THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
S. Jackson Kimball
Special Circuit Court Judge

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SC Court of Appeals

Case No. 2016-CP-46-03212

Andy Lee Rayburn,

Respondent,

v.

David Dysart

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. WAS THERE AN ACTION BEFORE THE YORK COUNTY COURT OF COMMON PLEAS WHEN THERE IS NO KNOWN PERSON BY THE NAME OF DAVID DYNAST?

II. DID THE TRIAL COURT ERR IN AMENDING APPELLANT'S NAME IN THE CASE CAPTION TO CORRECT AN INCORRECT LAST NAME WITHOUT ALLOWING APPEELLANT TO ANSWER THE COMPLAINT?

III. DID THE TRIAL COURT ERR IN FAILING TO ALLOW APPELLANT TO ANSWER THE PLAINTIFF'S AMENDED COMPLAINT?

STATEMENT OF THE CASE

Respondent, Andy Lee Rayburn, filed a Complaint in the York County Court of Common Pleas on October 31, 2016 and caused a Summons to be issued that same day. (R. pp. 10-11) The Complaint and Summons both named "David Dynast" as the sole defendant. (R. pp. 10-11). On November 5, 2016, Plaintiff served David "Dysart" with the Summons and Complaint which named "David Dynast" as the defendant. (R. p. 70) David Dysart did not file an answer or otherwise respond to the incorrect Summons and Complaint.

On December 13, 2016, Plaintiff filed an Affidavit of Default and a Motion for Default Judgment against David Dynast. (R. pp. 70-73) On December 22, 2016, the Honorable Daniel Dewitt Hall issued an Order granting Plaintiff's Motion for Entry of Default and Default Judgment against David Dynast. (R. p. 2)

On February 28, 2017, The Honorable S. Jackson Kimball presided over a damages hearing for the matter captioned Andy Lee Rayburn v. David Dynast. (R. pp. 15-48) At that hearing, Counsel for David Dysart appeared and made an oral motion to set aside the entry of default pursuant to South Carolina Rule of Civil Procedure Rule 55 on grounds that the court lacked personal jurisdiction over David Dysart, as he had never been named in the Summons or Complaint or properly served with an accurate Summons or Complaint. (R. pp. 21-26)

Judge Kimball held that because David Dysart was served with process pursuant to South Carolina Rule of Civil Procedure, Rule 5 and had an opportunity to respond to the Complaint with a motion to dismiss, there were no good grounds to set aside the entry of default against him, even though he had never been accurately named in the action. (R. pp. 3, 29-30)

In his March 7, 2017 Order, Judge Kimball ordered that: 1) Defendant's motion to set aside default judgment pursuant to Rule 55, SCRCP is denied; 2) Plaintiff is granted judgment against Defendant, David Dysart, in the sum of $25,000.00, actual damages, together with the costs of this action; 3) The 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; 4) The Clerk of Court is authorized and directed to enter the judgment in this case upon the judgment roll against the Defendant in the name of "David Dysart." (R. pp 3-7). The Appellant also argued that if the Appellee's Complaint was being amended, then the Appellant must have the opportunity to serve a responsive pleading. That argument was also denied by the trial court. (R. pp. 51-56)

On May 18, 2017, Judge Kimball heard Appellant's Motion for Reconsideration pursuant to Rule 59(e) SCRCP. (R. pp. 74-77) Judge Kimball denied the motion, holding that there were not any issues that were not already addressed in his March 7, 2017 Order, and there was no basis for reconsideration. (R. pp. 8-9)

STATEMENT OF FACTS

Respondent brought this action following an automobile accident that occurred on April 14, 2016 on Chamberside Drive and David Lyle Boulevard in Rock Hill, South Carolina. (R. pp. 11-14). Respondent claimed that David Dynast failed to yield to Respondent while making a left turn. (R. p. 11).

Plaintiff alleges that as a result of this accident, he suffered injury to his neck, back, and right ankle. (R. p. 7). He also claimed that he missed time from work and missed out on activities with his son. (R. p. 7).

STANDARD OF REVIEW

The standard of review for a denial of a motion to set aside an entry of default is abuse of discretion. Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006); Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004). An abuse of discretion occurs when the trial court judge entered the order "by an error of law or without evidentiary support." Id.; Limehouse v. Hulsey, No. 4805, 2011 S.C. App. LEXIS 124, at *21 (Ct. App. June 2, 2011).

ARGUMENT

I. WAS THERE AN ACTION BEFORE THE YORK COUNTY COURT OF COMMON PLEAS WHEN THERE WAS NO KNOWN PERSON BY THE NAME OF DAVID DYNAST?

The trial court erred in finding that there was an action against David Dynast in the York County Court of Common Pleas. "A civil action may be maintained only in the name of a person in law, an entity, which the law of the forum may recognize as capable of possessing and asserting a right of action." Glenn v. E. I. Du Pont de Nemours & Co., 254 S.C. 128, 134, 174 S.E.2d 155, 158 (1970).

In Glenn, the plaintiff had previously served as the administratrix of the estate of her late husband. Id. at 131. After the final return and accounting of the estate, she was "forever discharged" as the administratrix of the estate. Id. Five years later, the plaintiff attempted to bring a lawsuit against E.I. DuPont De Nemours & Co. for wrongful death. Id. In the complaint for the wrongful death suit, the plaintiff claimed to be the administratrix of her husband's estate. Id. The

defendant moved to strike the complaint. Id. at 132. One of the grounds for striking the complaint was that the caption read "Mrs. Dorothy R. Glenn, administratrix of the estate of Carl Glenn" when the plaintiff was not the administratrix of the estate of Carl Glenn, since she had already been discharged. Id. In response, the plaintiff filed a motion to be reinstated as administratrix and appoint her administratrix *de bonis non*. Id.

The trial court allowed the plaintiff to amend her complaint to name herself as administratrix *de bonis non*. Id. The court held that since the action brought by the plaintiff was "a nullity," the pleadings could not be amended to name the plaintiff as "Mrs. Dorothy R. Glenn, administratrix *de bonis non*. Id. at 137. Furthermore, the court added, "a complaint brought in the name of a plaintiff which is not a legal entity is a nullity and there is no foundation upon which to base an amendment." Id. at 134.

In the case at bar, to the knowledge of Appellant, there is no such individual named David Dynast. Furthermore, there is certainly no such individual as David Dynast living at 1988 Smiths Circle, Rock Hill, South Carolina 29730. Permitting the trial court to simply change Appellant's name in the caption of this case from "David Dynast" to "David Dysart" is allowing the Appellee to base an amendment upon "a complaint brought in the name of a plaintiff which is not a legal entity." Just as this was not permissible in the context of a wrongful death action where the plaintiff was not proper, it should not be permissible for a defendant to substituted into the litigation without properly being named or served, and particularly after a default judgment has been entered against the improper defendant.

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

Even if there was a valid action against David Dysart in the York County Court of Common Pleas, which is denied, then the trial court erred in amending Appellant's name on the March 7, 2017 Order granting judgment against the Appellant to change the name from David Dynast to David Dysart.

a. Appellant informed the court of the error with his name that appeared in the pleadings.

"There is no doubt that when a party is sued by a wrong name and he appears to the suit and does not plead the misnomer in abatement, and judgment is rendered against him in the erroneous name, execution may be issued upon it in that name and levied upon the property and effects of the real defendant." Waldrop v. Leonard, 22 S.C. 118, 127 (1885). This rule applies even if the judgment is obtained by default. Id.

In Waldrop, the plaintiff attempted to sue "Jonas" P. Leonard for trespass. Id. at 118. However, the pleadings identified the defendant as "James" P. Leonard. Id. Upon advice from his lawyer, Jonas P. Leonard, did not answer or make an appearance. Id. An entry of default was then made against James P. Leonard, and a judgment and execution were issued against James P. Leonard. Id. The execution against James P. Leonard was returned unsatisfied. Id.

Plaintiff then realized that the person he intended to sue was Jonas P. Leonard, and moved for supplemental proceedings against Jonas P. Leonard. Id. The court issued an order requiring that "Jonas P. Leonard, alias James P. Leonard, to appear and answer concerning his property." Id. at 119. This order was served on Jonas P. Leonard, who then appeared to state that he had not been served in any cases where the plaintiff had obtained judgment against him. Id. The evidence put forth indicated that Jonas P. Leonard had been served by sheriff, but did not answer or appear after consulting with his attorney. Id. Plaintiff subsequently moved for leave to amend the judgment and execution to change the name from James P. Leonard to Jonas P. Leonard. Id. Jonas

P. Leonard objected and moved for an order declaring the judgment against Jonas P. Leonard void and dismissing the supplemental proceedings brought by the plaintiff. Id. The trial court granted Jonas P. Leonard's motion and held that the judgment against Jonas P. Leonard was void and thus could not be amended. Id. The Supreme Court of South Carolina reversed and remanded, holding that when a party fails to appear and plead a misnomer, the judgment may be issued in the incorrect name but then the property of the intended defendant may be levied. Id. at 126.

Unlike in Waldrop, in the case at bar, Appellant did appear and plead misnomer. In Waldrop, when Jonas P. Leonard appeared before the court, he "denied that he had been served in the case or that he had ever been known by any other name other than Jonas P. Leonard." Id. at 119. In contrast, Appellant here did appear and plead misnomer, seeking to have the entry of default set aside so as to be able to defend the case on its merits. At the February 28, 2017 default damages hearing in front of Judge Kimball, Appellant, by and through counsel, explained to the court that the Summons and Complaint in this matter identified the defendant as David Dynast when the intended defendant's name was actually David Dysart. (R. pp. 19-21, 26-27). The correct defendant should have been allowed the opportunity to defend the claims made against him.

b. Respondent's mistake in the pleadings regarding Appellant's name was material and substantial.

South Carolina courts treat a misnomer of an individual the same as they treat a misnomer of a corporation in pleadings and judicial proceedings. Tunstall v. Lerner Shops, Inc., 160 S.C. 557, 563, 159 S.E. 386, 389 (1931). When a name is mistaken "materially and substantially… the suit cannot be regarded as against the corporation, and it cannot be affected by the proceedings or judgment therein." Id.

In Tunstall, the plaintiff filed a civil lawsuit against "The Lerner Shops, Incorporated." Id. at 559. The actual name of the intended defendant was "Lerner Stores Corporation," but the business operated under the name "Lerner Shops." Id. No answer or other response was made to the Complaint. Id. The trial court judge entered a default judgment of $1,500.00. Id. The defendant moved to set aside the judgment and contended that Lerner Stores Corporation was not bound by the judgment because it had not been properly named in the lawsuit. Id. The defendant also moved to prevent any of its property from being levied to satisfy this judgment. Id. The plaintiff then moved to amend the judgment in order to correct the name of the defendant. Id. at 560. The trial court denied the motion to amend. Id. at 566.

The Court of Appeals held that the plaintiff should have been permitted to amend the judgment to correct the name of the defendant. Id. In holding that the mistake was not material and substantial, the Court reasoned that plaintiff had presented evidence that the defendant clearly used the name "Lerner Shops" to conduct business and that the manager of the store had even told plaintiff's counsel that the corporate name of the store was "The Lerner Shops, Incorporated." Id.

Unlike in Tunstall, in the case at bar, the mistake in Appellant's name was material and substantial. David Dysart has never gone by the name David Dynast nor has he ever represented that his name is David Dynast. Further, David Dysart is not even aware of the existence of a person named David Dynast. It is this confusion over the name that prevented him from responding to the suit. Had the Appellee properly identified the Appellant in the Complaint, David Dysart would have properly responded to it.

The Appellee and the trial court have maintained throughout that the incorrect name was a mere misnomer and that David Dysart was properly served despite his name never actually appearing on a Summons, Complaint or Motion for Default Judgment. In Judge Kimball's March

7, 2017 Order, it states that "David Dysart was duly served with the Summons and Complaint in full compliance with Rule 5, SCRPC." (R. p. 5) Later in the same paragraph, it is admitted that "the pleadings incorrectly named him as 'David Dynast'." (R. p. 5) If the Appellee was incorrectly named in the Summons and Complaint, then he could not possibly have been served "in full compliance" with the Rules. If the trial court's finding reflects a "close enough" approach, then what is the cut off? Had the Appellee identified "Jane Doe" as the defendant but described the correct accident and then served the Summons and Complaint to David Dysart's address, would this still be a misnomer to the extent that the Appellee could obtain a default judgment against Jane Doe and then merely move to amend after the fact to enforce the judgment against David Dysart? In effect, what the trial court has done is flip the burden of proof from the plaintiff, to show that he has identified the correct defendant, over to the defendant to prove that he is not the correct party. This is contrary to the basic tenets of our legal system and the default must be set aside.

c. The amendment of the judgment to change Appellant's name prevents him from being able to put up a defense.

"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 correcting a mistake in the name of a party...*when the amendment does not change substantially the claim or defense*. Tunstall v. Lerner Shops, Inc., 160 S.C. 557, 562-63, 159 S.E. 386, 389 (1931)(emphasis added).

Appellant contends that changing his name from David Dynast to David Dysart does substantially change his defense because it inherently denies Appellant the ability to put up any defense. In his March 7, 2017 Order, Judge Kimball amended the caption of the case to change the caption in the case to name Appellant as David Dysart rather than David Dynast and permitted judgment in the case to roll against David Dysart. (R. p. 7). In doing this, the trial court denied David Dysart the ability to defend this lawsuit, despite the fact that David Dysart had never been

named in any pleading or motion. There is no more substantial change to a defense than a complete bar to asserting a meritorious defense.

III. DID THE TRIAL COURT ERR IN FAILING TO ALLOW THE APPELLANT TO FILE AN ANSWER IN RESPONSE TO THE PLAINTIFF'S AMENDED COMPLAINT?

In the March 7, 2017 Order, the trial court acknowledged that the Defendant had been incorrectly identified in the original Complaint and held that "the 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." (R. p. 7) SCRCP 15(a) provides the rules which govern amendments to pleadings. Rule 15(a) allows amendments to pleadings within 30 days of a responsive pleading being served, within 30 days of service if no responsive pleading is required, upon the written consent of the adverse party or with leave of court.

Rule 15(a) further states that when a pleading is amended "A party shall plead in response to the amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders." Therefore, when the trial court allowed the Appellee to amend his Complaint to correctly identify the Appellant, the Appellant should have been allowed fifteen days in which to file a response, per the express terms of Rule 15(a). This argument was again made by the Appellant during the hearing on the motion for reconsideration, and was again denied by the trial court.

By failing to allow the Appellant to file a responsive pleading to the Appellee's Amended Complaint, the trial court has violated the terms of Rule 15(a) and has denied the Appellant the opportunity to put forth a meritorious defense to the Appellee's claims.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court, set aside the entry of default against the Appellant, set aside the default judgment against the Appellant and allow the Appellant a reasonable amount of time to serve his response to the Appellee's Amended Complaint.

Respectfully submitted,

January 22, 2018

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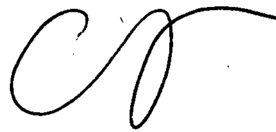
CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Appellant's Final Brief complies with Rule 211(b) of the Sourth Carolina Rules of Appellate Procedure and that no substantive changes have been made from the Appellant's initial brief.

This the 22 day of January, 2018.



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