

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	CIVIL ACTION NO.: 2017-CP-23-00311
)	
TERENCE GRAHAM,)	
Plaintiff,)	
)	
v.)	
)	
FULL LOGISTICS, INC.,)	
)	
Defendant.)	

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 SC Court of Appeals

ORDER

This matter came before the Court on April 24, 2019, for hearing on Trustgard Insurance Company’s (“Trustgard”) Motion to Intervene and Motion to Set Aside Default Judgment and Defendant Full Logistics, Inc.’s (“Full Logistics”) Motion to Set Aside Default Judgment. All parties were represented by their respective counsel. After careful consideration, a review of the arguments presented by counsel at the hearing, and review of the materials submitted, the Court grants Trustgard’s Motion to Intervene for the sole purpose of posing its Motion to Set Aside Default but denies Trustgard’s Motion to Set Aside Default Judgment and denies Full Logistics’ Motion to Set Aside Default Judgment.

FACTS

This case arises from an accident that occurred on January 29, 2014, in which the Plaintiff, Terence Graham (“Graham”), was a passenger in a Full Logistics’ tractor trailer operated by Johnnie Foster. (Compl. ¶¶ 13-14). Wintery weather conditions persisted throughout the day, and Mr. Foster drove too fast for the road conditions, causing him to lose control of the vehicle and collide with a guard rail. (*Id.* at ¶¶ 18-19). The accident led to serious physical injuries for Graham. (*Id.* at ¶ 20). Trustgard issued a Policy of Insurance to Full Logistics, which was in effect at the time of the accident. (Trustgard’s Mem. in Supp. Mot. to Int. at 1). Trustgard was notified of the accident and began its investigation on January 31, 2014. (*Id.* at 2).

Graham filed the Summons and Complaint in this action on January 23, 2017. (Compl.). At a hearing on January 8, 2019, Full Logistics’ owner, Drico Fuller (“Fuller”), testified under oath that he

was served with process. (Graham Ex. 12). After Full Logistics failed to timely appear, default was entered and Judge Verdin held a damages hearing on June 26, 2018. (Damages Ord.). Full Logistics received notice of the damages hearing and did not appear. (Damages Ord.). On July 24, 2018, Judge Verdin entered an Order of Damages by Way of Default and awarded Graham \$1,843,349.73 in actual damages and \$1,000,000.00 in punitive damages. (Damages Ord.).

In October 2018 Trustgard retained counsel in this action. (Burchstead Aff. ¶ 5). As early as November 8, 2018, Trustgard's counsel communicated with counsel for Graham. (Graham Ex. 7). On November 28, 2018, Trustgard's counsel, Michael Burchstead, spoke with Fuller and learned that Fuller was personally served with process. (Burchstead Aff. ¶ 9). The next day, on November 29, 2018, counsel retained by Trustgard to defend Full Logistics filed a 60(b) Motion arguing that Full Logistics was "never properly served under Rule 4", SCRCP. (Full Logistics' Mot. to Vacate at 1). Full Logistics' counsel retained a private investigator, Keith Johnson, to locate Fuller. (Graham Ex. 8). Between December 3rd and 5th 2018, Johnson also became aware through a series of text messages that Fuller was personally served and turned everything over to Trustgard. (Graham Ex. 9). On December 13, Fuller again communicated with Johnson in a text message that he was served and the insurance company "dropped the ball". (Graham Ex. 9). At a January 8, 2019 hearing before the Court, Drico Fuller appeared and testified under oath that he was served and turned everything over to the insurance company: "I got served"; "They dropped the ball"; "When they served me, I sent it to them"; "I got served at my place of business". (Graham Ex. 12 – Tr. p. 10, ll. 11-22). Following continuation of the January 8, 2019 hearing, Trustgard moved on February 22, 2019, to intervene in this action to seek to set aside the default judgment.

FINDINGS

I. TRUSTGARD IS ENTITLED TO PERMISSIVE INTERVENTION FOR THE PURPOSE OF POSING ITS MOTION TO SET ASIDE DEFAULT JUDGMENT

Trustgard argues that it is entitled to intervention as a matter of right and permissive intervention. (Trustgard Memo. in Support pp. 9-14). The Court finds that Trustgard cannot satisfy the requirements for intervention as a matter of right but grants the Motion to Intervene to pose the Motion to Set Aside the Default Judgment on permissive intervention.

Rule 24(a), SCRPC, governs intervention as a matter of right and provides in part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties.

Rule 24(a), SCRPC.

An applicant seeking to intervene as a matter of right must satisfy the following factors: (1) establish timely application; (2) assert an interest relating to the property or transaction; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. Berkeley Electric v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). While needing to satisfy all four factors for intervention as a matter of right, the Court finds Trustgard cannot satisfy any of the four factors. Although retaining counsel in October 2018 (Burchstead Aff. ¶ 5), Trustgard did not file its Motion to Intervene until February 22, 2019. The passage of over four months since retaining counsel does not establish a timely application in light of Trustgard moving after the January 8, 2019 hearing that was continued before deciding to intervene. Trustgard does not satisfy the first factor for intervention as a matter of right.

Even if it could satisfy a timely application, the Court also finds Trustgard cannot establish an interest relating to the property or transaction based on the South Carolina Supreme Court's holding in

Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007). Ex Parte GEICO involved a family court action where GEICO sought to intervene as a finding of common law marriage may allow stacking multiple vehicles for underinsured coverage. Id. at 134, 644 S.E.2d at 700. The Supreme Court denied GEICO's motion to intervene, holding that GEICO "has no real interest in whether Cooper and Goethe have a valid common law marriage." Id. at 138, 644 S.E.2d at 702. The Supreme Court explained that "GEICO's interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court." Id. at 138-39, 644 S.E.2d at 702. Thus, even though GEICO argued that the decision of the family court "would impact GEICO's ability to protect its interests under the insurance policy issued to Goethe," the Supreme Court found any such interest was not "sufficiently related to the subject matter of the action" to warrant intervention. Id. at 134-35, 139, 644 S.E.2d at 703. Trustgard does not satisfy the second factor for intervention as a matter of right.

Even if Trustgard could satisfy the first two factors, it cannot demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest. Trustgard's only interest is in the coverage it will be required to provide in satisfaction of the judgment against its insured, Full Logistics. However, Trustgard has other means to protect its interests with respect to coverage, such as through a declaratory judgment action. Trustgard does not satisfy the third factor for intervention as a matter of right.

Even if Trustgard could satisfy the first three factors, it still cannot satisfy that its interest is inadequately represented by other parties. Trustgard chose, retained, and is paying for counsel to defend Full Logistics, and Full Logistics has filed its own Motion to Set Aside Default Judgment that is before the Court. Trustgard does not satisfy the fourth factor for intervention as a matter of right.

Although ruling Trustgard cannot intervene as a matter of right, the Court grants Trustgard's Motion to Intervene on the basis of permissive intervention. Permissive intervention is governed by Rule 24(b) and provides in part:

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common When exercising its discretion the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 24(b), SCRPC.

Permissive intervention is appropriate where (1) the applicant shows a claim or defense "involving a question of law or fact in common with the main action," and (2) the intervention does not "unduly delay or prejudice" the rights of the original parties. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 368 S.E.2d 72, 75 (Ct. App. 1988). The Court finds Trustgard meets the commonality requirement for permissive intervention. Additionally, the original parties – Graham and Full Logistics – will not be unduly prejudiced by allowing Trustgard to intervene for the sole purpose of posing its Motion to Set Aside Default Judgment. For these reasons, the Court grants Trustgard's Motion for Permissive Intervention for the limited purpose of posing its Motion to Set Aside Default Judgment.

II. THE COURT DENIES TRUSTGARD AND FULL LOGISTICS' MOTIONS TO SET ASIDE DEFAULT JUDGMENT

Trustgard argues that the default judgment should be set aside under Rule 60(b) because the judgment is void due to insufficient service of process, or due to mistake, inadvertence, surprise, excusable neglect, or fraud. As will be set forth below, the Court finds Fuller testified under oath in Court that he was personally served and made a voluntary appearance, thus warranting the denial of Trustgard's 60(b) Motion.

A. Trustgard Does Not Satisfy The Standard For Relief Under Rule 60(b)

Rule 60(b) states that “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void” Rule 60(b), SCRCP. It is well established that the standard for relief under Rule 60(b) is more rigorous than the standard to set aside default under Rule 55(c). Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Rule 60(b) *requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise*, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. *Id.* at 608 (emphasis added). The intent of the rules is to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality. *Id.* “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) (emphasis added).

1. The default judgment is not void under Rule 60(b)(4) because Full Logistics was properly served with the summons and complaint.

Under Rule 60(b)(4), a court may relieve a party from a final judgment if the judgment is void. Rule 60(b)(4), SCRCP. A judgment is void if the court acts without personal jurisdiction. BB&T, 369 S.C. at 551, 633 S.E.2d at 503. Trustgard argues that the court did not have personal jurisdiction over Full Logistics because it was never properly served. Fuller testified under oath to the Court on January 8, 2019 that he was personally served: “I got served”; “When they served me”; “I got served at my place of business”. (Graham Ex. 12 – Tr. p. 10, ll. 11-22). Fuller not only acknowledged service in his testimony but also made a voluntary appearance on January 8, 2019. Rule 4(d), SCRCP (“Voluntary appearance by defendant is equivalent to personal service”). In his testimony on January 8, 2019, Fuller never wavered from his position that he received notice of the lawsuit and did not contest proper service. His testimony is corroborated by his phone communications with Michael

Burchstead on November 28, 2018 and text messages with Keith Johnson in December 2018. Based on Fuller's testimony regarding personal service, the Court has personal jurisdiction. The judgment is not void for lack of process, and the Court denies Trustgard's Motion to Set Aside Default Judgement.

2. There is No Mistake, Inadvertence, Surprise, Excusable Neglect, Fraud, Misrepresentation, or Misconduct under Rule 60(b)(1) and Rule 60(b)(3)

Under Rule 60, a judgment may also be set aside due to mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or misconduct. Rule 60(b), SCRPC. In determining whether a default judgment should be set aside for these reasons, courts should consider the promptness with which relief is sought, the reasons for failure to act promptly, the existence of a meritorious defense, and the degree of prejudice to the plaintiff if relief is granted. Rouvet v. Rouvet, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010). Based on Fuller's sworn testimony acknowledging service, there is no mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct that warrants setting aside the default judgment. The mistake, inadvertence, or excusable neglect must be passed on Fuller, not on Trustgard as Full Logistics' insurer. The Court denies Trustgard's Motion to Set Aside Default Judgment.

3. There is No Prima Facie Evidence of a Meritorious Defense

Even if the Court finds that Full Logistics had a valid reason that it failed to act promptly, its motion should be denied because there is no evidence of a meritorious defense. Full Logistics argues that it has a meritorious defense as required by Rule 60(b)(1) and Rule 60(b)(3). "To justify relief under this rule, *a party must establish that he has a meritorious defense*" Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989) (emphasis added). "A meritorious defense is more than merely a factor to consider under certain 60(b) grounds for setting aside default judgments . . . not only must the movant make a proper showing he is entitled to relief based upon one of the

specified grounds, he must also make *a prima facie showing of a meritorious defense.*” McClurg v. Deaton, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008) (citing Stearns Bank Nat’l Ass’n v. Glenwood Falls, LP, 373 S.C. 331, 341, 644 S.E.2d 793, 798 (Ct. App. 2007) (emphasis added). “A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief.” Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). In Bowers, the Court of Appeals noted that Mr. Bowers, in moving under Rule 60(b), did not offer proof of a meritorious defense through affidavit. Id. at 68, 403 S.E.2d at 129. In holding Bowers did not present a meritorious defense the Court confirmed the established legal tenet that “[a]rguments of counsel are also not evidence.” Id. (citing McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (“This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.”)).

In this case, the burden was not satisfied with evidence by way of affidavit to show a meritorious defense. Unsupported argument from counsel cannot satisfy this burden. Full Logistics claims that it has the affirmative defense of an act of God. When a defendant pleads an act of God defense, “he must prove that the act of God is the sole proximate cause of the injury, and to do so, such defendant must of necessity prove that he is without negligence which contributed as a proximate cause.” Montgomery v. National Convoy & Trucking Co., 186 S.C. 167, 195 S.E. 247, 252 (1938). Here, Full Logistics has offered no evidence that an act of God was the sole proximate cause of the accident giving rise to this action. Full Logistics merely cites the complaint to show that it was snowing on the day of the accident and that equates to an act of God defense. Since neither Full Logistics nor Trustgard have offered evidence, by affidavit or otherwise, to show that the accident was the result of anything other than its negligence, it has not met its burden of proof to merit relief under Rule 60(b). The Motion to Set Aside Default Judgment is denied on this basis.

4. Setting Aside the Default Judgment Would be prejudicial to Graham in light of Fuller's Testimony of Personal Service

Even if there was a valid basis to vacate the default judgment under Rule 60(b), the prejudice to Graham also outweighs vacating the judgment. The events giving rise to this collision occurred on January 29, 2014. The Court entered judgment against Full Logistics on July 24, 2018. Vacating the judgment will start these proceedings anew, which will likely add several years before this matter is brought to a close. The Court has weighed the prejudice to Graham and will not vacate the default judgment in light of Fuller's sworn testimony regarding personal service and turning everything over to his insurance company.

Having found Fuller made a voluntary appearance and service was waived, the Court likewise denies Full Logistics' Motion to Set Aside the Default Judgment.

CONCLUSION

For the reasons set forth above, the Court denies Trustgard's Motion to Intervene as a Matter of Right but grants the Motion for Permissive Intervention for the limited purpose to move to set aside the default judgment. The Court denies Trustgard's and Full Logistics' Motions to Set Aside Default Judgment.

Further, Defendant has moved that the ruling in this matter be stayed so that additional discovery can be conducted. The Court sees little profit in conducting additional discovery based on a party's hope that the testimony of witnesses or the evidence will change. As discussed herein, the Court has conducted a deliberate inspection of the circumstances of default. Any inconsistencies in the affidavit of service are overcome by Fuller's acknowledgement and acceptance of service. The request for additional time and discovery suggests that Defendant realizes that it does not have sufficient evidence or information to meet its burden of providing that "particularized showing" required under

the law. The Court specifically finds that the Defendant has raised a suspicion of impropriety, but has failed to meet its burden of presenting a particularized showing that it is entitled to the requested relief.

IT IS SO ORDERED.

Robin B. Stilwell
Judge, Thirteenth Judicial Circuit

August _____, 2019
Greenville, South Carolina



Greenville Common Pleas

Case Caption: Terence Graham vs. Full Logistics Inc

Case Number: 2017CP2300311

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

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