

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM JASPER COUNTY
Court of Common Pleas

FEB 17 2017

SC Court of Appeals

Honorable C. Stephen Bennett, Presiding Special Referee
Honorable Michael G. Nettles, Circuit Judge
Honorable Carmen T. Mullen, Circuit Judge

Case No.: 2015-CP-27-358
Appellate Case No.: 2016-001951

Ronis Acosta,

Respondent,

v.

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

Of Whom Zaida Altamirano and Pura Life Fiestas Center are the Appellants.

RETURN TO MOTION TO DISMISS APPEAL

Appellants Pura Life Fiesta Center ("Pura Life") and Zaida Altamirano ("Altamirano") (collectively, "Appellants") hereby respond to the Motion to Dismiss the Appeal filed by Respondent Ronis Acosta ("Respondent"). Respondent's motion to dismiss the appeal should be denied because the appeal was timely filed and the orders subject to this appeal are appealable.

BACKGROUND

Respondent filed this negligence and dram shop action against Appellants and other parties on August 18, 2015. (Ex. 1 to Resp.'s Motion to Dismiss.) After service of the

Complaint, counsel for Appellants obtained from counsel for Respondent an extension of time to answer through October 25, 2015. (Ex. 1, Affidavit of Jose Fuentes ¶ 6.) Counsel for Appellants inadvertently failed to file the answer by October 25, 2015 and instead filed and served the answer on November 4, 2015. (Fuentes Aff. ¶¶ 7-8.) On November 16, 2015, counsel for Respondent filed an Affidavit of Default. (Ex. 4 to Resp.'s Motion to Dismiss.)

On December 2, 2015, the trial court entered an Order of Default. (Ex. 5 to Resp.'s Motion to Dismiss.) Counsel for Appellants filed a Motion to Open Default and/or Stay Damages Hearing. (Ex. 7 to Resp.'s Motion to Dismiss.) Appellants sought to lift the entry of default pursuant to Rule 55(c), SCRPC. Id. The trial court denied Appellants' motion by order dated April 4, 2016. (Ex. 8 to Resp.'s Motion to Dismiss.)

Following a damages hearing, the trial court filed an Order of Judgment against Appellants on August 1, 2016. (Ex. 11 to Resp.'s Motion to Dismiss.) Counsel for Appellants received notice of this Order on August 21, 2016. Appellants mailed the instant appeal for filing and service on September 26, 2016. On that same date, Appellants mailed a Rule 60(b) motion for filing in the trial court. (Ex. 2, Rule 60(b) Motion.) Respondent now seeks an order dismissing this appeal.

ARGUMENT

Appellants simultaneously filed the instant appeal and the Rule 60(b) motion out of an abundance of caution to ensure that Appellants' rights to appellate review of the trial court orders were preserved. This case presents somewhat of a procedural dilemma for Appellants. It is well-settled that the denial of a motion to set aside an entry of default for good cause shown under Rule 55(c) is not immediately appealable. See, e.g., Thynes v. Lloyd, 294 S.C.

152, 153, 363 S.E.2d 122, 122 (Ct. App. 1987). Therefore, Appellants could not appeal the trial court's denial of Appellants' motion to lift the entry of default at the time it was entered.

When the final judgment was entered following the damages hearing, Appellants could have filed the Rule 60(b) motion for relief from the default judgment, waited for that motion to be decided by the trial court, and—if denied—appealed the denial of the Rule 60(b) motion. However, doing so, Appellant feared, would result in this Court considering only the Rule 60(b) standard for relief from a default judgment and not the Rule 55(c) standard for relief from the entry of default. “[T]he standard for granting relief under Rule 60(b) is more rigorous than under Rule 55(c) [and] an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment.” Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). For that reason, once the trial court's refusal to grant Appellants relief from the entry of default was made final by the entry of the judgment, Appellants filed this appeal seeking review of the trial court's decision under the standard set forth in Rule 55(c). As a result, the appeal is timely and proper because it was filed within thirty days of the entry of a final order.

Respondent argues that the appeal should be dismissed because, in general, no appeal lies from a default judgment and the proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b). Respondent relies exclusively on the South Carolina Supreme Court's decision in Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985), in making this argument. Winesett has been distinguished by this Court in Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990), and is distinguishable from the instant case.

In Winesett, the court offered three reasons the default judgment could not be appealed: (1) “a defendant who does not appear and answer has no status in court which will enable him to appeal from the judgment rendered;” (2) “a party appealing a default judgment will ordinarily be precluded from raising any issues on appeal because they were not first presented below;” and (3) the appellant will often not be able to meet his burden of providing this Court with a record sufficient to permit an adequate review.” Winesett, 287 S.C. at 333-34, 338 S.E.2d at 341.

In Balloon Plantation, the appellant was placed in default by a trial judge after the judge concluded the appellant failed to comply with a discovery order. Balloon Plantation, 303 S.C. at 153-54, 399 S.E.2d at 440. The appellant appealed the order placing it in default and the respondent argued, based on Winesett, that the appeal should be dismissed because the appellant “failed to move before the trial court to have the default and/or judgment set aside.” Id. at 157, 399 S.E.2d at 442. In distinguishing Winesett, this Court held as follows:

The procedure required by the Court in Winesett is not required in the instant case. Here, unlike there, the defendants did appear and answer. They are not in default because of their failure to do so. Rather, they are in default because the circuit judge decided they should be in default. Here, unlike there, the trial court explicitly ruled on the question of whether the defendants should be in default. This Court is not being asked to rule on an issue not first presented below. There is no point in requiring the defendants to ask the circuit judge to rule on the same question twice. Here, unlike there, the appellants are able to provide this Court with a sufficient record on appeal.

Id. at 157, 399 S.E.2d at 442.

The instant case is more comparable to Balloon Plantation than it is to Winesett and this Court should allow the appeal of the default judgment and consider whether relief from the entry of default should have been granted under Rule 55(c). In this case, Appellants

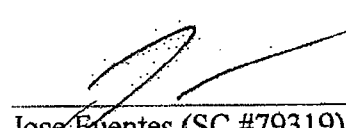
appeared in the lower court. Appellants filed an answer. Appellants presented their grounds for relief from the entry of default to the lower court. The lower court considered and ruled upon Appellants' bases for relief from the entry of default. Appellants established a record below that is sufficient for this Court to determine whether the trial court erred in holding that Appellants did not establish "good cause" as required by Rule 55(c). This Court should deny Respondent's motion to dismiss the appeal and should determine whether the trial court erred in denying Appellants' Rule 55(c) motion.

Finally, in the event this Court is inclined to agree with Respondent that a Rule 60(b) motion must be decided by the trial court before Appellants can proceed with an appeal, this Court should dismiss the instant appeal without prejudice so that the trial court can address the Rule 60(b) motion and, if necessary, Appellants can seek appellate review of whether the trial court erred in denying the Rule 55(c) and Rule 60(b) motions.

CONCLUSION

For the reasons set forth above, this Court should deny Respondent's motion to dismiss the appeal.

JENKINS, ESQUIVEL & FUENTES, P.A.



Jose Puentes (SC #79319)
Post Office Box 21307
Hilton Head, SC 29925
843-593-9999 – telephone
843-593-9998 – facsimile
Jose@Jenkins-Esquivel.com

February 14, 2017

Attorneys for Appellants

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

) IN THE COURT OF COMMON PLEAS
)
) THE FOURTEENTH JUDICIAL CIRCUIT

Ronis Acosta,

Plaintiff,

vs.

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

Defendants.

Civil Action No.: 2015-CP-27-358

AFFIDAVIT OF JOSE A. FUENTES

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SC Court of Appeals

Personally appeared before me Jose A. Fuentes, who first being duly sworn, deposes and states as follows:

1. I am Jose Fuentes. I am over the age of 18 years, and I submit this affidavit based upon my personal knowledge.
2. I am an attorney with Jenkins, Esquivel, & Fuentes, P.A. in Bluffton, South Carolina.
3. I have been licensed to practice law in the State of South Carolina since May 11, 2010.
4. I was retained by Defendants Pura Life Fiesta Center and Zaida Altamarino (the "Defendants" or the "Clients") to represent them in the above-referenced matter.

Ex. 1

5. At the time I was first asked to represent the Defendants, the Defendants had been served with the Complaint filed by Plaintiff Ronis Acosta. Mr. Acosta is represented by Patrick W. Carr with Berry & Carr.

6. On behalf of the Defendants, I requested and obtained an extension of time to answer or otherwise plead in response to the Complaint. Mr. Carr granted an extension through October 25, 2015.

7. During that time, my Clients were gathering information necessary to assist me in preparing a responsive pleading to the Complaint. While waiting to receive this information from my Clients, I inadvertently failed to file the answer on their behalf by October 25, 2015.

8. I filed and served an Answer on November 4, 2015. The Answer sets forth several meritorious defenses to the causes of action asserted by Plaintiff against the Defendants.

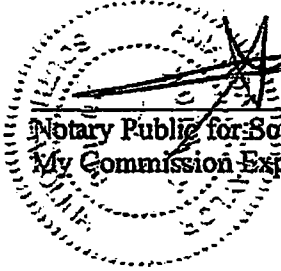
9. At the time I filed the Answer, Mr. Carr had not filed an Affidavit of Default or otherwise requested that the Court enter default against my Clients. On November 10, 2015, Mr. Carr filed an Affidavit of Default.

10. A damages hearing in this matter was held on May 25, 2016. On August 1, 2016, the Court entered a default judgment against the Defendants in the amount of \$6,711,985.26. I did not receive notice of the default judgment until August 21, 2016.

11. The failure to file a timely answer on behalf of the Defendants was a result of inadvertence and excusable neglect and I respectfully request that the Court reinstate my Clients' Answer in this matter and allow this case to proceed on the merits.

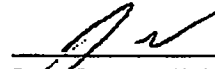
FURTHER AFFIANT SAYETH NOT.

Sworn to before me this 16 day
of September, 2016

 A circular notary seal for South Carolina is partially obscured by a signature. The seal contains the text "NOTARY PUBLIC" and "SOUTH CAROLINA".
[Signature]
Notary Public for South Carolina
My Commission Expires: 9/14/2020

[Signature]
Jose A. Fuentes

JENKINS, ESQUIVEL & FUENTES, P.A.



Jose Fuentes (SC #79319)

Post Office Box 1969

Bluffton, SC 29910

843-815-3500 – telephone

843-815-3524 – facsimile

Jose@Jenkins-Esquivel.com

***Attorneys for Defendants Zaida Altamirano
and Pura Life Fiesta Center***

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Of Whom Zaida Altamirano and Pura Life Fiestas Center are the Appellants.


PROOF OF SERVICE

I hereby certify that a copy Appellant's Return To Motion To Dismiss was served upon all counsel of record by depositing same in the United States Mail, proper postage affixed thereto on **February 14, 2017** addressed as follows:

Patrick W. Carr, Esquire
Berry & Carr
2 Spanish Wells Road
Hilton Head Island, SC 29926
Attorney for Respondent

E. Mitchell Griffith, Esquire
Griffith Sharp and Liipfert, LLC
PO Drawer 570
Beaufort, SC 29901

JENKINS, ESQUIVEL & FUENTES, P.A.



Jose Fuentes (SC #79319)
Post Office Box 21307
Hilton Head, SC 29925
843-593-9999 - telephone
843-593-9998 - facsimile

February 14, 2017

JENKINS, ESQUIVEL & FUENTES, P.A.

ATTORNEYS AT LAW
155 WILLIAM HILTON PKWY
POST OFFICE BOX 21307
HILTON HEAD, SC 29925
TELEPHONE: (843) 593-9999
FACSIMILE: (843) 593-9998

WILLIAM-G. JENKINS, JR.
E-MAIL: WILLIE@JENKINS-ESQUIVEL.COM

HECTOR F. ESQUIVEL*
E-MAIL: HECTOR@JENKINS-ESQUIVEL.COM

JOSE A. FUENTES^
E-MAIL: JOSE@JENKINS-ESQUIVEL.COM
*ALSO LICENSED IN GEORGIA
^ALSO LICENSED IN FLORIDA

February 14, 2017

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

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SC Court of Appeals

Re: Ronis Acosta v. Pura Life Fiestas, et al
C/A No.: 2015-CP-27-358
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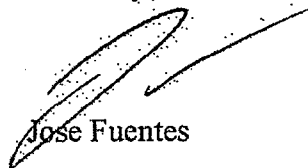
Dear Honorable Ms. Abbott Kitchings:

Enclosed please find the original and seven copies of the Appellant's Return To Motion To Dismiss, along with the Certificate of Service. Please file the original and return a clocked copy to me in the envelope provided for your convenience.

If you have any questions or need any additional information do not hesitate to contact me.

With kind regards, I remain

Sincerely,



Jose Fuentes

Enclosures

cc: Patrick W. Carr, Esq.
E. Mitchell Griffith, Esq.

FAX

Date:	02/16/2017
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Pages including cover sheet:	13
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To:	
Phone	
Fax Number	(803) 734-1839

From:	Judith Gonzalez
	Jenkins, Esquivel & Fuentes
	155 William Hilton Parkway
	Hilton Head Island
	SC 29926
Phone	(843) 593-9999 * 108
Fax Number	(843) 593-9999

NOTE:	
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Dear Sir/Madam:

Would you please let me know if you have received this? We just wanted to make sure. It was over nighted. our fax is: 843-593-9998

Thank you

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SC Court of Appeals