

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011-CP-10-3367

Elinor Cohen,

Respondent,

v.

Tripp Creech d/b/a Atlantic
Lawn Service, Inc.,

Appellants.

ORIGINAL

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court err when it declined to overturn the Magistrate's denial of Appellant's request for a new trial on the issue of liability, when Appellant was tried in absentia due to false representations on the part of Plaintiff that the case was settled?
- II. Did the lower court err when it declined to overturn the Magistrate's denial of Appellant's request for a jury trial?
- III. Did the lower court err when it declined to overturn the Magistrate's refusal to allow Appellant to amend its answer to assert additional affirmative defenses relating to a settlement reached after Appellant's initial Answer had been filed, which also affected the Appellant's initial admission of liability "in part" included in Appellants' initial pro se Answer that was submitted using the pre-printed form available through the Magistrate?
- IV. Did the lower court err when it, contrary to the Magistrate's Return, made a determination that Tripp Creech was still an individual defendant in the case when the Magistrate's Return reflects this was not the case?

STATEMENT OF THE CASE

Respondent Elinor Cohen (“Respondent”) initially filed her Complaint in this matter on November 29, 2010. Appellant Atlantic Lawn Service, Inc. (“Appellant”)¹ filed its *pro se* Answer on January 5, 2011. After the pleadings were closed, the parties reached a settlement of the dispute, which Appellant believed to resolve the entire case. *See Affidavit of William H. Creech, III*, at ¶ 4-6 (R. p. 92-93); *see Appellant’s Pro Se Motion for New Trial* (R. p. 18).

In performing the settlement, Appellant invested thousands of dollars of materials and his own labor that gave Respondent a new yard. In exchange, Appellant told Respondent that she would cancel the court proceedings due to the settlement. *Id.* As a result, Appellant did not appear for the scheduled trial on February 9, 2011. *Id.* However, Respondent did not cancel the trial and instead appeared in court without Appellant and obtained a judgment for \$7,217.97 in damages through a bench trial against Appellant *in absentia*. *Id.*; (R. p. 17). This was in addition to the new yard she had received under the settlement that she abrogated.

Appellant was not aware that Plaintiff had gone forward with the trial in Appellant’s absence until it received a copy of the judgment in the mail. *See Affidavit of William H. Creech, III*, at ¶ 6 (R. pp. 92-93). Appellant immediately requested a new trial on the basis of the settlement and Plaintiff’s representations that the case was resolved. *See Appellant’s Pro Se Motion for New Trial* (R. p. 18). Appellant obtained counsel, who requested leave to amend Appellant’s answer to assert additional defenses relating to the settlement and request a jury trial. *See Appellant’s Motion to Amend Answer* (R. pp. 34-35). The Magistrate denied Appellant’s Motions except to vacate the judgment of damages against both Appellants, to

remove Tripp Creech as an individual defendant, and to allow Appellant Atlantic Lawn Service, Inc. to participate in a new, non-jury hearing on damages. *See Magistrate's Return* (R. pp. 7-9). During the damages hearing, in order to clarify the applicable measure of damages and law, Appellant indicates that it requested that the Magistrate identify the cause of action upon which the finding of liability was based. The Magistrate did not clarify the basis for liability and continued with the damages hearing. Without being allowed to confirm the cause of action upon which liability was to be founded, Appellant was deprived of the ability to know the measure of damages, legal standard for awarding damages, or the affirmative defenses available to him.

At the close of the damages hearing, the Court took the matter under advisement and conferred with counsel. Appellant indicated that it would appeal the denial of a new trial on liability, denial of a jury trial, and refusal of a continuance. As a result, the Magistrate did not enter any judgment of damages and appeal was taken to the Court of Common Pleas ("Circuit Court"). In the appeal, the Circuit Court affirmed the Magistrate's rulings, but failed to recognize that the Magistrate had dismissed Tripp Creech as a defendant and entered an erroneous ruling that carries a suggestion that Tripp Creech was a proper defendant.

¹ As noted in the Return, the corporate entity is the sole Defendant. The caption on appeal is incorrect, but has been kept uniform for administrative purposes.

ARGUMENT

As an initial matter, Appellant notes that South Carolina Rules of Magistrate's Court provide that "[a]ll civil actions in the magistrate's court shall be conducted in such a manner as to do substantial justice between the parties according to the rules of substantive law." S.C. R. Mag. Ct., "Scope and Purpose."

I. THE MAGISTRATE AND THE LOWER COURT ERRED IN DENYING APPELLANT'S REQUEST FOR NEW TRIAL.

In the original proceeding below, Appellant presented evidence that he was not present for the trial of the case based upon his belief that the parties had reached a settlement and his reliance upon statements made by Respondent.

In cases where a party fails to appear before the magistrate for the trial of a case, and subsequently requests a new trial, South Carolina law provides for the following potential relief:

If (a) the appellant failed to appear before the magistrate, (b) it is shown by the affidavits served by the appellant, or otherwise, that manifest injustice has been done, and (c) the appellant satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment and order a new trial before the same or any other magistrate in the same county at such time and place and on such terms as the court may deem proper. When a new trial shall be ordered before a magistrate the parties must appear before him according to the order of the court and the same proceedings must thereupon be had in the action as on the return of a summons personally served.

S.C. Code § 18-7-150. Appellant provided adequate excuse for its failure to appear and showed that manifest injustice would result if Appellant was denied the basic opportunity to present any defenses to liability.² The opportunity to confront witnesses and present a

² Additionally, under S.C. R. Civ. P. 60(b), Defendant has asserted that relief from the finding of liability should be granted on grounds of mistake, inadvertence, surprise, and excusable neglect. The court believes that the record supports the granting of a new trial on the ground of mistake, based on Defendant's belief and Plaintiff's representation that the matter was resolved. Because the South Carolina Rules of Magistrate's Court

defense to liability is fundamental to the concept of due process. In the proceedings below, much was made of the fact that Appellant made a partial admission of liability in the initial *pro se* Answer filed on January 5, 2011 that was submitted on the pre-printed form available through the Magistrate's Office. However, the Magistrate and the Circuit Court failed to give proper weight to the fact that the settlement, which itself can be a complete defense to liability, was not reached until *after* Appellant submitted its initial answer. Ultimately, Appellant had a potentially complete defense to liability, but was denied the opportunity to assert it or to contest liability in any way as a result of the Magistrate's ruling. In addition, Appellant met the burden under Rule 60(b) of the South Carolina Rules of Civil Procedure to be allowed a new trial on grounds of mistake, inadvertence, surprise and/or excusable neglect. As a result, Appellant should be allowed a new trial on both liability and damages.

II. THE MAGISTRATE AND THE LOWER COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A JURY TRIAL.

With regard to Appellant's request for a jury trial, the South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate." S.C. Const. Art. I, § 14. The right to trial by jury is recognized to be "a fundamental right." *See Wright v. Colleton County School Dist.*, 301 S.C. 282, 291, 391 S.E.2d 564, 570 (1990). A denial of a request for a jury trial is immediately appealable, as it affects substantial rights and involves the mode of trial. *See, e.g., Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389-90 (2004).

Both the Magistrate and Plaintiff argue that Appellant waived the right to a jury trial by failing to request a jury trial five days prior to the initial trial date. This argument

do not contain a specific counterpart to S.C. R. Civ. P. 60, the Court may apply the civil rule in accordance with Rule 2 of the South Carolina Rules of Magistrate's Court.

overlooks the fundamental issue underlying the appeal. Appellant believed, in good faith, that the matter was settled. *See Affidavit of William H. Creech, III*, at 5 (R. p. 92). As a result, Appellant would not be expected to request a jury trial in a matter that Appellant thought was already resolved. Furthermore, the additional defenses based on the settlement did not exist at the outset of the case. Appellant requested a jury trial in connection with its request to amend its pleadings to assert the additional defenses that arose as a result of Appellant's belief that the matter was settled. It was improper under the circumstances for the request for jury trial to be denied.

III. THE MAGISTRATE AND THE LOWER COURT ERRED IN DENYING APPELLANT'S REQUEST FOR AN AMENDED ANSWER.

The South Carolina Rules of Magistrate's Court provide that "[t]he court shall be lenient in the allowance of changes to or amendments to complaints, answers and counterclaims, and in granting continuances for good cause shown when necessary to serve the ends of justice." S.C. Mag. Ct. R. 14. Based on the record, Appellant has made a sufficient showing that the ends of justice necessitated that an amended Answer be allowed. Subsequent to the filing of an initial *pro se* Answer on the prepared forms available through the Magistrate, a settlement was reached and performed. This constitutes a potentially complete defense to liability. However, Appellant was denied the right to amend its answer. This Court should reverse the Order on Appeal and confirm that Appellant may amend its Answer in connection with a new trial on liability and damages.

IV. THE CIRCUIT COURT'S STATEMENT IN ITS ORDER ON APPEAL THAT TRIPP CREECH IS STILL A PARTY TO THIS ACTION IS ERRONEOUS AND MUST BE REVERSED.

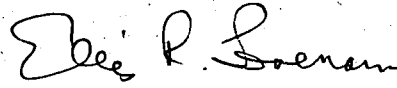
Within the appeal, Appellant requested that the Circuit Court amend the caption simply to reflect the fact that the Magistrate had dismissed Tripp Creech as a party and that Atlantic Lawn Service, Inc. was the sole defendant. A review of the Magistrate's Return reflects a correct caption and the body of the Return reflects that the corporate entity is the sole defendant. At the close of the hearing on the appeal, the Circuit Court requested that the parties submit proposed orders. In her proposed order, Respondent included findings that Tripp Creech was still a party to the action, even though the Magistrate's Return specifically indicated that this was no longer the case.³ In the course of affirming the Magistrate's rulings on the other issues, the incorrect findings regarding the inclusion of Tripp Creech as a party were adopted by the Circuit Court. These findings, which were actually interposed by Respondent in disregard of the Magistrate's Return, are erroneous and should be reversed.

³ At the time that Appellant filed its appeal with the Circuit Court, the Magistrate's Return was not yet prepared. Out of an abundance of caution, prior to seeing the Return, Appellant requested that the caption be corrected. Once the Return was prepared and submitted, the issue regarding the deletion of Tripp Creech from the caption was clear.

CONCLUSION

For the reason stated, this Court should reverse the order of the circuit court, allowing Appellant Atlantic Lawn Service the basic rights of a trial on liability and damages where he can be present, a trial by jury, the ability to amend its Answer, and clarification that the sole defendant in the matter is Atlantic Lawn Service, Inc.

Respectfully submitted,



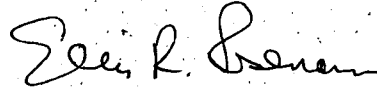
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief complies with Rule 211 of the South Carolina Appellate Court Rules.

August 30, 2012



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