THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
R. Keith Kelly, Circuit Court Judge

Case No. 2014-CP-42-02846
Appellate Case No. 2017-000464

Paula Rose,

Respondent,

v.

Charles Homer Rose, III,

Petitioner

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Dated: March 20, 2017 Spartanburg, South Carolina

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QUESTION PRESENTED

Did the Court of Appeals err in upholding the lower court's denial of a motion to set aside default on an abuse of discretion standard in a case where Petitioner failed to file any responsive pleading until one-hundred and seven (107) days after due and legal service of the complaint.

INTRODUCTION

In South Carolina, a trial court's decision whether or not to set aside an entry of default or a default judgment will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Roberson v. S. Fin. of S.C., Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005). Here, the Court of Appeals correctly held that the lower court did not abuse its discretion.

COUNTER-STATEMENT OF THE CASE

Plaintiff/Respondent (hereinafter "Respondent") filed this action for assault and battery against Defendant/Petitioner (hereinafter "Petitioner") including allegations Petitioner physically struck Respondent in the head multiple times with his handheld police radio on or about September 18, 2014. The Summons and Complaint in this matter were duly served on the Petitioner on October 6, 2014. (App. pp. 61-64). The appropriate affidavits of default were submitted to the court and default was entered pursuant to S.C.R.Civ.P. 55(a) on or about December 19, 2014. (App. p. 65). A damages hearing was scheduled for January 21, 2015. Upon receiving notice of the hearing, counsel for Respondent hand delivered notice of the hearing to Petitioner and sent a courtesy copy to Petitioner's divorce counsel on or about January 13, 2015. Petitioner failed to file any responsive pleading until January 20, 2015, one-hundred and seven (107) days after service, when Petitioner filed an Answer and a Motion to Set

Aside the Default. (App. pp. 66-72). The Court heard extensive argument on the default issue, held the default issue in abeyance, and proceeded to a damages hearing. After hearing evidence at the damages hearing, the Court entered an Order on February 25, 2015 finding no good cause to set aside the default and further finding for the Respondent in the amount of $37,254.00 in actual damages and $111,762.00 in punitive damages. (App. p. 54-60). This is the Order from which Petitioner appealed when he filed his notice of appeal on March 23, 2014. The Court of Appeals issued a decision affirming the decision of the trial court without a hearing. (App. pp. 5-6).

ARGUMENT

Respondent filed this action against Petitioner for assault and battery following an incident in which Petitioner physically struck Respondent in the head multiple times with his handheld police radio on or about September 18, 2014. (App. pp. 61-63). Petitioner admits that he was served with the summons and complaint on October 6, 2014. (App. p. 69). As indicia of the seriousness of the matter, Petitioner was served at the Spartanburg County Sherriff's Office. (App. p. 64). No extension to answer was ever given. (App. pp. 94-95). It is undisputed that there is no documentation of any kind – email, letter, text message, or otherwise – that would meet the writing requirement of South Carolina Rule of Civil Procedure 6(b). (App. p. 106). Thus, the Answer was due no later than November 9, 2014. Petitioner admits that he never filed any responsive pleading of any kind until January 20, 2015. (App. p. 66).

The Court moved forward into the damages hearing. Respondent called multiple witnesses, including a psychiatrist who diagnosed Respondent with PTSD following the

assault by Petitioner. Respondent also called Chaz Reed, Petitioner's step-son, to the stand and he testified as to seeing a great deal of blood after hearing the screams of Respondent when she was struck with Petitioner's police radio. (App. pp. 194-198). Reed also testified about how Petitioner attempted to conceal his wrongdoing by hiding his shirt from the incident. (Id.). Petitioner called no witnesses and did not take the stand and his counsel stated he would have pled his Fifth Amendment right against self-incrimination to all questions if he had taken the stand. (App. p. 264, line 21 to p. 265, line 6). The parties stipulated to certain things that Petitioner would have testified to if he had taken the stand. Included in that was that Petitioner had a trust account with $3.8 million dollars in it and that he received approximately $146,800.00 from that account each year. (App. p. 266). There was no direct testimony from Petitioner on any of the purported misleading texts, statements, etc. that form the basis for the Petition for Certiorari.

a. The Court of Appeals properly held that the lower court did not abuse its discretion in ruling Petitioner's negligence, miscommunications, and lack of diligence to hire counsel to timely answer the Complaint failed to demonstrate good cause to warrant relief from default.

Under South Carolina law, the standard for granting relief from an entry of default under Rule 55(c) is "good cause." Sundown Operating Co., Inc. v. Intedge Industries Inc. 681 S.E.2d 885 (S.C. 2009). That standard requires a party seeking relief from an entry of default "to provide an explanation for the default and give reasons why vacation of the default would serve the interest of justice." Id. at 888. The trial court's decision whether or not to set aside an entry of default or a default judgment will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Roberson v. S. Fin. of S.C.,

Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005).

It is well settled in South Carolina's jurisprudence that negligent handling or oversight of a properly served Complaint, by either the defendant or the defendant's agents does not constitute "good cause" to justify setting aside entry of default. See, Roche v. Young Bros., Inc. of Florence, 456 S.E.2d 897, 900 (1995) (upholding trial court's entry of default where "[l]osing a summons and complaint within the corporation" offered as reason to set default aside); Sundown Operating Co., Inc., supra, 681 S.E.2d at 889 (defaulting corporate defendant failed to show good cause for relief from an entry of default where registered agent forwarded the suit papers to company's manager, manager forwarded the complaint to the vice-president, and vice-president telephoned the company's insurer about the lawsuit but did not forward the complaint to its insurer or follow-up until several days after the time to answer expired); Dixon v. Besco Eng'g Inc., 463 S.E.2d 636, 639 (S.C. App. 1995) (affirming denial of motion to set aside default on grounds defendant failed to show good cause where company employee in charge of responding to the complaint failed to timely retain local counsel and missed the deadline to answer complaint because he erroneously assumed company was given extension to respond).

"Court deadlines and rules 'serve important social goals, and a party should not be permitted to flout them with impunity.' Respect for judicial guidelines and judicial economy and efficiency suggest a more stringent interpretation of good cause..." Eli A. Poliakoff, Setting Aside Entries of Default: South Carolina Should Require a Reason, 54

S.C. L. Rev. 477, 480.

Here, there is no reasonable explanation as to why the Petitioner did not file an answer until one-hundred and seven (107) days after he was served.

Petitioner's brief alleges that Petitioner's attorneys had obtained an extension to answer. (Petition for Writ of Certiorari, p. 5). Rule 6(b) of the SCRCP requires any enlargement of time to be in writing. There is no evidence of any writing regarding an extension. Indeed, the lawyer from whom the extension was purportedly obtained provided an affidavit to the contrary. (App.. pp. 94-95). Therefore, Petitioner was in default thirty one (31) days after he was served. Petitioner never sought to get out of default from Respondent's counsel at any time. This is not good cause.

Petitioner's brief alleges that he relied on Mrs. Rose who purportedly told him she was going to drop the case. This is nonsensical based on Petitioner's own affidavit. (App. pp. 76-80). In the Affidavit, Petitioner goes through a detailed history of all the harms that Respondent has done to him and horrible acts he alleges Respondent committed to harm him. Specifically, the affidavit states that Respondent was unstable psychologically and had been taking psychiatric medication/getting treatment for the past fifteen years (App. p. 80, para. 34). The affidavit also states that Respondent had schemed Petitioner with a credit card machine (App. p. 77, para. 13-14) and that she stole vast sums of money from him up to half a million dollars by transferring or secreting funds from their accounts. (App. p. 77, para. 13-14). Based on all of this, Petitioner admitted that he did not have a clear understanding of whether or not Respondent was going to drop the case. (App. p. 103, lines 17-22).

Combining this admission with the foregoing history of a volatile relationship, there was no reasonable reliance by Petitioner on any purported statement made by Respondent and therefore no misrepresentation or fraud.

In the absence of a clear understanding, the diligent party takes action to protect its interests, particularly if involved in divorce litigation with the party in whom reliance is supposedly placed. Petitioner took no such action, made no written confirmation that Respondent was dropping the case, made no contact to Respondent's counsel, and despite having years of knowledge of the court system, made no review of the Court's file. A trip to the clerk's office would have revealed that Respondent had filed a motion for default and request for damages hearing. No, Petitioner did not do any of those things. In sum, Petitioner did not do anything at all to support an argument for good cause.

In the absence of "good cause" for failure to timely respond to the Summons and Complaint, South Carolina law makes it clear that a motion to set aside an entry of default must be denied. Here, there was no evidence of "good cause" and the trial court properly exercised its sole discretion in reaching this conclusion.

b. The Wham factors support the decision of the lower court holding Petitioner in default.

Even assuming Petitioner had somehow shown "good cause" for the default, the following relevant factors weigh in favor of the lower court's finding of default: "(1) the timing of the defendant's motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct.App.1989).

As to the timing, Petitioner's motion for relief from default was filed by the Clerk of Court on January 20, 2015, one hundred and seven (107) days after Petitioner was served with the Complaint. Petitioner had missed the S.C.R.Civ.P. 12(a) deadline to answer the suit papers by forty (40) days at the time default was sought by the Respondent on December 19, 2014. (App. p. 65). Likewise, Petitioner waited until one day before a damages hearing was scheduled to be heard before filing their motion. These are all facts that weigh heavily in support of the discretion the lower court exercised in denying the motion to set aside default.

Petitioner has failed to set forth any facts demonstrating he has a meritorious defense. As discussed above, Respondent went to great lengths to support her claim; calling several witnesses including the only eye witness and an expert psychologist to establish PTSD from the attack by Petitioner. Maybe the best evidence illustrating a lack of a meritorious defense is from Petitioner, however. Specifically, Petitioner's own Facebook page includes a picture that states: "I'm wondering how much jail time I would get for knocking the stupid out of someone." Subsequent to the attack on Respondent on September 14, 2014, Petitioner responded with a comment: "None...I tried it." (App. p. 294). As noted above, Petitioner never took the stand in order to preserve his 5th Amendment right against self-incrimination. (App. p. 213). Under such circumstances, the lower court judge was obligated to draw an adverse inference against Petitioner as the South Carolina Court of Appeals has reversed a trial judge for failing draw such an inference against a party invoking the Fifth Amendment privilege. Griffith v. Griffith, 506 S.E.2d 526, 532 (S.C. App. 1998). Add to this the audio recording of the

attack by Petitioner, the pictures of Respondent's injuries, the eye-witness testimony corroborating Respondent's version of the attack, the history of violence by Petitioner shown in his text messages and prior divorce based on Petitioner's physical cruelty, and there is no meritorious defense. (App. pp. 277-288, pp. 289-293, and pp. 295-298).

Respondent filed suit in the instant case on October 2, 2014, shortly after experiencing the complained-of injuries. (App. pp. 61-63). At the time of this filing nearly nine-hundred days have passed since the lawsuit was filed. During this time, Respondent has been denied appropriate funds from Petitioner to address the mental health damages Petitioner caused. To set aside the entry of default at this juncture would add significant time to what has already amounted to a very long wait for the Respondent. During this wait, Respondent has undergone what treatment she can afford and met with specialists but still lacks the funds to obtain the treatment that will be required.

A longer delay would also prejudice the Respondent in the discovery process. It is undisputed that the longer a case is delayed the more difficult it becomes to find documents, secure witnesses with a clear memory of the event, and properly litigate a case through discovery. The undue delay caused solely by the Petitioner has the significant threat of prejudicing the Respondent, who will likely not be able to obtain the same discovery she would have three years ago.

c. Authority cited by Petitioner is inapposite to the case at bar.

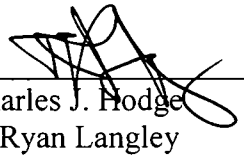
Petitioner cites to Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App.1987) as purported support for its position. There are marked distinctions that

render that decision inapposite to the case at bar. Specifically, the Defendant in Ricks filed her answer only eleven (11) days after the entry of default; some sixty (60) plus days earlier than Petitioner in this case. Further, the Defendant in Ricks had good cause for the delay as she acted diligently but was just a few days late due to bankruptcy of her insurance agent and a broken down vehicle. Petitioner did not act diligently and did not file his motion to set aside until January 21, 2015; 75 days after the entry of default. The Ricks case is inapposite to the case at bar.

CONCLUSION

The Order of the Court of Appeals is correct. The lower court went to great lengths to take due consideration of all factual issues and reasonably concluded that there was no good cause for Petitioner's failure to file an Answer until one-hundred and seven (107) days after he was served. This was far from an abuse of discretion and accordingly the decision should be upheld. Thus, this Court should deny certiorari.

Respectfully Submitted by: HODGE & LANGLEY LAW FIRM



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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with a copy of the *Return to Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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