STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-In-Equity
Trial Court Case No. 2018-CP-42-01540

RECEIVED
OCT 21 2019
SC Court of Appeals

Appellate Case No. 2019-000819

Karolee Russell, Individually, and as Personal Representative of the Estate of Kevin Brian Russell, Respondent,

v.

B&R Contracting, LLC, Brian K. Bass, and Richard A. Robertson, Defendants,

Of Whom Richard A. Robertson is the Appellant.

FINAL REPLY BRIEF OF APPELLANT

C. Daniel Atkinson (S.C. Bar #72721)
datkinson@wilkeslaw.com
W. Spencer Barrow (S.C. Bar #103813)
sbarrow@wilkeslaw.com
Wilkes Law Firm, P.A.
127 Dunbar St., Suite 200
Spartanburg, SC 29306

Attorneys for Richard A. Robertson, Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUPPLEMENT TO STATEMENT OF THE CASE 1

ARGUMENT 1

I. REGARDLESS OF LANGUAGE USED IN THE ORDER OF REFERENCE, THE COURT OF APPEALS IS THE PROPER VENUE FOR THIS APPEAL 1

II. EVEN IF THE TRIAL COURT PROPERLY HELD APPELLANT IN DEFAULT, THE ORDER OF DEFAULT JUDGMENT CANNOT STAND, BECAUSE THE ORDER IS WITHOUT FACTUAL SUPPORT 2

CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Dixon v. Besco Eng'g, Inc.

320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995) 3

Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.,

369 S.C. 540, 633 S.E.2d 497 (2006) 5

In re Estate of Weeks,

329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997) 3, 4, 5

Karppi v. Greenville Terranzo Co.,

327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997) 4

Murray Props. P'ship of Dallas v. L.P. Cox Co.,

293 S.C. 170, 359 S.E.2d 297 (Ct. App. 1987) 2

Appellate Court Rules

Rule 203, SCACR 1, 2

Rules of Civil Procedure

Rule 12(b)(6), SCRCP 3

Rule 55(c), SCRCP 3

Rule 37, SCRCP 4

Statutes

1988 S.C. Acts No. 678 2

S.C. Code Ann. § 14-11-85 (1988) 1

S.C. Code Ann. § 14-11-90 (Supp. 1986) 2

SUPPLEMENT TO STATEMENT OF THE CASE

On June 21, 2018, the Spartanburg Clerk of Court entered an Order of Reference referring the matter to the Spartanburg Master-in-Equity. (R. p. 4-5.) The Order of Reference states that a final order is appealable to the Supreme Court of South Carolina, but it states no legal support for this provision. (R. p. 4-5.)

ARGUMENT

I. REGARDLESS OF LANGUAGE USED IN THE ORDER OF REFERENCE, THE COURT OF APPEALS IS THE PROPER VENUE FOR THIS APPEAL.

The legislature has clearly set the rules governing appeals from masters-in-equity, stating:

> When some or all of the causes of action in a case are referred to a master-in-equity or special referee, the master or referee shall enter final judgment as to those causes of action, and an appeal from an order or judgment of the master or referee must be to the Supreme Court or the court of appeals as provided by the South Carolina Appellate Court Rules. A matter may not be referred to a master or referee for the purpose of making a report to the circuit court.

S.C. Code Ann. § 14-11-85. The statute contains no provision allowing the parties or the Clerk of Court to determine where an appeal must be filed. *Id.* Under the Appellate Court Rules, appeals from Masters are treated identically to appeals of orders from the Court of Common Pleas. See Rule 203(b)(4), SCACR, *referencing* Rule 203(b)(1), SCACR. Rule 203(d)(1), SCACR, states that all appeals, except those in six specifically-enumerated categories shall be filed with the Clerk of the Court of Appeals.[1] Rule 203(d)(1), SCACR. Based on the plain language of the Appellate Court Rules, the Court of Appeals is the proper venue for this appeal.

---

[1] The categories of cases for which appeals must be filed with the Supreme Court are: (1) circuit court cases involving death sentences; (2) challenges to the constitutionality of state laws and county or municipal ordinances; (3) circuit court cases involving the issuance of public debt; (4) circuit court rulings addressing elections or election procedure; (5) orders limiting investigation

Respondent incorrectly contends that appeals from the trial court were required to be filed with the Supreme Court. The Order of Reference contends that appeals from the Master in Equity should be taken directly to the Supreme Court of South Carolina. This provision may be based on a statute which has not been effective for thirty years; therefore, it is not enforceable or effective in this case. Prior to January 1, 1989, under S.C. Code Ann. § 14-11-90 (Supp. 1986), final judgments entered by a master were required to be appealed to the circuit court unless otherwise directed by the circuit court of by consent of the parties. See S.C. Code Ann. § 14-11-90 (Supp. 1986) (repealed Jan. 1, 1989); *see also Murray Props. P'ship of Dallas v. L.P. Cox Co.,* 293 S.C. 170, 170-71, 359 S.E.2d 279, 280 (Ct. App. 1987) (outlining prior provisions of statute). Under that statute, parties could agree, or a circuit court could order a direct appeal to the Supreme Court. This provision was repealed by 1988 S.C. Acts No. 678, which took effect on January 1, 1989; therefore, it is inapplicable to this case. 1988 S.C. Acts No. 678. Even if the prior, repealed statute were applicable, it is unclear whether a Clerk of Court would have the power to determine where an appeal should be heard.

II. EVEN IF THE TRIAL COURT PROPERLY HELD APPELLANT IN DEFAULT, THE ORDER OF DEFAULT JUDGMENT CANNOT STAND, BECAUSE THE ORDER IS WITHOUT FACTUAL SUPPORT.

The trial court had Respondent's Complaint before it at the hearing on the Motion for Default Judgment, and prior to entering judgment, it heard the testimony of Appellant. (*See* R. pp. 20-23, p. 51, line 18-p. 61, line 1.) The evidence, including the very complaint in this case, before the trial court showed that: (1) Appellant was neither a party to nor a signatory of the contract at

---

by a State Grand Jury; and (6) family court orders relating to an abortion by a minor. Rule 203(d)(1), SCACR. None of these categories are remotely analogous to this case.

issue; (2) Appellant had no interaction with Respondent; and (3) Brian Bass, and not Appellant, admitted to receiving the monetary deposit from Respondent. (R. pp. 24, 28, 38, p. 52, lines 7-11, p. 61, line 10-p. 62, line 6.)

In this case, the trial court's findings were wholly unsupported by the evidence. Respondent herself stated that she had no interaction with Appellant, and yet the trial court entered judgment on causes of action for fraud, breach of contract accompanied by fraud, negligent

The discretionary element afforded a judge in addressing motions to set aside entries of default make it "clear that the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default." *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). Rule 55(c), SCRCP, should be liberally construed to promote justice and dispose of cases on the merits. *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995).

Respondent takes the opposite approach to that required by Rule 55(c), SCRCP. Respondent contends that, if a defendant fails to timely answer, they should have judgment entered against them, even if the complaint against that defendant fails to survive the scrutiny of a Rule 12(b)(6), SCRCP, analysis. Respondent contends that an entry of default is a legal "gotcha," and, if a defendant fails to timely answer, that defendant should be subject to judgment, even if the complaint against the defendant fails to state claims upon which relief can be granted.

As addressed in detail in Appellant's Brief, the Complaint, when viewed in its entirety, plainly shows that Respondent did not contract with Appellant, and, even with the evidence presented at the damages hearing, there is no evidence that Respondent received any funds that Appellant paid to Brian Bass. As such, it was plain error for the trial court to enter default judgment.

Here, it is helpful to compare our situation to an appellate court's review of imposition of default judgment as a sanction. Under Rule 37, SCRCP, a trial court is empowered to order judgment by default for a failure to respond to discovery requests. Rule 37, SCRCP. Even so, appellate courts retain the right to review trial court rulings for abuses of discretion, and such abuses may be found "where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of the appellant. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). In the *Karppi* case, the Court of Appeals reversed the entry of the sanction entered, finding that even the intentional violation of court discovery orders was insufficient to justify the sanction of default. *Id.* at 543, 489 S.E.2d at 682.

As noted in Appellant's prior Brief, the trial court considered solely the failure of Appellant to timely answer Respondent's Complaint in denying Appellant's Motion to Set Aside Default, stating "[i]f that is his meritorious defense, that is for a whole different determination. But that is not what we are here today to do. We are here today to reconsider not [sic] set aside the default." (R. p. 73, line 25-p. 74, line 2.) Prior to and at the hearing, Appellant presented the meritorious aspects of his defense, and the trial court failed to consider them. This constitutes an abuse of discretion, and it requires reversal on appeal.

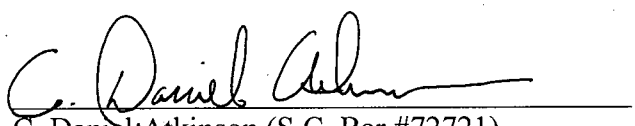
Essentially, the trial court abused its discretion by ignoring the facts before it, in the form of the contract and the testimony presented by Respondent and by Brian Bass. Allowing a trial court to rely on facts alleged in a Complaint which are refuted by actual admissible evidence before a trial court renders default a technicality, and results in favoring technical compliance over resolution on the merits, which ignores the requirement that "Rule 55(c) should be liberally

construed so as to promote justice and dispose of cases on the merits." *In re Estate of Weeks,* 329 S.C. 251, 259, 495 S.C.2d 454, 459 (Ct. App. 1997).

CONCLUSION

The trial court's findings leading to entry of default judgment were wholly unsupported by the evidence, and they were controlled by errors of law. Accordingly, pursuant to *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.,* 369 S.C. 540, 546, 633 S.E.2d 497, 500 (2006), the trial court's entry of default judgment must be reversed, and the case against Appellant must be resolved on the merits.

October 15, 2019



C. Daniel Atkinson (S.C. Bar #72721)
datkinson@wilkeslaw.com
W. Spencer Barrow (S.C. Bar #103813)
sbarrow@wilkeslaw.com
Wilkes Law Firm, P.A.
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
(864) 591-1113
Attorneys for Appellant Richard A. Robertson

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-In-Equity
Trial Court Case No. 2018-CP-42-01540

RECEIVED
OCT 21 2019
SC Court of Appeals

Appellate Case No. 2019-000819

Karolee Russell, Individually, and as Personal Representative of the Estate of Kevin Brian Russell, Respondent,

v.

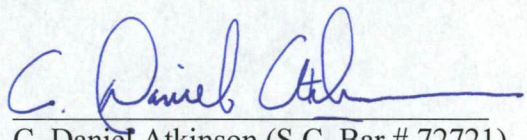
B & R Contracting, LLC, Brian K. Bass, and Richard A. Robertson, Defendants,

Of Whom Richard A. Robertson is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing ***Final Reply Brief of Respondent*** complies with Rule 211(b), South Carolina Appellate Court Rules.

October 15, 2019



C. Daniel Atkinson (S.C. Bar # 72721)
datkinson@wilkeslaw.com
W. Spencer Barrow (S.C. Bar #103813)
sbarrow@wilkeslaw.com
Wilkes Law Firm, P.A.
127 Dunbar St., Suite 200
Spartanburg, SC 29306

Attorneys for Richard A. Robertson, Appellant