

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr, Circuit Court Judge

Case No. 2015-000593

Ronald J. Ferguson

Appellant,

v.

John D. Hatcher, Rachel Shaluly, James F. Gilbert,
Molly A. Miller, and Michael Stehney, individually
and as members of the Architectural Committee of
Mill Creek Estates,

Appellees.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF THE CASE

On September 20, 2013 the Appellant brought this action against the developer and architect of the Residential Protective Covenants Mill Creek, Mill Creek, LP. On December 16, 2014 the Honorable Judge Verdin entered default judgment against Mill Creek, LP. Subsequent to that Order, Appellees filed a Motion to Intervene on December 22, 2014 and following hearing on February 13, 2014, Judge J. Cordell Maddox granted such. Mr. Ferguson timely filed a Notice of Appeal. This Appeal follows.

ISSUES

Did the trial court err in ruling that default judgment is not a final judgment and thus Rule 55 or 60 need not be met to set aside the entry of default?

Did the trial court err in setting aside a default judgment and Ordering intervention pursuant to SCRCF, Rule 24 without meeting the requirements of SCRCF, Rule 55 or 60?

Did the trial court err in holding that restrictive covenants can only be invalidated based on the language of the document and thus all parties touched must be defendants?

STATEMENT OF THE FACTS

Appellant, Ronald J. Ferguson, filed the case at bar against Defendant Mill Creek, LP, a South Carolina partnership, on September 20, 2013.

The South Carolina Secretary of State accepted service on September 26, 2013, pursuant to 33-42-220. Secretary of State attempted to provide notice to Defendants via USPS Certified Mail, mailed September 27, 2013, which was returned as undeliverable.

Appellant provided the Secretary of State Acknowledgment of Service, USPS Certified Mail record as well as the returned envelope with Affidavit of Service to the Clerk of Court on October 23, 2013.

The Secretary of State verified that Defendant Mill Creek, LP, was still legally operating within

the State of South Carolina by virtue of Certificate of Existence on October 31, 2013.

Following hearing in June 13, 2014, Honorable Robin B. Stilwell issued an Order directing Plaintiff complete service by publication. This occurred Wednesday, July 9, 2014; Wednesday, July 16, 2014; and Wednesday July 23, 2014.

Upon receiving the affidavits from the service by publication, such were filed with the Clerk of Court on August 6, 2014.

Plaintiff's Motion for Declaratory and Summary Judgment was filed on October 22, 2014.

Annette Butts, acting on behalf of Rodney Brown, contacted Judge Simmons via email on October 27, 2014, seeking to have this case (2013-CP-23-05102) consolidated with others before him. A copy of that email was later mailed to the Plaintiff via USPS First Class Mail.

Judge Verdin held a status hearing in the matter on November 3, 2014 and reaffirmed the Motion hearing date of December 16, 2014.

Judge Simmons issued an Order dated November 6, 2014, which consolidated 2013-CP-23-01715 and 2013-CP-30-3179 and included Brown's filing of 2013-CP-23-01810 for discovery purposes only; as Brown had objected to the case being consolidated. That Order in no way applied to this case.

During the hearing held by Judge Verdin on December 16, 2014, the Court called the parties then directed the bailiff to inquire of any other parties appearing in the case outside of the courtroom as well. Plaintiff's Affidavit and Memorandum brief were filed, documents examined and a determination that default judgment was proper with further direction that a damages hearing would be held at a future date. Though the Order was signed December 16, 2014, the Clerk did not file such until December 30, 2014.

On December 24, 2014, Appellees filed a Motion to Intervene which bears at least one signature of Annette Butts.

Though previously scheduled for February 12, 2015, the court rescheduled a hearing for the

Motion to Intervene before Honorable J. Cordell Maddox, Jr. on February 13, 2015.

Acting on the Court's instructions the Appellant was given notice of the Order prior to the Judiciary's signing such, though he declined noting the conduct and appeal.

The Order for Intervention was signed by Judge Maddox on February 19, 2015.

SUMMARY OF THE ARGUMENT

Judge Letitia Verdin held a hearing in the matter on December 16, 2014, and determined pursuant to SCRCP, Rule 55, an Order of Default be entered against the Defendant and a hearing be set to determine damages. Following the entry of default, Appellees moved to intervene and following hearing by Judge Maddox, Jr., an Order allowing intervention was filed. Appellant holds the lower court erred in finding that Appellees need not meet the requirements of Rule 55 or 60 in setting aside the default judgment due to the pending damages hearing having not been held there was no final judgment and the requested relief is unavailable from the named defendant; instead, the Appellants and all similarly situated parties must be named to the action. Existing precedent fails to support the findings.

ARGUMENT

A. 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.

DEFAULT JUDGMENT

Appellant argues the circuit court erred in setting aside the default judgment and allowing a third party to intervene under the premise the default judgment entered by Judge Verdin following the December 16, 2014, hearing is not a final judgment because the damages hearing had not been held.

“THE COURT: So the default has been done but not the damages?” (P9, L5-6)

MR. BROWN: Yes. We don't care what damages they get. We just want to make sure the Court doesn't do something they don't have jurisdiction to do which is vacating the restrictions.” (P9, L7-10)

SCRPC, RULE 55

A determination in this case requires an evaluation of Rule 55, SCRPC 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), SCRPC. If a party has failed to “plead or otherwise defend 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), SCRPC. 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).

It is common practice for the court to hold a hearing and have an entry of default. Then order

a damages hearing. Once there exists an entry of default Rule 55 or 60 must be met. *ROCHE v. YOUNG BROS., INC., OF FLORENCE*, 456 S.E.2d 897 (1995); *ROBERSON v. SOUTHERN FINANCE OF SOUTH CAROLINA INC*, 26001 (2005).

Rule 55(b)(2), entitled "All Other Cases," provides, in pertinent part, "In all other cases, the party entitled to a judgment by default shall apply to the court therefor; If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties if a proper demand therefor has been made pursuant to Rule 38 and not withdrawn, or when and as required by any statute. 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."

"For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Quoting SCRCF, Rule 55(c)

INTERVENORS LACK STANDING

According to Appellees Counsel, "We're moving to intervene because there was a default judgment granted against them without damages being granted against the LP which we could care less about and I don't represent. (P5, Lines 13-16). "We move to intervene, Your Honor, pursuant to Rule 24. We believe we have intervention as a matter of right or certainly permissive intervention that applies to an applicant whose claims interest in property relating to the transaction or the subject matter of the action..." (P5, Lines 19-23) "We're not a party to this action." (P6, Line 23)

Clearly, the Appellants are not the Defendant and are seeking to assert a third party claim beneficial to their own interests outside of this action.

SCRPC, Rule 55(c)

Admittedly the Appellees do not represent the Defendant or have any interest in their well being, knew there had been an Order of Default entered in the matter against them and chose to file a Motion to Intervene pursuant to Rule 24 for Appellees own interests. Even if the trial court is construed to have held proceedings pursuant to Rule 55(c) (or 60) the record fails to show good cause to justify setting aside the entry of default.

The standard for granting relief from an entry of default is good cause under Rule 55(c), SCRPC, while the standard is more rigorous for granting relief from a default judgment under Rule 60(b), SCRPC. *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, 681 S.E.2d 885 (S.C.2009). 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. *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct.App.1989). The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Harbor Island Owners' Ass'n v. Preferred Island Prop., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006).

TIMING OF MOTION

While Appellees admit they knew of the pending action and only after the Court issued an Order of Default chose to file a Motion to Intervene, the record on appeal is wholly void of when Appellees had knowledge of the action because the Court held Judge Verdin's Order of Default pursuant to Rule 55 was not a final judgment. However, the facts of the case show that Brown contacted the Court via email on October 27, 2014 regarding this specific case and seeking action. He willfully chose not to act until after the Order of December 16, 2014 because Brown "doesn't care about the damages they get" (P.9, Lines 7-8) but "just want to make sure the Court doesn't do

something they don't have jurisdiction to do which is vacating the restrictions.” (P9, 8-10). As that could affect litigation Brown brought against Plaintiff's father.

COMPULSORY CLAIMS

Appellees contend “we believe we're entitled to have this action dismissed pursuant to Rule 12(b)8 because there would be two actions pending regarding the same relief sought.”¹ Rule 13(a), SCRPC, provides that compulsory counterclaims must be asserted along with a responsive pleading. As Appellees were in default and failed to timely file and serve their answer, they also failed to timely assert their counterclaims. Appellants clearly failed requirements of Rule 12(a), SCRPC, to file an answer within thirty days of service of the summons and complaint upon them and they were technically in default.

As the meritorious defense requirement derives from the policy that courts do not engage in acts of futility:

A meritorious defense need not be perfect[,] nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.

Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989) (quoting *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978)).

The South Carolina Court of Appeals has ruled multiple times, “ 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), SCRPC, meaningless. We find the court's entry of default was proper.” (*Roche*, supra) Thus, it would not be a meritorious defense to make compulsory counterclaims as a defense.

¹ Appellant would have to note the rules of professional conduct and Brown's knowledge that his client Michael Stehney in the unverified complaint for 2013CP2301810 is the same party represented by Chace Campbell in Michael Stehney, Jr., v. Ronald E. Ferguson & Susan M. Ferguson, 2013CP2301715, which also has elements of the alleged restrictive covenants – and predates the 1810 filing. (Ref Email 10/27/14 and Simmons Order 11/6/14)

RESTRICTIVE COVENANTS

“A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue.” *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). In the present case, the underlying issue is a declaration as to whether or not the restrictive covenants are enforceable. Therefore, this is an equitable action. *See Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006). In an equity action, the appellate court may review the evidence to determine the facts in accordance with its own view of the evidence. *Florence County Sch. Dist. #2 v. Interkal, Inc.*, 348 S.C. 446, 450, 559 S.E.2d 866, 868 (Ct. App. 2002). Furthermore, the appellate court is not bound by the trial court’s legal determinations. *Swindler v. Swindler*, 355 S.C. 245, 249, 584 S.E.2d 438, 440 (Ct. App. 2003).

Quoting Brown (P5, Lines 6-9), “Of course, as Your Honor knows restrictive covenants are governed and can only be vacated, changed, or altered in accordance with the terms and conditions in the restrictive covenant.” And, “We just want to make sure the Court doesn't do something they don't have jurisdiction to do which is vacating the restrictions.” (P9, Lines 7-10).

THE COURT: Let's just say he wanted to bring a suit to change the restrictions, who does he have to sue? (P10, Lines 6-8)

Mr. Brown: I'm not sure he can sue anybody.

THE COURT: I understand the law ---

Mr. Brown: The deed restrictions govern, of course, how the deed restrictions are to be changed, altered or amended.

THE COURT: But what party would he have to sue?

Mr. Brown: All of the homeowners. He would have to have a majority vote to change the restrictive covenant...” (P10, L9-18)

ERROR OF LAW

Under South Carolina law, restrictive covenants can be deemed unenforceable where there has been a change of conditions. *Inabinet v. Booe*, 262 S.C. 81, 202 S.E.2d 643 (1974). Restrictive covenants can also be vacated if they are indefinite or contravene public policy. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987).

SCRCP 55(b)(2) provides, in part, "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties if a proper demand therefor has been made pursuant to Rule 38 and not withdrawn, or when and as required by any statute."

Consequently, pursuant to applicable statute and SCRCP, the court is vested with authority to hold hearings and examine documents which were created and filed by Mill Creek, LP, in effort to determine their legality and enforcement.

ERROR OF FACT

It was indicated to the Court, by Brown, that he "represents four or five individuals, individually, and as members of the Architectural Committee of a subdivision known as Mill Creek..."

The only reason the corporation was ever brought into existence to begin with was because it developed the subdivision of Mill Creek back in the 60's I believe it was." (P4, L13-17)

"Mill Creek, LP, again with regard to background, never established the restrictive covenants, so Mill Creek, LP really has nothing to do with why we're here today." (P5, L10-13)

"The relief they're seeking against the defendants that's presently in the case doesn't even exist, doesn't even participate. I can hand up the the restrictive covenants. The LP is not even mentioned in there any way, shape or form." (P8, L7-11).

While Judge Maddox did not review the applicable document (P10, L20-22), Judge Verdin actually had and examined the Restrictive Covenants, which were filed as part of the case. VOL 1002, PAGE 77 provides in part, "a committee composed of Kasper Fulghum, Kasper Fulghum, Jr., Robert Rosenthal, Solon Rosenthal, I.W. Moore and J. Kent Garrison or by a representative designated by said Committee. Said Committee shall be known as the Subdivision and Architectural Control Committee." VOL 1002, PAGE 78 shows that Mill Creek General Partner Kasper Fulghum signed the Restrictive Covenants with further notary "PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named named partnership by its general partner sign, seal and deliver the foregoing Protective Covenants..."

Looking further into Brown's assertions and examining the record, VOL 1002, PAGE 77, states, "In the event of the death or resignation of any member of said committee, the remaining members shall have full authority to approve or disprove such design and location or to designate a representative with such authority."

AMBIGUITY

While contrary to Brown's position elsewhere, in this case he holds that Mill Creek does not exist or participate in the development, *supra*. The Supreme Court of South Carolina affirmed Special Referee Judge Simmons findings and conclusion in *Hardy v. Aiken* that where "A restrictive covenant is ambiguous when its terms are reasonably susceptible of more than one interpretation. *South Carolina Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001)." "[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *See Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free

use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Restrictive covenants are contractual in nature. *Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. *Taylor*, 32 S.C. at 4, 498 S.E.2d at 864.

A clear and plain reading shows the Kasper Fulghum signed and filed the Restrictive Covenants as General Partner of Mill Creek on May 31, 1974, which vested same with authority to appoint person(s) acting on their behalf. Consequently, once the partnership is divested of all property ownership within the community and the partnership is dissolved, terminated or otherwise ceases to exist - the ability to appoint persons who act on behalf of Mill Creek, LP ends. There is no language allowing formation a committee outside of Mill Creek, LP. To hold otherwise means the contract language is ambiguous and subject to the Court's determination.

CONCLUSION

The record is clear. Appellees admit they knew of the pending action, that there had been an Order pursuant to Rule 55 entered, and only after that such did they choose to pursue a claim pursuant to Rule 24 as a matter of self interest. A third party claim. Appellees did not cause the restrictive covenants to be drafted, signed, filed, are not named in such, and are not recognized under the law as responsible for the defendants actions and deny on their behalf. There is no legal standing for them to be substituted for the defendant where the Court is addressing specific acts of conduct and assigning damages. The record is incomplete of the requisite showing why the appellees only decided to file to intervene after the entry of default judgment, what meritorious defense they might present on behalf of the actual defendants, and erroneously believe the Court lacks jurisdiction to determine the legality of a contract.

The Order to Intervene should be vacated and Judge Verdin's Order of Default should proceed as originally contemplated to a damages hearing reflecting the specific conduct of Mill Creek, LP.

Respectfully submitted,

July 28, 2015



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APPEAL FROM GREENVILLE COUNTY
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J. Cordell Maddox, Jr, Circuit Court Judge

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Mill Creek Estates,

Appellees.

CERTIFICATE OF SERVICE

I certify, that on this date, I served a copy of the Initial Brief of Appellant, dated 07/28/2015 on
Appellees' Attorney of record by

 delivering it to him/her personally; or,

 mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an
envelope with sufficient postage affixed, addressed as follows; or,

 X mailing it to the address indicted by their counsel of record in the Summons as follows:

Rodney M. Brown
210 S Main St
Fountain Inn, SC 29644

This the 28 day of July, 2015.



Ronald J. Ferguson

F
C
it, SC 29673



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SC Court of Appeals

**The Honorable Jenny Abbott Kitchings
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