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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Judge

Appellate Case No. 2024-0001724
Court of Common Pleas Case No. 2023-CP-21-02320

ASZANE CRUZ,

Respondent/Appellant,

v.

ARETE WYNDHAM PROPERTY OWNER, LLC D/B/A WYNDHAM PLACE APARTMENTS; CASA BAHARI, LLC; DARLINGTON 48 UNIT, LLC; AND JOHN DOE, INDIVIDUALLY, AND AS MANAGER/GENERAL MANAGER OF ARETE WYNDHAM PROPERTY OWNER, LLC D/B/A WYNDHAM PLACE APARTMENTS, DEFENDANTS

OF WHICH CASA BAHARI, LLC IS THE APPELLANT/RESPONDENT.

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INITIAL BRIEF OF APPELLANT/RESPONDENT CASA BAHARI, LLC

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STATEMENT OF ISSUES ON APPEAL

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III. Did the Circuit Court err in finding that Appellant/Respondent received proper notice of the damages hearing?

STATEMENT OF THE CASE AND FACTS

On September 29, 2023, Respondent/Appellant Aszane Cruz (hereinafter "Respondent") filed this action against Defendants Arete Wyndham Property Owner, LLC; Casa Bahari, LLC; Darlington 48 Unit, LLC; and John Doe, individually and as manager of Arete Wyndham Property Owner, LLC. (Compl. ¶¶ 1 – 34). In her complaint, Respondent alleged causes of action for premises liability/negligence and negligent hiring, training, and supervision against all defendants, including Appellant/Respondent Casa Bahari, LLC (hereinafter "Appellant"), related to a personal injury that was allegedly sustained by Respondent on or around April 9, 2022, at 816 West Marion Street, Apt. A, Florence, South Carolina, 29501 (hereinafter "Premises). (Compl. ¶¶ 20 – 34). Respondent served the Summons and Complaint on Appellant through its registered agent, Registered Agents, Inc., via Process Server on December 4, 2023. (4/5/24 Pltf.'s Mot. Recons., p. 2). On January 11, 2024, Appellant, through its counsel in Atlanta, Georgia, sent a letter to Respondent's counsel via FedEx advising Respondent that Appellant did not own the property on the date of Respondent's alleged incident and requesting Appellant be dismissed from the action. (4/5/24 Pltf.'s Mot. Recons., p. 2). In the letter, counsel for Appellant included a true and correct copy of the recorded Warranty Deed showing that Appellant did not acquire the Premises until June 13, 2023, from Defendant Darlington 48 Unit, LLC. Importantly, at the time Respondent received the letter, she had not taken any action to put Appellant in default. (4/5/24 Pltf.'s Mot. Recons., p. 2).

On January 12, 2024, Respondent filed an Affidavit of Service certifying that the Summons and Complaint were served on Appellant through its registered agent, via Process Server, on December 4, 2023. (4/5/24 Pltf.'s Mot. Recons., p. 2). On January 16, 2024, counsel for Appellant sent the same letter via email to counsel for Respondent again requesting for Appellant to be

dismissed from the action and including a copy of the recorded deed. (4/5/24 Pltf.'s Mot. Recons., p. 2). Again, importantly, at the time of this second letter, Respondent had not taken any action to put Appellant in default.

Despite having this information, Respondent filed a Motion for Entry of Default as to Appellant on January 25, 2024, and the Clerk of Court filed an Entry of Default as to Appellant on that same day – January 25, 2024. (4/5/24 Pltf.'s Mot. Recons., p. 2). On January 31, 2024, Respondent requested a damages hearing as to Appellant only. (4/5/24 Pltf.'s Mot. Recons., p. 2). On March 13, 2024, a damages hearing was held before the Honorable Judge Michael Nettles without notice having been given to Appellant. (4/5/24 Pltf.'s Mot. Recons., p. 3). Appellant would receive a letter on March 14, 2024, notifying it of the March 13, 2024 default judgment hearing. (4/5/24 Pltf.'s Mot. Recons., Ex. D).

Upon receipt of the letter regarding the damages hearing on March 14, 2024, Appellant immediately sought counsel in South Carolina to file a motion to have default set aside, such motion having been filed shortly thereafter on March 25, 2024. By Order dated April 2, 2024, this Court granted default judgment arising out of the March 13, 2024, hearing against Appellant only. (4/2/24 Order). On April 5, 2024, Appellant filed its Motion to Reconsider/Set Aside the April 2, 2024, Default Judgment Order. (4/5/24 Pltf.'s Mot. Recons.). The parties briefed their arguments and were heard on the Motion to Reconsider on August 21, 2024. (8/21/24 Trans.) On September 11, 2024, Judge Nettles issued an Order denying Appellant's Motion to Reconsider/Set Aside. (9/11/24 Order). This appeal followed.

ARGUMENTS

I. STANDARD OF REVIEW ON APPEAL.

"[T]he power to set aside a default judgment 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." *Fassett v. Evans*, 364 S.C. 42, 49, 610 S.E.2d 841, 845 (Ct. App. 2005). "An abuse of discretion occurs when the judge'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 judge 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." *Ex parte Cap. U-Drive-It, Inc.*, 369 S.C. 1, 5-6, 630 S.E.2d 464, 466–67 (2006) (citing cases).

II. THE CIRCUIT COURT ABUSED ITS DISCRETION BY REFUSING TO RECONSIDER AND SET ASIDE THE DEFAULT JUDGMENT ORDER.

Pursuant to Rule 60(b), "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; [and] (5) the judgment has been satisfied, release, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." S.C. R. CIV. PRO. 60(b). "In determining whether to grant a motion under Rule 60(b), the trial [court] should [also] 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." *Microtronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001).

A. The Circuit Court erred by failing to relieve Appellant from the default judgment because of mistake, inadvertence, surprise, or excusable neglect.

"[C]ourts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits." *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 567, 274 S.E.2d 290, 292 (1981). "When a party has made 'a good faith mistake of fact' and has not attempted 'to thwart the judicial system,' the court has a basis to vacate a default judgment." *Ex parte Trustgard Insurance Co.*, 2023 WL 5944276 (Ct. App. Sept. 13, 2023) (quoting *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986)).

Here, the Circuit Court failed to relieve Appellant from default judgment because of mistake, inadvertence, surprise, or excusable neglect pursuant to Rule 60(b)(1). On or around January 11, 2024, and January 16, 2024, Appellant, through counsel, notified Respondent's counsel that it was not the owner of the Premises at the time of Respondent's alleged injuries. (4/5/24 Pltf.'s Mot. Recons., p. 2). Appellant provided counsel for Respondent with a deed recorded in the Florence County Register of Deeds Book No. 1053, page 1176 showing that Defendant Darlington 48 Unit, LLC sold the Premises to Appellant and Defendant Arete Wyndham Property Owner, LLC (hereinafter "Wyndham") on June 13, 2023 (3/25/24 Pltf.'s Mot. To Set Aside Default, Ex. A). The incident alleged in Respondent's Complaint occurred on April 9, 2022, more than fourteen (14) months prior to Appellant's purchase of the Property.

Counsel for Appellant provided Respondent and her counsel with all the information and knowledge to make them aware that Respondent lacked any reasonable grounds for its claims against Appellant. *See* S.C. R. CIV. PRO. 11. Relying on its Georgia counsel and the duty of

attorneys to pursue claims only when they have a good faith basis to do so, Appellant requested Respondent's counsel dismiss it from the lawsuit. Although counsel for Respondent admits to receiving the correspondence evidencing Appellant's lack of ownership, Respondent and her counsel, without a good faith basis to do so, pursued a claim against Appellant, and proceeded to place Appellant in default without notifying Appellant or its counsel. Respondent would proceed to a default judgment hearing without timely giving Appellant notice of the hearing date.

Appellant reasonably believed that by notifying and proving to Respondent that Appellant did not own the property at the time Respondent allegedly sustained injuries and Respondent's counsel's ethical duty to pursue claims only if a good faith basis to do so exists, no further action related to the claim was needed by Appellant. Such conduct constitutes mistake, inadvertence, surprise, or excusable neglect. As such, the Circuit Court erred in failing to relieve Appellant from the default judgment,

B. The Circuit Court erred by failing to relieve Appellant from the default judgment because of fraud, misrepresentation, or misconduct of an adverse party.

South Carolina Rule of Civil Procedure 60(b)(3) allows a default judgment to be set aside based on fraud, misrepresentation, or misconduct of an adverse party. S.C. R. CIV. PRO. 60(b)(3). Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, a signature by an attorney on a pleading, motion, or other paper of a party represented by an attorney "constitutes a certificate by [the attorney] that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." S.C. R. CIV. PRO. 11(a).

Here, Respondent and her counsel had the knowledge and information that they lacked good ground to support a default judgment against Appellant. Specifically, Respondent and her

counsel knew at the time they filed for entry of default and for a default judgment that Appellant was not in possession, ownership, or control of the subject property at the time Respondent was allegedly injured and therefore could not be liable for Respondent's incident or injuries. Respondent's counsel admitted this fact at the damages hearing on March 13, 2024, and the motion to reconsider/set aside hearing on August 21, 2024. At the March 13th hearing, Respondent's counsel stated:

> I will advise The Court that we received an email from what was alleged as counsel for Casa Bahari, but no one has appeared on the record for this matter or otherwise answered. As such, you know, being in a position to advocate on behalf of my client in this matter, we will proceed with the damages hearing at this time.

(3/13/24 Trans. p. 4). Again, at the hearing on August 21, 2024, Respondent's counsel admitted that she received the letter explaining that Appellant was not the owner of the subject property stating: "Defendant alleges they sent a letter to us, I believe it was January 13, 2024. That is true, Your Honor." (8/21/24 Tran. p. 6).

Of course, Respondent's counsel has the right to advocate on behalf of her client. However, that right coincides with the ethical obligations of attorneys. Recently, the South Carolina Supreme Court in deciding another matter involving Respondent's counsel, held "[a]ttorneys may have 'an obligation to provide zealous representation' to their client, but they also have 'a corresponding obligation to opposing parties, the public, [their] profession, the courts, and others to behave in a civilized and professional manner in discharging [their] obligations to [their] clients."' *Hood v. United Services Auto Association*, 2025 WL 45711 (SC 2025). Arguments presented by Respondent's counsel in *Hood* were deemed meritless and borderline frivolous. *Id.* at *7.

Here, the email and letter that Respondent and her counsel had received prior to any entry of default was not just an insignificant correspondence. The letter and the email contained factual

proof – a recorded deed proving that Appellant was not the owner of the property at the time Respondent and her counsel alleged that she was injured – that Respondent and her counsel lacked good ground to support a any claim of merit against Appellant. Despite this fact, and counsel's obligation pursuant to Rule 11 to certify that there is good ground to support its pleadings, counsel for Respondent filed a Motion for Entry of Default, received the Entry of Default, and then filed a Motion for Default Judgment all while knowing no good faith basis existed to support a claim against Appellant. Moreover, counsel for Appellant is informed and believes that Respondent and her counsel have repeated this conduct with Defendant Darlington 48 Unit, LLC. Upon information and belief, counsel for Respondent has been informed that the "registered agent" Respondent claims to have served on behalf of Defendant Darlington 48 Unit, LLC is in fact not the registered agent. Regardless, upon information and belief, Respondent and her counsel have continued to pursue default judgment proceedings against Defendant Darlington 48 Unit, LLC – just as they did with Appellant and Defendant Arete Wyndham Property Owner, LLC – despite knowing they lack a good faith basis to do so.

Such conduct represents fraud, misrepresentation, or misconduct of an adverse party and the Circuit Court erred in failing to relieve Appellant from the default judgment because of the fraud, misrepresentation, or misconduct of Respondent and her attorney. If a pleading, motion or other paper is signed in violation of SCRCP 11, the Court upon motion or upon its own initiative may impose upon a represented party an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee. SCRCP 11(a). Allowing a represented party to benefit from misconduct in pursuing a known, proven meritless

claim on a technical default basis usurps the intent of SCRCP 11 and a lawyer's oath of professional conduct.

C. The Circuit Court erred by failing to relieve Appellant from the default judgment because the default judgment is no longer equitable such that it should have prospective application.

Pursuant to Rule 60(b)(5), a default judgment may be set aside when "it is no longer equitable that the judgment should have prospective application." S.C. R. CIV. PRO. 60(b)(5). First and foremost, the default judgment is no longer equitable such that the judgment should have prospective application because Appellant did not own the property at the time of Respondent's alleged injuries. The uncontradicted evidence before the Circuit Court showed that Appellant did not have possession, ownership, or control of the Subject Property at the time of Respondent's alleged injuries and didn't obtain the same until over a year after Respondent's alleged accident. Therefore, the judgment is no longer equitable in that it holds Appellant liable for alleged negligence at a property which it did not own and cannot be held legally liable.

Moreover, the judgment is no longer equitable such that it should have prospective application because there are two other defendants in this case; however, the default judgment is only against Appellant for the entirety of Respondent's alleged damages. At the March 13, 2024, damages hearing, Respondent and her counsel asked for an award of her medical damages totaling $16,886.00, her lost wages totaling $13,344.00, and punitive damages. (3/13/24 Trans. pp. 14-15). At the hearing, the Court awarded these damages and $5,000.00 in punitive damages. In the Court's Order on Default Judgment, it ordered that "Defendant is liable for Plaintiff's damages and shall pay to Plaintiff the total sum of $40,686.00" which constituted her actual damages and punitive damages. (4/2/24 Order, p. 4).

However, on August 2, 2024, Respondent's counsel filed a Motion for Damages hearing as to Defendant Darlington 48 Unit, LLC stating that "a hearing to determine the amount of unliquidated damages is proper" and requesting that "this court conduct a hearing to determine the amount." (8/2/24 Pltf.'s Request for Hearing on Damages as to Def't. Darlington 48 Unit, LLC). Later, on September 27, 2024, Respondent's counsel filed additional Motions for Damages hearings – one as to Defendant Darlington 48 Unit, LLC, and one as to Defendant Arete Wyndham Property Owners, LLC. In those motions, Respondent states "a hearing to determine the amount of unliquidated damages is proper. If the court determines that no further hearing is necessary and that damages were already established at a previous hearing, Plaintiff respectfully requests that all defaulting Defendants be found jointly and severally liable for the damages awarded in the amount of $40,686.00" (9/27/24 Pltf.'s Request for Hearing on Damages as to Arete Wyndham Property Owners, LLC, p. 2; 9/27/24 Pltf.'s Request for Hearing on Damages as to Darlington 48 Unit, LLC, p. 2).

It is unclear how a default judgment against only Appellant for the entire amount of Respondent's damages can coexist with additional default judgments against the other defendants in this case. South Carolina law is clear that Respondent cannot receive a triple recovery for her damages in this case. *See The Winthrop University Trustees for the State of South Carolina v. Pickens Roofing and Sheet Metals, Inc.*, 418 S.C. 142, 166, 791 S.E.2d 152, 168 (Ct. App. 2016) ("It is the fundamental rule of law in this state that there can be no double recovery for a single wrong."). In fact, the Circuit Court agreed that Respondent was not entitled to another damages hearing stating:

> I personally don't think that you're entitled to another damage hearing for - - I think the damages were for a concrete entity, and we've already established what that is. As far as what the liability is, that's a a different thing, and how they divide it.

(8/21/24 Trans. pp. 12 – 13). Yet, Respondent's counsel is attempting to do just that by moving for default judgments against each of the defendants individually. Eventually, if this Court finds that the default judgment should not be set aside for the reasons discussed herein, a court will have to determine and apportion the default judgment against all the defendants making this default judgment order moot. Any future default judgment orders will materially change the default judgment order against Appellant, the Court's conditions, and Appellant's obligations under that default judgment order. *See Saro Investments v. Ocean Holiday Parnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that standard to be applied in determining whether order or judgment has "prospective application" is whether it is executory or involves supervision or changing conduct or conditions by court."). As such, the default judgment order should no longer have prospective application.

To the extent this court does not find that the Circuit Court erred to set aside the default judgment for the reasons previously argued, the Circuit Court erred to set aside the default judgment because it is not longer equitable such that it should have prospective application.

III. The Circuit Court erred in finding the Appellant was properly notified of the damages hearing.

"[N]otice of any trial or hearing on unliquidated damages shall also be given to parties in default." S.C. R. CIV. PRO. 5(a). "[W]hen the relief which is sought is unliquidated damages, Rule 5(a), specifically provides 'notice of any trial or hearing on unliquidated damages shall also be given to parties in default." *Roche v. Young Bros. Inc. of Florence*, 318 S.C. 207, 212, 456 S.E.2d 897, 901 (1995). In *Roche*, Chief Justice Toal reversed the trial judge and remanded the cases to the circuit court for a new damages hearing because "Young Brothers did not receive notice of the damages hearing as required by Rule 5(a), SCRCP." *Id.*

Appellant did not receive notice of the March 13, 2024, damages hearing until March 14, 2024 – one day after the damages hearing was held. Importantly, the letter sent by Respondent notifying of the damages hearing has no date nor has Respondent offered any affidavit of service, certificate of service, or affidavit of mailing to show that Appellant was properly served with notice of the damages hearing. As such, Respondent has failed to show that Appellant received notice of the damages hearing. Because Appellant was not properly notified of the damages hearing, the Circuit Court erred in failing to set aside the default judgment.

CONCLUSION

For the reasons discussed above, the Circuit Court erred in failing to set aside the default judgment as to Appellant Casa Bahari, LLC. This Court should reverse the Circuit Court and vacate the default judgment against Appellant Casa Bahari, LLC.

Respectfully submitted,

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