.C. 442, 452, 248 S.E.2d 594, 599 (1978). This rule, however, does not apply when an attorney abandons or withdraws from the case. *See id*. To overcome this general rule, the client must show that its former attorney willfully and unilaterally abandoned it. *Stearns Bank Nat.*

Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 342, 644 S.E.2d 793, 798-99 (Ct. App. 2007). Furthermore, the general rule is not a hard and fast – the courts apply it rationally with the "polestar" being justice to the litigants. *Brown v. Butler*, 347 S.C. 259, 266-67, 554 S.E.2d 431, 434 (Ct. App. 2001). (Arguments to be presented to the circuit court on this issue appear at pages 12-26 of Exh. 1 to the instant motion and are incorporated herein in support of the instant motion).

ARGUMENT

The breadth and depth of South Carolina counsel's misdeeds in this case present a likely unique set of facts, and BCR Inc. respectfully submits that the exceptional circumstances of this case warrant this Court granting leave to file the Rule 60 motion for consideration by the circuit court. Research reveals no case comparable to the breadth and depth of misdeeds by counsel here.

For example, BCR Inc. should never have been a party to this action – it did not have any relationship with Woods – BCR Southeast is the entity that entered the employment agreement with Woods. Moreover, neither BCR entity had any knowledge of and never approved any of the actions undertaken by South Carolina counsel for the 5½ years after BCR believed the matter had been concluded in late 2018 or early 2019. Further, South Carolina counsel appeared at the damages hearing in this case without any BCR representative (the "empty chair"), without having conducted any discovery on Woods' counterclaims or damages, and he did not present any evidence in defense against Woods' damage claim and calculations. Finally, and perhaps most notably, South Carolina counsel told the circuit court that BCR Inc. (or BCR Southeast) had lied to him about the existence of a BCR location within 100 miles of Columbia (the Augusta location) in order to justify the claim for breach of the covenant not to compete. BCR Inc. and BCR Southeast deny lying to South Carolina counsel about anything and will show that any assumed misunderstanding about when the Augusta location existed was at worst a mistake. Standing

alone, falsely telling the circuit court that BCR had lied about the Augusta location was an abandoment of BCR Inc. that warrants this Court granting leave to file a Rule 60 motion so that the circuit court may review the relevant facts and circumstances involved here, consider any evidence presented by the parties, make factual findings, and apply the law to those facts. The most important facts and circumstances that occurred without the knowledge of or approval by any BCR entity are summarized below.

Dec. 2018 – Feb. 2019: Filed a motion to amend the complaint by dropping the claim for breach of the Covenant Not to Compete and adding new claims related to an advance of moving expenses. Attended hearing on motion. Received order denying motion and filed two motions to reconsider.

Oct. 2019 – Mar. 2022: Received order(s) denying motions to reconsider. Filed appeal with Court of Appeals, re: denial of motion to amend. (See App. Case No. 2019-001811). Fully briefed appeal. Court of Appeals dismissed appeal, because an order denying a motion to amend is not immediately appealable. Awarded $2,502.70 in appellate fees and costs against BCR Inc. Never notified either BCR entity of any of this.

April 2022: Attended hearing before Judge Manning on Woods' motion for summary judgment on his counterclaims for Intentional Interference with Contract and violation of the South Carolina Frivolous Civil Proceedings Sanctions Act. Never filed anything in opposition to motion or in response to Woods' supporting memorandum. Defended himself, rather than BCR Inc. at hearing and stated on the record regarding BCR Inc., with whom he had never spoken: "***I was lied to***, Your Honor, the location in Augusta ended up not being a current location." (Exh. 1(F), Apr. 4, 2022 Hrg. Tr. at 8) (emphasis added). Received order granting partial summary judgment on liability against BCR Inc. on Woods' counterclaims. Never notified either BCR entity of this judgment.

Nov. 2022: Waived right to a jury trial on damages by consenting to a referral of the damages hearing to the Master-in-Equity. (See Exh. 2). Neither BCR entity was aware of or authorized the jury trial waiver. (See Exh. 1(C) at 2, ¶ 12 and Exh. 1(A) at 3, ¶ 25).

Jan. – Apr. 2023: Attended damages hearing *without* a representative from BCR Inc. Did not notify *anyone* at BCR Inc. of the hearing, and did not present any witnesses or any other evidence. Was directed to but did not submit a proposed order to the Master, who stated at the end of the hearing that Woods is "entitled to damages, I'm just not sure about the amounts."

(Exh. 1(G), Jan. 25, 2023 Hrg. Tr. at 92). Received Woods' proposed order awarding $4,851,235.73 in damages – did not send the Master any comments. Did not send a counter proposed order. Received Master's filed order awarding $4,851,235.73 judgment against BCR Inc., *i.e.*, the Master signed and filed Woods' proposed order. Did not notify either BCR entity about the the judgment. Filed motion to reconsider.

July 2023: Received a *sua sponte* order from the Master recusing himself from any further proceedings in the case – order did not state any grounds for the recusal. (See Exh. 3). BCR Inc. recently learned that the Master recused himself because he had hired Woods' counsel to represent him in a legal battle over his re-election. Filed motion to reconsider the recusal order.

Dec. 2023: Received a Form 4 Order by Judge Newman summarily denying the motions to reconsider the damages order and the recusal order. Received Execution of Judgment filed by Mr. Woods. Filed appeal of all substantive orders with the Court of Appeals. Filed motion to stay execution on the $4,851,235.73 judgment asking the court to require no supersedeas bond but stating that BCR Inc. "is prepared to provide one should the Court in its discretion order one." Never notified either BCR entity about any of this.

June 3, 2024: Filed BCR Inc.'s initial appellant's brief with this Court.

July 2024: Attended a hearing on the motion to stay execution of the judgment at which hearing Woods' counsel made the following uncontested statements that South Carolilna counsel did not respond to or challenge (all emphasis added):

> "*They lied*. *They lied to their attorney*. . . we can pull up a transcript that *their attorney has admitted in court that he was lied to by this client*." (Exh. 1(H), July 1, 2024 Hrg. Tr. at 8).
>
> "Mr. Johnson not only *did not object to any of our evidence*, he *brought zero evidence of this*. He has *never submitted a single piece of evidence, an affidavit, anything to defend what his clients have done*. The *only thing he has ever said is that the – that they lied to him*." (Id. at 16).
>
> "It is not Mr. Woods' fault that this company *keeps coming to hearings with no evidence, no briefing, no law*." (Id. at 23).

(See generally Exh 1(A), (B), (C) and (D), all *passim* – affidavits by personnel from BCR Inc. and BCR Southeast).

On July 23, 2024, South Carolina counsel received a Form 4 Order denying his motion to stay execution and requiring a supersedeas bond of more than $5 Million Dollars to prevent execution on the judgment during the instant appeal.[2] That same day, for the first time since late 2018, South Carolina counsel contacted BCR Southeast and BCR Inc. to advise that Woods now had a $4,851,235.73 judgment against BCR Inc. and that an appeal bond must be posted within 10 business days to stay execution on that judgment.

Woods may dispute some of the foregoing facts and circumstances. That dispute, however, and the question of whether South Carolina law affords BCR Inc. any Rule 60 relief under the likely unique facts and circumstance of this case, should be resolved by the circuit court in the first instance after an evidentiary hearing, full briefing, and full argument.

CONCLUSION

South Carolina counsel pursued the instant litigation for 5½ years without the knowledge or approval of BCR Inc. or BCR Southeast. He never told either BCR entity about the prior appeal to this Court. He never conducted any discovery in this case after the remand by this Court. He never told any BCR entity that the circuit court had granted summary judgment against BCR Inc. on liability for Woods' counterclaims. He falsely told the circuit court that BCR Inc. (or BCR Southeast) had lied to him about the key issue of a BCR location in Augusta, Georgia. He never told any BCR entity about the damages hearing, and he waived the right to a jury trial on damages by consenting to a referral of the matter to the Master-in-Equity without approval by any BCR entity. He never conducted any discovery on damages. He appeared at the damages hearing without telling any BCR entity about the hearing, without the attendance of any BCR

[2] The Form 4 Order noted that a more complete order was forthcoming. (Exh. 3). The circuit judge entered the more complete order on July 30, 2024, and specified the bond amount at $5,711,846.31. (Exh. 4).

representative (the classic "empty chair"), and he did not present any evidence against Woods' damage claims.

For all of these reasons, and for the reasons set forth herein, as well as the reasons set forth in the Rule 60 motion attached hereto as Exhibit 1 and incorporated herein, BCR Inc. respectfully submits that the exceptional facts and circumstances of this case warrant this Court granting leave to file the attached Rule 60 motion with the circuit court, so that the circuit court in the first instance may review the relevant facts and circumstances involved here, consider any evidence presented by the parties, make factual findings, and apply the law to those facts.

Respectfully Submitted,

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PROOF OF SERVICE

I, Robert L. Widener, counsel for Appellant, certify that on this 23rd of September, 2024, that a copy of the Appellant's *Motion for Leave to File Rule 60 Motion* and the Exhibits to that Motion was served upon all counsel of record in the above-captioned matter via a copies of the emails to this Court filing same at the email addresses listed below:

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