

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2015-000670

Anita Bacchi and Kristine Lomas,

Respondents,

v.

America's Source Consulting
Agency, LLC,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. WHETHER THE CIRCUIT JUDGE ERRED BY FAILING TO FIND GOOD CAUSE UNDER RULE 55(C), SCRPP, THEREBY REFUSING TO SET ASIDE THE ENTRY OF DEFAULT AND IN REFUSING TO PERMIT THE DEFENDANT'S ANSWER.

STATEMENT OF THE CASE

This appeal arises from the motion of Defendant America's Source Consulting Agency, LLC, ("America's Source") filed December 29, 2014, to set aside the entry of default against it and to subsequently permit the Defendant's answer. (R. p. 10-15). Defendant's motion was based on Rule 55(c), SCRCP.

On October 3, 2014, Judge Larry Hyman granted the Defendant's motion to vacate the default judgment against America's Source Consulting Agency, LLC. (R. p. 2-5). This decision was based on the fact that no verification or affidavit had been submitted by the Plaintiffs to support their demand for a default judgment against the Defendants. There was also no hearing held on the default judgment as required by state statutes. Sergey Sokolovsky had personally been relieved as a defendant in this case on August 24, 2014, due to improper service of process and inadequacies with the default judgment. Therefore, the only remaining defendants in this case going forward were America's Source Consulting Agency, LLC. However, Defendant believed, per the October 3, 2014 order vacating the default judgment against it, that the entry of default against the Defendant would also be lifted. (R. p. 2-5). However, Plaintiffs proceeded with their case against Defendant America's Source Consulting Agency, LLC when they moved for a final damages hearing that was scheduled for February 2, 2015. Upon learning of the

damages hearing, Defendant filed its motion to set aside the entry of default and to permit Defendant's answer. (R. p. 10-15).

At the final damages hearing held on February 2, 2015, Judge Steven H. John denied Defendant's motion and proceeded with the damages hearing that was scheduled in the case. (R. p. 6-9). That decision is the basis for this appeal.

FACTS

The Plaintiffs, Anita Bacchi and Kristine Lomas, filed their complaint against both America's Source Consulting Agency, LLC, and Sergey Sokolovsky personally, on October 20, 2008, alleging that wages, severance pay, and unused vacation pay were owed to the Plaintiffs as former employees of America's Source Consulting Agency, LLC. Defendant is a Connecticut limited liability company that was registered with the South Carolina Secretary of State. In 2008, the company decided to close its Myrtle Beach, South Carolina office and to relocate this office to Massachusetts. Plaintiff Anita Bacchi worked with the company as Vice President of Operations and was terminated from her position on February 4, 2008 when she was notified by fax from Sergey Sokolovsky that her services were no longer needed. (R. p. 94-95). Plaintiff Kristine Lomas worked as the Director of Operations and was also terminated from employment around this time.

Although Plaintiffs filed their complaint against both America's Source Consulting Agency, LLC and Sergey Sokolovsky personally, their complaint against Mr. Sokolovsky was later dismissed for improper service. The registered agent for service of process on the company, CN Search, LLC, did not forward the complaint to an appropriate party representing the company and therefore, America's Source was not apprised of this action against it.

On May 24, 2010, Plaintiffs filed a default judgment against both Defendants, America's Source and Sergey Sokolovsky in his individual capacity. However, neither Mr. Sokolovsky nor America's Source had actual notice of the complaint or the default judgments until November 21, 2013, when Mr. Sokolovsky's South Carolina attorney sent him copies of the default judgment and the complaint, which was obtained from the Horry County Clerk of Court.

ARGUMENTS

I. THE CIRCUIT COURT SHOULD HAVE EXERCISED ITS DISCRETIONARY AUTHORITY TO SET ASIDE AN ENTRY OF DEFAULT UNDER RULE 55(c), SCRCP.

Under South Carolina law, courts have the discretionary authority under Rule 55(c), SCRCP, to grant relief from an entry of default. *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 463 S.E.2d 636 (1995); *Top Value Homes, Inc. v. Harden*, 319 S.C. 302, 460 S.E.2d 427 (Ct. App. 1995). Rule 55 states that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Rule 55(c), SCRCP. Rule 55(c) should be applied liberally to promote justice and to allow the disposition of cases on their merits. *Dixon*, 320 S.C. at 178, 463 S.E.2d at 638. "Relief granted at the point of entry of default is within the equitable power of the court and excuses previous failure to act promptly." *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (1987).

The applicable "good cause" standard to set aside an entry of default is considerably less stringent than the Rule 60(b) "excusable neglect" standard applied to setting aside a default judgment. *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 381 S.E.2d 499 (1989); *Top Value*

Homes, 319 S.C. at 306, 460 S.E.2d at 429. The good-cause standard requires the court to determine whether the entry of default should be set aside by looking at (1) the timing of the motion for relief; (2) whether the party seeking relief from the entry of default has a meritorious defense; and (3) the degree of prejudice to the nonmoving party if relief is granted. *Wham*, 298 S.C. at 465, 381 S.E.2d at 501.

Additionally, South Carolina courts also recognize that the criteria for relief under Rule 60(b), where a default judgment has been entered, may be relevant in determining good cause under Rule 55(c), but the Rule 60(b) factors will be applied with greater liberality within the context of a Rule 55(c) motion. *Sundown Operating Co. v. Intedge Indus.*, No. 2007-UP-091, 2007 WL 8325994 (S.C. Ct. App. Feb. 23, 2007). The Rule 60(b) factors include mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud and misrepresentation. *Id.* at *6.

In *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987), the court applied the good-cause standard under Rule 55(c) and determined that the defendant made a sufficient showing of good cause to set aside an entry of default. The record showed that the defendant had initially acted reasonably by contacting her attorney and her insurance agent about the claims against her. The evidence also showed that the defendant reasonably believed that his case was being handled by the insurance company and that it was not his fault for not following the case. His tardiness in responding to the complaint was excused by the court. See also *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (1997) (applying the Rule 55(c) good-cause standards in a probate case, the court held that a party requesting default is not entitled to default as a matter of right, and justice requires that a party may be excused from a technically untimely responsive pleading).

II. DEFENDANT DEMONSTRATED GOOD CAUSE UNDER RULE 55(C), SCRPC, TO SUPPORT A REMOVAL OF THE ENTRY OF DEFAULT AGAINST IT, AND DEFENDANT'S MOTION TO SET ASIDE ENTRY OF DEFAULT WAS TIMELY

To satisfy the first element necessary to show good cause for setting aside an entry of default, America's Source must show that the timing of its December 29, 2014 Motion to Set Aside Entry of Default and to Permit Defendant's Answer was reasonable. *Wham*, 298 S.C. at 465, 381 S.E.2d at 501-02. In determining whether the defendant has shown good cause, the court "need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for finding of the lack of good cause." *Sundown Operating Co.*, 383 S.C. at 608, 681 S.E.2d at 888.

Here, after the individual Defendant, Sokolovsky, was dismissed from the complaint, and America's Source's default judgment was dismissed, Defendants thought Plaintiffs' cause against them was over. (R. p. 2-5). Once it was determined that this was erroneous and that the claims against America's Source were going forward, America's Source's Motion to Set Aside Entry of Default was filed immediately, and within weeks after the entry of default was entered. (R. p. 10-15).

Furthermore, the complicated procedural history of this case should be taken into consideration. Service of the initial pleadings on America's Source, a Connecticut corporation with its place of business in the Commonwealth of Massachusetts, was delivered to the registered agent for service of process. The pleadings, however, were never received by the principal of the company or other party responsible for tendering a defense. (R. p. 86 ¶ 5). In addition to the fact that America's Source was never able to tender a defense, notwithstanding a

minimally technical service of process, the original default judgment against America's Source was properly vacated on the ground that Plaintiff failed to provide an affidavit or verification to support the Court's original granting of default. (R. p. 88 ¶ 11).

Further delays ensued with latter pleadings, in part because the Court left the case open after the original default judgment was vacated against the out-of-state corporate Defendant. (R. p. 2-5). All claims against the individual Defendant, Sergey Sokolovsky, were dismissed because he was never served. Despite confusion over the status of the case, America's Source's Motion to Set Aside the subsequent entry of default and to permit Defendant's Answer, was filed in late December 2014, soon after notice of the Court's order vacating the prior judgment in October 2014. (R. p. 10-15). Defendant's answer was served on Plaintiffs just over a month after it was technically due to be filed.

III. DEFENDANT AMERICA'S SOURCE HAD A MERITORIOUS DEFENSE THAT SUPPORTED ITS MOTION TO SET ASIDE ENTRY OF DEFAULT

The procedural flaws, confusion, and delays in this case have never undermined the fact that a strong and conclusive meritorious defense exists in this case. This defense is set forth in the Answer attached as Exhibit A to Motion to Set Aside Entry of Default and to Permit Defendant's Answer. To establish a meritorious defense for purposes of showing a good-cause reason to set aside the entry of a default judgment, the defendant need only proffer evidence "which, if believed, would permit either the Court or the jury to find for the defaulting party." *Cox v. Sprung's Transp. & Movers, Ltd.*, 407 F. Supp. 2d 754, 757 (D.S.C. 2006) (applying the identical Federal Rule of Civil Procedure 55(c)).

In the present case, the dispute between the parties arises from the America's Source's proper termination of the Plaintiffs. The gravamen of Plaintiffs' allegations against America's Source is that they were terminated without cause and never received full pay, vacation pay, or severance pay despite written demands for the alleged pay. Yet, uncontroverted evidence shows that both Plaintiffs were properly terminated from America's Source, and both were fully paid all wages due prior to their termination. The terminations occurred in early February 2008 after America's Source announced the relocation of its South Carolina office to Philadelphia. (R. p. 94-95).

Further, Plaintiffs knew about the closure of the South Carolina office and agreed to cooperate and work with America's Source to transition the Myrtle Beach, South Carolina, office to Philadelphia. (R. p. 89-90). Additionally, on February 4, 2008, Anita Bacchi received a written termination notice explaining in detail the serious charges against her by America's Source. (R. p. 94-95). These charges against Anita Bacchi include receiving unearned wages and Ms. Bacchi's unlawful retention or destruction of certain company records. (R. p. 94-95). The letter also demonstrates that Ms. Bacchi received full payment for the work she performed and information about her entitlement to vacation pay under South Carolina law. (R. p. 94-95). Likewise, the record will plainly demonstrate that Ms. Lomas was also properly terminated, and received all wages and benefits due as of the date of termination.

Rule 55(c) grants the court discretionary authority to find good cause to set aside an entry of default and allow a case to be fully and completely resolved on its merits. *Melton v. Olenik*, 379 S.C. 45, 664 S.E.2d 487 (2008). Where, as in the present case, America's Source had proffered evidence that plainly demonstrates that a court or jury could find in favor of America's Source, the circuit court "should liberally construe [Rule 55(c)] to promote justice and dispose of [the]

case on the merits." Id. at 55, 664 S.E.2d at 492 (quoting *Bage v. Se. Roofing Co. of Spartanburg*, 373 S.C. 457, 471, 646 S.E.2d 153, 160 (Ct. App. 2007)).

IV. PLAINTIFFS WOULDNOT HAVE BEEN PREJUDICED IF DEFENDANT'S REQUESTED RELIEF HAD BEEN GRANTED

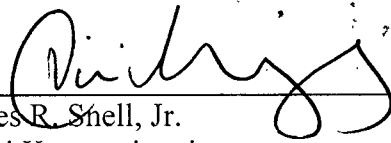
America's Source's Motion to Set Aside Entry of Default and to Permit Defendant's Answer, which includes as Exhibit A, America's Source's Answer, was filed weeks after the entry of default and immediately after America's Source was informed that the case was going forward against it but not against the individual Defendant. Any prejudice to Plaintiffs for the delay between the initial filing of their complaint and Defendant's Answer is due to Plaintiff's failure to properly serve the Defendants, including the individual Defendant, Sergey Sokolovsky, who was never properly served, and has been dismissed. Further, Plaintiffs failed to properly verify the initial default judgment against America's Source, which caused that default judgment to be set aside. (R. p. 2-5).

In determining whether good cause exists to set aside an entry of default, the Court should keep in mind the personal responsibility of the parties. *Cox*, 407 F. Supp. 2d at 757 (citing *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 953 (4th Cir. 1987)). In the present case, Plaintiffs must take responsibility for the majority of the delays that have occurred in this case. Taking all the relevant and material factual circumstances into consideration, Plaintiffs cannot reasonably show prejudice based solely on the recent minor delay in pleadings since the October 2014 Order by the Court to dismiss the default judgment against America's Source. (R. p. 2-5).

CONCLUSION

For each of the reasons stated herein, and because good cause was demonstrated under Rule 55(c), SCRCP, Defendant America's Source Consulting Agency, LLC, respectfully asks this Court to reverse the circuit court's order of damages that are owed to the Plaintiffs. Defendant further asks this Court to set aside the entry of default against Defendant and to permit this case to proceed on the merits, and for all other relief this Court deems just and proper.

Respectfully submitted,



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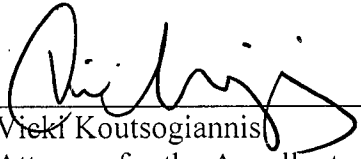
v.

America's Source Consulting
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RULE 211(b) CERTIFICATION

I hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR.


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