THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2012-205467

Delta Apparel, Incorporated,.....Respondent,

v.

Daniel G. Farina,.....Appellant.

RESPONDENT'S FINAL BRIEF

December 27, 2012

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STATEMENT OF THE CASE

On May 4, 2012, Respondent Delta Apparel, Incorporated filed suit against Appellant Daniel G. Farina in the Court of Common Pleas for Greenville County. Delta Apparel alleged causes of action for breach of contract, breach of the implied duty of good faith and fair dealing, and unjust enrichment. (R. pp. 11-13.) On May 13, 2010, Delta Apparel filed an Affidavit of Service from process server Gary Hansen. (R. p. 59.) In the Affidavit of Service, Hansen swore that on May 6, 2010 he effected substitute service by delivering the pleadings to Pablo Farina at 9341 Parrot Avenue, Downey, CA, 90240. Id. In addition, Hansen affirmed that Pablo Farina was a "co_occupant, a person authorized to accept service and a person of discretion and appropriate age, residing at the residence of the within named person and present at said residence at the time of service." Id.

Delta Apparel also filed a Motion for Temporary Restraining Order on May 4, 2010. Notice of the hearing on the Motion for Temporary Restraining Order was served on Appellant via Federal Express to the California address at which Hansen effected substitute service. (R. p. 54.) Appellant contacted a Greenville attorney to represent him at the hearing on the Motion for Temporary Restraining Order, and Appellant purports to have travelled to Greenville for the hearing. (R. p. 75, lines 17-25; p. 77, line 17-p. 78, line 4.)

Appellant did not answer the Summons and Complaint. On July 22, 2010, Delta Apparel filed an Affidavit of Default. (R. p. 56.) On July 8, 2011, Delta Apparel filed its Motion for Entry of Default and Default Judgment. (R. p. 55.) Notice of the Motion for Entry of Default and Default Judgment and the Affidavit of Default were served on

Appellant by mail to the same address set forth in Hansen's Affidavit of Service. (R. pp. 55 & 58.) On or about July 26, 2011, Appellant served a "Motion to Dismiss" Delta Apparel's Complaint pursuant to "60(b) Rules." (R. pp. 60-63.) Attached to Appellant's "Motion to Dismiss" was a copy of a Cochise County, Arizona voter registration card purporting to show an address for Appellant in Douglas, Arizona. Id.

On September 1, 2011, the trial court held a hearing on Delta Apparel's Motion for Default Judgment. (R. pp. 64-70.) Appellant failed to appear at the hearing despite being served with notice of the hearing at both his California address and the purported Arizona address listed on the copy of the voter registration card enclosed with Appellant's Motion to Dismiss. See (R. p. 68, lines 10-17.)

After the hearing, the trial court issued an order filed September 2, 2011 granting Delta Apparel judgment in the amount of $96,484.14, plus interest. (R. pp. 3-4.) In the trial court's Order of Default Judgment, it specifically found that

- Defendant has been duly served with process;
- The time within which pleadings may be filed by the Defendant has expired; the Defendant has filed his Motion to Dismiss out of time and after notice of this hearing was served upon him; the Defendant was served with a Notice of Motion of Default;
- Notice was sent to the Defendant stating that Delta Apparel was seeking to recover damages related to the allegations asserted in the Complaint; and
- Delta Apparel presented evidence of Deborah Merrill demonstrating that Delta Apparel has been damaged in an amount equal to $96,484.14, which includes the $57,984.14 paid directly to Defendant, plus $38,500.00 in attorneys' fees spent by Delta Apparel in defending the Honduran lawsuit.

Id.

On September 14, 2011, Appellant again filed his "Motion to Dismiss" pursuant to "60(b) Rules." Appellant's motion was accompanied by an unsworn "Affidavit in Support of Motion to Dismiss." (R. pp. 62-63.) The trial court construed Appellant's September 14 motion as a Request for Relief from Judgment pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. (R. p. 1.)

Appellant appeared at a hearing held on November 7, 2011 on Appellant's Request for Relief from Judgment. (R. pp. 71-85.) The trial court entered an order dated November 9, 2011 denying Appellant's Request for Relief from Judgment. (R. p. 1.) This appeal follows.

STATEMENT OF FACTS

Delta Apparel is a manufacturer and distributor headquartered in Greenville, South Carolina. (R. p. 52, ¶ 3.) On October 16, 2006, Delta Apparel hired Appellant as the General Manager of its Ceiba Textiles S de RL ("Ceiba Textiles") plant in Villanueva, Honduras. (R. p. 10, ¶ 5); (R. p. 41, ¶ 7.) Appellant was an employee of Delta Apparel, working as an expatriate in Honduras. (R. p. 41, ¶ 7.) During Appellant's employment with Delta Apparel, he had contact on a regular basis with Delta Apparel executives in the Greenville office. (R. p. 52, ¶ 14.)

On or about April 20, 2007, Delta Apparel began receiving Earnings Withholding Orders ("Withholding Orders) from the State of California Franchise Tax Board. (R. p. 10, ¶ 8); (R. p. 41, ¶ 7.) The Withholding Orders required Delta Apparel to withhold 25 percent of Appellant's weekly disposable earnings. (R. p. 10, ¶ 9.) Between August 15, 2007 and July 15, 2008, Delta Apparel levied Appellant's disposable earnings a total of eleven times, withholding 25 percent from eleven paychecks. (R. p. 10, ¶ 10.)

On or about July 10, 2008, Delta Apparel terminated Farina's employment. (R. p. 40, ¶ 3.) Pursuant to the termination, on August 8, 2008, Appellant signed a Solvency Settlement and Effective Payment Letter, accepting $41,022.92 as full severance corresponding to labor days covered from October 16, 2007 up to July 10, 2008. (R. p. 10, ¶ 12); (R. p. 40, ¶ 4.) On August 15, 2008, pursuant to the California Tax Board mandate, Delta Apparel withheld 25 percent, or $9,673.63, from its severance payment of $41,022.92 to Appellant. (R. p. 11, ¶ 13); (R. p. 40, ¶ 4.) On or about October 14, 2008, Appellant filed suit against Ceiba Textiles in Honduras claiming that he was an employee of Ceiba Textiles, that he was wrongfully terminated, and that he was owed $57,984.14 in unpaid severance and salaries under Honduran employment law. (R. p. 11, ¶ 14); (R. pp. 40-41, ¶ 6.) On September 1, 2009, the Honduran court ruled in Farina's favor, ordering Ceiba Textiles to pay Farina $57,984.14 in unpaid severance salaries prior to Farina's termination and $172,055.64 as damages and losses for unpaid salaries for a total of thirteen months and twenty days as a result of his allegedly wrongful termination. (R. p. 11, ¶ 15); (R. p. 41, ¶¶ 6, 8.) The judgment totaled $230,039.78. (R. p. 41, ¶ 8.)

On May 4, 2012, Delta Apparel filed suit against Appellant in the Court of Common Pleas for Greenville County, asserting causes of action for breach of contract, breach of the implied duty of good faith and fair dealing, and unjust enrichment. (R. pp. 11-13, ¶¶ 17-32.) Delta Apparel alleged that Appellant had misrepresented to the Honduran courts that he was an employee of Ceiba Textiles and was unjustly enriched by the Honduran judgment. Id.

ARGUMENT

I. The trial court's denial of Appellant's request for relief from judgment should not be reversed based on improper service because Delta Apparel submitted evidence that Appellant was served at his residence and Appellant had actual notice of Delta Apparel's lawsuit.

"The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief." BB&T v. Taylor, 369 S.C.548, 552, 633 S.E.2d 501, 503 (2006) (citing Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991)). "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." BB&T, 369 S.C. at 551, 633 S.E.2d at 502-03 (citing Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992)). The Court's review is thus limited to determining whether there was an abuse of discretion. Id. at 552, 633 S.E.2d at 502-03. "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." Id., 633 S.E.2d at 502-03 (citing Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).

There is ample evidence in the record to show that Appellant was duly served with process and subject to personal jurisdiction in South Carolina.

In the trial court's Order of Default Judgment, the court found that "[Appellant] ha[s] been duly served with process." (R. p. 3.) Appellant argues that the trial court's holding was "wholly unsupported by the evidence." (Appellant's Initial Brief p. 6.) This argument misses the mark because (1) process server Gary Hansen's Affidavit of Service shows that Appellant was served in conformity with S.C. Code Ann. § 36-2-806(1)(a) and Rule 4(d)(1), SCRCP, and (2) Appellant had actual notice of this lawsuit.

a. The sworn affidavit of process server Gary Hansen proves that Appellant was served at his residence.

S.C. Code Ann. § 36-2-806(1)(a) provides that service made outside South Carolina may be effected by personal delivery in the manner prescribed for service within the South Carolina. Rule 4(d)(1), SCRCP, provides that service shall be made by "delivering a copy of the summons and complaint to [the defendant] personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."

On May 7, 2010, Hansen executed a sworn affidavit stating that he served Appellant by leaving a copy of the Summons and Complaint with Pablo Farina "as co_occupant, a person authorized to accept service and a person of discretion and appropriate age, residing at the residence of the within named person and present at said residence at the time of service." (R. p. 59) (emphasis added). This sworn affidavit indicating that Hansen left copies of the pleadings with Pablo Farina "at the residence of the [Appellant]" was filed on May 13, 2010 and properly before the trial court at the time it issued its order denying Appellant's Request for Relief from Judgment. The trial court thus did not abuse its discretion because there was evidentiary support for its ruling. BB&T, 369 S.C. at 551, 633 S.E.2d at 502-03 (holding that abuse of discretion occurs when factual conclusions are without evidentiary support).

b. Appellant had actual notice of Delta Apparel's lawsuit as evidenced by the fact that he contacted an attorney to represent him and travelled to South Carolina for a hearing on Delta Apparel's Motion for Temporary Restraining Order.

Appellant had actual notice of Delta Apparel's lawsuit. At the November 7, 2011 hearing on Appellant's Request for Relief from Judgment, Appellant represented to the

trial court that he (1) contacted an attorney to represent him in this action and (2) traveled to South Carolina to attend a hearing on Delta Apparel's Motion for a Temporary Restraining Order. (R. p. 75, lines 17-25; R. p. 7, line 22-p. 8, line 4.)

The Supreme Court has specifically held that "we have never required exacting compliance with the rules to effect service of process." McCall v. IKON, 363 S.C. 646, 651, 611 S.E.2d 315, 318 (Ct. App. 2005) (quoting Roche v. Young Bros. Inc., 318 S.C. 207, 209-10, 456 S.E.2d 897, 899 (1995)). "The principal object of service of process is to give notice to the defendant [] of the proceedings against it." Mull v. Ridgeland Realty, LLC, 387 S.C 479, 485, 693 S.E.2d 27, 31 (Ct. App. 2010) (quoting Burris Chemical, Inc. v. Daniel Const. Co., 251 S.C. 483, 487, 163 S.E.2d 618, 620 (1968)). Thus, the proper inquiry is whether "the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." Id. (citations omitted).

Clearly, Appellant had notice of the proceedings in this case. Appellant contacted an attorney to represent him in this action, and that attorney corresponded with the court and acknowledged that he and Appellant were aware of the hearing date and time. In addition, Appellant has stated that he traveled to South Carolina for a hearing on Delta Apparel's Motion for Temporary Restraining Order. Because Appellant retained the services of a local Greenville attorney and traveled to South Carolina for the hearing, he cannot now argue that he did not have notice of the proceedings.

Blatantly ignoring the plain terms of Hansen's sworn Affidavit of Service and Appellant's own representations to the trial court, Appellant asserts that "all of the evidence before the Court indicated that Appellant had moved to Arizona the month

before, April 2010." (App. Initial Br. p. 5.) In support of this proposition, Appellant cites his "Motion to Dismiss." (App. Initial Br. p. 5.) Attached to Appellant's "Motion to Dismiss" was a document titled "Affidavit in Support of Motion to Dismiss." (R. pp. 62-63.) This unsworn statement authored by Appellant states that Appellant is a "resident of Arizona since April 2010" and "I was not served on May 6, 2010 in California . . . ." Id. Attached to the statement is what purports to be a voter identification card from Cochise County, Arizona. See (R. p. 62.)

Not only does Appellant's "affidavit" fail of its essential purpose because it is unsworn, see State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987) ("An affidavit is a voluntary *ex parte* statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation.") (citing 3 Am. Jur. 2d, Affidavits, § 1), the voter identification card only raises questions that Appellant neglected to answer: Where is his car registered? From what state was his driver's license issued? Where did he pay rent or own property? Where was he employed? Where were his bank accounts?

Appellant failed to meet his burden to present "evidence proving the facts essential to entitle [him] to relief." BB&T, 369 S.C. at 552, 633 S.E.2d at 503. The plain language of process server Hansen's sworn Affidavit of Service is that the Summons and Complaint were left with Pablo Farina, and that Pablo Farina was a co-occupant "residing at the residence of [Appellant]." The trial judge was thus within her sound discretion to deny Appellant's Request for Relief from Judgment.

II. The trial court's denial of Appellant's request for relief from judgment should not be reversed based on lack of personal jurisdiction because Appellant did not preserve this issue for appellate review and there was sufficient evidence in the record to find that Appellant was subject to personal jurisdiction.

On appeal, Appellant argues that the record is "totally devoid" of any facts to support the trial court's exercise of personal jurisdiction over Appellant. (App. Initial Br. p. 8.) Besides being inaccurate, this argument was not properly preserved for appellate review.

a. Appellant never raised an objection to personal jurisdiction to the trial court.

"Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised." Bakala v. Bakala, 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003). "[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

Neither Appellant's Motion to Dismiss, nor the unsworn statement included therein, assert that the trial court lacked personal jurisdiction over him. The "Facts" section of the unsworn statement attached to the Motion to Dismiss states that Appellant has never been a resident of, employed in, or conducted business in South Carolina. (R. p. 62.) The first paragraph of the "Argument" section raises the issue of proper service, and the remaining paragraphs make various assertions regarding the merits of Delta Apparel's claims:

> II. I have not had any relationship that could result in a monetary judgment award from a Family Court Division of South Carolina in favor of plaintiff
>
> III. I was employed as General Manager of in plaintiff's Honduran subsidiary, Ceiba Textiles SRL, from October 2006 until my termination on June 2008

IV. Any labor matter from that relationship is under the jurisdiction of the labor law of a foreign county, Honduras

V. Plaintiff is using South Carolina legal system to harass me, knowing well that I cannot afford legal representation and/or a personal appearance without losing a significant amount of income, jeopardizing my employment in these uncertain economic times, plus incurring in non-planned expenses

Arguments like these which go to the merits of Delta Apparel's claims are not properly considered on a Rule 60(b) motion. C-Sculptures, LLC v. Brown, 393 S.C. 27, 31, 709 S.E.2d 705, 707 (Ct. App. 2011) ("[]Rule 60(b) motions are made by parties seeking relief from a judgment for some reason other than the merits of the case"). Because personal jurisdiction over Appellant was not based on service of process, and because Appellant never raised an objection to personal jurisdiction to the trial court, the issue was not properly preserved for appellate review. Therefore, the Court should thus disregard this argument.

b. Even if the issue of personal jurisdiction was properly preserved for appellate review, there was sufficient evidence in the record for the trial court to find that Appellant was subject to personal jurisdiction.

"The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief." BB&T, 369 S.C. at 552, 633 S.E.2d at 503 (citations omitted) (analyzing whether defendant had been served with process sufficient to establish personal jurisdiction). Due process requires that a "defendant possess minimum contacts with the forum state such that maintenance of a suit does not offend traditional notions of fair play and substantial justice." Id. (internal citations omitted).

Appellant's employment with Delta Apparel, whose corporate headquarters are located in Greenville, South Carolina, established the minimum contacts required for the

trial court to exercise personal jurisdiction over him. The record includes the July 1, 2010 Affidavit of Deborah Merrill, filed July 13, 2010. (R. pp. 52-53.) Deborah Merrill is Delta Apparel's Vice President, Chief Financial Officer and Treasurer. (R. p. 53, ¶ 9.) According to Merrill, Appellant had contact with other Delta Apparel employees in its Greenville, South Carolina office on a regular basis. (R. p. 53, ¶ 14.) For example, if Appellant had questions about his employee benefits, he contacted the Vice President and Secretary responsible for Human Resources for Delta Apparel, Martha "Sam" Watson in Greenville, South Carolina. (R. p. 53, ¶ 9.) If Farina had questions or issues regarding financial matters, such as the assets he was purchasing in Honduras, he would speak to Ms. Merrill in Greenville, South Carolina. (R. p. 53, ¶ 11.) Moreover, Appellant discussed the Ceiba Textiles plant start-up and plant production levels with Bob Humphries, Delta Apparel's Chairman and CEO and Dennis Carrington, Delta Apparel's Senior Vice President of Manufacturing, both in Greenville, South Carolina. (R. p. 53, ¶ 10.)

Appellant asserts that Delta Apparel's affidavits are "devoid of showing any action that Appellant conducted activities [sic] within the forum state." (App. Initial Br. p. 9.) (emphasis in original). The Supreme Court South Carolina has held, however, that "jurisdiction may not be avoided merely because the defendants did not physically enter South Carolina." Hammond v. Butler, Means & Brown, 300 S.C. 458, 464, 388 S.E.2d 796, 799 (1990). The record shows that Appellant had consistent contact with the management team at Delta Apparel's Greenville headquarters. See id. (noting relevance of written correspondence and evidence of telecommunications to personal jurisdiction

analysis). The record thus contains ample evidence to support a finding that Appellant is subject to personal jurisdiction in South Carolina.

III. The trial court's denial of Appellant's request for relief from judgment should not be reversed based on the doctrines of collateral estoppel and res judicata because Appellant did not preserve this issue for appellate review and these doctrines are not proper bases for a motion under Rule 60(b), SCRCP.

For the first time, Appellant asserts on appeal that Delta Apparel's action is barred by collateral estoppel and res judicata. (App. Initial Br. pp. 9-10.) This argument was clearly not preserved for appellate review.

Appellant did not raise this issue in his Motion to Dismiss, nor did the trial court rule on this issue. It is axiomatic that "an issue cannot be raised for the first time on appeal, but have been raised to and ruled upon by the trial court to be preserved for appellate review." Staubes, 339 S.C. at 412, 529 S.E.2d at 546; Normandy Corp. v. S.C. Dept. of Trans., 386 S.C. 393, 408, 688 S.E.2d 136, 145 (Ct. App. 2009) (holding that party could not raise collateral estoppel and res judicata defenses for the first time on appeal); Duckett v. Goforth, 374 S.C. 446, 465, 649 S.E.2d 72, 82 (Ct. App. 2007) (holding party could not raise defense of collateral estoppel for the first time on appeal).

Moreover, even if he had raised this issue, it is not one properly decided on a Rule 60(b) motion. Motions under Rule 60(b), SCRCP, are reserved for relief sought from a judgment "for some reason other than the merits of the case." C-Sculptures, LLC, 393 S.C. at 31, 709 S.E.2d at 707. Instead, such a motion must be based on the reasons listed in the rule:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud, misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

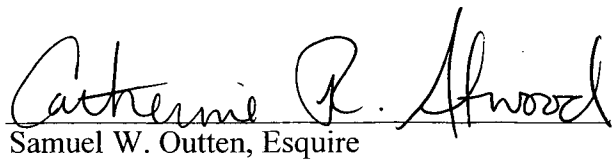
Rule 60(b)(1)-(4), SCRCP.

Appellant argues that "South Carolina does not have jurisdiction to re-litigate the same issues that were already tried" in Honduras. (App. Initial Br. p. 9.) (emphasis added). To the extent this is an attempt to squeeze Appellant's preclusion argument within strictures of Rule 60(b)(4), it is unavailing. This Court has held that "the application of res judicata and collateral estoppel principles are not matters of subject matter jurisdiction." Normandy Corp., 386 S.C. at 408, 688 S.E.2d at 145 (citing Mr. T v. Ms. T, 378 S.C. 127, 133, 662 S.E.2d 413, 416 (Ct. App. 2008)). Instead, "[t]he defense of preclusion by a former judgment is an affirmative defense which ordinarily must be specially pleaded." Id. (citing Wagner v. Wagner, 286 S.C. 489, 491, 335 S.E.2d 246, 247 (Ct. App. 1985)). Accordingly, even if Appellant had raised this argument before trial court, it is not a proper basis for consideration under Rule 60(b), SCRCP, and this Court should disregard it.

CONCLUSION

For the reasons stated herein, Delta Apparel respectfully requests that the trial court's Order denying Appellant's Request for Relief from Judgment be affirmed.

December 27, 2012



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CERTIFICATE OF COUNSEL

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

December 27, 2012

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PROOF OF SERVICE

I certify that I have served a copy of the **RESPONDENT'S FINAL BRIEF** and **CERTIFICATE OF COUNSEL** on the Appellant by U.S.P.S. First Class Mail, postage paid, on December 27, 2012, addressed to its attorney as follows:

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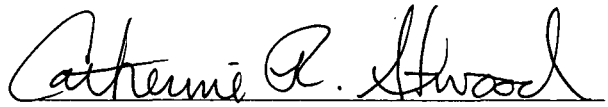

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