72137

PETITION FOR REHEARING

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2012-CP-40-04857

Lawrence Terry,

Appellant,

v.

Allen University, Respondent.

PETITION FOR REHEARING

Lawrence Terry
Post Office Box 24138
Columbia, South Carolina 29224
(803) 414-0760
Appellant, Pro Se

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STATEMENT OF ISSUES FOR REHEARING

1. THE FIRST ARGUMENT OF THE APPEALANT'S BRIEF WAS MISAPPREHENDED BY THE COURT DURING THE WRITING OF IT'S OPINION

ARGUMENTS

I. THE FIRST ARGUMENT OF THE APPEALANT'S BRIEF WAS MISAPPREHENDED BY THE COURT DURING THE WRITING OF ITS OPINION.

Bulletin number one states, "As to whether the trial court erred in granting Allen University's motion to dismiss:" was misinterpreted. Allen University did not have a motion to dismiss on the docket when the trial court rendered its Order. In this Appeals Court's Order dated August 9, 2013, it was stated that. "We find the motions Respondent filed with the circuit court which were misfiled remained misplaced in another case file until after the circuit court issued its orders dismissing Appellant's action and denying reconsideration. Accordingly, we find those motions were "not presented to the lower court" and may not properly be included in either the Record on Appeal or Supplemental Record on Appeal in this matter." This Appeals Court further stated in its Order dated September 24, 2013 that, "However, because the misfiled motions were stricken from the Record on Appeal by an order dated August 9, 2013, all references to the misfiled motions shall be omitted from Respondent's initial Brief. Accordingly, Respondent shall serve and file an Amended Initial Brief omitting any reference to the misfiled motions within thirty days." Both Orders are attached. Those Orders would imply that Allen University did not

file anything on the lower court docket in reply to the Amended Complaint and the Initial Requests for Admissions, deeming them all admitted. Therefore Allen University admitted to Negligence and Fraud.

The Opinion also references "Res judicata" and "three-year statute of limitations". As I stated in my Final Brief, the trial court's order only had two sentences with one of them instructing me that I may Appeal the order. So I did timely file my notice of appeal. It did not state that it was based on Res Judicata as the previous complaints were based on "breach of contact", as stated in the proposed order written by Allen University and signed by the lower court judge, plus the instant complaint is based on multiple negligent acts by Allen University. The initial issues were discovered in December 2009. That would make the claims void after December 2012. With the instant complaint being first filed in July 2012 and the amended complaint filed in August 2012 they both were well within the 3 year statute of limitations. The motion for reconsideration included newly discovered evidence of negligence and so did both complaints. All of the previous cases were dismissed without prejudice and I chose to amend/refile instead of appealing.

CONCLUSION

This case involves my educational background and ability to earn a living. The Order of Dismissal from the lower court only stated two plain and clear sentences, "THIS CAUSE OF ACTION IS DISMISSED WITH PREJUDICE. PLAINTIFF MAY APPEAL BUT MAY NOT FILE ANOTHER CAUSE OF ACTION REGARDING THIS MATTER WITH THIS COURT."

The Order is again attached. I did what the Order stated I could do which was Appeal. That same judge ruled on the previous case and if it were barred by any other means, he would have stated or even reiterated it after I filed my motion for reconsideration. I filed an affidavit of default six days prior to the Order of dismissal thereby voiding said Order. Based on Thynes v. Lloyd, 294 S.C. 152, 153-54, 363 S.E. 2d 122, 123 (Ct.App.1987) (holding that "whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit" of the moving party), attached. The Honorable presiding Judge A.J. Cureton even ruled in a similar case citing Thynes v. Lloyd in Stark Truss Co., Inc., v. Superior Construction Corporation and national Fire Insurance Company of Hartford, attached. There was not a Motion To Dismiss by Allen University for the trial court to err in granting nor did the Appellant state that as one of his issues.

For the reasons stated, this Court should rehear its recent Opinion.

Respectfully submitted,

May 8, 2014

Lawrence Terry
Post Office Box 24138
Columbia, South Carolina 29224
(803) 414-0760
Appellant, Pro Se

The South Carolina Court of Appeals

Lawrence Terry, Appellant,

v.

Allen University, Respondent.

Appellate Case No. 2013-000340

ORDER

Appellant has filed motions seeking judicial notice, contempt and sanctions, and an extension of time and clarification. Respondent has filed returns to the latter two motions, and Appellant has filed a reply to the last motion. After careful consideration, Appellant's Motion for Judicial Notice and Motion for Contempt and Sanctions are hereby denied.

We construe Appellant's Motion for Clarification as a motion to strike portions of Respondent's Designation of Matter and Initial Brief. We find the motions Respondent filed with the circuit court which were misfiled remained misplaced in another case file until after the circuit court issued its orders dismissing Appellant's action and denying reconsideration. Accordingly, we find those motions were "not presented to the lower court" and may not properly be included in either the Record on Appeal or a Supplemental Record on Appeal in this matter. *See* Rule 210(c), SCACR ("The Record shall not . . . include matter which was not presented to the lower court or tribunal."); *see also* Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal."); Rule 212, SCACR (requiring either written consent of all attorneys of record or leave of court to file a supplemental record on appeal).

Appellant's Motion for Extension of Time is hereby granted. Appellant shall prepare and file the record on appeal within fifteen days from the date hereof.

IT IS SO ORDERED.

Joseph W Cureton AJ
FOR THE COURT

Columbia, South Carolina

cc:
Lawrence Terry
Debbie Whittle Durban

FILED
8/9/13

The South Carolina Court of Appeals

Lawrence Terry, Appellant,

v.

Allen University, Respondent.

Appellate Case No. 2013-000340

ORDER

Appellant has filed a motion seeking to strike Respondent's Initial Brief, in whole or in part, and for "clarification," asking this court to instruct the circuit court to remove certain motions from case file #2012-CP-40-04857.. Respondent has filed a return to Appellant's motion, and Appellant has filed a reply.

After careful consideration, we deny Appellant's motion. However, because the misfiled motions were stricken from the Record on Appeal by an order dated August 9, 2013, all references to the misfiled motions shall be omitted from Respondent's Initial Brief. Accordingly, Respondent shall serve and file an Amended Initial Brief omitting any reference to the misfiled motions within thirty days.

Joseph M. Cureton AJ
FOR THE COURT

Columbia, South Carolina

FILED
24 Sept 2013

cc: Lawrence Terry
Debbie Whittle Durban

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lawrence Terry, Appellant,

v.

Allen University, Respondent.

Appellate Case No. 2013-000340

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Unpublished Opinion No. 2014-UP-192
Submitted April 1, 2014 – Filed May 7, 2014

AFFIRMED

Lawrence Terry, of Columbia, pro se.

Debbie Whittle Durban, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Respondent.

PER CURIAM: Lawrence Terry appeals the trial court's order dismissing his causes of action against Allen University, arguing (1) the trial court erred in dismissing the case with prejudice, (2) the trial court erred in failing to give a clear explanation of its order of dismissal, (3) his due process rights were violated, (4) the trial court erred in failing to give notice and hold a hearing before making its

final ruling, and (5) the trial court erred in failing to enter default judgment in his favor.[1] We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in granting Allen University's motion to dismiss: *Prof'l Bankers Corp. v. Floyd*, 285 S.C. 607, 613, 331 S.E.2d 362, 365 (Ct. App. 1985) ("An appealable order from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter.").[2]

2. As to whether the trial court violated Terry's right to procedural due process: *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) ("Due process does not . . . require that the defendant in every civil case actually have a hearing on the merits."); *id.* (explaining that all the Due Process Clause requires is an opportunity for a "hearing appropriate to the nature of the case" at a "meaningful time and in a meaningful manner" (internal quotation marks omitted)).

3. As to whether the trial court erred in denying Terry's motion for default judgment: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address appellant's remaining issues when its determination of a prior issue is dispositive).

AFFIRMED.[3]

HUFF, THOMAS, and GEATHERS, JJ., concur.

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[1] We have combined issues one and two into a single issue and issues three and four into a single issue.

[2] Even if this issue was not barred by the law of the case doctrine, this argument would still be without merit. *See Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties."); S.C. Code Ann. § 15-3-530(5) (2005) (setting a three-year statute of limitations for claims of negligence and intentional infliction of emotional distress).

[3] We decide this case without oral argument pursuant to Rule 215, SCACR.

Exhibit A

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012-CP-40-04857

Lawrence Terry
PLAINTIFF(S)

Allen University
DEFENDANT(S)

RICHLAND COUNTY FILED
2012 SEP 17 PM 1:54
JEANETTE W. WALDROP C.C.P. & G.S.

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☒ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

THIS CAUSE OF ACTION IS DISMISSED WITH PREJUDICE. PLAINTIFF MAY APPEAL BUT MAY NOT FILE ANOTHER CAUSE OF ACTION REGARDING THIS MATTER WITH THIS COURT.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** 2061 **Date** 9/5/12

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 17 day of Sept, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court Jeanette W. Waldrop

SCRCP Form 4C (10/2011)

SCANNED

LETTER TO CLERK OF LOWER COURT

Supplemental Citations

September 19, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court for SC Appeals Court
1015 Sumter Street, Columbia, South Carolina 29201
RE: Allen University, Respondent, v. Lawrence Terry, Appellant, Case No. 2012-CP-40-04857 Appellant Case No. 2013-000340

Dear Jenny Abbott Kitchings:

This letter comes to you pursuant Rule 208(b)(7), Supplemental Citations. Although I have already mentioned the below citation in previously filed "motions", I just wanted to confirm that they would be considered with the briefs. This citation is in regards to Argument #1 and Issues #3 and #4 in the brief(s). I was recently informed they would not unless submitted under Rule 208(b)(7).

Entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party. See Thynes v. Lloyd, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct.App.1987) (holding that "whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit" of the moving party). The filed Affidavit of Default on 9/11/2012 was six days before the abrupt 9/17/2012 Order to Dismiss. The Amended Complaint contained substantive changes from the Original and therefore the Respondent had a duty to respond, but did not.

Sincerely,

Lawrence Terry
Post Office Box 24138
Columbia, South Carolina 29224
(803) 414-0760
Appellant, Pro Se

cc: Debbie W. Durban
Post Office Box 11070
Columbia, South Carolina 29211
(803) 255-9465
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stark Truss Co., Inc., Respondent,

v.

Superior Construction Corporation and National Fire Insurance Company of Hartford, Appellants.

Appeal From Laurens County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3859
Submitted March 8, 2004 – Filed August 16, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

A. Cruickshanks, IV, of Clinton; and Steele B. Windle, III, of Charlotte, for Appellants.

Paul B. Zion, of Spartanburg, for Respondent.

CURETON, A.J.: Superior Construction Corporation and National Fire Insurance Company of Hartford (collectively, "Appellants") appeal the circuit court's order denying their motion to set aside an entry of default judgment and dismissing their counterclaims against Stark Truss Co., Inc. We affirm in part, reverse in part and remand.

FACTS

In 2001, Superior signed a purchase order agreement under which Stark Truss was to manufacture and deliver all the roof trusses Superior needed to complete a school construction project for the amount of $95,861. National issued Superior a labor and materials payment bond on the project. A dispute arose between Superior and Stark Truss concerning the condition of the trusses provided. Superior refused to pay in full for

the materials, and Stark Truss refused to deliver the remaining materials without full payment. Superior obtained replacement materials from another supplier. In June 2002, Stark Truss filed a $49,799 payment bond claim with National for the remaining balance of the purchase order price. National denied Stark Truss's claim on the basis of the existence of a bona fide dispute.

On July 12, 2002, Stark Truss filed a summons and complaint against Appellants for the remaining balance plus interest. The summons and complaint were served upon Superior on July 24 and upon National on July 26. National gave its defense in the matter to Superior on August 5, 2002, apparently intending for Superior to answer on its behalf.

Superior did not send a copy of Stark Truss's summons and complaint or National's suit papers to its attorneys until September 5, 2002. Upon receipt that same morning, Appellants' attorneys immediately telephoned Stark Truss's attorneys and requested an extension of time in which to file an answer. Later that day, Appellants' attorneys were contacted by one of Stark Truss's attorneys and informed that default proceedings had already begun, with the motion for entry of default judgment and affidavit of default being mailed that morning prior to the initial call. Stark Truss denied the request for an extension.

The Appellants' joint answer and counterclaim for damages in excess of $75,000 was prepared, filed with the court on September 6, 2002, and served on Stark Truss. Stark Truss's affidavit of default, motion for entry of default judgment, and a proposed order directing entry of default judgment, dated September 5, 2002, were received and filed five days later on September 11, 2002. Based on Stark Truss's motion, the court issued an order, without a hearing, simultaneously granting entry of default and a default judgment against Appellants.

On September 12, Stark Truss served on Appellants' attorneys its motion to dismiss Appellants' counterclaims, asserting the compulsory claims were barred by the default judgment. Appellants filed a "Motion to Set Aside Entry of Default Judgment" on October 22, 2002, in which Appellants argued both the entry of default and default judgment should be set aside. At the motions hearing, Appellants argued that because they filed an answer and counterclaim prior to the court's receipt of the motion for entry of default and default judgment, they had appeared in the matter, rendering the facts supporting the motion for default judgment inaccurate. Appellants also asserted that because they had appeared, entry of default was improper and required the entry of default judgment to be set aside. Appellants' attorney informed the circuit court that there was no good explanation for not filing an answer within thirty days, other than the fact that Superior's president was "struggling with some depression and a lot of things slipped through his fingers."

On November 15, 2002, the circuit court issued an order holding that Appellants had failed to present sufficient proof of either "good cause" for relief from default under Rule 55(c), SCRCP, or "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b), SCRCP sufficient to vacate the entry of default judgment. Since the counterclaims were compulsory and the answer was not timely filed, the court also granted Stark Truss's motion to dismiss all counterclaims. This appeal followed.

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989); Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989). This decision will not be reversed absent an abuse of that discretion. Thompson, 299 S.C. at 119, 382 S.E.2d at 902-903; In Re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). An abuse of discretion occurs when the order was controlled by an error of law or when the order is without evidentiary support. Id.

LAW / ANALYSIS

A.

Appellants argue the circuit court erred in entering default and in refusing to set aside the entry of default because they appeared in the matter by filing their answer and counterclaim prior to the filing of the motion for entry of default. We disagree.

A determination in this case requires an evaluation of Rule 55, SCRCP regarding default judgments. When interpreting a court rule, "we apply the same rules of construction used in interpreting statutes. Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning.

Unless an extension is granted, a defendant must serve his answer within thirty days "after the service of the complaint upon him." Rule 12(a), SCRCP. If a party has failed to "plead or otherwise defend **[1]** as provided by [the South Carolina Rules of Civil Procedure] and that fact is made to appear by affidavit or otherwise," the clerk of court will enter default. Rule 55(a), SCRCP. Entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party. See Thynes v. Lloyd, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct. App. 1987) (holding that "whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit" of the moving party).

Appellants initially argue the circuit court erred in entering default. Although Appellants' late answer amounted to a "pleading" filed prior to entry of default, it did not comply with the time requirements of Rule 12(a), SCRCP. Appellants clearly failed to file an answer within thirty days of service of the summons and complaint upon them and they were technically in default. Thus, Appellants' answer was not a valid pleading or defense "as provided by" the Rules of Civil Procedure. A plain reading of Rule 55(a) allows entry of default when a pleading or defense is asserted in a manner noncompliant with the Rules of Civil Procedure. To hold otherwise would render the requirements in Rule 12(a), SCRCP, meaningless. We find the court's entry of default was proper.

Appellants point to cases from other jurisdictions holding that entry of default is improper if even a late answer is filed prior to entry of default. See, e.g., Moore v. Sullivan, 473 S.E.2d 659, 660 (N.C. Ct. App. 1996) ("After an answer has been filed, even if the answer is untimely filed, a default may not be entered."). That is not the current law in this state.

Further, filing a late answer would not alter the fact that Appellants were in default, especially if entering default is a ministerial act to be automatically performed once an affidavit shows the defendant has failed to comply with the requirements of the rules. Thynes, 294 S.C. at 153-54, 363 S.E.2d at 123.

Appellants also argue the circuit court erred in denying their motion to set aside the entry of default. We disagree.

Rule 55(c), SCRCP, allows the circuit court to set aside an entry of default "for good cause shown." Rule 55(c), SCRCP. "In deciding whether good cause exists, the trial court should consider the following factors: (1) the timing of the defendant's motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Pilgrim v. Miller, 350 S.C. 637, 640, 567 S.E.2d 527, 528 (Ct. App. 2002), cert. dismissed (April 25, 2003). Whether to grant relief from entry of default is a decision within the sound discretion of the circuit court. Wham, 298 S.C. at 465, 381 S.E.2d at 502. In reviewing the court's exercise of discretion, the issue before the appellate court is not whether it believes good cause existed to set aside the default, "but rather, whether the [trial judge's] determination is supportable by the evidence and not controlled by an error of law." Pilgrim, 350 S.C. at 640-41, 567 S.E.2d at 528.

Appellants' motion for relief from entry of default was filed over a month after the circuit court entered default judgment. They argued that the entry of default should be set aside because they appeared prior to entry of default. The attorney for Appellants informed the circuit court that Superior's president had no good reason, other than depression, for failing to act when he was served with the summons and complaint. The attorney did not give any reason for National's failure to serve and file its answer to the summons and complaint. Based on these facts, we find there was evidence to support the circuit court's refusal to set aside the entry of default.

B.

Appellants argue that because they filed a late answer, they made an "appearance" in the action and entry of default judgment was improper. They further argue that the circuit court erred in refusing to set aside the default judgment. We agree.

Rule 55(b)(1), SCRCP, entitled "Cases Involving Liquidated Damages or Sum Certain," provides that where the amount sought is a sum certain and the defaulting party has not made an appearance, the judge may enter default judgment for the amount sought without holding a hearing. Rule 55(b)(2), entitled "All Other Cases," provides, in pertinent part, that a party who has "appeared" in the action is entitled to notice and a hearing before judgment by default may be entered. A party may seek relief from a default judgment for mistake, inadvertence, newly discovered evidence, fraud or other misconduct, where the judgment is void, or where the judgment has been satisfied. Rule 60(b), SCRCP.

Whether Appellants' late answer amounted to an "appearance" in this case is a critical question. This court has previously discussed whether a late filing constitutes an "appearance." In Dymon v. Hyman, 305 S.C. 170, 406 S.E.2d 388 (Ct. App. 1991), the defendant filed and served his answer late, and the plaintiff acknowledged service of the late answer. However, the plaintiff informed the defendant that he considered the defendant to be in default. Two months later, the plaintiff sought and obtained a judgment

by default without giving notice to the defendant. The defendant learned of the default judgment months later, and the circuit court denied the motion for relief from judgment. Interpreting the prior version of Rule 55(b)(1), **[2]** this court held that the defendant's late answer was an "appearance" and thus the defendant was entitled to notice and a hearing on the motion for default judgment. Because no notice was given, this court reversed the circuit court's refusal to set aside the void judgment. Dymon, 305 S.C. at 171, 406 S.E.2d at 389.

Appellants in the present case clearly filed their answer and counterclaims more than thirty days after they were served with the summons and complaint. However, as in Dymon, Appellants' late answer, filed before Stark Truss's motions were received by the circuit court, constituted an appearance in the matter. Appellants were entitled to notice and a hearing before judgment by default was entered. Dymon, 305 S.C. at 171-72, 406 S.E.2d at 389. Because no notice was given and no hearing was held, the default judgment was void. The circuit court erred in refusing to relieve Appellants from the void judgment. Id.; see also Rule 60(b)(4), SCRCP ("On 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 [where] . . . the judgment is void.").

C.

Appellants assert the circuit court erred in granting Stark Truss's motion to dismiss their counterclaims as compulsory. We disagree.

The circuit court found, and Appellants do not dispute, that the counterclaims asserted with the late answer were compulsory. Rule 13(a), SCRCP, provides that compulsory counterclaims must be asserted along with a responsive pleading. As Appellants were in default and failed to timely file and serve their answer, they also failed to timely assert their counterclaims. In this instance, we find the circuit court did not err in dismissing the Appellants' counterclaims.

CONCLUSION

Appellants failed to timely serve and file their answer and compulsory counterclaims on Stark Truss pursuant to the Rules of Civil Procedure. Thus, the entry of default was proper; the circuit court's refusal to set aside the entry of default was supported by the evidence, and the dismissal of Appellants' compulsory counterclaims was proper. However, as Appellants made an appearance in this action by filing a late answer, they were entitled to notice before entry of default judgment. The circuit court's refusal to set aside the void default judgment was error. We reverse the refusal to set aside the default judgment and remand for proceedings consistent with this opinion.

For the foregoing reasons, the decision of the circuit court is

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

HUFF and STILWELL, JJ., concur.

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[1] "The words 'otherwise defend' refer to the interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading." 10A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2682, at 16-17 (3rd ed. 1989).

[2] The prior version of Rule 55(b)(1) is nearly identical to the current version of Rule 55(b)(2). The rules were amended in 1998 to add the version of Rule 55(b)(1) concerning default judgments with liquidated damages and where the defaulting party has failed to appear. The former Rule 55(b)(1) became Rule 55(b)(2). See Rule 55, SCRCP Notes to 1998 Amendments.

PROOF OF SERVICE OF PETITION FOR REHEARING

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2012-CP-40-04857

Lawrence Terry,

Appellant,

v.

Allen University, Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Allen University by depositing a copy of it in the United States Mail, postage prepaid, on May 8, 2014, addressed to his attorney of record, Debbie W. Durban, Post Office Box 11070 Columbia, South Carolina 29211, Attorney for Respondent.

May 8, 2014

Lawrence Terry
Post Office Box 24138
Columbia, South Carolina 29224
(803) 414-0760
Appellant, Pro Se