

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Thirteenth Judicial Circuit
G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

DEC 17 2018

SC Court of Appeals

Appellate Case No. 2018-002114
Case No. 18-CP-23-01639

5 Star Life Insurance Co., Appellant,

v.

Peek Performance, Inc. Respondent.

MEMORANDUM REGARDING THE APPEALABILITY
OF THE ORDERS CHALLENGED ON APPEAL

Appellant 5Star Life Insurance Co. (“5Star”)¹ files this memorandum in response to the Deputy Clerk’s letter of December 6, 2018 requesting memoranda addressing the appealability of the Orders 5Star has challenged on appeal. 5Star has appealed from two Orders: (1) an Order denying 5Star’s motion for relief from default judgment pursuant to Rule 60(b), SCRCPC, and (2) an Order entering default and default judgment. As explained more fully below, the former is immediately appealable as a matter of right, and the latter may also be considered on appeal to conserve the resources of the lower court and the litigants by avoiding later, unnecessary litigation.

RELEVANT PROCEDURAL POSTURE²

5Star filed this suit on March 19, 2018, to recover commissions it paid Peek Performance (“Peek”) which Peek had not earned. On March 29, 2018, Peek filed an Answer and what it

¹ The caption includes an erroneous space inserted in Appellant’s name. The main text of this memorandum, however, employs the correct appellation.

² For the sake of brevity, this memorandum omits the factual background and summarizes only the portions of the procedural background relevant to the question of appealability.

styled as a Counterclaim. On May 10, 2018, Peek filed a Notice of Default and Motion for Entry of Default. On May 17, 2018, 5Star filed a Reply to the Answer and Counterclaim and, on August 17, 2018, filed an Opposition to the Motion for Entry of Default.

On September 13, 2018, Judge Cooper entered an order of default and default judgment against 5Star. *See* Order for Entry of Default and Default Judgment (attached hereto as **Exhibit A**). In addition, that Order compelled 5Star to respond fully to Peek’s discovery requests. *See id.* at 8. Notably, Peek had not filed a motion to compel discovery, the issue had not been briefed to the trial court, and the court had no basis upon which to make an informed decision to compel responses to the discovery requests. Peek’s Motion for Entry of Default did not raise the issue of discovery or request discovery relief, and it was not until Peek filed its Reply Memorandum in support of the motion that discovery was even mentioned. Furthermore, undersigned counsel is unsure if the interrogatories and requests for production that Peek allegedly served on 5Star were, in fact, actually served. None were conveyed to undersigned counsel by 5Star’s prior counsel when undersigned counsel was retained.

5Star subsequently filed a Motion for Reconsideration, Relief from Entry of Default, and Relief from Default Judgment pursuant to Rules 59(e), 55, **and 60**, SCRCF.³ *See* Motion, Sept. 24, 2018 (attached hereto as **Exhibit B**). In addition, 5Star filed a 20-page memorandum of law

³ As explained below, the critical procedural fact authorizing 5Star’s appeal is that this motion was made pursuant to Rule 60, SCRCF. Peek’s memorandum recently filed with this Court incorrectly refers to 5Star’s motion as a “Motion to Alter or Amend” and fails to mention it was a motion for Relief from Default Judgment pursuant to Rule 60(b). *See* Peek’s Dec. 13, 2018 memo at 2; *id.* at 3 (stating “[t]he Order entered October 29, 2018, was the denial of 5Star’s Motion under Rule 59(e),” but failing to disclose the motion was also made under Rule 60(b)).

In addition, Peek’s memo erroneously states 5Star’s Notice of Appeal cites a case without acknowledging it had been overruled. *See id.* at 4–5. This is incorrect. 5Star’s Notice of Appeal does not rely on *Hite*, a 1991 case that was overruled on other grounds in 1995. Rather, the Notice of Appeal cites to *Watson v. Underwood*—a 2014 case **that is still good law** and which itself cites to *Hite* for a proposition that likewise is still good law. In keeping with proper citation format, 5Star’s citation to *Watson* noted parenthetically that *Watson* cited *Hite*. Any insinuation that 5Star’s Notice of Appeal lacked candor or relied on bad law is categorically false.

in support of the relief requested. *See* Memorandum, Sept. 24, 2018 (attached hereto as **Exhibit C**). The memorandum explained at length that 5Star sought to set aside the default judgment pursuant to Rule 60(b). *See id.* at 16–20. On October 11, 2018, 5Star filed a Reply in further support of its motion, again expressly stating its motion was made pursuant to Rule 60(b). *See* Reply, Oct. 11, 2018, at p.2 (attached hereto as **Exhibit D**). Judge Cooper denied 5Star’s motion in an Order issued on October 29, 2018. (Attached hereto as **Exhibit E**.)

5Star filed and served its Notice of Appeal on November 28, 2018, appealing (1) the September 13, 2018 Order entering default and default judgment, and (2) the October 29, 2018 Order denying 5Star’s motion for relief from default judgment.

ANALYSIS

The two Orders from which 5Star has appealed may properly be considered by this Court at this time. One of the Orders is immediately appealable as a matter of right. The other Order would not on its own be immediately appealable, but it may be considered—and 5Star respectfully argues, *should* be considered—on appeal along with the other, immediately appealable order.

I. The October 29, 2018 Order denying 5Star’s motion for relief from default judgment is immediately appealable.

The appealability of an interlocutory order is governed primarily by S.C. Code Ann. § 14-3-330, which permits the immediate appeal of orders including those “involving the merits” or “affecting a substantial right.” That statute and the applicable rules have been interpreted by our courts to permit the immediate appeal of the denial of a motion seeking relief from default judgment pursuant to Rule 60(b), SCRPC. Judge Cooper’s ruling dated October 29, 2018 is such an order, and the law is clear that the denial of such a motion is immediately appealable:

The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule

60(b), SCRCP. *An appeal may then be taken from the denial of this motion.*

Winesett v. Winesett, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985) (emphasis added). See also *Ex parte Sadisco of Greenville, Inc. v. Greenville Cnty. Bd. of Zoning Appeals*, 340 S.C. 57, 58, 530 S.E.2d 383, 384 (2000) (“We find the Court of Appeals was incorrect in summarily dismissing the appeal. Petitioner was appealing the denial of the Rule 60 motion Therefore, the Court of Appeals should have considered the merits of the appeal, and if the Court of Appeals agreed with the circuit court, it should have affirmed the circuit court’s ruling on the Rule 60 motion rather than summarily dismissing the appeal.”); *Thynès v. Lloyd*, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (1987) (“Rule 60(b) [is] similar to the comparable federal rules. According to Professors Wright, Miller and Kane, the denial of a motion under Federal Rule 60(b) to set aside a default judgment is immediately appealable.”); Jean H. Toal et al., *Appellate Practice in South Carolina* 100 (2d ed., 2002) (“The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP. An appeal may then be taken from the denial of this motion.”) (citing *Ex parte Sadisco*, 340 S.C. 57, 530 S.E.2d 383; *Winesett*, 287 S.C. 332, 338 S.E.2d 340).

Notably, the ability to appeal from the denial of a Rule 60(b) motion is not limited to situations where the default judgment concluded the litigation *in toto*. Rather, a motion pursuant to Rule 60(b) may be made—and its denial appealed—even from *an order*. See Rule 60(b), SCRCP (“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, *order*, or proceeding for the following reasons”) (emphasis added). Further, allowing the immediate appeal from the denial of a Rule 60(b) motion to set aside a default judgment, even though damages have not been determined, makes good sense from a standpoint of efficiency and judicial economy. Requiring the parties to litigate the remainder of the case before appealing the default judgment would—if the appellate court

reverses the entry of default judgment—force the parties and the court below to start afresh and re-litigate the remaining claim starting at square one from discovery to motions practice to trial to post-trial motions.

Furthermore, as noted above, 5Star’s motion was based in part on Rule 60(b), and the denial of such a motion is immediately appealable. Accordingly, the *entire* order (including those aspects of it based on Rules 55 and 59(e)) is appealable. As long as one aspect of an order is appealable, the entire order should be considered upon appeal. See *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002) (“This Court reviews interlocutory orders when they contain other appealable issues.”) (citing *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991)); *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 216 S.C. 500, 511, 59 S.E.2d 132, 136 (1950), *overruled on other grounds*, *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (“We have here a single order from a part of which an appeal admittedly will lie, but it is manifest that the entire order should be considered upon this appeal; and the cases cited are sufficient to support this conclusion.”); see also Toal, *Appellate Practice in South Carolina* 88 (“Where there is a single order that is admittedly appealable in part, the entire order should be considered upon the appeal.”).

In sum, because Judge Cooper’s October 29 Order denied 5Star’s motion seeking relief from default judgment under Rule 60, that Order is immediately appealable in its entirety.

II. The September 13, 2018 Order for Entry of Default and Default Judgment may be joined in the appeal of another Order that is itself immediately appealable.

5Star also appeals from Judge Cooper’s Order dated September 13, 2018 entering default and default judgment. Admittedly, this Order, if standing alone, would not be immediately appealable. *Winesett*, 287 S.C. at 334, 338 S.E.2d at 341; *Belue v. Belue*, 276 S.C. 120, 121, 276 S.E.2d 295, 295 (1981). In the context of this appeal, however, this Order does not stand alone.

“[A]n order that is not directly appealable will nonetheless be considered if there is an

appealable issue before the court and a ruling on appeal will avoid unnecessary litigation.” *Watson v. Underwood*, 407 S.C. 443, 459, 756 S.E.2d 155, 163 (Ct. App. 2014) (quoting *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991)). In the instant appeal, there is an appealable issue—namely, the Order denying the motion to set aside the default judgment pursuant to Rule 60(b)—and this Court’s simultaneous consideration of the prior order will spare the lower court and the parties from expending needless resources litigating what could otherwise be resolved by this Court.

Specifically, the lower court’s September 13, 2018 Order wrongly compelled 5Star to respond to discovery requests Peek had allegedly served on 5Star. Peek, however, had not filed a motion to compel discovery, the issue had not been briefed to the trial court, and the court had no basis upon which to make an informed decision to compel responses to the discovery requests. *See* Order for Entry of Default and Default Judgment at 8 (attached hereto as **Exhibit A**). Peek’s Motion for Entry of Default did not raise the issue of discovery or request discovery relief. Rather, it was not until Peek filed its Reply Memorandum in support of its Motion for Entry of Default that the issue of discovery was first mentioned. But a party may not request discovery relief through a reply memorandum, nor may a party receive such relief if it was not requested *in the motion*. *See Wilson v. Walker*, 340 S.C. 531, 537, 532 S.E.2d 19, 22 (Ct. App. 2000) (noting that where the motion before the lower court had “failed to request an order compelling Father to answer interrogatories or produce documents, . . . discovery issues were not properly before” the trial court). In the absence of a proper request and adequate briefing by both parties, the lower court had no basis upon which to determine if the discovery requests were appropriate, overly broad, sought privileged or confidential information, or otherwise were requests which should or should not be enforced.

If not reversed, the lower court's erroneous discovery ruling will result in further litigation below. Indeed, on December 13, 2018, Peek's counsel urged the trial court to sanction 5Star for allegedly not complying with the lower court's discovery order—nevermind the fact that the order has been appealed. Should the lower court's September 13, 2018 Order stand, there will be further litigation, perhaps including a subsequent appeal if 5Star is held in contempt of the erroneous order. This Court should take the opportunity now to resolve the situation and avoid further litigation and an appeal on this erroneous ruling.

CONCLUSION

Because one of the Orders being appealed is immediately appealable, and because a related Order—even if not itself immediately appealable—may be joined in the appeal of an appealable ruling, this Court has jurisdiction to consider and rule upon both of the Orders appealed in 5Star's Notice of Appeal.

Respectfully submitted,

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Greenville, South Carolina
December 14, 2018

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PROOF OF SERVICE

I hereby certify that I have caused a copy of Appellant 5Star's Memorandum Regarding the Appealability of the Orders Challenged on Appeal to be served upon all counsel of record, by mailing copies of same, postage prepaid to the following addresses:

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[SIGNATURE PAGE ATTACHED]

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December 17, 2018

HAND DELIVERED

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

RE: *5 Star Life Ins. Co. v. Peek Performance Inc.*
Appellate Case No. 2018-002114
Our File No. 53746/01500

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Appellant 5Star Insurance Company's memorandum of law to be filed in the above-referenced matter and a proof of service regarding the same. We ask that you file these documents and return a file-stamped copy to us via our courier.

Very truly yours,

Miles E. Coleman

Enclosure

cc: James G. Carpenter, with enclosure
Beattie Ashmore, with enclosure
Adam C. Bach, with enclosure