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SC Court of Appeals

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY

Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Diane S. Goodstein, ... Respondent,

v.

Seal-O-Flex, Inc. And Latitude Construction Services, LLC ..... Defendants,

Of Whom Seal-O-Flex, Inc. is the ..... Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the lower court abused its discretion in denying defendant's Motion to Set Aside the Default Judgment?

STATEMENT OF THE CASE

On July 3, 2012, Plaintiff filed her Summons and Complaint against appellant and Latitude Construction Services, LLC alleging product defect, breach of contract, breach of implied and express warranties and unfair trade practices. *See* Exhibit A to Seal-O-Flex Inc.'s Motion to Set Aside Default Judgment. (R. pp. 17-22) The Summons and Complaint were served on Appellant by mailing; certified mail with restricted delivery. *See* Exhibit 1 to Memorandum in Opposition to Defendant Seal-O-Flex, Inc.'s Motion to set aside Default Judgment ("Memo in Opposition"). (R. p. 45) Wanda Gumbs, who had accepted certified mail earlier from Respondent's Counsel, *see Exhibit 3 to Memo in Opposition* (R. pp. 48-49) (R. p. 71, lines 11-15) represented to the United States Postal Service that she was an agent for Mr. Kaufman, the agent for service of process, and signed for the Summons and Complaint. See Exhibit 1 to Memo in Opposition. (R. p. 45) Ms. Gumbs then delivered the Summons and Complaint to the Appellant. See Order dated July 23, 2014. (R. pp. 8-10) Appellant in its initial brief at page 6 admits it willfully failed to answer or otherwise plead.

An order finding Appellant in default was entered on August 26, 2013. *See* Order dated August 26, 2013. (R. p. 3) This order and notice of the damages hearing was personally served on Appellant through Mr. Kaufman, its agent for service of process, on November 22, 2013. *See* Exhibit 4 to Memo in Opposition. (R. p. 50) The Appellant failed to appear at the damages hearing on December 6, 2013. In fact, the Appellant completely ignored the Court regarding the damages hearing. Respondent presented expert testimony to support her request at the damages hearing and the Court awarded damages on December 6, 2013. *See* Order dated December 6, 2013. (R. pp. 6-7)

Of course Defendant, for the third time, was served with the Court's order awarding damages on January 8, 2014. Appellant at last appeared in the matter for the first time by Motion to Set Aside the Default Judgment by mailing its motion on January 14, 2014.

ARGUMENT

I. SERVICE OF PROCESS WAS PROPERLY MADE, GIVING THE TRIAL COURT PERSONAL JURISDICTION OVER THE DEFENDANT

A. The Standard of Review

The decision whether to set aside default or a default judgment lies solely within the sound discretion of the trial court. *Richardson v. P.V., Inc.,* 383 S.C. 610; 682 S.E. 2d 263 (2009).; *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (S.C. 2005). The trial court's decision on appeal, absent a clear showing of abuse of discretion, will not be disturbed. Id.

The trial court's findings of fact are given a high measure of deference. *In re Luckabaugh*, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (S.C. 2002) (when reviewing action at law, on appeal of case tried without jury, appellate court will not disturb judge's findings of fact "unless found to be without evidence which reasonably supports the judge's findings") (citing *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)); *Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, 374 S.C. 216, 223, 647 S.E.2d 488, 491 (S.C. App. 2007) (on appeal of law action tried without jury, trial court's findings are equivalent to jury's findings in law action).

The rule applies with respect to opening defaults in the trial court, the trial court's decision lying particularly within its discretion. "The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court." *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989) (citing *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987)); *accord In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). This court cannot substitute its judgment for that of the trial judge and will not disturb the trial

court's decision absent a clear showing of abuse of discretion." *Ricks*, 293 S.C. at 374, 360 S.E.2d at 536; *Ammons v. Hood*, 288 S.C. 278, 279, 341 S.E.2d 816, 818 (Ct. App. 1986). *Bage, LLC v. Southeastern Roofing Co. of Spartanburg, Inc.* 373 S.C. 457, 464, 646 S.E.2d 153, 156-57 (S.C. App. 2007).

B. The Trial Court's Decision Finding that Process Was Served Was Supported by the Evidence

The trial court's decision on the facts with respect to default need only be supported by evidence. *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (S.C. 2005) ("An abuse of discretion in setting aside a default judgment occurs ... when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.").

In this case, the trial court found, on the basis of the facts in the record and representations of counsel, that process was properly served on Appellant.

At no time does Appellant maintain it failed to have notice of the Summons and Complaint. (R. p. 74, lines 16-17) (R. p. 78, lines 21-25)At no time does Appellant maintain it failed to have notice of the entry of default and damages hearing. The Appellant simply chose to ignore the court and its processes until it had been served three times, finally with a default judgment.

The standard for service has been stated clearly and consistently. The rule governing service addresses two purposes: it confers personal jurisdiction on the court and it assures the defendant of reasonable notice of the action. S.C. Rules of Civil Procedure 4(d)(3); *Richardson v. P.V., Inc.*, 383 S.C. 610; 682 S.E. 2d 263 (2009). Exacting compliance with the rules governing service on a corporation is not required to effect service of process. *Id.* While Respondent steadfastly maintains she absolutely

complied with the rule, even Appellant's best argument fails in light of the Court's dictates articulated in *Richardson*. *Id.*

In none of the cases cited by Appellant is there even a similarity to the following facts: an employee who repeatedly accepted return receipts and affirmatively represented that she was an agent for the addressee (the agent for Service of Process) and then delivered timely the documents to defendant. Appellant admits that the Summons and Complaint came into the possession of Ms. Ellington and Mr. Kaufman, the two people Appellant says the documents should come. It is nonsensical to believe anything other than Ms. Gumbs signed the receipt and then gave the Summons and Complaint to Mr. Kaufman and/or Ms. Ellington, the appropriate persons to receive the Summons and Complaint. These acts unequivocally indicate strict compliance with Rule 4.

The Court is also instructive in *Richardson* when it states that to determine whether an employee is an authorized agent to accept service on behalf of the employer, the Court must look to the circumstances surrounding the relationship. *Richardson* further holds that the Court is to determine whether the principal knowingly permitted the agent to exercise authority or did the principal hold the agent out as possessing such authority to accept service of process. The answer in the instant case is clearly yes to both.

It is uncontroverted that the Plaintiff showed compliance with Rule 4 and that the burden shifted to Appellant to prove that an unauthorized person accepted the return receipt. S.C. R. Civ. P. 4.

The only argument made by Appellant's is that Ms. Gumbs lacked authority to accept the Summons and Complaint. This is not the proper inquiry. Appellant must demonstrate sufficiently to meet its burden that Ms. Gumbs was unauthorized to sign the

"return receipt". This Appellant cannot do. In fact, Ms. Gumbs had signed a return receipt earlier from the Goodstein Law Firm. *See* Exhibit 3 to Memo in Opposition. (R. pp. 48-49)

What is not contemplated by Rule 4(d)(8) is that a corporate defendant can allow its employee to accept and sign for certified mail return receipt and change its position after reviewing the contents of the mailing. S.C. R. Civ. P. 4(d)(8). That is exactly the position of Appellant. There was and is no challenge to Ms. Gumbs having signed return receipts for correspondence received by the Goodstein Law Firm; just a challenge to her having signed the return receipt when one envelope contained a Summons and Complaint rather than a letter. Appellant's position is incredulous because obviously one cannot know what is in an envelope until it is opened. That is precisely the reason that Rule 4(d)(8) speaks of one being "unauthorized" to sign the *return receipt*. Ms. Gumbs was so authorized and in fact Appellant timely received the Summons and Complaint. *See* Affidavit of Ellington. (R. pp. 26-28) (R. p.64, line 19-p.66, line 1) (R. p.66, line 17-p.67, line 10) (R. p. 69, lines 8-12)

If Appellant's position is correct, service by certified mail restrictive delivery would be eviscerated and a mere trap for well meaning plaintiffs.

Further, as this Court determines whether it was an abuse of discretion for Judge Buckner to find as he did, it bears reviewing the legal import of the representations made by Ms. Gumbs to the United State Postal Service. The undertaking of a mailing by certified mail restricted delivery is a structured process governed by the Federal Code of Regulations. Interference with mailing is punishable by criminal penalties. *See.* 18 USC 1701. When the United States Postal Service is engaged to deliver a mailing by certified

mail restricted delivery, it is in effect guaranteeing to direct deliver only to the addressee or addresses' registered agent. By its regulations, the United States Postal Service may require proof of identification from the addressee or agent. *See* Part 503 Sections 2.0; 3.0; 6.0 of the Domestic Mail Manual of the United States Postal Service ("the manual").

In its brief, Appellant implies in order for one to be an agent authorized to receive certified mail restrictive delivery a postal form completion is required. Appellant's assertion is not correct. Part 503 section 8.3.3. of the manual simply provides that "an addressee who regularly receives restricted delivery may authorize an agent on postal form 3801 or by letter to the postmaster..." [emphasis added]. Typically, these forms are signed when there may be repeated mailings to individuals such as celebrities, the government, or other unique situations where the postmaster can direct those mailings to a designated surrogate. Nothing prohibits an agent for the addressee of certified mail restricted delivery from accepting the mail on his or her behalf so long as the agency is indicated in writing on the form, exactly as Ms. Gumbs did in this instance. *See* Exhibit 1 to Memo in Opposition [emphasis added]. (R. p. 45) (R. p. 68, line 22-p.69, line 25)

Nothing presented even to this date indicates Appellant or Ms. Gumbs has done anything to correct her representation to the United States Postal Service. 18 USC 1701 states "whoever knowingly and intentionally obstructs or retards the passage of the mail or any carrier or conveyance carrying the mail, shall be fined under this title or imprisoned nor more than six months or both".

It is clear that Ms. Gumbs did not violate 18 USC 1701. She represented to the United States Postal Service that she was an agent for the addressee, Mr. Kaufman, because in fact she was. In light of all the information and representations made to Judge

Buckner there was only one reasonable determination to be made. Appellant was properly served and simply ignored all opportunities to participate in the legal process.

II. APPELLANT'S MOTION WAS NOT TIMELY FILED

In response to appellant's second argument that says its motion was timely filed the Respondent would ask the court to first review appellant's memo regarding this issue presented to Judge Buckner. The memo states on page 6 that "it need not show that it is acting with utmost promptness". (R. p. 16) Nowhere does Appellant move for relief from judgment on the basis of excusable neglect. The only basis for alleging this ground is to assure the court that Appellant is in compliance with Rule 60(b). It is difficult to fathom how Appellant can maintain it acted within a reasonable time period when it ignored the Summons and Complaint; when it ignored the entry of default; when it ignored the damages hearing. The Summons and Complaint was served July 11, 2012 and Appellant made no appearance in this matter until eighteen months later. Plaintiff submits this was hardly reasonable.

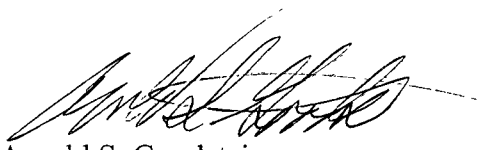
III. APPELLANT FAILS TO SHOW IT HAS A MERITORIOUS DEFENSE

Similarly in its initial brief Appellant argues it has a meritorious defense although it stated in its memo at page 5 to Judge Buckner that "it need not establish that it has meritorious defense to the Plaintiff's claim." (R. p. 15)(R. p. 73 lines 6-8) To this position the Respondent would simply call the court's attention to Respondent's exhibit 5 to memo in opposition where it admits its liability and states it is going to honor its warranty. (R. pp. 51-52)

CONCLUSION

For the reasons stated herein, the Plaintiff requests this court Affirm Judge Buckner's decision and remand the matter for further proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 29, 2015 he served a copy of the forgoing Final Brief of Respondent by depositing the same in the U.S. Mail, First Class postage prepaid, and addressed to the following:

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