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Apr 10 2026

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

David P. Caraker, Jr., Circuit Court Judge

Case No. 2024-CP-26-04023
Appellate Case No. 2026-000730

Linda Acker, Plaintiff,

v.

Westgate Myrtle Beach, LLC, Respondent,

AND

Westgate Myrtle Beach, LLC, Respondent

v.

Home Depot U.S.A., Inc., Appellant

MOTION FOR LEAVE TO FILE RULE 60(b) MOTION

Pursuant to Rule 60(b), SCRCR, and Rule 240, SCACR, Appellant, Home Depot U.S.A., Inc. (“Home Depot”), hereby moves for an order granting it leave to file a motion for relief from judgment pursuant to Rule 55(c) and Rule 60(b) and staying this appeal during the pendency of such motion. Home Depot makes this motion on the grounds that evidence shows that the judgment is void, that it is not equitable that the judgment have prospective application upon Home Depot, and that Westgate Myrtle Beach, LLC (“Westgate”) obtained its judgment through fraud, misrepresentation, or other misconduct. Moreover, a stay of the appeal promotes the efficient use

of judicial resources as an order granting Home Depot's motion would render this appeal moot. Moreover, if the lower court denies Home Depot's motion, Home Depot will likewise appeal such denial and seek to consolidate the second appeal with the current appeal. Accordingly, Home Depot requests that this Court grant it leave to file a Rule 60(b) motion and stay the current appeal until the motion is ruled upon.

Respectfully submitted,

s/Adam C. Bach

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April 10, 2026

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**MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE RULE 60(b) MOTION**

Pursuant to Rule 240, SCACR, Appellant Home Depot U.S.A., Inc. hereby submits this memorandum in support of its motion for leave to file a Rule 60(b) motion.

FACTUAL BACKGROUND

This case arises out of an alleged September 19, 2022 injury to Plaintiff Linda Acker when a piece of cabinet allegedly fell on her foot, for which she sued Westgate Myrtle Beach, LLC (“Westgate”) on June 11, 2024. (Am. Ans. & Third-Party Compl. ¶ 61.) Westgate had previously entered into a November 6, 2019 Contract for Services with Home Depot to replace cabinet doors,

drawers, and hardware in fifty-four units, including the unit where the injury allegedly occurred. (Am. Ans. & Third-Party Compl. ¶¶ 54, 59, 60.)

On April 9, 2025, Westgate filed a Third-Party Summons and Third-Party Complaint against Home Depot asserting claims sounding in indemnity, including breach of contract, negligence, contractual indemnity, equitable indemnity, breach of the covenant of good faith and fair dealing, and contribution. (Am. Ans. & Third-Party Compl. ¶¶ 87-124.) Although Westgate’s agent purportedly served the Third-Party Summons and Complaint, Home Depot has no record of receiving those documents. Westgate settled with Ms. Acker for \$13,500.00 on or about March 27, 2025. An Order for Default was entered against Home Depot on June 25, 2025. (Order for Default.) Westgate noticed a default damages hearing for February 9, 2026, and served notice on Home Depot’s agent on February 4, 2026; that transmittal to Home Depot constituted Home Depot’s first actual notice of the lawsuit. Following the February 9, 2026 hearing, the court entered judgment on February 13, 2026, awarding Westgate \$144,650.97. (Form 4 Order; Order Granting Third-Party Plaintiff Westgate Myrtle Beach, LLC’s Mot. for Default J.) Westgate’s counsel later provided a breakdown of the awarded damages: \$28,915.26 in legal fees, expenses, and costs; \$13,500.00 for the settlement with Ms. Acker; and \$102,235.71 as “contract amount for negligently performed construction and negligently installed materials.” (Bach Aff. ¶ 5.) In its Third-Party Complaint, Westgate sought damages due to the board installation in Plaintiff’s unit, not defects in all fifty-four units. (Am. Ans. & Third-Party Complaint ¶¶ 83, 90.c, 100, 113, 115.)

ARGUMENT

Rule 60(b), SCRCP, provides that a default judgment should be set aside when (a) it is the result of mistake, inadvertence, surprise, or excusable neglect; (b) the opposing party has acted with fraud, misrepresentation, or other misconduct; (c) the judgment at issue is void; and (d) it is

not equitable that the judgment should have prospective application. Rule 60(b)(1), (3)-(5), SCRPC. Here, these grounds apply to set aside the order entering default judgment against Home Depot.

First, through either a mistake in fact or potential representations by Westgate, the lower court awarded damages against Home Depot as if Plaintiff alleged that all fifty-four units—rather than just one—caused her damage. Because South Carolina law provides that appropriate damages for a breach of contract action are those damages for “actual loss suffered by the nonbreaching party as a result of the breach,” Westgate’s appropriate damages for this cause of action are those reflecting actual loss from the single alleged actual defect—not potential defects in all fifty-four units. *Shem Creek Dev. Grp., LLC v. Town of Mount Pleasant*, No. 2024-000636, 2025 WL 3158874, at *3 (Nov. 12, 2025) (listing cases). Moreover, because such a judgment is inaccurate pursuant to the facts alleged, the prospective application of such a judgment against Home Depot is likewise inequitable.

In addition, the judgment issued by the lower court is void, in whole or in part. First, to the extent that the lower court granted default judgment pursuant to Westgate’s negligence cause of action, such judgment is contrary to South Carolina law because Westgate cannot proceed with a negligence cause of action that is based on an alleged breach of contract. *Carroll v. Isle of Palms Pest Control, Inc.*, 446 S.C. 177, 187–88, 918 S.E.2d 532, 537 (2025) (“[T]he mere failure to perform a contract, without more, cannot support a tort action. . . . The cause of action for failing to perform or negligently performing a contract is breach of contract.”) Here, Westgate’s negligence cause of action repeats alleged duties set forth in its breach of contract cause of action and seeks damages for actions arising from Home Depot’s performance of the Contract for

Services. Accordingly, Westgate's negligence cause of action is not legally viable, and any judgment awarding damages based on negligence is void.

Finally, it appears that, through mistake or inadvertence, Home Depot did not receive the Summons and Complaint. Home Depot is still investigating whether such mistake or inadvertence occurred by lack of notice from its agent for service of process, Corporation Service Company, or through another component of the system whereby Home Depot receives notice of the service of a lawsuit.

Therefore, Home Depot should be granted leave to file a motion to set aside default judgment pursuant to Rule 60(b). Moreover, judicial efficiency promotes staying this appeal during the pendency of the Rule 60(b) motion—if the lower court grants the motion, this appeal will be moot, and if the lower court denies the motion, Home Depot will seek to appeal such denial and consolidate it with this appeal.

CONCLUSION

For the foregoing reasons, Home Depot U.S.A., Inc. respectfully requests that this Court grant it leave to file a Rule 60(b) motion in the lower court and stay this appeal pending resolution of that motion

Signature page follows

Respectfully submitted,

s/Adam C. Bach

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PROOF OF SERVICE

I certify that I have served the Motion for Leave to File Rule 60(b) Motion and the Memorandum in Support of Motion for Leave to File Rule 60(b) Motion, with attachments, on the Respondent, Westgate Myrtle Beach, LLC, by providing the same via electronic service to their attorneys of record at their primary e-mail address in the Attorney Information System, listed as follows:

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