

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

Diane Schafer Goodstein, Circuit Court Judge

**Appellate Case No. 2018-001090
Trial Court Case No. 2017-CP-10-3324**

Rosa Maritza Galban Aranda,..... Respondent,

vs.

Rigoberto Ortega,..... Appellant

RECEIVED

OCT 12 2018

SC Court of Appeals

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	1
Arguments	
1. IS THE ORDER OF JUDGE GOODSTEIN A FINAL ORDER?.....	2
2. IS A DEFENDANT IN DEFAULT PERMITTED TO PLEAD THE DEFENSE OF RES JUDICATA?.....	3
3. DOES THE DOCTRINE OF RES JUDICATA BAR THE SECOND COMPLAINT?.....	4
4. IS THE ORDER DENYING DEFENDANT`S MOTION FOR RELIEF FROM DEFAULT A VOID JUDGMENT?	5
5. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR RELIEF FROM DEFAULT?.....	6
Conclusion.....	7

TABLE OF AUTHORITIES

CASES

Watson v. Underwood, 407 S.C. 443, 756, S.E.2d 155 (2014)..... 3

RIM Associates v. Blackwell, 359 S.C.170, 597 S.E.2d 152 (2004)..... 3

Judy v. Judy, 383 S.C. 1, at 8-9, 677 S.E.2d 213, at 218 (2011)..... 4

Belle Hall Plantation Homeowner` s Assn., Inc., 419 S.C. 605, 799 S.E.2d 310, 316 (2010)..... 6

ITC Commercial Funding, LLC v. Cerar, 393 S.C. 487, 713 S.E.2d 335 (2011)..... 6

STATUTES

S.C. Code Ann. 1976, § 14-3-330..... 2

OTHER AUTHORITIES

None

STATEMENT OF ISSUES ON APPEAL

- I. IS THE ORDER OF JUDGE GOODSTEIN A FINAL ORDER?
- II. IS A DEFENDANT IN DEFAULT PERMITTED TO PLEAD THE DEFENSE OF RES JUDICATA?
- III. DOES THE DOCTRINE OF RES JUDICATA BAR THE SECOND COMPLAINT?
- IV. IS THE ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM DEFAULT A VOID JUDGMENT?
- V. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR RELIEF FROM DEFAULT?

STATEMENT OF THE CASE

On January 27, 2017, Respondent Rosa Maritza Galban Aranda filed a complaint against Appellant Rigoberto Ortega, based upon negligence, alleging a fall occurred at 4558 W. Montague Avenue, North Charleston. On August 8, 2017, Respondent filed a Notice of Voluntary Dismissal with Prejudice, indicating on the filing "it appearing Plaintiff listed the incorrect address in the complaint."

Respondent filed a second complaint on June 29, 2017, against Appellant. This complaint was also based on negligence; however, this complaint correctly listed the address where the fall occurred as 4667 Walton Street, Lot 11, North Charleston.

On September 15, 2017, an Order of Default was entered regarding the second complaint. On November 14, 2017, Defendant filed a Motion for Relief from Default. On November 16, 2017, Defendant filed a Motion to Dismiss. Both parties filed memoranda in support of their motions. Those motions were scheduled before Judge Goodstein on March 21, 2018. Defendant requested the Motion to Dismiss be heard first. However, the Judge ruled that, as Defendant was in default, she would entertain only the Motion for Relief from Default.¹ On April 27, 2018, Judge Goodstein filed an Order denying Defendant's Motion for Relief from Default.

ARGUMENTS

I. IS THE ORDER OF JUDGE GOODSTEIN A FINAL ORDER?

The Order of Judge Goodstein is not a Final Order as required by S.C. Code Ann. 1976, § 14-3-330. An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done prior to a determination of the parties' rights. *Watson v Underwood*, 407 S.C. 443, 408, 756 S.E. 2d 155(2014). An order is not immediately appealable when appellants have not 'arrived at the end of

¹"How are you going to make a motion to dismiss if you're in default?" Transcript, pp 2, l. 15-16.

the road' and would be able to appeal the decision after the trial was finished. *Id.*, at 459.

The Order of Default, which is the subject of this appeal, states: "A hearing shall be set to determine the amount of damages." Clearly, this lawsuit has not reached the end of its journey.

As there are further proceedings necessary before a final judgment is entered, the appeal should be summarily dismissed.

II. A DEFENDANT IN DEFAULT PERMITTED TO PLEAD THE DEFENSE OF RES JUDICATA?

Defendant has transformed a motion for relief from default into a motion to dismiss on the basis of res judicata. However, the law is very clear that this defense is not available. As noted in *RIM Associates v. Blackwell*, 359 S.C.170, at 182-183, S.E.2d 152, at 159 (2004):

"Res judicata is an affirmative defense that must be pled at trial in order to be pursued on appeal. *Wagner v. Wagner*, 286 S.C. 489, 335 S.E.2d 246, 247 (Ct.App.1985). An affirmative defense is waived if not pled. *Howard v. S.C. Dep` t of Highways*, 343 S.C.149, 152, 538 S.E.2d 291, 294 (Ct.App.2000). Generally claims or defenses not presented in the pleadings will not be considered on appeal. *McNeely v. S.C. Farm Bureau Mut. Ins., Co.*, 259 S.C. 39, 41, 190 S.E.2d 499, 499 (1972)."

As Defendant is barred from asserting the defense of res judicata, the motion for relief from default was properly denied.

III. DOES THE DOCTRINE OF RES JUDICATA BAR THE SECOND COMPLAINT?

Assuming arguendo, the doctrine of res judicata is "in play", Appellant's arguments still fail. Respondent's claims are not barred by the doctrine of res judicata, as the claim in the second lawsuit is not "identical" to the claim in the first lawsuit, notwithstanding the parties are the same.

As clearly stated in the notice of voluntary dismissal with prejudice: "it appearing Plaintiff listed the incorrect address in the complaint." Moreover, shortly into the hearing, the judge astutely perceived the flaw in defendant's argument: "Hold up. So here's – you are telling me that you think it's the same lawsuit, but it's a different address." (Transcript, pp. 3, l. 11-13)

Especially considering the lawsuit falls under the tort genre of premises liability, the correct address where the fall occurred is essential to establishing liability. As stated in *Judy v. Judy*, 383 S.C. 1, at 8-9, 677 S.E.2d 213, at 218 (2011):

"Whether judicata precludes a claim because the first and subsequent suits involve the same cause

of action is not merely a matter of aligning identical causes of action or theories of liability; rather, the subject matter of the two suits must be the same. *Plum Creek Dev. Co. V. City of Conway*, 334 S.C. 30, 35, 512 S.E.2d 106, 109 (1999). "The test utilized by this court for comparing two causes of action is to determine whether the primary right and duty and the delict or wrong are the same in both actions." *Plum Creek Dev. Co. V. City of Conway*, 328 S.C. 347, 350, 491 S.E.2d 692, 694 (Ct.App. 1997), *aff'd as modified*, 334 S.C. 30, 512 S.E.2d. 106 (1999); *see also Nunnery v. Brantley Constr. Co., Inc.*, 289 S.C. 205, 210, 345 S.E.2d 740, 743 (Ct.App.1986).

South Carolina courts use various tests in determining whether a claim should have been raised in a prior suit: 1) when there is identity of the subject matter in both cases; 2) where the cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; 3) when there is the same evidence in both cases; and recently 4) **when the claims arise out of the same transaction or occurrence.** (Emphasis added)

Simply stated, the first lawsuit involves a claim for an incident that did not occur. Therefore, res judicata is inapplicable.

IV. IS THE ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM DEFAULT A VOID JUDGMENT?

Once again, Defendant strains to transform a 60(b) motion into a motion to dismiss based on res judicata. And, once again, his efforts should be rebuffed; the Order of Judge Goodstein is not "void".

The definition of void under the rule only encompasses judgments from courts, which failed to provide proper due process, or judgments from courts, which lacked subject matter jurisdiction or personal jurisdiction." *Belle Hall Plantation Homeowner`s Assn., Inc. vs. Murray*, 419 S.C.605, 617, 799 S.E.2d 310, 316 (2010). Nowhere does Appellant argue any of these bases for relief.

Instead, Defendant reiterates his prior argument that the prior dismissal with prejudice precludes the filing of the second complaint, and any orders entered as a result. This is not a correct application of Rule 60(b)(5).

As the order for default is not void, the appeal should be denied.

V. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR RELIEF FROM DEFAULT?

It is well-settled jurisprudence that this issue is addressed to the discretion of the trial court:

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial [court]." *Robertson v. S. Fin. Of S.C.*, 365 S.C. 6, 9, 615 S.E.2d 112 114 (2205). "The trial court`s decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Id.* An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based


upon factual, as distinguished from legal, conclusions, is without evidentiary support. *Id. ITC Commercial Funding, LLC v. Cerar*, 393 S.C. 487, 490-491, 713 S.E.2d 335, 337, (2011).

Inexplicably, Defendant fails to argue in his appeal the trial court abused its discretion in denying the Motion for Relief from Default. Moreover, in the lower court Appellant failed to argue, in his motion or at the hearing, all of the various factors the trial judge is to consider under Rule 55(c) or 60(b).

As Appellant has failed to establish the trial judge abused her discretion in denying his motion for relief from default, the appeal should be denied.

CONCLUSION

Based on the foregoing, this Court should deny the appeal and affirm the judgment of the trial court.


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October 9, 2018
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October 9, 2018

Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
P. O. Box 11629
Columbia SC 29211

**Re: Rosa Maritza Galban Aranda, Respondent, v.
Rigoberto Ortega, Appellant
Appellate Case No. 2018-001090**

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Dear Ms. Kitchings:

OCT 12 2018

SC Court of Appeals

Enclosed please find the following documentation:

1. Initial Brief of Respondent;
2. Designation of Matter to be Included in the Record on Appeal;
3. Proof of Service.

Please file the originals and return a clocked copy to me in the envelope provided.

By copy of this letter to Mr. Sanders, we are serving him with a copy of the enclosures.

Your cooperation and assistance are very much appreciated. Should you have questions or need additional information, please feel free to let us know.

Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
October 5, 2018
Page Two

With kindest regards, I am

Very truly yours,



JOHNNY F. DRIGGERS

JFD/ddc

Enclosures

cc: Thomas O. Sanders, IV, Esquire (w/enclosure)
Don Gibson, Esquire (w/enclosure)
Rosa Galban (w/enclosure)

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PROOF OF SERVICE

I certify I have served the *Initial Brief of Respondent* and the *Designation of Matter to be Included in the Record on Appeal* on Rigoberto Ortega by depositing a copy of it in the United States Mail, postage prepaid, on October 09, 2018, addressed to his attorney of record: Thomas O. Sanders, IV, Sanders Law Firm, 1738 Three Oaks Avenue, Charleston, South Carolina 29407.

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