THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge
Edward W. Miller, Circuit Court Judge

Common Pleas Case No. 2017-CP-23-03720

Appellate Case No. 2018-000207

DARRIN VANDER TOORN,

Respondent,

v.

BILLETER RECRUITING, LLC, and WILLIAM ANCAR,

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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Appellants Billeter Recruiting LLC and William Ancar would respectfully reply to the Respondent's Brief as follows.

I. Issue One: The Wrongful Denial of the Motion to Set Aside Default.

Like the court below, Respondents claim that, because of the absence of affidavits or witnesses at the hearing, "the trial court was left with *no choice*" but to deny the motion to set aside the default. [Resp. Initial Br. at 7 (emphasis added)]. A wrongful belief that no discretion existed is an abuse of discretion that requires reversal. *See, e.g., Samples v. Mitchell*, 329 S.C. 105, 112 (Ct. App. 1997) ("Although the trial judge in this case correctly framed the issue as discovery abuse, he did not weigh the required factors. A failure to exercise discretion amounts to an abuse of that discretion." (citations omitted)).

The cases that Respondent cites are inapposite because they are predicated upon appellate review of an actual exercise of discretion—unlike the failure to recognize discretion at issue here.

Contrary to the Respondent's claim, affidavits or live testimony are not always required. A party seeking to set aside a default must "provide an *explanation* for the default and give reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 607 (2009) (empha-

sis added). The only "*evidentiary support*" required concerns findings that, notwithstanding that explanation, a denial of the motion to set aside is appropriate based upon "(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" *Id.* (emphasis added).

Here, while Respondent is not happy with the explanation that Appellants provided, Respondent has not established that as a matter of law the three factors—timing, defenses, and prejudice to plaintiff—mean this Court would have reversed an order setting aside the default as a matter of law or as an abuse of discretion. Because the trial court wrongly believed that an affidavit or witness was required even though no dispute existed as to Mr. Ancar's status as disabled, Appellants were denied their opportunity to ask for an actual exercise of that discretion. *See State v. Smith*, 276 S.C. 494, 498 (S.C. 1981) ("[T]he sentencing judge did not exercise any discretion but based his ruling on an erroneous view of the law. It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." (citations omitted)). A remand is, therefore, required.

II. Issue Two: The Excessive $107,061 Default Judgment

Like the trial court below, Respondent's again take the position that the default of

their complaint ipso facto guaranteed them the right to treble damages. [Resp. Initial Br. at 12]. But they ignore the rule that "where a defendant has made an appearance but is in default, liability is admitted but the amount of damages is not; the amount must be proved." *Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 561 (1981). *See also* R. 8(d), SCRCP. Because treble damages are discretionary, a plaintiff is never entitled to them even where, as here, a defendant has defaulted. *Rice v. Multimedia, Inc.*, 318 S.C. 95, 98 (1995) ("[B]y using 'may', rather than 'shall', the legislature has provided that the penalty is discretionary..."). The problem is, however, that the Respondent never offered any proof of willfulness, a predicate for establishing treble (as opposed to double or single) damages.[1]

Respondent also does not dispute that trebling of damages is especially inappropriate in the context of a default judgment.

With respect to actual damages, Respondent does not dispute that he is not entitled to recover unpaid "wages" for any period where there was no "labor rendered." S.C. Code §§ 41-10-10(2), 41-10-80(D). With respect to the June installment, however, Respondent does not dispute that he did not actually work after May 26. *See* [R. 90-

[1] To the extent that their default to the Complaint is relevant here, the Complaint alleges nonpayment due to "contract breaches and/or fraud that were under investigation." [R. 20 ¶29].

91]. It was thus impossible to have recovered unpaid "salary" after that time. Furthermore, Respondent does not dispute that the June installment was not even due when he filed the Complaint. Respondent fails to explain how a default on the Complaint could thus make him liable to pay an amount that was not lawfully due.

With respect to the unpaid commissions, Respondent does not dispute that the judge below did not actually make a finding that the commissions were attributable to "labor rendered." S.C. Code § 41-10-10(2). While the numerical value of the contracts was not in dispute, Respondent's role in obtaining those contracts was in dispute.

CONCLUSION

For the foregoing reasons, this Court should vacate the order denying the motion to set aside the default. To the extent, on remand, the court below does not set aside the default, this Court should (a) reverse the award of damages for the period following May 26, 2017; (b) vacate the damages attributable to the commissions and remand for determination of those commissions owed as a result of work actually performed; and (c) reverse the award of treble damages.

Dated this 10th day of September, 2018.

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