

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

RECEIVED

FEB 24 2017

SC Court of Appeals

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 the
.....Appellants.

**RESPONDENT'S REPLY TO APPELLANTS' RETURN TO RESPONDENT'S MOTION
TO DISMISS**

Respondent Ronis Acosta ("Respondent") submits this Reply to Appellants' Zaida Altamirano and Pura Life Fiesta Center ("Appellants") Return to Respondent's Motion to Dismiss the above captioned appeal. For the reasons stated below, and those stated in Respondent's motion, the Court should dismiss the appeal with prejudice.

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.

Appellants fail to reply to the majority of Respondent's arguments for dismissal. The only response Appellants make is that they strategically chose to file a notice of appeal before obtaining a ruling on a Rule 60(b) motion to have the Court of Appeals use the more favorable Rule 55(c), SCRCR, standard in its review of this case and that this case is allegedly distinguishable from *Winesett v. Winesett*, 287 S.C. 332, 338 S.E.2d 340 (1985). As discussed below, these points are incorrect and do not save this appeal.

Appellants failed to respond to Respondent's argument that the Court should dismiss the entire appeal because they chose not to participate in the damages hearing. See Mot. p. 7; *Winesett*, 287 S.C. at 333, 338 S.E.2d at 341 (“[A] defendant who does not appear and answer has no status in court which will enable him to appeal from the judgment rendered.” (internal quotation marks omitted)). Therefore, the Court should dismiss the entire appeal. See Rule 240(e), SCACR (“Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition.”).

Appellants failed to respond to Respondent's argument that the December 2, 2015 Order of Default and Reference is unappealable and any appeal is untimely. See Mot. pp 4-5. Therefore, the Court should dismiss the appeal as to that Order. Rule 240(e), SCACR.

Respondent addresses below the only arguments Appellants presented in their Return.

I. Appellants Admit they Failed to Follow the Proper Appellate Procedure

Appellants' explanation for its procedural decisions is inconsistent. First, Appellants admit they "could have filed the Rule 60(b) motion for relief from 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." (Return p. 3). This is an admission that Appellants failed to follow the proper procedure of filing a Rule 60(b) motion and obtaining a ruling on that motion **before** filing a notice of appeal. Despite this admission, Appellants assert they strategically chose to file an appeal to ensure review of the decision to deny relief from entry of default judgment is determined based on the more lenient standard in Rule 55(c), SCRPC, instead of the Rule 60(b) standard.³ *Id.* Appellants misconstrue the law.

When a Rule 55(c) motion for relief from entry of default is denied and a case proceeds to default judgment, the defaulting party must file a Rule 60(b) motion for relief from judgment. On an appeal from the denial of that order, the appellate court may review the Rule 55(c) decision using the Rule 55(c) standard and review the Rule 60(b) decision using the Rule 60(b) standard. *See, e.g., Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) ("The decision whether to set aside an entry of default **or** a default judgment lies solely within the sound discretion of the trial judge." (emphasis added)). This makes sense given that the motions are based on different grounds. Appellants misconstrued the law to their own detriment, and the Court should dismiss the appeal with prejudice.

II. **Winesett is Applicable to This Case and Supports Dismissal of this Appeal**

³ Appellants also imply the filing of the default judgment made the April 4, 2016 Order denying Appellants' motion to open default an appealable order. (Return p. 3). This is incorrect. *Winesett*, 287 S.C. at 333, 338 S.E.2d at 341 ("[A] direct appeal does not lie from a default judgment.").

Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985) is directly applicable to the procedural facts of this case and supports Respondent's motion for dismissal. In both this case and *Winesett*, the lower court entered judgment against an appellant in default. *Id.* at 333, 338 S.E.2d at 341. In both cases the defaulting appellant filed a notice of appeal without first seeking to set aside the default judgment under Rule 60(b), SCRPC. *Id.* at 333-34, 338 S.E.2d at 341. Under the reasoning of *Winesett*, the instant appeal should be dismissed because the appellant's "sole remedy" was to file a Rule 60(b), SCRPC, motion. *Id.* at 334, 338 S.E.2d at 341.

Appellants incorrectly attempt to compare this case to *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990). (Return pp. 3-4). The procedural facts of *Balloon Plantation* are completely different from those in this case, making the reasoning of that opinion inapplicable here. In *Balloon Plantation*, the lower court held the defendants in default as a sanction under Rule 37, SCRPC, for failing to timely serve answers to interrogatories as ordered. 303 S.C. at 153-54, 399 S.E.2d at 440. On appeal, the respondent cited to *Winesett* as support for its argument that the Court should dismiss the appeal because the appellant failed to first file a motion to set aside the default judgment. *Id.* at 157, 399 S.E.2d at 442. The Court refused to dismiss the appeal because it found the "default" of the appellant distinguishable in that the appellant was in default due to a sanctions order and not due to its failure to appear and answer. *Id.* The Court explained, "[t]he defendants do not seek relief based on any of these grounds [in Rule 60(b)]. Therefore, a motion pursuant to Rule 60(b) would not make any sense." *Id.*


In this case, unlike *Balloon Plantation*, Appellants are in default due to their failure to timely answer and appear. Further, Appellants chose not to appear at the damages hearing. As evidenced by the fact that Appellants filed a Rule 60(b) motion, that is the proper procedure they should have taken before filing a notice of appeal.

Finally, as an additional basis for dismissal, the Court should dismiss the appeal with prejudice for judicial economy. The only basis Appellants assert for failing to timely answer is the neglect of counsel. (Return p. 2). This is an invalid basis to obtain relief from default because it is attributable to the client. "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). Therefore, Appellants will not be able to successfully set aside default and the Court should dismiss the appeal with prejudice.

CONCLUSION

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

Respectfully submitted,



Patrick W. Carr, Esquire
SC Bar No. 15585; Fed. I.D. No. 07190
BERRY & CARR, P.C.
Attorneys at Law
2 Spanish Wells Road
Hilton Head Island, SC 29926
Phone: (843) 686-5432
Facsimile: (843) 785-6173
E-mail: patrick@hiltonheadlawyers.com
Attorney for Respondent

Dated: February 22, 2017

Hilton Head Island, South Carolina

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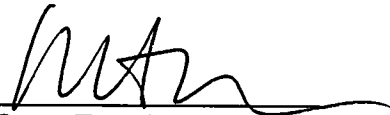
Pura Life Fiesta Center; Zaida Altamirano; Daniel's Espresso, Inc.; Daniel's Restaurant
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Defendants,

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

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Respondent's Reply to
Appellants' Return to Respondent's Motion to Dismiss and Motion to File Out of Time*
has been served upon the following counsel of record by mailing one copy by United
States Mail, addressed as shown below this 22 day of February, 2017.

Jose A. Fuentes
Jenkins, Esquivel & Fuentes, P.A.
Post Office Box 1969
Bluffton, SC 29910



Patrick W. Carr, Esquire
SC Bar No. 15585; Fed. I.D. No. 07190
BERRY & CARR, P.C.
Attorneys at Law
2 Spanish Wells Road
Hilton Head Island, SC 29926
Phone: (843) 686-5432
Facsimile: (843) 785-6173
E-mail: patrick@hiltonheadlawyers.com
Attorney for Respondent

Dated: February 22, 2017

Hilton Head Island, South Carolina

DAVID H. BERRY
ATTORNEY AT LAW
ADMITTED IN SC, SD, GA, & OH

PATRICK W. CARR
ATTORNEY AT LAW
CERTIFIED CIRCUIT COURT MEDIATOR



LUCAS M. PAULICK
ATTORNEY AT LAW

February 22, 2017

Via U.S. Mail

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

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 Reply to Appellants' Return to Respondent's Motion to Dismiss and Motion to File Return out of Time*. 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

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