

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) CASE NUMBER 2017-CP-10-0432 10-3324
COUNTY OF CHARLESTON)

ROSA MARITZA GALBAN)
ARANDA,)

Plaintiff,)

-vs-)

RIGOBERTO ORTEGA,)

Defendants.)

ORDER

RECEIVED

JUN 12 2018

SC Court of Appeals

FILED
2018 MAY -8 AM 11:09
CLERK OF COURT

JUDGE: The Honorable Diane S. Goodstein
DATE OF HEARING: March 21, 2018
PLAINTIFF'S ATTORNEY: Johnny F. Driggers, Esquire
DEFENDANT'S ATTORNEY: T. O. Sanders, IV, Esquire
COURT REPORTER: Ruth C. Weese

THIS MATTER is before the Court on Defendant's Motion to Set Aside a default judgment, pursuant to Rule 60(b), South Carolina Rules of Civil Procedure. A hearing was held on Defendant's Motion on Wednesday, March 21, 2018, at 10:00 a.m.; arguments were heard, and memoranda were submitted by each party. For the reasons set forth below, I find Defendant has not met his burden to set aside the entry of default under South Carolina Rule of Civil Procedure 60(b). And, therefore, the Court denies the motion.

PROCEDURAL BACKGROUND

Litigation¹ was commenced on January 27, 2017. Defendant was properly served on February 2, 2017. Defendant then came to Plaintiff's counsel's office, was advised no one was able to assist him and he would need to speak with his own attorney. After receiving no response, entry of default was filed May 26, 2017, more than 100 days after service. An Order of Default was entered June 7, 2017. However, it was learned the address where the incident occurred was incorrect; therefore, a voluntary dismissal was filed on August 14, 2017.

The subject lawsuit was filed June 29, 2017. Defendant was properly served on July 11, 2017. An affidavit ~~entry~~^{DSS} of Default was filed on September 6, 2017; an Order of Default was entered September 21, 2017. On October 12, 2017, Defendant was personally served with a letter notifying him a damages hearing had been scheduled for November 17, 2017. Just prior to the damages hearing, Defendant retained counsel, who filed a Notice of Appearance and Motion to Set Aside Default on November 14, 2017.

Shortly afterwards, on November 16, 2017, Defendant filed a Motion to Dismiss the Summons and Complaint.

¹The suit arises out of a slip and fall at property owned by Defendant.

LEGAL ANALYSIS

Plaintiff requests the Court not consider the affidavit of Defendant filed just prior to the commencement of the hearing, citing South Carolina Rules of Civil Procedure 6(d):

“When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served no later than two days before the hearing, unless the court permits them to be served at some other time.”

Concededly, the Rule appears to require that the affidavit should have been filed contemporaneously with the motion; however, the last phrase of the rule "... unless the court permits them to be served at some other time." appears to give this Court discretion to consider affidavits at any time. After careful consideration, this Court will consider all affidavits.²

As an Order of Default Judgment was issued in this case on September 21, 2017, Defendant's Motion to Set Aside the Default is governed by Rule 60(b) and not Rule 55(c). In ***Sundown Operating Company, Incorporated vs. Intel Agenda Series, Inc.***, 383, SC 601, 606, 681 S.E. 2nd 885, 889 (2009), the Supreme Court addressed the apparent confusion in the case law regarding the different applications of the standards of relief set forth in Rule 55(c) and 60(d):

²Plaintiff's counsel had the foresight to file an affidavit of one of his staff two days prior to the hearing, and a supplemental affidavit at the hearing.

"The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule 55(c). **Ricks v. Weinrauch**, 293 S.C. 372, 374, 360 S.E. 2d 535, 536 (Ct.App.1987). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." Rule 60(b), SCRCP. The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default **889 once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default."

Normally, there are four factors to be considered in granting relief under Rule 60: (1) the promptness with which relief is sought; (2) the reasons for failure to act promptly; (3) the existence of a meritorious defense; and (4) prejudice to the Plaintiff if default is vacated. However, it is not necessary for this Court to "...make specific findings of fact for each factor if there is sufficient evidentiary support in the record for the finding of the lack of good cause." **Sundown**, supra, at 608.

Defendant has failed to establish even a minimum showing of "good cause." In short, this Court does not accept Defendant's purported claim of illiteracy prevented him from timely filing an answer. At the commencement of the hearing Defendant filed an affidavit, averring, in part,

"After receiving the documents, I tried to meet with attorney, Johnny Driggers to request more information, but I was told that he could not

give me any information."

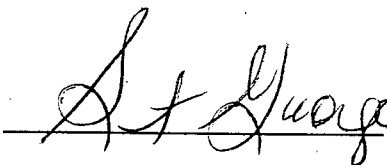
This Court considers it significant that, despite Defendant's alleged illiteracy, he attempted to speak directly with the Plaintiff's attorney. And, more importantly, he clearly understood the words and the import of those words that were communicated by the staff at Driggers Law Firm.³ Yet, for whatever reason, he chose not to retain counsel until more than four months later.

THEREFORE, IT IS ORDERED that the motion is denied.

AND IT IS SO ORDERED.



The Honorable Diane S. Goodstein
Judge of the Ninth Judicial Circuit



South Carolina

April 27, 2018

³The affidavit of Debra Curwen, Plaintiff's counsel's staff, buttresses this conclusion.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) CASE NUMBER 2017-CP-10-0432 10-3324
COUNTY OF CHARLESTON)

ROSA MARITZA GALBAN)
ARANDA,)

Plaintiff,)

-vs-)

RIGOBERTO ORTEGA,)

Defendants.)

ORDER

RECEIVED

JUN 12 2018

SC Court of Appeals

FILED
2018 JUN 12 - 8 AM 11:09
JULIE J. ANASTROPHO
CLERK OF COURT

JUDGE: The Honorable Diane S. Goodstein
DATE OF HEARING: March 21, 2018
PLAINTIFF'S ATTORNEY: Johnny F. Driggers, Esquire
DEFENDANT'S ATTORNEY: T. O. Sanders, IV, Esquire
COURT REPORTER: Ruth C. Weese

THIS MATTER is before the Court on Defendant's Motion to Set Aside a default judgment, pursuant to Rule 60(b), South Carolina Rules of Civil Procedure. A hearing was held on Defendant's Motion on Wednesday, March 21, 2018, at 10:00 a.m.; arguments were heard, and memoranda were submitted by each party. For the reasons set forth below, I find Defendant has not met his burden to set aside the entry of default under South Carolina Rule of Civil Procedure 60(b). And, therefore, the Court denies the motion.

PROCEDURAL BACKGROUND

Litigation¹ was commenced on January 27, 2017. Defendant was properly served on February 2, 2017. Defendant then came to Plaintiff's counsel's office, was advised no one was able to assist him and he would need to speak with his own attorney. After receiving no response, entry of default was filed May 26, 2017, more than 100 days after service. An Order of Default was entered June 7, 2017. However, it was learned the address where the incident occurred was incorrect; therefore, a voluntary dismissal was filed on August 14, 2017.

The subject lawsuit was filed June 29, 2017. Defendant was properly served on July 11, 2017. An affidavit ~~entry~~^{DSS} of Default was filed on September 6, 2017; an Order of Default was entered September 21, 2017. On October 12, 2017, Defendant was personally served with a letter notifying him a damages hearing had been scheduled for November 17, 2017. Just prior to the damages hearing, Defendant retained counsel, who filed a Notice of Appearance and Motion to Set Aside Default on November 14, 2017.

Shortly afterwards, on November 16, 2017, Defendant filed a Motion to Dismiss the Summons and Complaint.

¹The suit arises out of a slip and fall at property owned by Defendant.

LEGAL ANALYSIS

Plaintiff requests the Court not consider the affidavit of Defendant filed just prior to the commencement of the hearing, citing South Carolina Rules of Civil Procedure 6(d):

"When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served no later than two days before the hearing, unless the court permits them to be served at some other time."

Concededly, the Rule appears to require that the affidavit should have been filed contemporaneously with the motion; however, the last phrase of the rule "... unless the court permits them to be served at some other time." appears to give this Court discretion to consider affidavits at any time. After careful consideration, this Court will consider all affidavits.²

As an Order of Default Judgment was issued in this case on September 21, 2017, Defendant's Motion to Set Aside the Default is governed by Rule 60(b) and not Rule 55(c). In ***Sundown Operating Company, Incorporated vs. Intel Agenda Series, Inc.***, 383, SC 601, 606, 681 S.E. 2nd 885, 889 (2009), the Supreme Court addressed the apparent confusion in the case law regarding the different applications of the standards of relief set forth in Rule 55(c) and 60(d):

²Plaintiff's counsel had the foresight to file an affidavit of one of his staff two days prior to the hearing, and a supplemental affidavit at the hearing.

"The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule 55(c). **Ricks v. Weinrauch**, 293 S.C. 372, 374, 360 S.E. 2d 535, 536 (Ct.App.1987). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." Rule 60(b), SCRCP. The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default **889 once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default."

Normally, there are four factors to be considered in granting relief under Rule 60: (1) the promptness with which relief is sought; (2) the reasons for failure to act promptly; (3) the existence of a meritorious defense; and (4) prejudice to the Plaintiff if default is vacated. However, it is not necessary for this Court to "...make specific findings of fact for each factor if there is sufficient evidentiary support in the record for the finding of the lack of good cause." **Sundown**, supra, at 608.

Defendant has failed to establish even a minimum showing of "good cause." In short, this Court does not accept Defendant's purported claim of illiteracy prevented him from timely filing an answer. At the commencement of the hearing Defendant filed an affidavit, averring, in part,

"After receiving the documents, I tried to meet with attorney, Johnny Driggers to request more information, but I was told that he could not

give me any information."

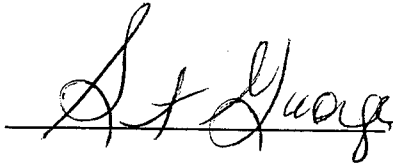
This Court considers it significant that, despite Defendant's alleged illiteracy, he attempted to speak directly with the Plaintiff's attorney. And, more importantly, he clearly understood the words and the import of those words that were communicated by the staff at Driggers Law Firm.³ Yet, for whatever reason, he chose not to retain counsel until more than four months later.

THEREFORE, IT IS ORDERED that the motion is denied.

AND IT IS SO ORDERED.



The Honorable Diane S. Goodstein
Judge of the Ninth Judicial Circuit



South Carolina

April 27, 2018

³The affidavit of Debra Curwen, Plaintiff's counsel's staff, buttresses this conclusion.