

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GEORGETOWN)
)
 Ernest Bley,)
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 Plaintiff,)
)
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 vs.)
)
 Linda Robinson and Herrington's, LLC)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 C/A NO. 2014-CP-22-00280

ORDER
RECEIVED
 JUN 16 2016
 SC Court of Appeals

FILED
 GEORGETOWN COUNTY, S.C.
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 ALMA Y. WHITE
 CLERK OF COURT

This matter is before the Court by way of Plaintiff Ernest Bley's Motion to Correct Clerical Mistake and Motion to Vacate Relief from Judgment or Order, filed on November 17, 2015. The Court held a consolidated hearing on February 25, 2016. William Saltzman, Esq. appeared on behalf of Plaintiff, and Alexander Hogsette, Esq., appeared on behalf of Robert Dale Herrington, d/b/a Herrington's Construction,, LLC, and Herrington's, proposed Defendants named in Plaintiff's Motions. After careful review of the record, applicable case law, and the arguments advanced at the hearing, this Court denies Plaintiff's Motion to Correct Clerical Mistake and Motion to Vacate Relief from Judgment or Order for the reasons stated herein.

FACTS/PROCEDURAL HISTORY

According to the Complaint, Plaintiff alleges that on or about December 18, 2011, he was visiting Linda Robinson ("Robinson"), his girlfriend, at her home. Complaint, ¶s 5-9. Plaintiff asserts that, unbeknownst to him, a hole "opened up" in Robinson's backyard on or about her septic tank. Id. Plaintiff alleges that Robinson paid "Herrington's, LLC" to "complete an inspection and work on [Robinson's] septic system." Id. Presumably, during the same visit

Plaintiff asserts that he fell into this hole on or about the area containing Robinson's septic tank causing injuries to his whole body. Id.

Plaintiff commenced this personal injury action on March 28, 2014. Plaintiff, as the master of his complaint, named Robinson and "Herrington's, LLC" as Defendants. Plaintiff alleged in his Complaint that "Herrington's, LLC" is a "corporation organized and existing pursuant to the laws of the State of South Carolina." Comp. ¶3. Plaintiff served Robinson and Dale Herrington with the Summons and Complaint. Neither Robinson nor "Herrington's, LLC" filed an Answer or otherwise appeared. At some point on or before July 15, 2015, Robinson settled with Plaintiff and was dismissed from this action. "Herrington's, LLC" was found in default and the court entered judgment against "Herrington's, LLC" in the amount of One hundred seventy-five thousand and NO/100 (\$175,000.00) dollars.

Thereafter, Plaintiff filed a Motion to Correct Clerical Mistake (hereinafter, "Motion to Correct") on October 15, 2015.¹ Plaintiff then filed an Affidavit of David Miller, on October 27, 2015, and a Memorandum in Support of Plaintiff's Motion to Correct, on November 2, 2015. Subsequently, Plaintiff filed, "as an alternative remedy to Plaintiff's outstanding [Motion to Correct]," a Motion to Vacate Relief from Judgment or Order (hereinafter, "Motion to Vacate") and Memorandum in Support on November 17, 2015.

STATEMENT OF LAW/ANALYSIS

Plaintiff filed motions pursuant to Rule 60(a) and Rule 60(b) of the South Carolina Rules of Civil Procedure. Rule 60(a) permits a party to request relief from judgment or order for clerical mistakes. Rule 60(a), SCRPC. Rule 60(b) permits a party to request relief from a

¹ At some point between June 20, 2015 and October 15, 2015, Plaintiff's attorney, David Miller, left the law firm of Merritt, Webb, Wilson & Caruso, PLLC. Plaintiff retained the services of Merritt Webb and William M. Saltzman assumed representation of Plaintiff. The two Motions before the Court were filed by Mr. Saltzman.

judgment or order due to, *inter alia*, mistake, inadvertence, surprise, or excusable neglect, or fraud, misrepresentation, or other misconduct of an adverse party. Rule 60(b), SCRCPP. The Court will address each motion individually.

I. MOTION TO CORRECT CLERICAL MISTAKE

Plaintiff's Motion to Correct, pursuant to South Carolina Rule of Civil Procedure 60(a), requests this Court substitute Defendant "Herrington's, LLC" with "the 'proper party,' Herrington's Construction, aka Herrington's Construction Septic Tank and Land Cleaning, aka Herrington's Septic Tank and Land Cleaning, aka Herrington's, and its owners, in their individual capacity, to include Roger D. Herrington, aka Roger D. Herrington Sr., aka Roger D. Herrington I, aka Dale Herrington, aka Dale R. Herrington." Motion to Correct, 1. Plaintiff asserts that substitution of "Herrington's, LLC" for the aforementioned proposed defendants is proper pursuant to Rule 60(a) of the South Carolina Rules of Civil Procedure because naming "Herrington's, LLC" as a defendant was merely a clerical mistake. Id.

A motion to correct clerical mistakes pursuant to Rule 60(a) of the South Carolina Rules of Civil Procedure provides, in relevant part, that "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party . . ." A clerical error "is a mistake or omission by a clerk, counsel, judge or printer, which is not the result of exercise of judicial function." Ex parte J.P Strom, 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000).

Generally, a clerical error is a mistake in writing or copying. Ex Parte Strom, 334 S.C. 605, 514 S.E.2d 599, 600 (Ct. App. 1999). It is an error resulting from a minor mistake or inadvertence, e.g. omitting an appendix from a document, typing an incorrect number, mistranscribing a word, or failing to log a call. BLACK'S LAW DICTIONARY 622 (9th ed. 2009).

“While a court may correct mistakes or clerical errors in its own process to make it conform to the record, *it cannot change the scope of the judgment.*” Dion v. Ravenal, Eiserhardt Assocs., 316 S.C. 226, 230, 449 S.E.2d 251, 253–54 (Cl. App. 1994) (emphasis added).

In support of his position, Plaintiff relies on Tri-County Ice and Fuel v. Palmetto Ice. 303 S.C. 237, 399 S.E.2d 779 (1990). In Tri-County, the court addressed the issue of “whether a default judgment entered *against a trade name* can be amended to substitute the name of the corporation who owns and operates the business operating under the trade name.” Id. (emphasis added). On or around August of 1986, plaintiff Tri-County Ice and Fuel (“Tri-County”) desired to file suit against Palmetto Ice Company. However, Tri-County, despite prior business dealings and research, was unable to determine—through no fault of its own—that the named defendant, Palmetto Ice Company, was merely a trade name used by P&H Company, Inc. (“P&H”). Id. Subsequently, when Tri-County attempted to execute its default judgment it was informed—for the first time—that a corporate entity, P&H, owned and operated under the trade name of Palmetto Ice Company. Id.

Upon a Rule 60(a) motion, the court in Tri-County held that Palmetto Ice Company and P&H were “one in the same” for the purposes of this action. Id. at 239. The Tri-County court’s justification was based upon its determination that the president of P&H

“clearly knew that Tri-County intended to sue [P&H], but that Tri-County was under a misapprehension as to the identity of Palmetto Ice Company. [P& H’s president] was also aware that Tri-County had no way of ascertaining that Palmetto Ice Company was a trade name, as [P&H] had not registered this assumed name with the Secretary of State.”

Id. at 241. The court held that under the circumstances where a corporation has acquired a name by usage adjudication against the corporation by the name so acquired is valid and binding. Id. at 241 (citing Tunstall, 160 S.C. at 566, 159 S.E. at 389).

The case at bar is dissimilar from Tri-County in several respects. First, the court found Tri-County harmlessly named the wrong defendant. Indeed, Tri-County was able to establish that the defendant it named (Palmetto Ice Company) and the business it desired to name (P &H) were “one and the same for purposes of [that] action.” Id. at 239. Additionally, the court also noted the responsibility all plaintiffs possess as “masters of their complaint,” and held that the plaintiff was blameless in this respect as the correct name for the intended defendant was undiscoverable. Id.

Unlike in Tri-County, Plaintiff does not assert—nor has he offered any evidence—that “Herrington’s, LLC” is a trade name used by any of the proposed defendants, and therefore, has not established the “Herrington’s, LLC” and the proposed defendants are “one and the same.” Indeed, despite Plaintiff’s assertion in the Complaint that “Herrington’s, LLC” is a corporate entity organized under the laws of this State (Comp. 3), “Herrington’s, LLC” is not—nor has it ever been—a corporate entity recognized by the Secretary of State according to the Secretary of State’s website.² Therefore, unlike Tri-County, Plaintiff offers no justification for the name used, why “Herrington’s, LLC” is a clerical mistake when it was selected in contradiction to the alleged evidence known by the party, or why he should be allowed to substitute “Herrington’s, LLC” for four business entities and add an unspecified number of individuals as defendants.

Indeed, in the Affidavit of David Miller, Plaintiff’s former counsel admits that—prior to filing the lawsuit—he was aware of an individual’s name and a potential trade name used by some of the proposed defendants that Plaintiff now wishes to attach the \$175,000 judgment to, “Dale Herrington” and “Herrington’s,” respectively. Miller Aff. ¶3. However, instead of designating “Herrington’s” or “Dale Herrington” as defendants, Plaintiff named the fictitious

² The South Carolina Secretary of State allows the public to search all business filings online at www.soc.sc.gov.

“Herrington’s, LLC” in direct contradiction to all the evidence available to him and without any justification. As such, it cannot be gainsaid that the proposed Defendants’ identity was undiscoverable to him when drafting his complaint.

Principally, if the Court were to grant Plaintiff’s requested relief, this would necessarily change the scope of the judgment in contradiction with Rule 60(a). The Court previously entered a default judgment against an alleged limited liability company, “Herrington’s, LLC.” Plaintiff, as the master of his own complaint, decided not to file suit against any individual defendants, despite allegedly knowing the name of at least one proposed defendant. Still, Plaintiff now comes before the Court seeking to attach this judgment against multiple defendants, including, but not limited to, “*its owners, in their individual capacity.*” Even during oral arguments, Plaintiff was still unable to articulate the individuals against whom he wished to attach a \$175,000 judgment. As such, this Court declines to allow Plaintiff to attach a \$175,000 judgment when it is unclear whom to substitute as the defendant.

The Court finds that naming “Herrington’s, LLC” was not a clerical mistake. Moreover, Plaintiff’s requested relief would improperly alter the scope of the judgment because he is attempting to substitute “Herrington’s, LLC” by adding multiple businesses and individuals. Plaintiff’s Motion to Correct is denied.

II. MOTION TO VACATE RELIEF FROM JUDGMENT OR ORDER

Plaintiff’s alternative motion is one to vacate relief pursuant to Rule 60(b)(1) and (3) of the South Carolina Rules of Civil Procedure. Specifically, Plaintiff requests this Court to return this matter to status quo ante to allow Plaintiff to amend the pleadings and to serve the proper defendants.

a. RULE 60(B)(1)

Rule 60(b)(1) states that upon such terms as are just, the court may relieve a party or his legal representative from a final judgment because of mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(1), SCRPC. "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. Perry v. Heirs at Law of Dadsden, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003). In a motion to vacate a judgment because of a mistake, the party must make a showing that failure to avoid the mistake was justified. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992).

In support of Plaintiff's Motion, he again claims that his former counsel mistakenly named "Herrington's, LLC" as a defendant instead of the proposed defendants. Motion to Vacate, 1. Plaintiff also claims that only after obtaining a default judgment against "Herrington's, LLC" did he learn that he did not name the correct defendants. Id. at 2. However, the evidence that Plaintiff relied upon when filing this lawsuit, eviscerates his claim of justifiable mistake. The former co-defendant—Plaintiff's girlfriend—provided Plaintiff with a copy of the check allegedly used to pay "Herrington's" (a proposed defendant), which was endorsed by "Dale Herrington" (also a proposed defendant), prior to the filing of this action. Plaintiff has not provided any justification for not naming "Herrington's," "Dale Herrington," or for failing to examine the public records on file with the Secretary of State. Instead, Plaintiff requests that the Court to allow him to do so after obtaining a \$175,000 judgment in his favor. Moreover, as discussed above, Plaintiff has not presented any evidence that "Herrington's, LLC" is a trade name used by any of the proposed defendants. As such, this Court finds that naming "Herrington's, LLC" was not a justified mistake, inadvertent, or excusable neglect in light of the information known and/or available to Plaintiff when he filed suit.

b. RULE 60(B)(3)

Rule 60(b)(3) states that upon such terms as are just, the court may relieve a party from or his legal representative from a final judgment because of fraud, misrepresentation, or other misconduct of an adverse party. Rule 60(b)(3), SCRC. Plaintiff contends that the proposed defendant's failure to answer or appear rises to the level of fraud, misrepresentation, or other misconduct contemplated by Rule 60(b)(3). Id. at 4. A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. Perry, 357 S.C. at 46, 590 S.E.2d at 504.

The record is devoid of any evidence to support Plaintiff's allegations that the proposed defendants, including but not limited to Dale Herrington, acted fraudulently in this matter. While Plaintiff asserts that a proposed defendant (Dale Herrington) was served with the Complaint, he has offered no evidence that Dale Herrington was authorized to accept service for "Herrington's, LLC" or that he knew Plaintiff was asserting claims against him. Plaintiff, as discussed above, also failed to substantiate his allegations that the proposed defendants misrepresented the name of its/his/their business as "Herrington's, LLC." Rather, the evidence presented by Plaintiff establishes an entirely different conclusion.

As stated above, Plaintiff presented a check that was in his possession prior to filing his lawsuit that listed a business name and an individual that Plaintiff now wishes to name as defendants. Thus, the evidence Plaintiff presented in support of his allegation for fraud or misrepresentation is a representation (the check listing two of the proposed defendants) that Plaintiff also asserts is accurate. Plaintiff admittedly knew the names and identity of at least two of its proposed defendants prior to filing suit but chose not to name either as a defendant. Therefore, Plaintiff's argument that, through no fault of his own, the proposed defendants

deprived him of a fair hearing or opportunity to present his case fails. Plaintiff's Motion to Vacate is denied.

CONCLUSION

Plaintiff filed suit against "Herrington's, LLC." This was not an oversight, omission, or clerical mistake by Plaintiff. Plaintiff also had the burden of presenting evidence entitling him to relief under his Rule 60(b) motion to vacate judgment. This Court also finds it unclear whom Plaintiff wishes to individually name as defendants. Thus, to permit Plaintiff to substitute "Herrington's, LLC" with the proposed defendants, both known and unknown, would improperly expand the scope of the judgment. This Court further finds that Plaintiff has failed to meet his evidentiary burden necessary to vacate the judgment. Therefore, based upon the record, case law, and arguments advanced by the parties, the Court denies Plaintiff's Motion to Correct Clerical Mistake and Motion to Vacate Judgment.

AND IT IS SO ORDERED.


Judge Benjamin H. Culbertson

This 14th day of March, 2016

Conway, South Carolina.