

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-08-03405

Century Metal Recycling PVT LTD D/B/A CMR AMERICA,.....Respondent.

v.

DON'S CAR CRUSHING, INC. AND DONALD R. BREWER,.....Appellant.

INITIAL BRIEF OF APPELLANT

RECEIVED

DEC 9 9 2013

SC Court of Appeals

John M. Prosser, Jr., Esquire
P.O. Drawer 779
Johnsonville, SC 29555
(843)386-2825
Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1-3

Arguments.....4-6

Conclusion.....6

TABLE OF AUTHORITIES

CASES

Beckmann Concrete Contractors, Inc. v. United Fire and Causalty Co. and Golf Construction of America, 360 S.C. 127; 600 S.E.2d 76 (2004).....4, 5
W.T. Lewis v. The Congress of Racial Equality and/or C.O.R.E., Inc. and C.O.R.E. Special Purpose Fund, 275 S.C. 556; 274 S.E. 2d 287 (1981).....5

OTHER AUTHORITIES

SCRCP Rule 55(b)(2).....2, 3, 4, 5

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING A JUDGMENT BY DEFAULT IN THE AMOUNT OF \$42,919.60 WITHOUT REQUIRING THE PLAINTIFF TO HOLD A PROPER HEARING PER SCRCR RULE 55(b)(2), ESPECIALLY SINCE THE DAMAGES IN THE MATTER WERE UNLIQUIDATED IN NATURE?

2. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR RELIEF TO SET ASIDE DEFAULT JUDGMENT PER SCRCR RULE 60(b)(1) and SCRCR RULE 55(b)(2), THEREBY PRECLUDING THE DEFENDANT FROM EXERCISING ITS RIGHT TO A HEARING TO DETERMINE THE PROPER AMOUNT OF DAMAGES?

STATEMENT OF THE CASE

This matter initially involved a contractual dispute between the Plaintiff and the Defendant related to the purchase of scrap metal by the Plaintiff from the Defendant for the amount of \$204,875.00. The Plaintiff paid the Defendant said amount, and the Defendant failed to provide the product which was purchased in a timely manner. On November 27, 2012, the Plaintiff filed the within action requesting specific payment of said amount and served the pleadings upon the Defendant on December 14, 2012.

After the Plaintiff personally served the Defendants with the pleadings in this matter on December 14, 2012, the Defendants retained the services of the undersigned, John M. Prosser, Jr. J.D., and an appearance was made on behalf of the Defendants within the thirty (30) day response time. In fact, Plaintiff's counsel and Defense counsel had several conversations regarding the situation, and Plaintiff's counsel granted the Defendants an extension to respond to the pleadings.

Shortly thereafter, the parties negotiated a settlement, whereby and wherein the Defendants would provide the Plaintiff materials which would compensate the Plaintiff for any

losses claimed. Plaintiff's counsel prepared a settlement document, and sent the same to Defendant's counsel. However, prior to the execution thereof, a representative of the Plaintiff, Rajiv Kaushal, and the Defendant, Donald R. Brewer, negotiated and consummated a settlement between themselves, and as a result thereof, the Defendants shipped a pre-inspected quantity of materials to the Plaintiff, and they were under the belief that the matter was concluded. It was not until after the shipment(s) of materials arrived overseas that the Defendants discovered that the Plaintiff now was not satisfied with the materials which were given to settle this matter.

Plaintiff's counsel then instituted and procured a Default Judgment against the Defendants knowing that an appearance was made on their behalf, knowing that they were represented by counsel, and knowing that a settlement was consummated. The undersigned Defense counsel, being under the impression that he and Plaintiff's counsel had agreed on an extended continuance to answer the pleadings because the matter was consummated as described above, failed to file responsive pleadings. Plaintiff's counsel procured a Default Judgment on an affidavit, when the amount requested therein was in dispute, was not liquidated, and was not a sum certain figure. Therefore, Defense counsel never received notification of any damages hearing in this matter.

Considering the foregoing, the Defendants moved for Relief from Default Judgment entered against them on August 14, 2013 pursuant to Rule 60 and Rule 55 of the South Carolina Rules of Civil Procedure. The Defendants entrusted their legal defense to the undersigned counsel, and the undersigned counsel mistakenly failed to file an Answer, as he was under the impression that a settlement had been consummated and that the Plaintiff had granted him an extension.

In that regard, Defendants' counsel argued that since a settlement was consummated, the more appropriate proceeding would be to enforce the settlement, especially since both parties acted upon their understanding of the terms of the settlement. In essence, the parties agreed that the Defendant would ship \$204,875.00 worth of materials to them to provide them the relief they sought in their complaint. The Defendants shipped the materials, which were pre-inspected, and thereafter the Plaintiff alleged that the materials were \$42,919.60 short of the total amount sought. The Defendants disputed the amount shipped was short, as agreed upon. Therefore, the matter became a dispute over the settlement, not the original action or a failure to file responsive pleadings.

Furthermore, the Plaintiff procured the Default Judgment amount without notifying them of any type of damages hearing as required by Rule 55(b)(2) of the South Carolina Rules of Civil Procedure. Defense counsel, considering the foregoing, argued that the amount allegedly owed to the Plaintiff was not liquidated and was definitely not a sum certain amount. Defense counsel also argued that this would require testimony from the Plaintiff to prove that it was entitled to further relief. Defense counsel never received any such notice, and therefore, the Defendants have been precluded from their day in court to cross-examine the Plaintiff or their witnesses regarding any amounts owed to them.

The trial court summarily denied the Defendant's motion to set aside the default judgment and to hold a damages hearing in the matter, despite the fact that the damages in this matter were unliquidated in nature. Plaintiff's counsel did not dispute the fact that the parties attempted to settle the matter on their own and did not file a return to the Defendant's motion in that regard.

ARGUMENTS

The prevailing case which is directly in line with the matter at hand is Beckmann Concrete Contractors, Inc. v. United Fire and Casualty Co. and Golf Construction of America, 360 S.C. 127; 600 S.E.2d 76 (2004). In essence, the facts in the Beckman Concrete case are virtually identical to this situation. The court therein expounded upon the definition of unliquidated damages as opposed to liquidated damages by quoting Black's Law Dictionary and other applicable case law, and stated that, "an 'unliquidated claim' is defined as '[a] claim in which the liability of the party or the amount of the claim is in dispute'" *Id.* at 132. Furthermore, the court stated that "the mere demand for judgment of a specified dollar amount does not suffice to make Plaintiff's claim one for 'a sum certain' as contemplated by Rule 55(b)" *Id.*, citing Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E. 2d. 858(N.C. Ct. App. 1980).

As set forth herein above, the parties hereto attempted to settle the matter between themselves after the within legal action was instituted. They met without the assistance of counsel, and the Defendant shipped materials to the Plaintiff after the Plaintiff inspected the same, intending to resolve the dispute. However, after the Plaintiff received the goods shipped, it then asserted to the Defendant that the materials did not satisfy the original claim for \$204,875.00. While the Plaintiff's original claim was contractual in nature and was a sum certain liquidated amount, the fact that the parties attempted to settle the matter by "bartering" or trading goods to satisfy the amount created a situation which transformed their dispute into one involving the sufficiency of a settlement. Therefore, since the Plaintiff and the Defendant were disputing whether the claim was fully and properly settled, the amount of damages is in dispute and is thereby unliquidated in nature.

Furthermore, the court in the Beckmann Concrete case reestablished that in cases involving unliquidated damages, a defendant is entitled to a hearing to properly determine the amount of the damages owed, even if the defendant did not answer the pleadings in a timely manner. The court therein quoted SCRCF Rule 55(b)(2) and stated, “pursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party **whether or not such party has appeared in the action**” *Id.* at 133 (emphasis added by the court therein).

In the case at hand, it is undisputed that the parties attempted to settle their matter after the initial filing of pleadings. It is also undisputed that Plaintiff’s counsel procured a judgment by default against Defendants without initiating or conducting a damages hearing, pursuant to SCRCF Rule 55(b)(2). Although Plaintiff’s counsel did not file a response to the Defendant’s Motion for Relief to Set Aside Default Judgment, the trial court refused to consider the above uncontested facts and summarily denied the Defendants’ request for a damages hearing. This is simply in error and is not in line with SCRCF or prevailing case law.

As a result, the Defendants in this matter have been denied their right to dispute the fact that the Plaintiff is entitled to any money above and beyond their attempted settlement.

Where a defendant has made an appearance but is in default, liability is admitted but the amount of damages is not; the amount must be proved. The appearing party is entitled to limited participation in [a] damages-assessment hearing. . . Participation by the defending party will give to the judge. . . a broader understanding of the amount which should be awarded and will tend to ensure a more fair verdict and judgment. When the defaulting party is not given the opportunity to participate in the damages hearing, the trial court and the reviewing court should closely scrutinize the award to prevent harsh, unwarranted results.

W.T. Lewis v. The Congress of Racial Equality and/or C.O.R.E., Inc. and C.O.R.E. Special

Purpose Fund, 275 S.C. 556, 561; 274 S.E. 2d 287, 289; (1981). Defense counsel attempted to

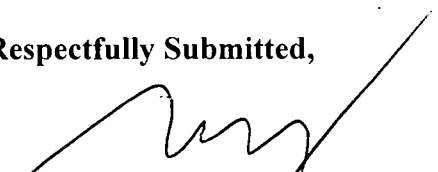
argue to the trial court that the Defendants were not opposing the fact that they were liable initially to the Plaintiff and that their only dispute was whether or not they had fully compensated the Plaintiff via their attempted settlement. However, the trial court refused to hear said argument and summarily denied the Defendants' request for a damages hearing.

CONCLUSION

Therefore, the trial court initially erred in this matter by issuing a judgment by default for the specific amount of \$42,919.60 without requiring the Plaintiff to establish its damages via a hearing to determine the same, even though said amount is different from the amount requested in its initial complaint of \$204,875.00. This fact alone should have caused the court to hesitate when issuing the default judgment. Furthermore, the subsequent trial court erred in summarily denying the Defendants' motion to set aside this default judgment and not requiring the Plaintiff to establish the true value of its claim in a proper hearing, especially since the parties attempted to settle their matter between themselves, thereby creating a situation which obviously involved unliquidated damages. For the reasons set forth hereinabove, Appellant respectfully requests that the Default Judgment issued by the court on August 14, 2013 be vacated and remanded for the purpose of requiring the Plaintiff to conduct a damages hearing after proper notice.

December 4th, 2013
Johnsonville, South Carolina

Respectfully Submitted,


John M. Prosser, Jr., Esquire
PROSSER LAW FIRM, P.A.
Post Office Drawer 779
436 S. Georgetown Highway
Johnsonville, South Carolina 29555
Tele: 843-386-2825
Fax: 843-386-3334
Shannon@prosserlawfirm.com