THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2012-CP-40-01901

Desiree D. Beatty, ...Respondent,

v.

Pyong Han Cho, ... Appellant.

REPLY BRIEF

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June 7, 2013

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II) WHETHER THE DEFAULT JUDGMENT AGAINST APPELLANT SHOULD BE SET ASIDE DUE TO FRAUD, MISREPRESENTATION, OR OTHER MISCONDUCT OF AN ADVERSE PARTY.

III) WHETHER APPELLANT HAS DEMONSTRATED A MERITORIOUS DEFENSE IN THIS CASE.

In Reply to Respondent Desiree D. Beatty's Brief, Appellant Pyong Han Cho refers to the Statement of the Case contained in the Brief of the Appellant and submits the following.

ARGUMENT

I. THE DEFAULT JUDGMENT AGAINST APPELLANT SHOULD BE SET ASIDE DUE TO MISTAKE, INADVERTANCE, SURPRISE, OR EXCUSABLE NEGLECT.

Appellant is entitled to relief from the default judgment pursuant to Rule 60(b)(1) because the undisputed evidence shows Appellant's wife who was served with the Summons and Complaint in this matter speaks and reads limited English and did not understand what the papers were about. (R.p.21.) Diana Cho did not understand the papers or realize they were Court documents. (R.p.21.) She believed she and her husband were being harassed by Respondent and did not send the papers to GEICO. (R.p.21.) Accordingly, GEICO was never notified that the claim was in suit and never received a copy of the pleadings from Diana Cho or anyone else. (R.pp.24, 26.) GEICO's adjuster, Jennifer Delong, called Diana Cho after learning of the default judgment and was told she mailed a copy of the pleadings to GEICO. (R.p.26.) However, there is no dispute Diana Cho did not send the Summons and Complaint to GEICO and GEICO did not receive a copy of the pleadings. (R.pp.21, 26.) The undisputed testimony of Diana Cho constitutes the mistake, inadvertence, surprise or excusable neglect of Rule 60(b)(1).

Respondent's contention that Appellant's ability to converse with Respondent after the accident, read and sign an affidavit, and pass a driver's license test equates to the ability to understand legal documents is pure conjecture. One could just as easily assume

that the aforementioned activities such as reading an affidavit were performed with the assistance of an interpreter. The instant case differs from Hill v. Dotts because Diana Cho not only failed to understand the pleadings, she also undisputedly spoke and read limited English. See Hill, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001) (holding only inability to understand legal process did not justify setting aside of default judgment).

This case also differs from Cowan v. Allstate Insurance Co., 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004), because there is no contention Respondent's insurance coverage should be voided because of Respondent's failure to cooperate. This case is about Respondent's mistake, inadvertence, surprise or excusable neglect under Rule 60(b) and not about S.C. Code Ann. 38-77-142. Therefore, Respondent's reliance on Cowan is misplaced. Because Appellant met the mistake, inadvertence, surprise or excusable neglect requirement of Rule 60(b)(1), the default judgment should be set aside.

II. THE DEFAULT JUDGMENT AGAINST APPELLANT SHOULD BE SET ASIDE DUE TO FRAUD, MISREPRESENTATION, OR OTHER MISCONDUCT OF AN ADVERSE PARTY.

Appellant is also entitled to relief from the default judgment pursuant to Rule 60(b)(3) because the undisputed evidence shows Respondent's counsel continued to negotiate with GEICO without telling GEICO that the case was already in suit and that its insured was in default. According to the undisputed affidavit of GEICO's adjuster, Jennifer Delong, she contacted or attempted to contact Respondent's counsel about the case a total of eight times after Respondent's counsel had filed suit. (R.pp.25, 26.) Despite Respondent's argument in her Brief, there is no evidence Respondent's counsel's voice mail was inoperable. Instead, the undisputed evidence shows Delong followed up on her settlement offer with Respondent's counsel after counsel had filed suit by leaving a

voice mail with counsel, speaking with counsel on the phone, leaving a phone message with counsel's secretary, and writing counsel a letter. (R.pp.25, 26.)

There is also no evidence to dispute the fact Respondent's counsel spoke with Delong about the case after filing suit and never mentioned the fact he had filed or served the Summons and Complaint. (R.p.25.) Further, there is no evidence to establish that Respondent's counsel did not receive Delong's numerous messages regarding settlement of the case. Through arguments in both the Brief and before the trial court at the hearing for the Motion to Set Aside Default Judgment, Respondent's counsel denies speaking with GEICO or contends he cannot remember speaking with GEICO. (R.p.54.) However, there is no evidence to support Respondent's arguments or to dispute the thorough affidavit testimony of Delong detailing the exact timeline of every communication with Respondent's counsel after suit had been filed.

According to this Court's holding in McClurg v. Deaton, the setting aside of a default judgment is proper where the insurer is involved in ongoing negotiations with a claimant but is not informed that the defendant has been served with a summons and complaint. McClurg, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011). Such conduct by Respondent's counsel meets the requirement of Rule 60(b)(3) and merits the setting aside of the default judgment due to fraud, misrepresentation, or other misconduct of an adverse party.

III. APPELLANT HAS DEMONSTRATED A MERITORIOUS DEFENSE IN THIS CASE.

In determining whether to grant relief under Rule 60(b)(1), the following factors are considered: "(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to

the other party." Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct.App. 2001). "A meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial." Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978).

Based on the affidavit of Jennifer Delong, she was made aware of the motor vehicle accident which occurred on August 6, 2011, and initiated settlement negotiations with Respondent's counsel on January 24, 2012. (R.pp.24, 25.) Suit was filed on March 12, 2012, and Diana Cho was served on April 14, 2012, but GEICO was neither notified nor sent a copy of pleadings. (R.p.26.) Default was entered on June 14, 2012, and a damages was hearing was held on August 9, 2012. (R.pp.3, 6.) GEICO was eventually notified of the default judgment on August 28, 2012, and Appellant's counsel submitted a Motion for Relief from Judgment dated August 30, 2012, and filed September 6, 2012. (R.p.10.)

Relief was sought promptly within nine days of GEICO being notified of the Default judgment. Also, there is no prejudice to Respondent when the setting aside of the default judgment merely requires her to actually litigate her case. This is true especially in light of South Carolina's general policy of promoting justice and disposing of cases on the merits. See Melton v. Olenik, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008).

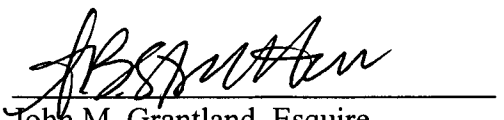
Finally, the default judgment should be set aside because Appellant has a meritorious defense. Although Appellant admits he caused the accident by rear-ending Respondent, he does not admit he proximately caused Respondent's alleged injuries. In fact, Appellant Pyong Cho and his wife, Diana Cho, testified the accident was a very minor bump which caused almost no damage to either vehicle. (R.pp.20, 22.) Appellant

and his wife had the opportunity to observe the Respondent and speak with her for almost three hours after the accident during which time Respondent showed no sign of bodily injury. (R.pp.20, 22.) Jennifer Delong investigated the accident and also noted the photographs and invoices received by GEICO show the physical damage to both vehicles involved in the accident at issue was minimal. (R.p.26.) Based on the undisputed testimony of Delong and the Chos, Appellant has a meritorious defense as to proximate cause.

Appellant has a meritorious defense not only to proximate cause but also to damages. Based on the same evidence cited above, Appellant contends Respondent's judgment for $20,000 is grossly disproportionate to the evidence. In McClurg, the Supreme Court left open the question of whether a meritorious defense as to damages alone is an adequate basis for the grant of Rule 60 relief. McClurg, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011). In fact, in her dissenting opinion, Chief Justice Toal provided extensive justification for the rule that a meritorious defense as to damages satisfies the Rule 60(b) requirement. Consequently, even if Appellant lacks a defense as to liability, his defense as to damages justifies the setting aside of the default judgment.

CONCLUSION

For the reasons stated herein and in Appellant's Brief, Appellant respectfully requests the Court reverse the order of the trial court entering a default judgment and find that pursuant to Rule 60(b), the default judgment should be set aside.



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b).

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant by depositing a copy of it in the United States Mail, postage prepaid, on June 7, 2013, addressed to attorney of record, Barry B. George, Esquire, 1419 Bull Street, Columbia, South Carolina 29201.

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