

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
In the Court of Common Pleas

R. Knox McMahon, Presiding Judge

Case No. 2012-212487

Mariko Marie Clack.....Respondent,

v.

Eddie Arnold Smith, d/b/a the Lawn Doctor.....Appellant.

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENTS

THE TRIAL COURT RULED UPON THE ISSUES ARGUED IN APPELLANT'S BRIEF

Contrary to the arguments contained in Respondent's Brief, the issues raised and argued in Appellant's Brief were addressed and ruled upon by the Trial Court. Respondent's arguments and assertions to the contrary lack merit and are unsupported by either the argument of counsel before Judge McMahon or a review of Judge McMahon's Order.

Counsel for Appellant opened his argument before Judge McMahon by informing the Court, "Your Honor, the case we have here is interesting. There is an affidavit of default in the file indicating that the defendant is in default even though an answer had been filed." (R.p. 79, lines 9-12). Counsel later informed the Court, "It would be our intent that, assuming the motion for default were denied and the affidavit of default, or any default vacated or declaration there was no default, it would be our intent to set aside the order in regards to summary judgment." (R.p. 83, lines 8-13). Counsel for Appellant concluded his argument by informing the Court, "So, it's a two pronged motion; basically, for a declaration that we are not actually in default. And if we are, that we be allowed to escape default by virtue of the fact that it was properly served on the Department of Insurance, but we just never got notice of the fact they had received it." (R.p. 84, lines 19-25). Despite the position he now appears to take in his Brief, Counsel for Respondent acknowledge the scope of issues before the Court by informing the Court, in closing, "I would just say briefly, Judge, **the concept of whether this Defendant is in default or whether Allstate has waived its right to appear is the issue before the Court.**" (R.p. 95, lines 24-25; R.p.96, lines 1-6).

Judge McMahon's Order clearly addresses the Appellant's Motion to vacate or be relieved from Default. ("First Allstate argues that the Answer provided in the name of Defendant State Farm Insurance Company, the primary UIM Carrier, is sufficient as to prevent default to Allstate. Alternatively Allstate argues that it had 'good cause' for its late Answer and should therefore be relieved from default." (R.pp. 1-6) ("Allstate fails to present a sufficient argument in favor of setting aside...the entry of default..." (R. pp. 1-6).

THE APPELLANT IS NOT IN DEFAULT

The Trial Court erred in holding that the Appellant Eddie Smith, d/b/a the Lawn Doctor was in Default. At no time was Appellant Smith ever in default. An Answer was filed on his behalf on December 20, 2010 had has been on file at the Courthouse continuously since that date. It has never been withdrawn. Respondent's counsel clearly recognized this fact in June of 2011 when he moved for default judgment under the mistaken belief that State Farm had withdrawn the Answer previously filed on behalf of Appellant. (R.p. 87, lines 6-13). Respondent also concedes the existence of a valid Answer on file at the Courthouse in her Brief ("There is no misunderstanding by the Circuit Judge or Allstate that the answer of the Defendant Smith was timely filed by State Farm's attorneys and had not been withdrawn..." Brief of Respondent, page 10) ("The issue in the case is not about the bogus answer filed by Defendant Smith's State Farm Attorneys..." Brief of Respondent, page 12). The Trial Court erred in holding Appellant in default because there has never been any default. The Trial Court's Order should be reversed.

ALLSTATE'S FAILURE TO COMPLY WITH NOTICE REQUIREMENTS OF SOUTH CAROLINA CODE SECTION 38-77-160 DOES NOT PUT APPELLANT IN DEFAULT

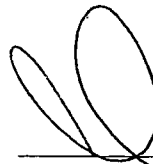
The Trial Court held, and Respondent argues that the failure of Allstate Insurance Company to file a Notice of Appearance under South Carolina Code Section 38-77-160 after

allegedly being served with a Copy of the Summons and Complaint somehow negates or voids the Answer filed by State Farm on his behalf puts the Appellant Smith in default in this case. (“The ‘default’ or ‘waiver’ by Allstate is its failure to comply with the provisions of South Carolina Code Ann. Sect. 38-77-160...” Respondent’s Brief, page 10) (“Allstate’s argument is based entirely on its construction of the term ‘default’ and attempt to attach the term to Defendant Smith’s representation by State Farm rather than Allstate’s failure to comply with provisions of the Statute.” Respondent’s Brief, page 11).

This argument is not supported by South Carolina Law. The Trial Court’s Order effectively holds that Allstate must file a Notice of Appearance in order to avail itself of the Answer previously filed on behalf of Appellants by Attorney Austin Hood.. The failure to file a Notice of Appearance simply was not an event of default under any definition set forth in the Code or the South Carolina Rules of Civil Procedure. The Court’s order effectively rewrites South Carolina Code Section 38-77-160 and reads a term and condition not placed in the statute by the South Carolina Legislature. This is clearly erroneous. *Liberty Mutual Insurance Company v. Second Injury Fund*, 363 S.C. 612, 611 S.E. 2d. 297 (S.C. App. 2005); *Estate of Nicholson Ex. Rel. Nicholson v. South Carolina Department of Health and Human Services*, 377 S.C. 590, 660 S.E. 2d. 303 (S.C. App. 2008).

CONCLUSION

For the reasons set forth above and in its Brief previously filed by the Court, the Order of the Trial Court denying the Appellant the relief requested in his Motion should be reversed by this Court.



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March 26, 2013

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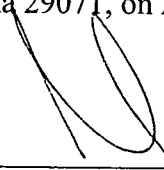
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PROOF OF SERVICE

I certify that I have served the Appellant's Final Reply Brief by mail, to Donald E. Jonas, Esquire, Post Office Box 99, Lexington, South Carolina 29071, on April 1, 2013.



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