

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016-CP-40-03728

Neal Truslow

Stephen Bretzinger, Lindsey Holsinger,
and Rikard & Protopapas, LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____ Attorney for: Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

Defendants' Motion to Set Aside Default Judgment is denied.

This order ends does not end the case.
Additional Information for the Clerk : _____

RECEIVED
NOV 30 2017
SC Court of Appeals

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge Al Bruce Lee Judge Code 2118 Date 9/24/2017

For Clerk of Court Office Use Only

This judgment was entered on the 21 day of Sept, 2017 and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Jeanette W. McBride

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS)
FIFTH JUDICIAL CIRCUIT)

Neal Truslow)

Docket No. 2016-CP-40-03728)

Plaintiff,)

v.)

ORDER)

Stephen Bretzinger, Lindsey Holsinger,)
and Rikard & Protopapas, LLC.)

RECEIVED

NOV 30 2017

Defendants.)

SC Court of Appeals

RICHLAND COUNTY
FILED
2017 SEP 21 PM 4:10
JENNIFER
CITRIST

This matter came before the Court on a Motion to Set Aside Default Judgment and Entry of Default by Defendants Stephen Bretzinger and Lindsey Holsinger ("Defendants") against Plaintiff Neal Truslow ("Plaintiff"). A hearing on the motion was conducted on July 11, 2017. Present at the hearing were Desa Ballard, Esquire, attorney for Plaintiff, and Alexandre MacClenahan, Esquire, attorney for Defendants.

BACKGROUND

This case arises from a breach of contract claim for defects in a home from Crestwood Homes, LLC, purchased in 2008. Plaintiff filed this action following Defendants' refusal to pay Plaintiff attorney's fees and costs advanced by Plaintiff while representing Defendants in prior litigation in federal court. Plaintiff filed the Summons and Complaint on June 16, 2016. Defendants Stephen Bretzinger and Lindsey Holsinger filed an answer on November 18, 2016. Plaintiff filed a Motion for Default Judgment on November 14, 2016. Defendants filed a Motion to Set Aside Entry of Default on November 18, 2016. On the same day, an Order for Default Judgment was signed and subsequently filed on November 29, 2016. Thereafter, Defendants filed a Motion to Set Aside Default Judgment on December 28, 2016.

DISCUSSION

At the motion hearing Defendants argued that on October 24, 2016, Defendants' counsel notified Plaintiff's counsel of his recent representation in the case and requested a copy of the pleadings filed to date. Later that same day, a copy of the Summons and Complaint, Order for Service by Publication, and a filed copy of the Affidavit for Service by Publication were provided

ad
#1

to Defendants' counsel. On November 14, 2016, a copy of Plaintiff's Affidavit of Default, Motion for Default, and Proposed Order for Default Judgment were sent by email to Defendants' counsel. He responded on November 15, 2016, stating an answer was being prepared and requested Plaintiff to set aside the default. Plaintiff's counsel declined to do so.

Service by Publication was authorized by Order dated September 12, 2016 after the Sheriff's Department attempted service upon Defendants on eight occasions and noted activity that suggested Defendants were avoiding service of process. Service was also attempted by United Parcel Service on four occasions. Defendants were served by publication in the Sun Sentinel newspaper in the area of Defendants' residence in Florida once a week for three consecutive weeks completed on October 6, 2016. Upon receipt of the documents from Plaintiff's counsel on October 24, 2016, Defendants did not request an extension of time to file an Answer and did not communicate with Plaintiff's counsel.

Defendants contend the Default Judgment should not have been entered and should be set aside because Defendants' Answer was pending and Plaintiff sent the Motion for Default Judgment to circuit court without an examination under oath, which is required under Rule 55(b)(4), SCRCF. Further, Defendants contend they acted swiftly and promptly to defend their rights in the case by notifying Plaintiff of their representation in the case. Upon learning of the entry of default, Defendants' counsel made a formal appearance and promptly filed an Answer and Motion to Set Aside Entry of Default.

Defendants rely on Rule 55(b)(4), SCRCF, as a basis to set aside the default judgment. It states:

In actions for the recovery of money only, when the summons has been served by publication and the defendant is a non-resident of the State, no default judgment shall be rendered unless the plaintiff or his agent at or before the time of making the application for judgment shall have been examined on oath respecting any payments that have been made to the plaintiff or any one for his use on account of the demand mentioned in the complaint, and shall show by affidavit that an attachment has been issued in the action and levied upon property belonging to the defendant, which affidavit shall contain a specific description of such property, and a statement of its value and shall be filed with proof of publication.

However, Rule 55(b)(4) does not apply in this case. An examination under oath was not necessary because the Complaint alleges the money owed to Plaintiff has not been paid and is being held in

ad
#2

trust by Defendant Rikard & Protopapas, a law firm. An attachment to levy on property of Defendants was not necessary because the money was being held in the law firm trust account. Plaintiff alleges Defendants were represented by an attorney when the dispute arose, refused to negotiate with Plaintiff, acknowledged they were aware of Plaintiff's charging lien, and evaded service. Sufficient evidence existed at the time the default judgment was entered to demonstrate that Plaintiff complied with the requirements for the issuance of the judgment and that Defendants' due process rights were protected.

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. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607-608, 681 S.E.2d 885, 888 (2009). Once a default judgment has been entered, a party seeking to be relieved from the judgment must do so under Rule 60(b), SCRPC. *Id.* at 608, 681 S.E.2d at 888. Defendants argue the default judgment should be set aside under Rule 60(b)(1) which requires a showing of mistake, inadvertence, excusable neglect, or surprise. Rule 60(b)(1), SCRPC. The party seeking to set aside the judgment has the burden of presenting evidence proving the facts essential to entitle him to relief. *McClurg v. Deaton*, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (Ct. App. 2008). The decision whether to set aside a default judgment lies solely within the sound discretion of the trial court. *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 490, 713 S.E.2d 335, 337 (Ct. App. 2011).

Regarding the timing for relief, Defendants filed a Motion to Set Aside Default Judgment on December 28, 2016, after an Order for Default Judgment was signed and subsequently filed on November 29, 2016. Defendants filed an Answer five weeks after service by publication was completed and three weeks after proof of service on October 6, 2016 had been provided by Plaintiff. The filing of the motion was certainly prompt. However, Defendants' failed to establish a basis to set aside the default under Rule 60(b)(1). Even when Plaintiff provided the documents evidencing the filing of the action and service, no efforts were made by Defendants to answer within the remaining time allotted or to request additional time to respond to the Complaint. Defendants make no argument to show mistake, inadvertence, excusable neglect, or surprise.

Courts have held that in order to obtain relief from a default judgment under Rule 60(b)(1), not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense. *McClurg*

ad
#3

v. Deaton, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008). A meritorious defense need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence. *Id.* at 575, 671 S.E.2d at 94. Defendants' Answer alleges defenses of unclean hands, misrepresentation, fraud, failure to mitigate damages, and estoppel without any factual basis. Defendants do not provide any explanation as to how these defenses are meritorious.

Defendants argue there is no prejudice to Plaintiff if the default judgment in this case is determined on the merits. However, Defendants have been holding \$35,132.55 allegedly owed to Plaintiff in trust since June 5, 2015. Defendants have not provided a satisfactory explanation for the default and have not presented any evidence proving the facts essential to entitle them to relief. Accordingly, Defendants are not entitled to relief on any of the grounds specified under Rule 60(b)(1), SCRPC.

ORDER

IT IS HEREBY ORDERED, Defendants Stephen Bretzinger and Lindsey Holsinger Motion to Set Aside is Default Judgment is **DENIED**.

AND IT IS SO ORDERED.



ALISON RENEE LEE
Presiding Judge

September 21, 2017
Columbia, South Carolina

ad
#4