THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 07 2018
SC Court of Appeals

APPEAL FROM OCONEE COUNTY
CIRCUIT COURT

CORDELL MADDOX, CIRCUIT COURT JUDGE

CASE NO.: 2012-CP-37-00902
APPELLATE CASE NO. 2017-000294

Alexander Pastene.....Appellant,

v.

Marion R. McMillan and Synergy Spine Center, P.A.....Respondents.

FINAL BRIEF OF RESPONDENTS

David A. Wilson
Wilson & Englebardt, LLC
200 Whitsett Street, Suite 100B
Greenville, South Carolina 29601
(864) 232-2329
ATTORNEY FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

STATEMENT OF THE CASE

By Complaint filed June 21, 2012, Appellant Alexander Pastene sued Respondents Marion R. McMillan and Synergy Spine Center, P.A. in Magistrate's Court for "unpaid bill for services rendered" and criminal "blackmail". (Amended Record on Appeal hereinafter referred to as "R.")(R. pp. 4-8). Appellant "reserved" the right to demand a jury trial in the future. (R. p. 8 para.22).

Respondents filed a Motion to Dismiss which was denied by Order of the Magistrate dated August 12, 2012. (R. pp.9-10).

Respondents filed an Answer setting forth various defenses. Respondent also filed counterclaims for defamation and intentional interference with potential contractual relations. (R. pp.12-16).

Appellant argued that Respondents did not file and serve the Answer and Counterclaim timely. The Magistrate denied Appellant's motion and transferred the case to circuit court because the counterclaims exceeded the jurisdictional limit of the magistrate court. (R. pp.19-20).

Appellant failed to timely file responsive pleadings to the counterclaims.

Respondents filed an "Affidavit of Default" with the circuit court as to Respondents' counterclaims on November 14, 2012. (R. p. 21). On April 22, 2013, Respondents filed a "Motion for Default Judgment." (R. p. 22).

By "Order for Default Judgment" filed June 17, 2014 (hereinafter "Default Judgment #1"), the circuit court held Appellant in default and reserved jurisdiction to determine the amount of the judgment at a damages hearing. (R. pp. 23-24).

On June 20, 2014, Appellant received a copy of Default Judgment #1. (R. p.25 para. 1). Appellant filed a "Motion for Reconsideration Order Clocked June 17, 2014" on or about August 11, 2014 and served it on Respondents on July 18, 2014 – more than ten days after Appellant's receipt of written notice of entry of Default Judgment #1. (R. p. 26 "Certificate of Mailing").

In this Motion for Reconsideration and during the hearing on the motion held September 16, 2015, Appellant set forth his arguments objecting to Default Judgment #1. (R. pp. 91-109). The circuit court denied Appellant's motion by Order Denying Defendant's (sic) Motion for Reconsideration filed April 1, 2016. (R. p. 27). Appellant did not file a notice of appeal from Default Judgment #1 or the order denying the motion for reconsideration.

The damages hearing referenced in Default Judgment #1 was held on April 12, 2016. Appellant did not attend this hearing despite receiving notice of same. (R. pp. 28, 29, 35, 114 ll. 3-9, 133 ll.10-20).

By Form 4 Judgment in Civil Case dated April 18, 2016 and filed April 19, 2016, the circuit court awarded Respondents $100,000.00 in actual damages and $200,000.00 in punitive damages on the counterclaims. (R. p. 30)(hereinafter "Default Judgment #2").

On or about April 29, 2016, Appellant filed "Plaintiff's Motion to Vacate Judge Maddox Order 4-1-16 Reconsider, and Set Date for Trial by Jury." (R. p. 32) (hereinafter "First Motion for Relief from Judgment"). In this motion, Appellant requested that the court reconsider and vacate Default Judgment #2 arguing that he did not attend the damages hearing because "he understood that he was <u>not</u> required to attend the hearing." (R. p. 32 para. 1).

The circuit court denied Appellant's First Motion for Relief from Judgment by Order filed June 13, 2016. (R. p.35)(hereinafter "First Order Denying Motion for Relief from

Judgment"). Appellant did not appeal the First Order Denying the Motion to for Relief from Judgment.

The circuit court then filed Default Judgment *Against Plaintiff Alexander Pastene* on June 13, 2016. (R. p. 36)(hereinafter "Default Judgment #3). Appellant did not appeal Default Judgment #3.

Instead of appealing Default Judgment #1, Default Judgment #2 or Default Judgment #3, Appellant filed "Plaintiff's Motion for Relief from Judgment under Rules 60 SCRCP & 55 SCRCP" dated June 28, 2016 (R. p. 39)(hereinafter "Second Motion for Relief from Judgment").

On December 8, 2016, Respondent's filed "Defendant's Return to Plaintiff's Motion Relief from Judgment under Rules 60 SCRCP & 55 SCRCP." (R. pp. 43-47).

The circuit court heard Plaintiff's Second Motion for Relief from Judgment on December 12, 2016 resulting in Order Denying Plaintiff's Motion for Relief from Judgment filed January 17, 2017. (R. pp. 48-52)(hereinafter "Second Order Denying Motion for Relief from Judgment"). Appellant did not file a motion pursuant to Rule 52 or 59, SCRCP.

Appellant served his initial Notice of Appeal on February 15, 2017 but he failed to attach a copy of the order to be challenged on appeal. After receiving a notice of deficiency from the Court of Appeals, Appellant filed an Amended Notice of Appeal attaching only the Second Order Denying Motion for Relief from Judgment.

STATEMENT OF THE FACTS

In light of the procedural posture of this case, the events occurring prior to the entry of Default Judgment #1 on June 17, 2014 are not relevant or "necessary to an understanding of the appeal" or likely to "throw light upon the questions involved in the appeal." Rule 208(b)(1)(C). Other than pleadings or orders necessary to demonstrate the "history of the proceedings," no

materials regarding events predating June 17, 2014 "support the salient facts" involved in this appeal. Rule 208(b)(4), SCACR.

The circuit court entered several default judgments against Appellant. (R. pp. 23, 30, 36). Appellant did not appeal any of these default judgments.

Pursuant to Default Judgment #1, the Clerk of Court scheduled the damages hearing for April 12, 2016. The Clerk of Court mailed Appellant the "Notice of Motion Scheduling" by certified mail. (R. p. 28). Appellant signed the return receipt on March 18, 2016. (R. p. 29). Appellant had notice of the damages hearing twenty-five (25) days before the hearing. The Clerk of Court confirmed on the record at the April 12, 2016 hearing that Appellant had notice of the damages hearing. (R. pp. 114 ll.3-14; 133 ll.10-20).

Appellant did not appear for the damages hearing.

By Default Judgment #2, the circuit court entered judgment against Appellant in the amount of $300,000.00. (R. p. 30).

Appellant filed his first motion for relief from the judgment on April 29, 2016. (R. p. 32). The circuit court denied this motion. (R. p. 35). Appellant did not appeal this order.

By Default Judgment #3, the circuit court confirmed the judgment against Appellant in the amount of $300,000.00. (R. p. 36).

Appellant filed his Second Motion for Relief from Judgment dated June 28, 2016. (R. p. 39). Although Appellant argued that he failed to attend the damages hearing "in good faith, for good cause," he ultimately confirmed that the Clerk of Court told him by telephone that he was to attend the hearing unless he was told otherwise. (R. p. 40 para. 3).

Other than attempting to justify his absence from the damages hearing, Appellant did not argue any other mistake, inadvertence, surprise or excusable neglect relating to the Default Judgment.

STANDARD OF REVIEW

The decision whether to grant a party relief from a default judgment lies solely within the sound discretion of the trial judge. Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Id. See also Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. Id. See also In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

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 or surprise. Sundown, 383 S.C. at 608, 681 S.E.2d at 888. 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 once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default. Id.

ARGUMENT

I. THE APPELLATE COURT SHOULD DISMISS APPELLANT'S APPEAL BECAUSE APPELLANT'S BRIEF FAILS TO COMPLY WITH THE REQUIREMENTS OF THE SOUTH CAROLINA APPELLATE COURT RULES.

The Appellant's Brief fails to satisfy the requirements of Rule 208, SCACR. Accordingly, the appeal should be dismissed pursuant to Rule 260, SCACR.

Rule 208(b)(1)(A) provides that the brief of appellant "shall" contain a "table of cases (alphabetically arranged), statutes, and authorities cited, with the references to the page of the brief where they are cited." In his Amended Brief, Appellant includes a Table of Authorities which randomly cites cases for various legal principles without references to the pages of the Amended Brief where they are cited. In fact, the cases contained in the Table of Authorities are not otherwise referenced at all in the Amended Brief. Appellant's Table of Authorities does not satisfy the requirements set forth in Rule 208, SCACR.

Rule 208(b)(1)(B) provides that the brief of appellant "shall" contain a statement of each of the issues presented for review. "The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court."

Appellant's Statement of Issues on Appeal are broad general statements listing various problems Appellant has with Respondent McMillan and Appellant's dissatisfaction with the procedural history in this case, the attorney for Respondents and the trial judge. The appellate court should disregard Appellant's Statement of Issues on Appeal as they do not satisfy the requirements set forth in Rule 208, SCACR.

Pursuant to Rule 208(b)(1)(C), the brief of appellant "shall" contain a statement of a case which "shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters and shall contain, as a minimum, the following information:"

- The date of the commencement of the action or matter;
- The nature of the action or matter;
- The nature of the defense or the response;
- The action of the court, jury, master or administrative tribunal;
- The date(s) of trial or hearing;
- The motive of trial;
- The amount involved on appeal;
- The date and nature of the order, judgment or decision appeal from;
- The date of the service of the notice of appeal;
- The date and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in appeal; and
- Any changes made in the parties by the death, substitution or otherwise. (Rule 208(b)(1)(C)).

Appellant's Statement of the Case does not provide any of the information necessary for an understanding of the appeal. In fact, most of the Statement of the Case references the history between the parties prior to the initiation of any lawsuit. It is impossible to tell from the Statement of the Case that the current appeal involves only the propriety of the trial court's denial of Appellant's Second Motion for Relief from Judgment. Appellant's Statement of the Case does not satisfy the minimum requirements set forth in Rule 208, SCACR.

Pursuant to Rule 208(b)(1)(D), the "brief of appellant shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issues to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority."

In his Statement of Issues on Appeal, Appellant sets forth four issues and multiple sub-issues. The Argument section, however, is not divided into as many parts as there are issues to be argued. Instead, Appellant jumbles his various arguments into one section without specifically

expressly addressing each of the framed issues on appeal. The Appellant fails to specifically argue his exceptions to the Second Order Denying Motion for Relief from Judgment under an appropriately stated question. This appellate court should find Appellant's entire argument abandoned on appeal. See Rule 208(b)(1)(B)&(D); See e.g. Infinger v. Edwards, 268 S.C. 375, 234 S.E.2d 214, 215 n.4 (1977) ("error not specifically argued in the briefs under an appropriately stated question is deemed abandoned on appeal."). The Argument in the Appellant's Amended Brief fails to satisfy the requirements set forth in Rule 208, SCACR.

Pursuant to Rule 208(b)(1)(E), the brief of appellant shall contain a "short conclusion stating the precise relief requested." Appellant's Amended Brief contains a conclusion that fails to state the precise relief requested from the order being appealed which is only the Second Order Denying Motion for Relief from Judgment. Appellant's conclusion fails to satisfy the requirements set forth in Rule 208, SCACR.

Pursuant to Rule 208(b)(4), the "brief shall contain references to the transcript, pleadings, orders, exhibits or other materials which may be properly included in the record on appeal to support the salient facts alleged." Appellant's Amended Brief contains no references to materials which may be properly included in the record on appeal to support the facts relevant to the appeal from the Second Order Denying Motion for Relief from Judgment. His argument only contains references to documents related to an issue with South Carolina Attorney General's Office which has no bearing whatsoever on the case at bar. In failing to reference material properly included in the Record on Appeal, Appellant's Amended Brief fails to satisfy Rule 208, SCACR.

Based upon Appellant's failure to comply with Rule 208 of the South Carolina Appellate Court Rules, Respondents respectfully request that Appellant's appeal be dismissed pursuant to Rule 260, SCACR.

II. THE APPELLATE COURT DOES NOT HAVE THE AUTHORITY OR JURISDICTION TO REVERSE OR VACATE THE UNAPPEALED DEFAULT JUDGMENT WHICH IS THE LAW OF THE CASE.

Three of Appellant's enumerated issues on appeal (1, 2 and 3) relate to Appellant's request for this court to reverse the Default Judgment[2] entered against him. The Default Judgment is the law of the case. Appellant failed to preserve any issues related to the Default Judgment. This court lacks appellate jurisdiction to reverse or vacate the Default Judgment.

Appellant failed to file and serve a notice of appeal within thirty days after receipt of written notice of entry of the Default Judgment. Accordingly, this court lacks jurisdiction over any appeal from the Default Judgment. See Rule 203, SCACR; Camp v. Camp, 386 S.C. 571, 689 S.E.2d 634, 636 (2010); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772 (2004); Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985).

The Default Judgment is the law of the case.[3] Bakala v. Bakala, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case); In re Morrison, 321 S.C. 370 n.2, 468 S.E.2d 651 n.2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal; Richland Cnty. V. Palmetto Cablevision, 261 S.C. 222, 199 S.E.2d 168 (1973) (stating that an unchallenged ruling, right or wrong, is the

[2] The circuit court issued three orders of default. (R. pp. 23, 30, 36). For purposes of this Argument II, all three judgments are referred to collectively as "Default Judgment" because the distinction between the three is not particularly relevant for this Argument.

[3] Similarly, Appellant only appealed the Second Order Denying Motion for Relief from Judgment. He did not appeal the First Order Denying Motion for Relief from Judgment. The First Order Denying Motion for Relief from Judgment is the law of the case.

law of the case); McAleese v. McAleese, 309 S.C. 548, 550-51, 424 S.E.2d 558, 559-60 (Ct. App. 1992)(noting prior orders in same case were not appealed and thus, were law of the case).

Additionally, Appellant's arguments contesting to the Default Judgment are not preserved for appellate review because he did not make the same arguments before the trial court. In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the lower court, raised by the Appellant, raised in a timely manner and raised to the lower court with sufficient specificity. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007). For example, in his Second Motion for Relief from Judgment, Appellant did not argue that Respondents failed to present evidence in support of the counterclaims. (Brief of Appellant p. 5). Appellant also did not argue that Respondents "took advantage of an overburdened judge who was ill" and was "handling a load of 5,000 cases." (Id.).

Finally, in the "Arguments" portion of his Brief, Appellant does not cite any case law or refer to any matter in the record on appeal in support of his conclusory arguments objecting to the entry of the Default Judgment. Accordingly, these issues are abandoned on appeal. State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998)(finding a conclusory, two-paragraph argument with no citation to authority to be abandoned).

Appellant continues to argue against the entry of Default Judgment against him. He wants to argue his case to a jury.[4] However, because of his failure to abide by the legal process, Appellant must "suffer the consequences." Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894 (Ct. App. 2001) (confirming that a party's failure to understand and follow the legal process is not

[4] Appellant claims he has a right to a jury trial. He did not demand a jury trial pursuant to Rule 38, SCRCP. (R. p. 8 para. 22).

excusable neglect sufficient to allow that party his "day in court."). The appellate court does not have the authority to reverse or vacate the Default Judgment.

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO RELIEVE APPELLANT FROM THE DEFAULT JUDGMENT PURSUANT TO RULE 60(b)(1).

The only order on appeal is the Second Order Denying Motion for Relief from Judgment filed January 17, 2017. (R. pp. 48-52). Appellant did not demonstrate that Default Judgment #3 was obtained due to any legally sufficient mistake, inadvertence, surprise or excusable neglect as set forth in Rule 60(b)(1), SCRCP.[5] Appellant did not even argue the existence of a meritorious defense to Respondent's causes of action against him much less demonstrate a meritorious defense. Appellant did not preserve his objections to the Second Order Denying Motion for Relief from Judgment. Accordingly, the circuit court did not abuse its discretion in refusing to set aside the Default Judgment.

The sole issue in this case is whether the circuit court clearly abused its discretion in refusing to relieve Appellant from the judgment in this case.[6] The decision to grant or deny a party relief from a default judgment will not be disturbed absent a clear showing of an abuse of discretion. Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885, 888 (2009).

---

[5] Although Appellant indicates he seeks relief from the judgment pursuant to Rules 55 and 60, SCRCP, Rule 55 is not implicated because Appellant seeks relief from a judgment, not just the entry of default. Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009). Furthermore, although Rule 60 sets forth numerous possible bases for granting relief from a judgment, Appellant's arguments only implicate Rule 60(b)(1) which provides that the court may relieve a party from a final judgment based upon mistake, inadvertence, surprise or excusable neglect. Rule 60(b)(1), SCRCP. In his Amended Brief, Appellant does not argue for relief from the Default Judgment based upon any alleged fraud, misrepresentation, or other misconduct of the Respondents. See Rule 60(b)(3), SCRCP.

[6] In his Brief, Appellant recites his version of his relationship with Respondent, the procedural history of the case and sets forth his arguments as to why the court should reverse or vacate the Default Judgment. These arguments are not relevant to the appeal from the Second Order Denying Plaintiff's Motion for Relief from Judgment. The validity of the Default Judgment is not subject to attack. See supra Argument II.

Appellant includes only one short paragraph in his Amended Brief even arguably related to the issue on appeal. Appellant's position is that he should be relieved from Default Judgment because it was "impossible" for him to attend the damages hearing "because the Appellant was over four (4) hours away from Walhalla, on Hilton Head Island." (Amended Brief of Appellant p. 10).

First of all, Appellant cites no case law in support of his position. He also fails to reference any matter in the Record on Appeal. "An issue is deemed abandoned if the argument in the brief is only conclusory." R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000); See also State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule to be abandoned), aff'd as modified on other grounds, 337 S.C. 622, 525 S.E.2d 246 (2000). Even if preserved for appellate review, Appellant's arguments do not demonstrate any abuse of discretion by the circuit court.

In the body of his Brief, Appellant argues that he should "be relieved from judgment due to clerical mistake, and impossibility to attend due distance, lack of time, and delay or postponement of notification, which could have been effectuated the day before." (Amended Brief of Appellant p. 10). Appellant contends that the Clerk of Court's Office called him on the telephone the morning of April 12, 2016 to confirm his attendance at the damages hearing that afternoon. Appellant implies in his Brief that the court had previously indicated that the damages hearing had been continued. Nothing in the record supports such an inference. In fact, the record establishes just the opposite.

The Clerk's office mailed a "Notice of Motion Scheduling" by certified mail to Plaintiff. (R. p. 28). This notice clearly indicated that the "damages hearing" was scheduled for April 12, 2016 at 2:00 p.m. The Appellant signed the return receipt on March 18, 2016. (R. p. 29).

Appellant confirmed that he was aware of the April 12, 2016 damages hearing in his First Motion for Relief from Judgment. In this motion, Appellant asserts that he was "specifically told my telephone from the Clerk of Court that 'unless Plaintiff heard otherwise, that the hearing set to take place at the Walhalla Courthouse, on 4-12-16, at 2:00 p.m., that the Plaintiff was required to attend.'" (R. p. 32 para.1). Appellant was aware of the damages hearing and the court never continued the damages hearing.

During the hearing held on December 12, 2016 on Appellant's Second Motion for Relief from Judgment, Appellant confirmed once again that the Clerk of Court told him to be present at the damages hearing on April 12, 2016 unless he heard otherwise. (R. pp.156 l. 21 – 157 l. 1).

Based upon the record, the circuit court held that:

> The Plaintiff simply failed to show up for the damages hearing despite being notified of same. The judgment was not obtained through mistake, inadvertence, surprise or excusable neglect. Plaintiff had notice of the damages hearing and simply did not show up. His neglect was the cause of the problem and it was not excusable or reasonable. Plaintiff's failure to attend does not create grounds for relief from a judgment pursuant to Rule 60(b)(1). (R. pp. 50-51 (citations omitted)).

Appellant had notice of the damages hearing and simply did not show up. Appellant's failure to attend the damages hearing was not excusable or reasonable. See Paul Davis Systems v. Deepwater of Hilton Head, 362 S.C. 220, 607 S.E.2d 358 (Ct. App. 2004). The failure to understand the legal process is not excusable neglect under Rule 60(b), SCRCP. Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894 (Ct. App. 2001)(affirming denial of motion for relief from default judgment when defendant failed to appear a damages hearing despite having notice);

Goodson v. American Bankers Ins. Co., 295 S.C. 440, 368 S.E.2d 687, 689 (Ct. App. 1988)("party has the duty to monitor progress in this case. Lack of familiarity with proceedings is unacceptable and the court will not hold a layman to any lesser standard that is applied to an attorney."). The circuit court did not abuse its discretion in making a finding of fact supported by the record and a legal conclusion based upon case law.

In his Statement of Issues on Appeal, Appellant now claims that the "Walhalla Clerk of Court mislead the Appellant when she contacted him by telephone, stating that he was NOT to appear at the scheduled hearing of April 12, 2016, as the Clerk of Court's Office had been done previously, seemingly because it was going to be continued again." (Amended Brief of Appellant p. 5 Issue #3). This is simply false and inconsistent with Appellant's own testimony and filings with the court.

Furthermore, this argument is not preserved for appellate review as it is not the same argument Appellant presented to the trial court. A party cannot advance a new argument on appeal. The record must show an issue was raised to and ruled upon by the trial court for it to be preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Additionally, Appellant did not argue in the body of his Brief that he was told not to appear at the scheduled hearing. If Appellant's new position is that the Clerk of Court specifically told him not to attend the damages hearing, he failed to preserve this issue for appellate review.

Even if Appellant demonstrated that Default Judgment #3 was entered because of some legally sufficient excuse, the circuit court did not abuse its discretion in denying Appellant's motion. 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 specialized grounds,

he *must* also make a prima facie showing of meritorious defense. McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87, 93 (Ct. App. 2008)(emphasis added); See also, Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991)(affirming the denial of a motion to set aside a portion of an order based solely on the movant's failure to present meritorious defense). A party making a motion under Rule 60(b) as the burden presenting evidence proving the facts essential to entitle him to relief. Bowers , 304 S.C. at 67, 403 S.E.2d at 129.

In the present case, Appellant not only has not made a showing of meritorious defense, he has not even argued the existence of meritorious defense to Respondents' counterclaims. Perhaps more importantly, Appellant never even raised the issue of a meritorious defense before the circuit court.

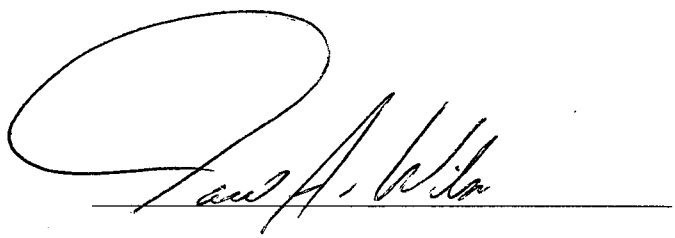
The circuit court did not abuse its discretion in denying Appellant's Motion to Set Aside Default Judgment when Appellant failed to present a meritorious defense. See e.g. McClurg, 380 S.C. at 574, 671 S.E.2d 93-94. (affirming denial of motion to set aside default judgment because, among other reasons, movant never even raised the issue of meritorious defense before the trial court). See also, Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989)(providing a movant must present a defense discussing whether it raises a real controversy arising from a conflict or doubtful evidence).

In his Amended Brief, Appellant does not actually argue that the circuit court abused its discretion in denying his Motion for Relief from Judgment. Even if this court could infer such an argument, the trial court did not abuse its discretion in refusing to relieve Appellant from Default Judgment #3. Appellant failed to appear at the damages hearing after receiving actual notice of the hearing. Appellant's decision not to attend the damages hearing does not qualify as mistake, inadvertence, surprise or excusable neglect as contemplated by Rule 60(b)(1), SCRCP.

Furthermore, Appellant failed to present any evidence or argument of meritorious defense to the trial court or in his Amended Brief to this appellate court.[7]

CONCLUSION

Based upon the foregoing, Respondents respectfully request that this appellate court affirm the circuit court's Order Denying Plaintiff's Motion for Relief from Judgment filed January 17, 2017.



David A. Wilson
Wilson & Englebardt, LLC
200 Whitsett Street, Suite 100B
Greenville, South Carolina 29601
(864) 232-2329

ATTORNEY FOR RESPONDENTS

[7] The circuit court issued several unappealed orders of default. Even if Appellant were to prevail in this appeal, the only relief would be a new damages hearing. Appellant would not be entitled to produce testimony or other evidence at a damages hearing. See Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013)(confirming that a defendant's participation in post-default hearing is limited to cross-examination and objection to plaintiff's evidence).

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 07 2018
SC Court of Appeals

APPEAL FROM OCONEE COUNTY
CIRCUIT COURT

CORDELL MADDOX, CIRCUIT COURT JUDGE

CASE NO.: 2012-DR-37-00902
APPELLATE CASE NO.: 2017-000294

Alexander Pastene.....Appellant,

v.

Marion R. McMillan and Synergy Spine Center, P.A.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

David A. Wilson
Wilson & Englebardt, LLC
200 Whitsett Street, Suite 100B
Greenville, South Carolina 29601
(864) 232-2329

ATTORNEY FOR RESPONDENTS