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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2015-000670

Anita Bacchi and Kristine Lomas

Respondents,

v.

America's Source Consulting

Appellant.

Agency, LLC

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

1. DID THE CIRCUIT COURT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO SET ASIDE THE ENTRY OF DEFAULT?

STATEMENT OF THE CASE

On February 2, 2015, the circuit court denied motion of Defendant America's Source Consulting Agency, LLC, ("America's Source") to set aside the entry of default. (R. p.43-46). The Defendant now appeals alleging the circuit court abused its discretion in so ruling.

On May 19, 2010, the circuit court ordered "America's Source" in default and awarded judgement to plaintiffs. (R. p.19-20). On November 22, 2013, "America's Source" moved to vacate the default judgement alleging various grounds including ineffective service, lack of personal jurisdiction and non-compliance with court rules. (R. p. 16-17).

On October 3, 2014, the circuit court heard the motion above mentioned and voided entry of default **judgment** (emphasis added) against "America's Source". (R. p. 5). Plaintiffs Anita Bacchi and Kristine Lomas ("Plaintiffs") moved for a final damages hearing scheduled for February 2, 2015. "America's Source" filed its motion to set aside the entry of default and to permit "America's Source" to answer.

On February 2, 2015, the circuit court, after hearing full arguments from the parties (R. p. 24-43), denied the motion of "America's Source" to set aside the default; after testimony, both direct and cross-exam, from Plaintiffs and the introduction of a

number of exhibits into evidence, the circuit court ordered judgments in favor of the Plaintiffs as well as judgments for attorneys' fees.

FACTS

On October 20, 2008, the Plaintiffs, Anita Bacchi and Kristine Lomas, filed their complaint against America's Source Consulting Agency, LLC, and another party alleging wages, severance pay and compensation for unused vacation pursuant to terms of the Employees Handbook for "America's Source". The complaint was properly served on the agent registered with the South Carolina Secretary of State for "America's Source".

Bacchi was Vice President of Operations for "America's Source". Lomas was Director of Operations. Both were terminated on or about February 4, 2008, after the corporation closed operations in Myrtle Beach, South Carolina.

On May 24, 2010, after "America's Source" failed to answer for a period approaching two (2) years, Plaintiffs filed for default judgment.

ARGUMENTS

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETIONARY AUTHORITY IN DENYING DEFENDANT'S MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT TO RULE 55(c), SCRCP.

In this appeal, "standard of review leaves the decision to set aside an entry of default within the sound discretion of the trial court which the (appellate court) not reverse absent an abuse of discretion." Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 101 (Ct. App. 2004). "An abuse of discretion occurs either

when the trial court's decision is based upon an error of law or when the trial court's order is without evidentiary support." Id.

At the hearing on February 2, 2015, "America's Source" raised the following issues as a basis for the circuit court to set aside the default: (1) despite admitted proper service on the registered agent for "America's Source", the Defendant should be excused for failing to appear or answering the complaint of the Plaintiffs, (2) the Defendant had a "meritorious" defense based on the inapplicability of the law allowing treble damages in that the corporation did not employ five (5) or more employees and/or all wages due had been paid, and (3) the Plaintiffs would not be prejudiced by lifting the default. (R. p. 36-38).

Rule 55 (c), SCRCP, requires good cause be shown to set aside an entry of default. This rule also directs us to Rule 60 (b), SCRCP, to consider the available grounds to obtain relief from a judgment or order. The circuit court specifically found no grounds pursuant to Rule 60 (b), SCRCP, existed to justify setting aside the default. Implicit in the circuit court's ruling, the court held no relief was due Defendant for mistake, inadvertence, surprise or excusable neglect. Rule 60 (b) (1), SCRCP. No other grounds pursuant to Rule 60 are asserted by Defendant. In doing so, the circuit court noted service was properly made to the **registered agent** (emphasis added) of "America's Source". (R. p. 44). The Plaintiffs met their responsibility under the rule of law existing at the time. (R. p. 44).

As to Defendant's assertion that a meritorious defense exists, the circuit court found, after testimony, subject to cross-examination by counsel for "America's Source", Defendant employed the requisite number of employees for the requisite period of time

under Section 41-10-20, Code of Laws of South Carolina, 1983, as amended, and the monies alleged to be owed to the Plaintiffs were, in fact due. (R. p.81-83).

Plaintiffs, contrary to the assertion of “America’s Source”, have already been prejudiced in this matter. Monies were due them since on or about the time of their separation from “America’s Source”, February 4, 2008. After gaining no satisfaction from “America’s Source”, they filed suit on October 20, 2008, eight (8) months later, against Defendant. This complaint went unanswered for approximately twenty (20) months when they filed a default judgment against Defendant on May 24, 2010. The substantial delay in satisfaction of debts owed speaks to the prejudice to the Plaintiffs.

No error of law exists in the circuit court’s ruling. The record in this matter contains ample evidentiary support for the circuit court’s order.

II. DEFENDANT FAILED TO DEMONSTRATE GOOD CAUSE PURSUANT TO RULE 55 (c), SCRPC, TO SUPPORT A REMOVAL OF DEFAULT AGAINST IT AND DEFENDANT’S MOTION TO SET ASIDE ENTRY OF DEFAULT WAS NOT TIMELY.

The burden is on “America’s Source” to establish that the timing of its December 29, 2014, Motion to Set Aside the Default is reasonable in order to show good cause for setting aside entry of default. Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 501-502 (1989).

Default against Defendant was entered on May 24, 2010. (R. p.19-20). Defendant moved to “vacate default judgment” on November 22, 2013, some three and one half years later. (R. p. 16-17).

Defendant was represented by counsel at the hearing wherein the circuit court ordered the entry of default judgment void. This hearing took place on August 5, 2014. The circuit court signed the order on October 3, 2014. The order is entitled "ORDER GRANTING MOTION TO VACATE JUDGMENT". The Court found the default judgment was void "for lack of verification under Rule 55 (b)(1)". The final line of the circuit court's order is "Therefore, the entry of default judgment is void". (R. p. 2-5). This order does not address the entry of default against "America's Source" in any way. Defendant asserts as to the initial delay of three and one half years, its properly served registered agent failed to forward the pleadings to "the principal of the company or any other party responsible for tendering a defense". (Appellant's Brief p. 5). Service of the registered agent in a matter where the defendant is a foreign corporation operating within the State is established by Court rule. The rule recognizes the inherent difficulties dealing with foreign corporations in matters of service and others. The Plaintiffs met their responsibility and had every reason to rely the operation of law as set forth in the rule.

Defendant asserts as to the delay to take further action regarding the order of default following the August 5, 2014, hearing confusion existed concerning the effect of the order. Defendant was represented by counsel at the hearing. Defendant apparently drafted the order. The order was clear by its language including, but not limited to, its title and its final sentence that it simply voided the entry of default judgment and did not address in any way the default against Defendant.

No reason asserted by establishes the timing of its Motion to Set Aside Entry of Default on December 29, 2014, was in any way reasonable. Having failed to meet this

threshold burden, no good cause may be shown by Defendant for setting aside the entry of default. As to this argument, Defendant has not established an error of law was committed or an abuse of discretion was made by the circuit court.

III. DEFENDANT AMERICA'S SOURCE DOES NOT HAVE A MERITORIOUS DEFENSE SUPPORTING ITS MOTION TO SET SIDE ENTRY OF DEFAULT.

As to Defendant's Argument III, Plaintiffs rely on their argument set out in Argument I of their brief. The circuit court fairly considered this argument after admission of testimony and exhibits and rejected it. No error of law was committed by the circuit courts in its ruling on this issue ruling and the record contains evidence in support of the circuit court's ruling.

IV. PLAINTIFFS HAVE BEEN PREJUDICED BY THE DELAY AND WOULD FURTHER BE PREJUDICED BY THE GRANTING OF RELIEF TO DEFENDANT.

Defendant asserts, in part, that "Plaintiffs must take responsibility for the majority of the delays that have occurred in this case." (Appellant's Brief p.8). This assertion ignores the delay of twenty (20) months by Defendant in which it failed to answer the complaint of Plaintiffs who, thereafter, filed for default judgment. (R. p.19-20). The circuit court found Defendant was properly by Plaintiffs through its registered agent and

no excuse pursuant to Rule 60, SCRCRCP, or any case law emanating from Rule 60, exists to set aside the entry of default against Defendant. (R. p.43-45).

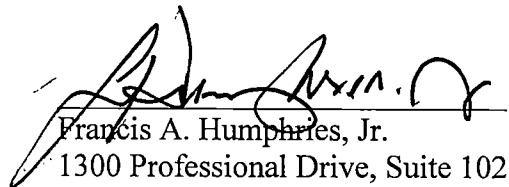
Defendant's assertion further ignores its delay of three and one half years transpiring between entry of default judgement in favor of the Plaintiffs and its motion to vacate default judgment. (R. p.16-17). Defendant is responsible for the delays above mentioned as well as the admitted responsibility for the delay "in pleadings since the October 2014 Order by the Court to dismiss the default judgment against America's Source." (Appellant's Brief p.8).

Plaintiffs further rely on their argument set out in Argument II of their brief. The circuit court committed no error of law in implicitly finding prejudice to Plaintiffs should the requested relief of Defendant have been granted. Evidence in the record supports such a finding by the circuit court.

CONCLUSION

For the reasons stated above and, in particular, because no error of law or abuse of discretion exists in the circuit court's denial of Defendant's motion to set aside its default. Plaintiffs respectfully request this Court to affirm the ruling of the lower court and for all other relief this Court deems just and proper.

Respectfully submitted,



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July 26, 2016

THE STATE OF SOUTH CAROLINA
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Court of Common Pleas

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Steven H. John, Circuit Court Judge

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Anita Bacchi and Kristine Lomas

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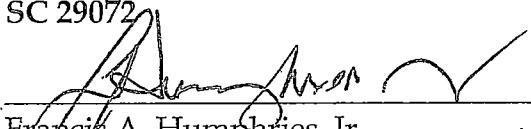
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Agency, LLC

Appellant.

PROOF OF SERVICE

I certify that I have served a copy of the Motion to Accept Late Filing of the Initial Brief and Designation of Matter; the Initial Brief and Designation of Matter and a copy of the Proof of Service on the Appellant, America's Source Consulting Agency, LLC, by pre-paid Overnight Service on July 27, 2016 addressed to the attorney of record, Vicki Koutsogiannis, at the following address:

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July 27, 2016

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SC Court of Appeals

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**RE: Anita Bacchi and Kristine Lomas vs. America's Source Consulting
Agency, LLC
Case #: 2015-000670**

Dear Jenny Abbott Kitchings,

I have enclosed an Original copy and a bound copy of our Motion to Accept Late Filing of the Initial Brief and Designation of Matter; the Initial Brief; the Designation of Matter and a Proof of Service for the case noted above. Please let us know if anything else is necessary.

Best regards,



Karen Sanders

Paralegal to Francis A. Humphries, Jr.

cc: file

Enclosures: as noted

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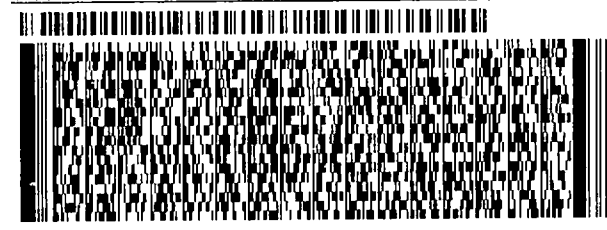
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