

86653

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2017-CP-10-01603
Appellate Case No.: 2018-000766

RECEIVED
MAY 04 2018
SC Court of Appeals

Lashonda MiddletonRespondent,

v.

TBONZ Management, Inc.Appellant.

MOTION TO DISMISS APPEAL AND SUPPORTING MEMORANDUM

Respondent Lashonda Middleton (hereinafter "Respondent") hereby respectfully moves for this Court, pursuant to Rule 240, SCACR to dismiss the above captioned appeal which arises from an order of the Circuit Court refusing to grant relief from the entry of default. This motion is based upon the fact that this appeal is premature and not appealable until after entry of judgment.

STATEMENT OF CASE

Appellant seeks to appeal an order denying Appellant's Motion to Set Aside Entry and Order of Default issued by the Honorable J.C. Nicholson, Jr. (hereinafter "Judge Nicholson") (motion and order attached hereto as Exhibits 1 and 2). Judge Nicholson also denied Appellant's Motion for Reconsideration (motion and order attached hereto as Exhibits 3 and 4). On April 19, 2018, the Charleston County Clerk of Court issued a notice scheduling the damages hearing in

this case for May 25, 2018 (attached hereto Exhibit 5). Appellant filed its Notice of Appeal on April 23, 2018.

ARGUMENT

Whether an order denying a motion to set aside entry and order of default is immediately appealable under Rule 72 and S.C. Code Ann. § 14-3-330 has been addressed in a number of recent cases, including *Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 361 S.E.2d 340, (Ct.App.1987), in which the Court dismissed an appeal from an order setting aside an entry of default prior to final judgment. The Court found that “*an order setting aside an entry of default is not appealable until after final judgment.*” In *Thynes v. Lloyd*, 294 S.C. 152, 363 S.E.2d 122 (Ct.App.1987), the Court also dismissed an appeal from an order refusing to grant relief from the entry of default as premature. In *Wells Fargo Bank, NA v. Marion Amphitheatre, LLC*, 408 S.C. 87, 757 2d 816, (Ct.App. 2014), the Court dismissed the appeal and cited *Ateyeh* in finding that, “*a motion to set aside an entry of default is not immediately appealable until after final judgment.*”

CONCLUSION

As judgment has not been entered in this case, Respondent respectfully moves for the dismissal of this appeal so that the damages hearing scheduled for May 25, 2018 may proceed.

May 3, 2018



Jonathan S. Altman, Esquire
Derfner & Altman, LLC
575 King Street, Suite B
Charleston, SC 29403

Attorney for Respondent

EXHIBIT 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Lashonda Middleton,)
)
Plaintiff,)
)
v.)
)
TBONZ Management, Inc.,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-10-01603

**DEFENDANT'S MOTION TO SET ASIDE
ENTRY OF DEFAULT AND ORDER OF
DEFAULT**

FILED
2017 JUN 27 PM 4:38
JULIE J. ARMSTRONG
CLERK OF COURT

TO: JONATHAN S. ALTMAN, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that Defendant TBONZ Management, Inc. (hereinafter "Defendant"), by and through its undersigned counsel, will move at a time and place to be arranged by the Court pursuant to SCRPC 55(c), or in the alternative SCRPC 60(b), for an Order setting aside the Order of Default against it, dated June 13, 2017, in the above referenced matter. In support of this motion, Defendant would show that good cause exists for the Court to Order the relief sought and that the Plaintiff has suffered no prejudice by the insignificant delay of Defendant.

Defendant's argument in support of this Motion will rely upon the applicable law of the state of South Carolina, Rules of Civil Procedure, all pleadings and affidavits filed in this action, testimony of Attorney Morgan Templeton, forthcoming Affidavit(s), Memorandum, and any such other authorities as may be presented at the hearing on this motion.

Respectfully submitted,

LUZURIAGA MIMS, LLP

By: 

Kevin W. Mims
Randell C. Stoney III
50 Immigration St, Suite 200
Charleston, SC 29403
(843) 410-4713
kmims@lmlawllp.com
rstoneyl@lmlawllp.com

Attorneys for the Defendant

Charleston, South Carolina

June 27, 2017

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 27th day of June, 2017.

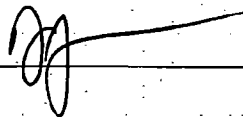


EXHIBIT 2

Schwartz or any representative of Defendant. Stubbs is a senior claims adjuster with Owner's Insurance Company, Defendant's insurer. In his affidavit, Stubbs acknowledges that he and Owner's Insurance Company received notice of this lawsuit on May 22, 2017. Thereafter, Stubbs attempted to assign defense of this suit to Templeton by emailing him on May 25, 2017 and June 1, 2017. Stubbs did not communicate with Templeton prior to making this assignment and made no effort to confirm Templeton's engagement. Stubbs' emails were not received by Templeton who states that he did not learn of the assignment until after the issuance of the order of default.

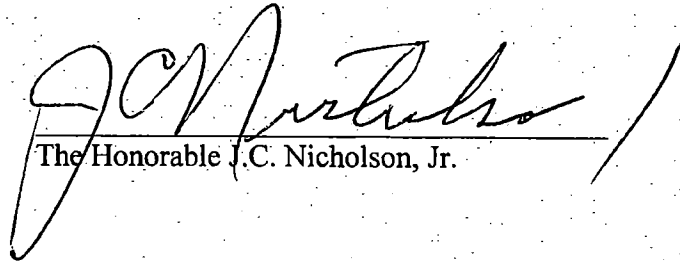
In its memorandum in support of its motion to set aside entry of default and order of default, Defendant submits that Judge Jefferson's order of default is not a judgment of default and that Rule 55(c) governs Defendant's motion. Plaintiff maintains that the more rigorous "*excusable neglect*" standard set forth in rule 60(b) applies.

gcn
"The power to set aside a default judgment is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion," *Melton v. Olenik*, 379 S.C. 45, 48, 664 S.E.2d 487, 490 (Ct. App. 2008). It is the finding of this Court that Defendant's motion does not satisfy the "*good cause*" standard of Rule 55(c) or the "*excusable neglect*" standard of Rule 60(b). In its memorandum, Defendant acknowledges that "*the South Carolina Supreme Court has held that pleadings received and subsequently lost or dilatory acts by an insurance carrier or attorney are not justification to lift an entry of default.*" See *Scruggs v. Ballenger Corp.*, 260 S.C. 509, 510, 197 S.E.2d 91, 92 (1973), *White Oak Manor, Inc. v. Lexington Insurance Company*, 407 S.C. 1, 753 S.E.2d 537 (2014), and *Bissonette v. Joseph*, 170 S.C. 407, 170 S.E. 467 (1933).

While Defendant attempts to distinguish this case from *Scruggs* and *White Oak Manor* and maintains that Stubbs and Defendant's insurance carrier's efforts to assign a defense were steadfast and thwarted by "*unexpected technological occurrences*", the record in this case does not support Defendant's assertions. Stubbs did not communicate with Templeton prior to e-mailing him and made no effort to communicate with Templeton to confirm his receipt of this assignment. Stubbs and Defendant's carrier's efforts were not steadfast. Its failure to engage Templeton was the result of neglect.

It is therefore ORDERED this 8 day of JAN, 201~~7~~⁸ that Defendant's motion to set aside entry of default and order of default is denied. It is also hereby ORDERED that the proof of service is amended to reflect that the amended summons and complaint was served on Defendant¹.

Date: _____


The Honorable J.C. Nicholson, Jr.

¹ Plaintiff's proof of service contains a scrivener's error that reflects that Schwartz, Defendant's Registered Agent, was served with the summons and complaint. The transmittal letter to Schwartz, as well as the affidavit of default and order of default, accurately reflect that Schwartz was properly served with the amended summons and amended complaint. While Defendant raised this issue in its memorandum, Rule 4(i) provides discretion of the Court to amend any proof of service it deems just.

EXHIBIT 3

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
Lashonda Middleton,)	CASE NO. 2017-CP-10-01603
)	
Plaintiff(s),)	
)	
v.)	DEFENDANT'S MOTION TO
)	RECONSIDER
TBONZ Management, Inc.,)	
)	
Defendant(s),)	

FILED
 2018 JAN 17 PM 4:37
 JULIE NEWSTRONG
 CLERK OF COURT

TO: THE HONORABLE J. C. NICHOLSON JR.; COUNSEL OF RECORD

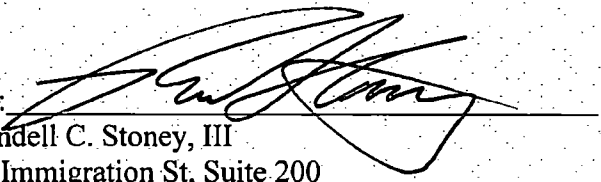
PLEASE TAKE NOTICE that pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendant TBONZ Management Inc. will move at such time, date, and place as counsel may be heard that the Court reconsider its Order filed January 10, 2018 denying Defendant's Motion to Set Aside Entry of Default and Order of Default and to request the Court clarify certain aspects its Order including but not limited to confirmation of whether the Court's denial of Defendant's Motion is pursuant to Rule 55(c) or 60(b) of the South Carolina Rules of Civil Procedure.

This Motion is based on South Carolina case law, rules, and statutes. A detailed memorandum of law in support of this motion may be submitted at the appropriate time.

ATTORNEY SIGNATURE PAGE TO FOLLOW

Respectfully submitted,

LUZURIAGA MIMS, LLP

By: 
Randell C. Stoney, III
50 Immigration St, Suite 200
Charleston, SC 29403
(843) 266-9781
rstoney@lmlawllp.com
Attorneys for the Defendant -

Charleston, South Carolina

January 17, 2018

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing
pleading was mailed to all counsel of record
in this proceeding this 17th day of
January, 2018.

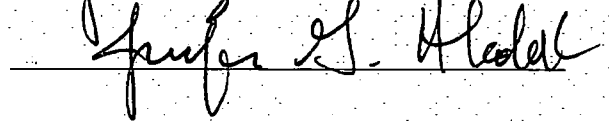


EXHIBIT 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-10-1603

Lashonda Middleton
PLAINTIFF(S)

TBONZ Management, Inc.
DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or
	<input type="checkbox"/> 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. See Page 2 for additional information.
- 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
- STAYED DUE TO BANKRUPTCY**
- 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: Defendant's Motion for Reconsideration filed January 17, 2018, is respectfully Denied without a rehearing. However, for clarification, denial of Defendant's motion to set aside entry of default was primarily based upon Defendant's failure to show good cause pursuant to Rule 55.

ORDER INFORMATION

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

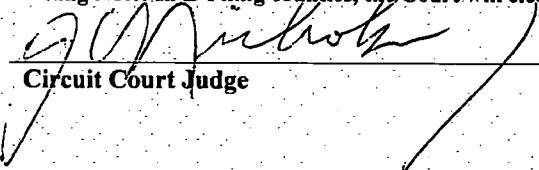
FILED
2018 MAR 16 PM 1:59
JULIE J. ARASTIR
CLERK OF COURT
BY

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property and an 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 (List amount(s) below)
N/A		
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

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.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2117
Judge Code

3/15/18
Date

EXHIBIT 5



Rachel Savini <rsavini@derfneraltman.com>

Motion "MOFREE-Motion/Other DAMAGES HEARING" for Case "2017CP1001603-Lashonda Middleton VS Tbonz Management Inc" was added to a Motions Roster for 5/25/2018 at 12:00 PM

1 message

cpas@charlestoncounty.org <cpas@charlestoncounty.org>
To: rsavini@derfneraltman.com

Thu, Apr 19, 2018 at 2:29 PM

HEARINGS WILL BE BEFORE JUDGE NICHOLSON IN COURTROOM 3E
.PLEASE SUBMIT ALL MEMOS THREE DAYS PRIOR TO THE HEARING.
- PLEASE SUBMIT ALL REQUESTS FOR CONTINUANCES TO JUDGE NICHOLSON AT
jnicholsonlc@sccourts.org. THE DEADLINE FOR THESE REQUESTS IS WEDNESDAY, MAY
16th at 5PM

PLEASE CONTACT CAROLINE LEONARD, NON JURY DOCKET COORDINATOR AT
ccleonard@charlestoncounty.org IF YOU HAVE QUESTIONS.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No.2017-CP-10-01603
Appellate Case No.: 2018-000766

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MAY 04 2018
SC Court of Appeals

Lashonda MiddletonRespondent,

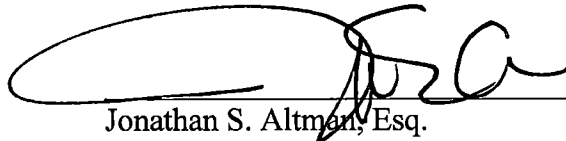
v.

TBONZ Management, Inc.Appellant.

PROOF OF SERVICE

I certify that I have served Respondent's Motion to Dismiss and Supporting Memorandum, by depositing a copy of it in the United States Mail, postage prepaid, on May 3, 2018, properly addressed to Appellant's attorneys, Kevin W. Mims, Esquire and Randell C. Stoney, III, Esquire, of Luzuriaga Mims, LLP, 50 Immigration Street, Suite 200, Charleston, South Carolina 29403.

May 3, 2018



Jonathan S. Altman, Esq.
Derfner & Altman, LLC
575 King Street, Suite B
Charleston, SC 29403

Attorney for Respondent

D · & · A

D E R F N E R
& A L T M A N

May 3, 2018

RECEIVED

MAY 04 2018

SC Court of Appeals

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Lashonda Middleton v. TBONZ Management, Inc.
Case No.: 2017-CP-10-01603
Appellate Case No.: 2018-000766

Dear Madam Clerk:

Please find enclosed an original and seven copies of the following in accordance with Rule 240, SCACR:

1. Respondent's Motion to Dismiss and Supporting Memorandum;
2. Proof of Service; and
3. My firm's check in the amount of \$25.00 representing the filing fee associated therewith.

Please file the originals and return a filed copy to me in the enclosed self-addressed stamped envelope. Please contact me with any questions.

Yours Very Truly,

DERFNER & ALTMAN, LLC



Jonathan S. Altman

JSA/rs

Enclosures

cc: Randell C. Stoney, III, Esq.
Kevin W. Mims, Esq.

ARMAND DERFNER | SAMUEL H. ALTMAN | JONATHAN S. ALTMAN

843.723.9804 (PHONE) | 843.723.7446 (FAX) | 575 KING STREET | SUITE B | CHARLESTON, S.C. 29403 | WWW.DERFNERALTMAN.COM

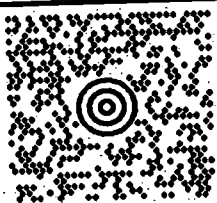
RACHEL SAVINI
843-723-9804
DERFNER & ALTMAN, LLC
575 KING STREET, SUITE B
CHARLESTON SC 29403

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1 OF 1

SHIP TO:

CLERK OF COURT
SOUTH CAROLINA COURT OF APPEALS
1220 SENATE STREET
COLUMBIA SC 29201



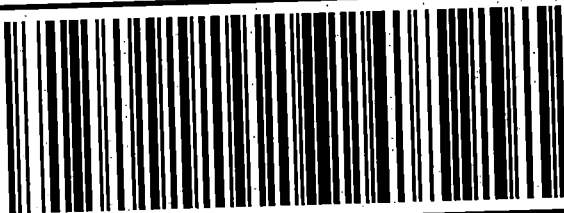
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MAY 04 2018

SC Court of Appeals