(6)

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

S. Jackson Kimball

Special Circuit Court Judge

Case No. 2016-CP-46-03212

Andy Lee Rayburn,

Respondent,

v.

David Dysart,

Appellant.

INITIAL BRIEF OF RESPONDENT

November 6, 2017

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STATEMENT OF THE CASE

This action arises out a motor vehicle collision that occurred on April 14, 2016 in Rock Hill, South Carolina involving Respondent, Andy Lee Rayburn, and Appellant, David Dysart. However, Appellant's name appeared in the collision report as "David Dynast." Respondent filed the present action, alleging personal injury and damages, including medical expenses and loss of wages, on October 31, 2016 in the York County Court of Pleas but identified Appellant in the caption of the case as "David Dynast", thus, perpetuating the misspelling of Appellant's name from the collision report. Respondent's Complaint otherwise described in detail the very motor vehicle collision that both Appellant and Respondent had been parties to on the aforementioned date. Appellant was served with the Summons and Complaint on November 5, 2016 but failed, thereafter, to file an answer or otherwise respond to Respondent's pleadings.

On December 13, 2016, Respondent filed an Affidavit of Default and Motion for Default Judgment. (Pl.'s Mot. For Default J.). An order granting Appellant's Motion for Default Judgment was signed by the Honorable Daniel D. Hall on December 22, 2016. (Order of The Hon. Daniel D. Hall, December 22, 2016). At a hearing to determine damages, held before the Honorable S. Jackson Kimball on February 28, 2017, Appellant moved to set aside the default pursuant Rule 55 of the South Carolina Rules of Civil Procedure. Appellant argued at that time that the Court's Order of December 22, 2016 holding Appellant in default should be vacated on the grounds that

Appellant was not the individual named in Respondent's Summons and Complaint and that, therefore, the court lacked personal jurisdiction over him. It is of note that Appellant did not contend at that hearing that he had not been served with Respondent's Summons and Complaint or that said service did not otherwise comply with Rule 5 of the South Carolina Rules of Civil Procedure. Judge Kimball denied Respondent's motion to set aside the default and proceeded at that point with the hearing on damages.

On March 7, 2017, Judge Kimball issued an Order ruling that: 1) Appellant's motion to set aside the default judgment pursuant to Rule 55, SCRCP, was denied; 2) Respondent was granted judgment against Appellant in the amount of $25,000; 3) the caption of the case was to be "amended to reflect the name of the Defendant as "David Dysart", and the appropriate records of the Court shall be amended to reflect the amendment"; and 4) that judgment was to be entered in the present matter upon the judgment roll against Appellant in the name of "David Dysart." (Order of The Hon. S. Jackson Kimball, March 7, 2017).

Appellant subsequently filed a Motion for Reconsideration pursuant to Rule 59(e), SCRCP, which was heard by Judge Kimball on May 18, 2017. Judge Kimball ultimately ruled that all matters raised by Appellant had been addressed in his March 7, 2017 Order and that, accordingly, Appellant's motion was denied. (Order of The Hon. S. Jackson Kimball, May 23, 2017). Moreover, Judge Kimball denied Appellant's request to for leave to file an answer based upon his previous ruling that the case caption was to be "amended" to reflect the correct spelling of Appellant's name.

STANDARD OF REVIEW

"Determining whether to set aside an entry of default lies solely within the sound discretion of the trial court and that decision will be overturned absent a clear showing of any abuse of

discretion." White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 10, 753 S.E.2d 537, 542 (2014). Our appellate courts have held that abuse of discretion occurs when the trial court's decision "was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Roberson v. S. Finance of S.C., Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005).

ARGUMENT

I. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT?

Respondent would contend that the circuit court's denial of Appellant's Motion to Set Aside Default Judgment was well within the sound discretion of the court and that the ruling should be affirmed.

"For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." *South Carolina Rules of Civil Procedure*, Rule 55(c). "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating Co., Inc. v Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014).

Appellant's sole argument before the circuit court with respect to his Rule 55(c) motion was that the court lacked personal jurisdiction over Appellant in light of the fact that the Summons and Complaint identified the defendant is this action as "David Dynast." Appellant restates this

issue on appeal in the context of whether there was a valid action before the court given that Appellant's named was misspelled in Respondent's pleadings. However, our courts have long held that the misnomer of a defendant in the Summons and Complaint does not give rise to a lack of personal jurisdiction so long as the defendant was properly served with the pleadings in according with Rule 5, SCRCP.

As the circuit court noted in its March 7, 2017 Order, "[t]he purpose of Rule 5, SCRCP, is provide a defendant with notice of the action so as to afford him the opportunity to respond to the lawsuit in the appropriate manner." (Order of The Hon. S. Jackson Kimball, March 7, 2017). To maintain that service on Appellant in the present matter failed to provide him with adequate notice of the action simply because his named was misspelled in the Summons and Complaint runs contrary to well-settled case law. "We have never required exacting compliance with the rules to effect service of process. Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." Roche v. Young Bros. Inc., 318 S.C. 207, 209-10, 456 S.E.2d 897, 899 (1995). "When these rules are followed, there is a presumption of proper service." Id at 211.

"To establish that service has been properly effected, the plaintiff need only show compliance with the civil rule on service of process." McCall v. Ikon, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Ct. App. 2005). In McCall, the plaintiff brought suit against defendant in the name of defendant's corporate subsidiaries rather than in the name of the legal corporate entity authorized to do business in South Carolina. Id at 649. Plaintiff subsequently served the defendant via a manager of the corporate defendant and eventually obtained a default judgment. Defendant then moved for relief from the default judgment pursuant to Rule 60(b)(1), SCRCP, arguing that plaintiff had failed to name or serve the correct corporate entity. Id at 650. The trial court, which

was affirmed by the Court of Appeals, denied the defendant's motion, having determined that the defendant had adequate notice of the suit as service had been properly perfected. Id.

In the case at bar, Appellant did not dispute before the circuit court that he was duly served in accordance with Rule 5, SCRCP, with the Summons and Complaint. Moreover, there is no dispute in this matter that David Dysart was a party to the motor vehicle collision that was described in detail in the body of the Complaint. Nevertheless, Appellant is attempting to play the role of a "hapless victim of mistaken identity." McCall at 652. However, our courts have rejected this sort of argument for more than 130 years. As far back as 1885, our Supreme Court has held that "if the writ is served on the party intended to be served, and he fails to appear and plead in abatement, and suffers judgment to be obtained by default, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments." Waldrop v. Leonard, 22 S.C. 118, 127 (1885).

In Waldrop, Plaintiff brought an action for trespass against "James P. Leonard", although Plaintiff's intent had been to bring suit against "Jonas P Leonard." Waldrop at 118. Similar to the present matter, "James P. Leonard" and "Jonas P. Leonard" were one in the same. However, after plaintiff had properly served and subsequently obtained default judgment against "James P. Leonard", his attempts to execute the judgment were thwarted by defendant, who averred to the sheriff that he was not "James P. Leonard" but rather was named "Jonas P. Leonard" and had never been known by any other name. Id at 118-19. Upon learning of the apparent discrepancy, plaintiff moved for leave to amend the judgment and execution by replacing "James" with "Jonas" while defendant moved to have the judgment declared void due to the misnomer in defendant's name. Id at 119. The trial court denied plaintiff's motion to amend the judgment and granted defendant's motion to void the judgment. Id. In the appeal that followed, the Supreme Court reversed the trial

court, ruling that the defendant's failure to appear and plead the misnomer in abatement bound him to the judgment obtained by default. Waldrop at 127.

In the present case, having been duly served with the Summons and Complaint, Appellant had the option of either filing a responsive pleading, in which he could have objected to the misnomer, or filing a motion to dismiss the action for lack of personal jurisdiction pursuant to Rule 12(b)(2), SCRCP. However, Appellant elected to take no action in this matter until the Court had already issued an order holding in him default. To then argue that the action commenced by Respondent is a nullity is in stark conflict with the position of our appellants courts with respect to misnomer of the defendant's name:

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and the courts should not put themselves in the position of failing to recognize what is apparent to everyone else." (McCall v. Ikon, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Ct. App. 2005) *citing* Griffin v. Capital Cash, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992)).

As Appellant raised no other grounds upon which his motion to set aside the entry of default should have been granted, the trial court acted properly in denying said motion for failing to demonstrate the requisite good cause.

In his brief, Appellant cites the Glenn case, in which the plaintiff sought to bring a wrongful death suit on behalf of the estate of her deceased husband, despite the fact that the estate had been closed and she already had been discharged as administratrix of the estate several years prior to the commencement of the wrongful death action. Glenn v. E.I. Du Pont de Nemours & Co., 254 S.C. 128, 131-32, 174 S.E.2d 155, 156-57 (1970). In that case, our Supreme Court held that the plaintiff, in light of the fact that she had taken no steps to reopen the estate and be reappointed

administratrix prior to bringing the action, was not a legal entity and that the lawsuit was, therefore, a nullity. Glenn at 133.

Appellant, in citing Glenn, is attempting to steer the issue at hand from one of misnomer and personal jurisdiction, which was the sole argument Appellant raised before the circuit court in his motion to set aside the entry of default, to one of whether Appellant, as identified in the caption of the Summons and Complaint, is a legal entity capable of being sued. Respondent would respectfully argue that the Glenn case is not analogous to present matter, insomuch as there is a clear distinction between what constitutes a proper plaintiff in the context of a wrongful death action and the mere misnomer of a defendant's name. The Waldrop case cited above would appear to be more instructive with respect to the case at bar.

II. DID TRIAL COURT DID ERR IN AMENDING APPELLANT'S NAME IN THE MARCH 7, 2017 ORDER?

Appellant makes the following further arguments: (1) that by "appearing" at the February 28, 2017 damages hearing, Appellant should have been allowed to answer the Summons and Complaint; (2) that the misspelling of Appellant's name in the in the pleadings was material and substantial, such Appellant was confused and didn't realize he was the intended party; and (3) that by not allowing Appellant to file an answer after the circuit court amended the judgment, he is further barred from raising any defense to the action.

With respect to the first of these three arguments, Appellant contends that simply appearing at the February 28, 2017 damages hearing and advising the circuit court of the misnomer in Appellant's name somehow gives rise to grounds for relief from default independent of the jurisdictional argument raised by Appellant in his Rule 55(c) motion at that same hearing. Indeed, this argument is little more than a restatement of the argument that Appellant put forth at that hearing.

Appellant argues that the facts of the present case differ from those of Waldrop v. Leonard insomuch as Appellant "appeared" at the February 28, 2017 damages hearing and moved to set aside the default whereas Defendant Leonard did not "appear" in that matter until after default judgment had been obtained against him. Waldrop v. Leonard, 22 S.C. 118, 118-19. However, in Waldrop, the defendant, nevertheless, did move to have the default judgment declared void, essentially arguing similar grounds to that Appellant in the case at bar, which our Supreme Court ultimately rejected. Id at 119. Respondent maintains that there is no meaningful distinction between the "appearance" Appellant made at the damages hearing of February 28, 2017 in this matter and the "appearance" the defendant eventually made after default judgment was obtained in the Waldrop case. The clear implication in Waldrop and subsequent cases is that "appearance" portends either to the timely filing of an answer or an appropriate motion to dismiss, which Appellant failed to do in the case at hand. Accordingly, the result should be the same in this case as it was in Waldrop and other cases cited herein.

As to Appellant's contention that the mistake in Appellant's name in the Summons and Complaint was substantial and material, the facts of the present case would suggest otherwise. In the Tunstall case cited by Appellant, the Supreme Court notes:

> The misnomer of a corporation in pleadings and otherwise in judicial proceedings has the same effect as the misnomer of an individual. And when an action is brought against a corporation, the general rule is that where the name is mistaken materially and substantially, or where there is such a variation that a different entity is indicated, the suit cannot be regarded as against the corporation, and it cannot be affected by the proceedings or judgment therein; *but a mere misnomer of a corporation defendant in words and syllables is immaterial, and a judgment in the action will bind it if it is duly served with process or appears and does not plead the misnomer in abatement. As a general rule the misnomer of a corporation....is immaterial if it appears that it could not have been, or was not, misled.* (Tunstall v. Lerner Shops, Inc., 160 S.C. 557, 660, 159 S.E. 386, 388 (1931)(emphasis added)).

While Appellant argues that the misnomer in the present matter caused Appellant to be so confused that it prevented him from responding to the suit, the Complaint, as noted above, clearly describes, by date, location and general factual allegations, the same motor vehicle collision that Appellant was a party to. Appellant has never disputed the fact that he and Respondent were involved in the very car wreck that is the subject of Respondent's Complaint. Moreover, at the February 28, 2017 damages hearing, Appellant did not dispute that he had been duly served with the Summons and Complaint. As noted above in McCall, if it is apparent from the summons and complaint that the defendant should have understood that he was the intended party, the pleadings have fulfilled their purpose. McCall v. Ikon, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Ct. App. 2005). It is evident based upon the facts of this case that Appellant was not and could not have been misled by the misnomer in the Summons and Complaint and, as such, the misnomer is immaterial. As the misnomer in Appellant's name was immaterial, the circuit court was correct in denying Appellant's motion to set aside the default in this matter.

The last of these three arguments is that the circuit court's amendment of the judgment so as to reflect the correct spelling Appellant's last name constituted a substantial change to the defense of the case and that, as a result, Appellant should have then been afforded the opportunity to file an answer. In support of this position, Appellant points the following language from the Tunstall case, where Court cites Section 436 of the 1922 Code of Civil Procedure:

> The Court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking the name of any party, or a mistake in any other respect; or by inserting allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. (Tunstall v. Lerner Shops, Inc., 160 S.C. 557, 660, 159 S.E. 386, 388 (1931).

The emphasis that Appellants places on the above-noted language ignores the fact that, in the case at hand, the circuit's court's decision is consistent with the Supreme Court's holding in the Tunstall case, in which the Court held that a motion to amend the default judgment in that matter should have been granted by the trial court despite the fact that it had been obtained against the intended defendant via its trade name. Tunstall at 389. In that case, the Court held that "the amendment sought was not 'so extensive as to substitute a new defendant, but was merely a correction of a mistake in the name of the defendant'..." Id. This is analogous to the action of the circuit court in the present case, where the court merely sought by post-judgment amendment to correct a mistake in the spelling of Appellant's case, and which was also consistent with the conclusion reached by our appellate courts in Waldrop and McCall, cited herein above, and the Tri-County Ice case, which is discussed below, all of which dealt with the amendment of default judgments in the context of misnomer of the defendant's name. It is apparent from the all of these cases that our courts have adopted the position that when it is evident from the summons and complaint that a defendant has been misnamed in the caption of the case but those same pleadings would otherwise intimate that individual or entity served is the intended party, so long as said service of process on that defendant complies with Rule 5, SCRCP, the misnamed defendant is required to contest the misnomer via an answer or other responsive pleadings. In the present matter, Appellant should have either answered the pleadings or brought a motion to dismiss pursuant to Rule 12(b)(2), SCRCP. Thus, once in default and having failed to demonstrate grounds upon which relief from that default could be granted, Appellant was correctly barred from subsequently answering the suit. The circuit court's post-judgment amendment of the case caption does not substantially change the defense of the case with respect to Appellant, who had already been adjudged to be in default and who's motion for relief had already been denied.

III. SHOULD THE TRIAL COURT HAVE ALLOWED APPELLANT TO FILE AN ANSWER AFTER THE CASE CAPTION WAS AMENDED?

Appellant's final argument is that the he should have been afforded the opportunity to answer the "amended complaint" following the circuit court's Order of March 7, 2017, in which the court ordered that "[t]he caption of this case shall be amended to reflect the name of the Defendant as 'David Dysart', and the appropriate records of the Court shall be amended to reflect the amendment." (Order of The Hon. S. Jackson Kimball, March 7, 2017). Respondent, however, would counter that Appellant's reading of this particular provision of the March 7, 2017 Order is flawed and that, while the order seeks to amend the case caption and "appropriate records of the Court," this language does not constitute an amendment to the Complaint as contemplated by Rule 15(a), SCRCP.

The amendment in the present instance is more akin to the amendment of the default judgment in the Tri-County Ice case. In that case, plaintiff brought suit against Palmetto Ice Company and served the company's president with the summons and complaint. Tri-County Ice and Fuel Company v. Palmetto Ice Company, 303 S.C. 237, 238, 399 S.E.2d 779, 780 (1991). After plaintiff obtained default judgment, Palmetto Ice Company moved to vacate the judgment, arguing that Palmetto Ice Company was merely a trade name and that the proper defendant to the action was actually an entity named P&H Company. Id at 239. Plaintiff then moved to amend the default judgment so as to substitute P&H Company for Palmetto Ice Company as the defendant. Id. While denying the defendant's motion to vacate, the trial judge granted plaintiff's motion to amend pursuant to Rule 60(a), SCRCP, which provides, in part, that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." Id.

Our Supreme Court affirmed the trial judge's ruling in Tri-County Ice with respect to the amendment of the default judgment, holding that the "amendment was not so extensive as to substitute a new defendant, but was merely a correction of a clerical mistake in the name of the corporation." Tri-County Ice at 241.

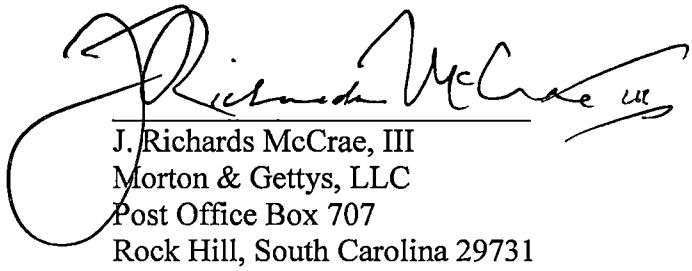
In the present matter, it would appear that the circuit court's decision to amend the caption and "appropriate records of the court" to reflect the correct spelling of Appellant's name is more in keeping with the amendment of a judgment pursuant to Rule 60(a), SCRCP, whereby the court is ultimately correcting a clerical mistake post-judgment, than that of an amendment to the summons and complaint as envisioned by Rule 15(a). Furthermore, an amendment of the judgment pursuant to Rule 60(a), which the court may make at any time on its own initiative, does not give rise to a corresponding right of a defendant already adjudged to be in default to then file an answer to the summons and complaint. To do so would render Rule 12(a), SCRCP, meaningless. Moreover, Appellant fails to cite any case law or other authority, aside from Rule 15(a) itself, that would suggest that a defendant who is in default can file a valid answer, thus defeating the default, when no relief has been granted from either an entry of default or default judgment. Thus, Appellant's argument that he should have been permitted by the circuit court to file answer based upon the court's post-judgment amendment should be rejected.

CONCLUSION

For the reasons stated herein, the judgment of the circuit court should be affirmed in all respects.

November 6, 2017

Respectfully submitted,



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PROOF OF SERVICE

The undersigned certifies that he has served this Initial Brief of Respondent on the Appellant by depositing a copy of it in the United States Mail, postage prepaid, on November 6, 2017, addressed to its attorney of record, Carrie Hailman O'Brien, Willson Jones Carter & Baxley, P.A., 6701 Carmel Road, Suite 475, Charlotte, North Carolina 28226.

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RE: ***Andy Lee Rayburn v. David Dysart***
C/A No.: 2016-CP-46-03212

Dear Sir or Madam:

Enclosed please find the original and one copy of the initial brief of respondent and proof of service of the same. Please file the original and return the clocked copy in the self-addressed stamped envelope provided.

Please do not hesitate to contact our office with any questions. I can be reached directly at 803-366-3425. With kind regards, I am

Sincerely,

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