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JAN 19 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
The Honorable Carmen T. Mullen
The Honorable Michael G. Nettles
C. Stephen Bennett, Special Referee ¹

Appellate Case No. 2016-001951

Ronis Acosta,
Respondent,

v.

Pura Life Fiesta Center; Zaida Altamirano; Daniel's Espresso, Inc.; Daniel's Restaurant and Lounge; Gali Milstain; Aviv Ben Yair; Kfir Gispan; Nicole Naglieri²; Beach Market, LLC; and Michael Larrow,
Defendants,

Of Whom Zaida Altamirano and Pura Life Fiesta Center are theAppellants.

RESPONDENT'S MOTION TO DISMISS

Respondent Ronis Acosta ("Respondent") moves to dismiss the above-captioned appeal filed by Appellants Zaida Altamirano and Pura Life Fiesta Center ("Appellants") as untimely and unappealable. For the reasons stated below, the Court should dismiss the appeal.

PROCEDURAL AND FACTUAL BACKGROUND

¹ Respondent uses the caption presented by Appellant but maintains that it is improper to file a single notice of appeal from three orders issued three different judges.

² Nicole Naglieri is no longer a defendant in this action because she was dismissed with prejudice by stipulation on November 30, 2015.

This case arises out of a Complaint asserting causes of action for negligence and dram shop liability. (**Exh. 1**, Cmplt.). Appellant Pura Life Fiesta Center is a corporate entity that owns a bar and nightclub on Hilton Head Island. (Exh. 1, Cmplt. ¶ 8). Appellant Zaida Altamirano is the owner/operator of the nightclub. *Id.* at ¶ 9. Respondent filed this action on August 18, 2015. *Id.* Respondent properly served Appellants on August 25, 2015, which counsel for Appellants acknowledged in an email dated September 23, 2015. (**Exh. 2**, emails). Respondent granted a 30-day extension for Appellants to answer, making the answer due on October 25, 2015. (Exh. 2). Appellants failed to serve an answer by October 25, 2015.

On November 4, 2015, counsel for Respondent emailed counsel for Appellants to inquire as to whether Appellants filed an answer. (Exh. 2). Counsel for Appellants responded by acknowledging that the extension expired on October 25 and stated he mailed the answer earlier in the day on November 4. *Id.* It is undisputed that Appellants did not timely serve an answer. (**Exh. 3**, Answer).

On November 16, 2015, Respondent filed an affidavit of default. (**Exh. 4**, Aff. of Default). On December 2, 2015, the Honorable Carmen T. Mullen signed an Order of Default and Reference, finding Appellants in default and referring the case to Stephen Bennett as Special Referee for a damages hearing. (**Exh. 5**, Order of Default). On January 14, 2016, Respondent served a Notice of Damages Hearing on Appellants, stating the damages hearing was scheduled for February 25, 2016. (**Exh. 6**, Not. of Hearing).

On January 25, 2015, Appellants filed a motion to open default and stay the damages hearing. (**Exh. 7**, Mot. to Open Default). In the motion, Appellants admit “there is no dispute that the deadline for filing [an] Answer as to [Appellants] was October 5, 2015” and they did not serve “counsel for [Respondent] with their answer [until] November 5, 2015.” *Id.* at pp. 1-2.

Appellants only basis for its motion was the mistake of counsel in failing to timely answer the Complaint.³ *Id.* at p. 3. On April 4, 2016, the Honorable Michael G. Nettles signed an order denying Appellants' motion to open default. (**Exh. 8**, Order).

On April 21, 2016, Respondent served a second Notice of Damages Hearing on Appellants, stating the damages hearing was scheduled for May 25, 2016. (**Exh. 9**, Not. of Hearing). Counsel for Appellants was copied on a May 24, 2015 email regarding the damages hearing. (**Exh. 10**, emails). The following day, he responded "My client is not planning to participate in today's hearing." *Id.*

On August 1, 2016, the Special Referee filed an Order of Judgment against Appellants. (**Exh. 11**, Order of Judgment). On September 16, 2016, Appellants served the Notice of Appeal on Respondent. (Not. of Appeal). The Notice states Appellants appeal three orders:

1. The Order of Default and Order of Reference entered by the Honorable Carmen T. Mullen dated December 2, 2015 and filed December 21, 2015;
2. The Order Denying Motion to Open Default as to Defendants Zaida Altamirano and Pura Life Fiestas Center entered by the Honorable Michael G. Nettled dated April 4, 2016 and filed April 19, 2016; and
3. The Order of Judgment entered by the Honorable C. Stephen Bennett, Presiding Special Referee, dated and filed August 1, 2016.

(Not. of App. pp. 1-2). The same day, Appellants served the motion for relief from judgment as to the August 1, 2016 Order of Judgment. The Notice of Appeal was filed on September 19, 2016, one day prior to the filing of the motion for relief from judgment.

³ "Concerning a claim of attorney neglect, the general rule is that the neglect of the attorney is attributable to the client" absent attorney abandonment or withdrawal from the case. *Stearns Bank N.A. v. Glenwood Falls, LP*, 373 S.C. 331, 342, 644 S.E.2d 793, 798 (Ct. App. 2007).

ARGUMENT

None of the orders on appeal are appealable. Even if the Order of Default and Reference and the Order denying Appellants' motion to open default are appealable, any appeal is untimely. Further, this is not a situation similar to one in which a Rule 59(e), SCRCP, motion stays the appeal and the appellant then files an appeal as to both the underlying order(s) and the order denying the Rule 59(e) motion. An appeal of the Order of Default Judgment does not include an appeal of the Order of Default and Reference and Order denying the motion to set aside the entry of default.⁴ Those orders are unappealable, and an appeal from an Order of Default Judgment cannot save them.

To seek appellate review of the Order of Default Judgment, Appellants were required to *first* file a Rule 60(b), SCRCP, motion. Instead of following this established procedure, Appellants filed the Notice of Appeal at issue and, the following day, filed a Rule 60(b), SCRCP, motion in the lower court. Appellants acted out of order and, in doing so, deprived the lower court of jurisdiction to rule on the Rule 60(b) motion, and submitted a notice of appeal to this Court for unappealable orders.⁵ This Court should dismiss the appeal with prejudice as to all three orders.

I. THE ORDER OF DEFAULT AND REFERENCE IS NOT APPEALABLE AND ANY APPEAL IS UNTIMELY

⁴ The caption on the Notice of Appeal evidences that it should be dismissed because it lists three judges. A notice of appeal is generally taken from one order, not from three orders issued by three different judges, as Appellants attempt to do in this case. *See* Rule 201(a), SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order or decision.").

⁵ Under Rule 205, SCACR, "Upon service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . ." (emphasis added). "Under Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal . . ." *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012).

The Order of Default and Reference is not appealable because it is not a final judgment within the meaning of S.C. Code Ann. § 14-3-330(1) (1976). “If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory.” *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). The Order of Default and Reference entered default against Appellants and referred the case to a Special Referee for *further* proceedings and a damages determination. Therefore, it was not final and is not appealable.

Additionally, any appeal of the Order of Default and Reference is untimely. The Order of Default and Reference was filed on December 21, 2015, and Appellants served the Notice of Appeal almost nine months later, on September 16, 2016. “A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.” Rule 203(b)(1), SCACR. Appellants failed to serve a notice of appeal on Respondent within thirty days of receipt of the December 21, 2015 Order of Default and Reference. “The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Elam v. S.C. DOT*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). Further, Appellants did not file a Rule 59(e), SCRPC, motion or other post-order motion and, therefore, the time for filing a notice of appeal was not stayed. The Notice of Appeal is untimely as to the Order of Default and Reference, and the Court should dismiss it.

II. THE ORDER DENYING APPELLANTS’ MOTION TO OPEN DEFAULT IS NOT APPEALABLE AND ANY APPEAL IS UNTIMELY

The Order denying Appellant’s motion to open default is unappealable. “[T]he grant or denial of a Rule 55(c) motion is not directly appealable under S.C. Code Ann. § 14-3-330

(1976).” *Jefferson v. Gene’s Used Cars, Inc.*, 295 S.C. 317, 317, 368 S.E.2d 456, 456 (1988); *Thynes v. Lloyd*, 294 S.C. 152, 153, 363 S.E.2d 122, 122 (Ct. App. 1987) (“[A]n order refusing to grant relief from the entry of default is not appealable until after final judgment.”). Therefore, the Court should dismiss the appeal as to this Order.

Additionally, any appeal of the Order denying Appellants’ motion to open default is untimely. The Order was filed on April 19, 2016, and Appellants served the Notice of Appeal almost five months later, on September 16, 2016. “A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.” Rule 203(b)(1), SCACR. Appellants failed to serve a notice of appeal on Respondent within thirty days of receipt of the April 19, 2016 Order. “The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Elam*, 361 S.C. at 14-15, 602 S.E.2d at 775. Further, Appellants did not file a Rule 59(e), SCRCR, motion or other post-order motion and, therefore, the time for filing a notice of appeal was not stayed. The Notice of Appeal is untimely as to the Order denying Appellants’ motion to open default, and the Court should dismiss it.

III. THE ORDER OF DEFAULT JUDGMENT IS NOT APPEALABLE

Finally, the Order of Default Judgment is not immediately appealable. “[A] direct appeal does not lie from a default judgment.” *Winesett v. Winesett*, 287 S.C. 332, 333, 338 S.E.2d 340, 341 (1985). “The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCR. An appeal may then be taken from the denial of this motion.” *Id.* at 334, 338 S.E.2d at 341. Rather than following this established

procedure, Appellants improperly attempt to immediately appeal the Order of Default Judgment. The Court should dismiss an appeal of that Order as unappealable.

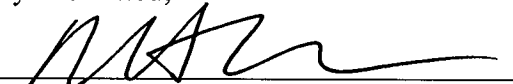
As an additional basis for dismissal, Appellants' case has no merit because they chose not to participate in the damages hearing. "[A] defendant who does not appear and answer has no status in court which will enable him to appeal from the judgment rendered." *Winesett*, 287 S.C. at 333, 338 S.E.2d at 341 (internal quotation marks omitted). *Winesett* is directly applicable to this case in which Appellants acknowledge notice of the extended due date of the answer and notice of the damages hearing but chose not to timely answer the Complaint and chose not to participate in the damages hearing. Appellants specifically represented in an email to the Special Referee and opposing counsel that they chose "not [] to participate in today's [damages] hearing." (Exh. 10, emails). Therefore, Appellants cannot now appeal from a judgment rendered against them when they chose not to answer or participate. The Court may dismiss the entire appeal on this basis alone.

CONCLUSION

For the reasons stated above, the Court should dismiss the above-captioned appeal with prejudice.

January 18, 2017

Respectfully submitted,



Patrick W. Carr
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Hilton Head Island, SC 29926

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
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The Honorable Michael G. Nettles
C. Stephen Bennett, Special Referee

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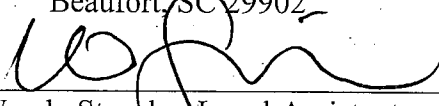
PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Respondent's Motion to Dismiss* and accompanying exhibits has been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below this 17 day of January, 2017.

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January 18, 2017

VIA REGULAR U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: *Ronis Acosta v. Pura Life Fiesta Center, et al.*
Appellate Case No. 2016-001951

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter please find the original and seven copies of *Respondent's Motion to Dismiss* and accompanying exhibits. Also enclosed is a check for the \$25.00 motion filing fee. Please file the original and return one file-stamped copy to me in the enclosed self-addressed, stamped envelope. By copy of this letter, I am serving all counsel of record with a copy of the same.

If you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,


Patrick W. Carr

cc: Jose A. Fuentes, Esquire
E. Mitchell Griffith, Esquire