

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No.: 2014-001215

Larry E. Koon and Allen Lee Koon by and through his attorney in fact, Larry E. Koon, Respondents,

v.

Thomas Jackson Construction Inc, Appellant.

REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in its Initial Brief. The factual history discussed below is limited to reply to the issues raised in the Respondents' Statement of the Case.

Respondent indicated that the instant matter stems from the judgment entered against Allen Lee Koon, in his individual capacity, as a sanction for repeated discovery abuses during the course of supplemental proceedings in Civil Action No. 2006-CP-36-395 (the "original action"). The Special Referee issued such a sanction under Rule 37(b) (2) based upon a finding that Allen Lee Koon's actions and failures as they pertained to discovery issues required numerous Motions to Compel, extreme and prejudicial delays, and great financial expense. (Record p. 149). Although never explicitly defining Allen Lee Koon as an officer, director, or managing agent of Lake Murray Tree, Inc., the Special Referee detailed a list of transactions indicating that Lake Murray Tree, Inc. was little more than the alter ego of Allen Lee Koon.¹

Despite Respondents' contention that the "Relief from Judgment S.C. Civ. P. Rule. 60(b)(4)" "never mentioned the judgment entered personally against Allen Koon²," the language on the face of the document states that "Lake Murray Tree, Inc., by and through Allen Lee Koon, **and Allen Lee Koon, alleged defendants...**" [emphasis added] were attempting to set aside the Special Referee's Judgment of August 6, 2007. Although this document mentions only the judgment pending against Lake Murray Tree, Inc., it is noteworthy that Allen Lee Koon filed this document approximately one month after the

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"[Appellant] proved that many of the debits from [Lake Murray Tree, Inc.]'s bank accounts were for personal items or services... In addition, [Lake Murray Tree, Inc.] transferred several pieces of equipment to Mr. Koon with no consideration being paid..." (Order Granting Plaintiff's Motion for Contempt Order and Sanction, p. 3).

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See Initial Brief of Respondents, p. 3.

filing of the Special Referee's above-discussed Contempt Order and nearly three years after the August 2007 Judgment against Lake Murray Tree, Inc.

Two days after being charged and arrested in connection with the murder of his late wife, Allen Lee Koon executed a Power of Attorney to his father, Larry Koon. Nearly six months after his son's arrest and incarceration, Larry Koon acquired an interest in a 23.194 acre parcel. Despite his attempt to set aside the judgments against both himself and Lake Murray Tree, Inc., Allen Lee Koon allegedly told his father, Larry Koon, that the property described above was unencumbered. Larry Koon relied upon his son's representation rather than electing to perform a title search which would have uncovered the Judgment lien attached to the property.

On February 26, 2014, four months after acknowledging the Judgment against Allen Lee Koon and releasing the property described above from Judgment, and four years after the filing of the Order Granting Plaintiff's Motion for Contempt Order and Sanctions, Respondents filed the instant action seeking to have the Judgment against Allen Lee Koon, in his individual capacity, declared void for lack of personal jurisdiction.

ARGUMENT

At issue is whether the trial court in the instant action erred in granting Respondents' Motion for Summary Judgment or, conversely, erred in failing to grant Appellant's Motion to Dismiss. For the reasons discussed in Appellant's Initial Brief, the trial court committed reversible error in granting Respondents' Motion for Summary Judgment by incorrectly ruling that: 1) the Special Referee's issue of a personal judgment against Allen Lee Koon, in his individual capacity, was void for lack of personal jurisdiction; and 2) that the Special Referee's Sanction pursuant to SCRCP 37 was improper. Further, the trial court erred in failing to grant Appellant's Motion to Dismiss on the ground that Respondent's action to set aside the Special Referee's judgment was not brought within a "reasonable time" for purposes of SCRCP 60(b).

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE SPECIAL REFEREE'S JUDGMENT AGAINST ALLEN LEE KOON, IN HIS INDIVIDUAL CAPACITY, WAS NOT VOID FOR LACK OF PERSONAL JURISDICTION AND THE SPECIAL REFEREE'S SANCTION RULE 37(b) SANCTION WAS PROPER.

As discussed at length in Appellant's Initial Brief, the trial court erred in granting Respondents' Motion for Summary Judgment based on the erroneous holdings that the Special Referee did not have personal jurisdiction over Allen Lee Koon and further erred in finding that the Special Referee's sanction under Rule 37, SCRPC was improper. Rather than revisiting each argument set forth in Appellant's Initial Brief, Appellant will respond to Respondents' assertions contained in their Initial Brief. Further, Appellant realleges and reincorporates each argument contained in its Initial Brief into this Reply Brief.

A. THE SPECIAL REFEREE WAS IMBUED WITH PERSONAL JURISDICTION OVER ALLEN LEE KOON IN HIS INDIVIDUAL CAPACITY.

Respondents argue the trial court was correct in finding that the Special Referee did not possess personal jurisdiction over Allen Lee Koon in his individual capacity on two primary grounds: 1) There was no question of fact as to whether Allen Lee Koon ever made a voluntary appearance; and 2) The Special Referee abused his discretion by committing the error of issuing an unauthorized sanction. Although each of Respondents' argument must fail, Appellant will briefly address each issue in order.

1. Allen Lee Koon Made a Voluntary Appearance before the Special Referee.

Respondents first argue that the Special Referee did not attain personal jurisdiction over Allen Lee Koon in his individual capacity because Allen Lee Koon was never served with a Summons or Rule to Show Cause. In making this assertion, Respondents cite Thornton v. Alford, 274 S.C. 1, 260 S.E.2d (1979) and Ex Parte S.C. Dept. of Rev. v. McClure, 350 S.C. 404, 566 S.E.2d 196 (Ct. App. 2002) for the

proposition that a court cannot attain personal jurisdiction absent service of a Summons or Rule to Show Cause as a matter of law. (Initial Brief of Respondents, pp. 7-8). Respondents next assert that Appellant failed to produce any evidence that a Summons or Rule to show Cause was ever served upon Allen Lee Koon or his counsel. (Id. at pg. 9).

Although correct in their assertion that Allen Lee Koon was served with neither a Summons nor Rule to Show Cause, Respondents are incorrect in their assertion that a Court cannot otherwise attain personal jurisdiction over an individual. Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance. Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 337, 644 S.E. 2d 783, 786 (Ct. App. 2007).

For the sake of brevity, Appellant reincorporates and realleges the arguments pertaining to voluntary appearance contained in its Initial Brief. Even though Respondents attempt to argue that the Special Referee could have never obtained personal jurisdiction over Allen Lee Koon, individually, as Mr. Koon was never served with a Summons or Rule to Show Cause, this argument must fail because Mr. Koon voluntarily appeared and subjected himself to the court's jurisdiction as discussed at length in Appellant's Initial Brief.

2. The Issue of Voluntary Appearance was preserved for review.

Respondent initially contends that Appellant failed to preserve the issue of voluntary appearance for the Court's review. Respondent has never contended that the Special Referee lacked personal jurisdiction over Allen Lee Koon in his individual capacity. Rather, Respondent raised the issues of personal jurisdiction. (See Transcript of Record, p. 13:3-6, April 9, 2014) ("So my argument is basically this, he was never a party, Mr. Koon, Jr., Allen Koon was never a party to the 2006 case therefore no

judgment could be entered against him in that case because the Court lacked personal jurisdiction.”) Appellant’s counsel, in discussing Allen Lee Koon’s Motion to Set Aside, stated that “So it seems to me that this motion makes it clear that he was aware that he was acting on behalf of Lake Murray and on behalf of himself.” Id. at p. 18:2-4. Further, Appellant argued that Allen Lee Koon fell under the jurisdiction of the Special Referee incident to the Special Referee’s ability to sanction Mr. Koon for discovery abuses pursuant to Rule 37(b), SCRC³. See Id., pp. 18:24 – 19:5

“... Rule 37 also allows the Judge to sanction ... persons who have been designated under Rule 30 or Rule 31 which is [sic] the rules that allow for depositions. So certainly there is authority in Rule 37 to sanction individuals who have been served notice of depositions and failed to comply. And they are not parties to the action.”

Respondents cite Trivelas v. S.C. Dept. of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001) for the proposition that where a party has not raised issues to the court, the issue was not addressed in the court’s order, and no post trial motions were raised on the issue, the issue is not preserved for appeal. However, as shown above, both parties raised the issue of whether the Special Referee had jurisdiction over Allen Lee Koon, in his individual capacity. Further, the trial court discussed at length and ruled upon the issue of personal jurisdiction in the Order from which Appellant appeals. Finally, as the issue of personal jurisdiction was both raised by the parties and ruled upon by the trial court, Appellant was under no obligation to file any post-trial motions. See Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001) (Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not ruled upon.) Accordingly, Appellant’s arguments regarding personal jurisdiction via voluntary appearance are preserved for the Court’s review.

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Respondent incorporates by reference it’s full argument of the propriety of a sanction pursuant to Rule 37, SCRC³ contained in Appellant’s Initial Brief.

B. THE SPECIAL REFEREE'S SANCTION PURSUANT TO RULE 37(B),
SCRCP WAS PROPER.

Rule 37(b)(2), SCRCP provides that if a party or an officer, director, or managing agent of a party fails to obey an order to provide or permit discovery, the court in which the action is pending may make such orders in regard to the failure as are just including striking out pleadings or parts thereof or rendering a judgment by default against the disobedient party.

Respondents take the position that the application of Rule 37(b)(2), SCRCP is limited to sanctioning parties to any given action. (Initial Brief of Respondents, p. 23).

However, the plain language of the Rule states:

“If a party or an officer, director, or managing agent of a party ... fails to obey an order to provide or permit discovery ... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following...” Rule 37(b)(2), SCRCP.

Despite the Respondents' assertion that Rule 37 applies only to parties, nothing in the language of the Rule limits the scope of the Rule to parties to the action. Rather, the Rule describes those who may run afoul of its provisions and imbues the trial court with the authority to make such orders as are just under the circumstances. Although Respondents are correct in their assertion that no court of record has ever upheld a sanction against a non-party officer, director, or managing agent, it is equally true that no court of record has ever invalidated a sanction against a non-party officer, director, or managing agent.

Additionally, Respondents take issue with the language of the Special Referee's issue of sanctions against Allen Lee Koon, in his individual capacity, due to the Special Referee's failure to define Mr. Koon as an “officer,” “director,” or “managing agent.” Respondent is correct that the Special Referee failed to utilize this specific verbiage in describing Allen Lee Koon's role within Lake Murray Tree, Inc. However, the Special

Referee did describe the relationship between Allen Lee Koon and Lake Murray Tree, Inc. to the extent the two entities were not, in fact, one and the same⁴.

Allen Lee Koon exercised control over Lake Murray Tree, Inc. in a manner distinct from that which a stockholder can ordinarily exert over the issuing company. It is undisputed that Allen Lee Koon used Lake Murray Tree, Inc. funds to pay for personal expenses ranging from gambling debts to vacations aboard cruise liners; it is undisputed that Allen Lee Koon transferred title of Lake Murray Tree, Inc. equipment and assets to himself during the pendency of supplemental proceedings; it is further undisputed that the sanctions issued in the original matter stemmed from Allen Lee Koon's actions and failures to act. Further, it is equally undisputed that Mr. Koon attempted to represent Lake Murray Tree, Inc. after relief of counsel. The Special Referee, therefore, had ample information at his disposal to substantiate a finding that Lake Murray Tree, Inc. did not exist separate and apart from Allen Lee Koon. With this in mind, the Special Referee's failure to name Mr. Koon as an "officer," "director," or "managing agent," was, at worst, a semantic one.

Accordingly, in light of Allen Koon's status within Lake Murray Tree, Inc., assuming Lake Murray Tree, Inc. was more than an extension of Allen Lee Koon, and the dearth of case law prohibiting a Special Referee from issuing a sanction against a corporate officer or managing agent, the Special Referee did not commit an abuse of discretion by sanctioning Allen Lee Koon in his individual capacity. As such, Appellant would respectfully request that this Court reverse the trial court's grant of Summary Judgment.

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See (Order Granting Plaintiff's Motion for Contempt Order and Sanction, pp. 3-4).

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO DISMISS BECAUSE RESPONDENTS' ACTION WAS UNTIMELY FOR PURPOSES OF RULE 60(b), SCRPC.

Rule 60(b), SCRPC provides that “the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (4) the judgment is void....” Rule 60(b)(4), SCRPC. However, the Rule requires that the motion shall be made within a reasonable time. Id. At issue is whether Respondent’s filing of the instant matter was within a “reasonable time” for purposes of setting aside the Special Referee’s entry of judgment against Allen Lee Koon in his individual capacity.

Respondents acknowledge that the instant action was not filed until February 26, 2014, nearly 4 years after the filing of the Special Referee’s Order awarding judgment against Allen Lee Koon, in his individual capacity, on February 1, 2010. In light of this 4 year period between entry of judgment and the present action to set the judgment aside, Respondent attempts to set forth an argument that South Carolina law is unsettled as to whether the language “reasonable time” appearing on the face of the Rule even matters. Further, Respondents argue that Allen Lee Koon was unaware of the judgment against him until either late August or early September of 2013, six months before filing the instant actions. However, each of Respondents arguments must fail.

Initially, Respondents acknowledge that the language of Rule 60(b), SCRPC requires that actions to set aside a judgment on the ground that it is void must be brought within a reasonable time. (Initial Brief of Respondents, p. 26). However, Respondents attempt to create the impression that South Carolina Courts are in disagreement as to whether the “reasonable time” language on the face of the Rule applies to judgment which are supposedly void. (Id. at p. 27). In doing so, Respondent cites federal authority based upon the Federal Rules of Civil Procedure, which are disparate from our State

Rules, and cites undisturbed South Carolina precedent upholding the “reasonable time” requirement. Although Respondents contend that “[d]ue to the state of law in [South Carolina State and Federal courts as well as other jurisdictions], it is certainly arguable that the reasonable time requirement should not apply when attacking a void judgment....” (Initial Brief of Respondents, pg. 27). Although an inconvenient truth for Respondents, the “reasonable time” requirement remains firmly in place in the State of South Carolina and, thus, applies to the facts and circumstances of this case.

Despite having established that the “reasonable time” requirement applies to actions to set aside judgments on the grounds that they are void, Respondents next attempt to narrow a 4 year chasm between the filing of the Special Referee’s judgment and that of the instant matter into a 6 month gap. Respondents rely heavily upon the Affidavits of Allen Lee Koon and Larry Eugene Koon in support of the proposition that the parties first became aware of the Special Referee’s Judgment in September and August of 2013, respectively. Id. at pg. 29.

In arguing that the instant matter was filed within a reasonable time, Respondent contends that Allen Lee Koon’s “Relief from Judgment” fails to evince any indication that Allen Lee Koon was aware of the judgment against him.⁵ Id. at pg. 30. Respondents apparently contend that Allen Lee Koon would have sought to set aside the Judgment against himself personally had he known it existed. Id. at pg. 31. However, Appellant contends, as discussed at length in Appellant’s Initial Brief, that Allen Lee Koon was aware of the judgment against him as evidenced by his filing of the “Relief from Judgment” discussed above and in Appellant’s Initial Brief.

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“A mere cursory review of the Relief from Judgment clearly shows that the motion sought to set aside *only* ‘the Judgment against Defendant Lake Murray Tree Inc... Had Allen Koon had notice of a Judgment against him individually, certainly the Relief from Judgment would have sought to have that Judgment set aside as well.”

Although Respondents contend there is “no evidence to the contrary”⁶ that Allen Lee Koon was unaware of the judgment issued against him in his individual capacity, the very language of the Motion itself declares that “Lake Murray Tree, Inc. by and through Allen Lee Koon, *and Allen Lee Koon*, **alleged defendants**, hereby gives the court Notice [sic] that the Judgment against Defendant Lake Murray Tree Inc on August 6, 2007 is void for lack of jurisdiction...” Relief from Judgment S.C. Civ. P. Rule 60(b)(4) [emphasis added]. Appellant has contended at length that such language evinces Allen Lee Koon’s notice that a judgment existed against him in his individual capacity. However, rather than repeating the argument set forth in Appellant’s Initial Brief, Appellant incorporates such arguments in this Reply Brief to the effect that Allen Lee Koon’s actions evince notice of the judgment against him, in his individual capacity, despite Respondents’ arguments to the contrary.

Accordingly, having established in Appellant’s Initial Brief that 4 years between the entry of judgment and action to set aside is an unreasonable amount of time for purpose of Rule 60(b), SCRCF, Appellant respectfully requests that this Court reverse the trial court’s denial of Appellant’s Motion to Dismiss as the trial’s court’s finding that the action was filed within a reasonable time amounted to a reversible error of law.

CONCLUSION

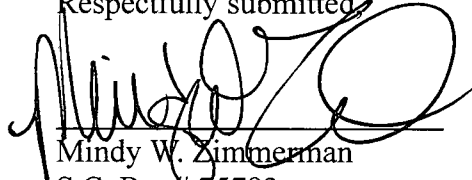
In light of the foregoing and the arguments contained in Appellant’s Initial Brief, Appellant contends that this Court should reverse the trial court’s grant of Respondents Motion for Summary Judgment as its findings that the Special Referee was devoid of personal jurisdiction over Allen Lee Koon, individually, and that the Special Referee’s sanction was not authorized under Rule 37(b), SCRCF amounted to reversible errors of law. Further, Appellant contends that this Court should reverse the trial court’s denial or

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See Initial Brief of Respondents, p. 29.

Appellant's Motion to Dismiss as the trial court committed an error of law in finding that Respondents' action seeking to set the Special Referee's judgment aside was filed within a reasonable time for purposes of Rule 37(b), SCRCP.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mindy W. Zimmerman', written over a horizontal line.

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December 4, 2014

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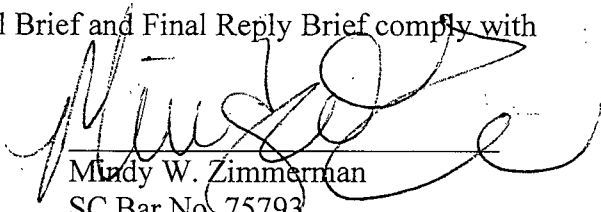
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief and Final Reply Brief comply with
Rule 211(b), SCACR.


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