STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-in-Equity
Civil Case No. 2018CP4201540

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.

RECEIVED
OCT 24 2019
SC Court of Appeals

FINAL BRIEF OF RESPONDENT

Paul A. McKee, III
409 Magnolia St.
Spartanburg, SC 29303
864-573-5149
864-948-1403 fax
pmckee@hanovertitle.com

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES....ii

STATEMENT OF THE CASE....1

STATEMENT OF FACTS....3

STANDARD OF REVIEW....3

ARGUMENT....4

I. THE ENTRY OF DEFAULT AND ORDER OF REFERENCE ENTERED BY THE CLERK OF COURT ON JUNE 21, 2018 DECLARED THAT THE MATTER IS DIRECTLY APPEALABLE TO THE SOUTH CAROLINA SUPREME COURT....4

II. THE MASTER PROPERLY DECLARED APPELLANT TO BE IN DEFAULT DURING THE FINAL HEARING....4

III. THE MASTER PROPERLY RELIED ON APPELLANT'S FAILURE TO DENY THE ALLEGATIONS IN THE COMPLAINT....5

IV. THE COURT PROPERLY DENIED APPELLANTS REQUEST TO SET ASIDE ENTRY OF DEFAULT....6

CONCLUSION....8

TABLE OF AUTHORITIES

CASES

Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009)..................4

Lewis v. Congress of Racial Equality, 275 S.C. 556, 274 S.E.2d 287 (1981)................................4

Motors Ins. Corp v. Willing & B&W, 313 S.C. 279, 437 S.E.2d 555 (Ct.App 1993).......................6

Dixon v. Besco Engineering, Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995).........................7

Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989)................7

Williams v. Stalnaker, 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994)...7

RULES OF CIVIL PROCEDURE

Rule 8(d), SCRCP..6

Rule 12(b) SCRCP..6

Rule 55(c), SCRCP..6-7

STATUTES

S.C. Code § 8-21-320..7

STATEMENT OF THE CASE

On May 9, 2018, Kevin Russell (now deceased) and Karolee Russell (Karolee Russell is hereafter singularly referenced as "Respondent") (Kevin Russell and Karolee Russell are hereafter collectively referenced as "Plaintiffs"), collectively filed this action (the "Action") alleging breach of contract, fraud, breach of contract accompanied by fraudulent act, conversion, civil conspiracy, and violations of the S.C. Unfair Trade Practices Act against B&R Contracting, LLC, Brian K. Bass, and Appellant Richard A. Robertson (Robertson is hereafter referenced as "Appellant"). (*See* Generally, R. pp. 19-41.) Appellant was personally served on May 19, 2018 and the Affidavit of Service was filed on May 23, 2018. (R. p. 80.). Respondent filed an affidavit of default on June 20, 2018. (R. pp. 81-82.)

On June 21, 2018, the Clerk of Court filed an Order entering default upon all Defendants and referred the matter to the Master-in-Equity with direct appeal to the Supreme Court of South Carolina. (R. pp. 4-5.)

On July 31, 2018, Respondent filed a Motion for Substitution of Parties, based upon the death of Kevin Russell. (R. pp. 42, 83-85.) On August 1, 2018, the trial court issued an Order making Respondent the sole party-plaintiff in this Action. (R. pp. 6-7.) Appellant was served with a Notice of Hearing on September 11, 2018 and a Certificate of Service for the Notice of Hearing was filed on the same date. (R. p. 92.)

Appellant attended the hearing *pro se*, marking his initial appearance in the case. Upon the close of direct examination of Karolee Russell, Appellant requested the opportunity to cross-examine the witness. In his cross-examination Appellant indicated that he wanted to verify that he had nothing to do with the contract, that he was not a part of B&R Contracting, and that he

was one of the Defendants in this case. (R. p. 59, lines 16-25). Appellant stated that he did not file an Answer, because he thought Mr. Bass filed one for him. (R. p. 59, lines 1-7.) The Court refused to allow Appellant to pose questions, except as to damages. (R. p. 59, lines 8-10, 22-25.) The Court found Appellant to be in default. (R. p. 59, lines 4-6, 22-24, p. 60, lines 5-7, 9-11.)

The Court issued its final Order on October 8, 2018, finding that Respondent was entitled to judgment against all Defendants, jointly and severally, for all causes of action set forth in the Complaint, and to recover actual damages, special damages, treble damages, attorney's fees and costs for a total amount of $106,759.44. (*see* R. p. 8-14.)

Prior to the filing of this Order, Respondent's Counsel filed a certificate of service of the proposed Order to all Defendants (R. p. 93.) Respondent's Counsel also filed a letter to the Court indicating that he had served a copy of the Proposed Order on all Defendants and that no Defendant had contacted his office regarding the content of the Order. (R. p. 94.) On October 19, 2018, Respondent served all Defendants with a copy of the final Order and filed a Certificate of Service. (R. p. 95.)

On October 18, 2018, the Appellant's Counsel entered an appearance and filed a Motion to Reconsider the Entry of Default. (R. pp. 43-45.) In his Motion, Appellant alleged that Appellant's comments to the Court at the final hearing constituted a Motion to Set Aside the Entry of Default. Appellant further claimed there was good cause to set aside Default because Appellant did not sign the contract, Respondent testified that she did not directly speak with Appellant, and that Respondent lacked facts necessary to establish the causes of action in the Complaint. (*see generally* R. pp. 43-45, 46-68.)

The trial court denied the Motion to Reconsider by Order dated April 11, 2019, in which it stated that based on Appellant's failure to answer and evidence presented at the hearings, sufficient evidence existed of a relationship between the co-Defendants. (R. p. 16.) In that Order, the trial court acknowledged that, in the Motion to Reconsider, the trial court was evaluating a Motion to Set Aside Entry of Default, based on Appellant's request at the September 27, 2018 hearing for leave to file an Answer. (R. p. 15.) The trial court found that there was no "good cause" to set aside the entry of default. (R. pp. 15-16.) Appellant filed a Notice of Appeal on May 13, 2019. (R. pp. 96-97.)

STATEMENT OF FACTS

On October 10, 2016, Respondent entered into a contract with an entity called B&R Contracting, LLC for the construction of a log-construction house. The contract was executed by Brian Bass, though Bass did not indicate in what capacity he was executing the contract. Respondent tendered a deposit in the amount of $29,928.46 to B&R Contracting, LLC. Respondent's late husband handled most of the limited transaction with Bass and Appellant. Respondent was under the belief that Bass and Appellant were licensed contractors. Neither Bass nor Appellant began construction on the log house, filed for building permits, or returned the deposit when demanded. Respondent filed an action for Breach of Contract, Fraud, Breach of Contract accompanied by a Fraudulent Act, Conversion, and violation of the South Carolina Unfair Trade Practices Act.

STANDARD OF REVIEW

Appellate courts have a clear standard in assessing the denial of a Motion to Set Aside an Entry of Default, or a motion seeking relief from default judgment:

> The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. The trial court's decision will not be disturbed on appeal absent a clear showing of all abuse of that discretion. An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606-07, 681 S.E.2d 885, 888 (2009) (internal citations omitted).

"Whether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof, and such proof must be by a preponderance of the evidence." *Lewis v. Congress of Racial Equality*, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981).

ARGUMENT

I. THE ENTRY OF DEFAULT AND ORDER OF REFERENCE ENTERED BY THE CLERK OF COURT ON JUNE 21, 2018 DECLARED THAT THE MATTER IS DIRECTLY APPEALABLE TO THE SOUTH CAROLINA SUPREME COURT.

On June 21, 2018, the Clerk of Court filed an Order entering default upon all Defendants and referring the matter to the Master-in-Equity with direct appeal to the Supreme Court of South Carolina. (R. pp. 4-5.) Entry of Default was complete upon the filing of the Clerk's Order and at that time, Respondent made application for a final hearing for an Order of Default in requesting the scheduling of a damages hearing. Appellant was provided notice of the hearing and attended, *pro se*. (R. p. 92.)

II. THE MASTER PROPERLY DECLARED APPELLANT TO BE IN DEFAULT DURING THE FINAL HEARING.

The Master found Appellant to be in default after Appellant's requested to cross-examine the Respondent. The Master stated, "There is an affidavit filed by the attorney on behalf of Mrs.

Russell that B & R Contracting, LLC, Brian K. Bass and Richard A. Robertson, did not file an Answer and they are in default. You are all in default under the terms of this. But there is not an Answer." (R. p. 59, lines 4-6.)

The Master further addressed Appellant, "There is no answer filed. There is no denial of the money being received. There is no denial of anything. There is just a Complaint, the service. You were all served because you are here. And the Affidavit of Default by Mr. McKee on behalf of the Plaintiff. But nothing was filed denying the position of the Plaintiff in this case." (R. p. 59, lines 12-15).

The Order of October 8, 2018 found that the Defendants failed to answer the Complaint or otherwise plead and that an Affidavit of Default had been properly filed by Respondent. (R. pp. 8-14.) It was within the Master's discretion to declare Appellant in default when Appellant admitted he filed no Answer to the Complaint.

III. THE MASTER PROPERLY RELIED ON APPELLANT'S FAILURE TO DENY THE ALLEGATIONS IN THE COMPLAINT.

In failing to respond to a Complaint, Appellant does not deny those allegations in the Compliant. In effect, those allegations are admitted. Rule 8(d) of the South Carolina Rules of Civil Procedure states:

> Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

"Allegations made in a complaint that are not denied in the answer are deemed admitted." *Motors Ins. Corp v. Willing & B&W*, 313 S.C. 279, 281, 437 S.E.2d 555, 556-57 (Ct.App 1993).

In failing to answer the Complaint, Appellant admits or does not deny any of the allegations in the Complaint including the material facts that:

1. Appellant was a party to the contract with Respondent. (R. p. 20, ¶ 5.),
2. Appellant was tendered a deposit in the amount of $29,928.46. (R. p. 20, ¶ 6.),
3. Appellant failed to perform pursuant to the terms of the contract. (R. p. 21, ¶ 7, 9.), and
4. Appellant refused to refund Respondent's deposit when demanded. (R. p. 21, ¶ 8.)

Appellant further admits or does not deny those allegations for all of the causes of action set forth in the Complaint to include breach of contract, fraud, breach of contract accompanied by fraudulent act, conversion, civil conspiracy, and violations of the S.C. Unfair Trade Practices Act. (*See generally* R. 20-23.) Similarly, general defenses, such as assertions of the existence of a "corporate veil" are waved if not properly pled in required, responsive pleadings. (*See* Rule 12(b), SCRCP.)

IV. THE COURT PROPERLY DENIED APPELLANT'S REQUEST TO SET ASIDE THE ENTRY OF DEFAULT.

Appellant contends that his oral request for an appeal should have been construed as a Motion to Set Aside Entry of Default. Further, Appellant claims there is good cause for setting aside Entry of Default in this matter pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure.

Rule 55(c) permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry

would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994).

Appellant filed no Motion before the Court, provided no Affidavit in support of his Motion, and did not pay a Motion fee required under S.C. Code § 8-21-320. In denying Appellant's Motion to Reconsider, the Court noted that Appellant's first appearance at any stage in this matter was at the final hearing. (R. p. 16.) Most importantly, the Court did not find it necessary to apply the *Wham* factors to the current case as Appellant never established that sufficient 'good cause' existed for the initial failure to file and Answer or otherwise plead.

The Court found that:

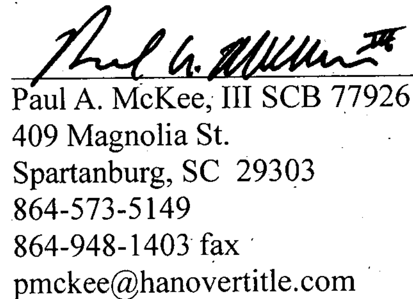
> Defendant Robertson stated that his reason for the default was because he thought Mr. Bass had filed a timely Answer for him. (Hr'g Tr. 10:1-7). The Court does not find Mr. Robertson's explanation satisfactory.
>
> Defendant Robertson's first appearance in this matter was at the final hearing on October 8, 2018. At no time did Defendant Robertson communicate with Plaintiff's Counsel prior to the hearing. He was personally served with the Summons and Complaint and mailed two notices of hearing over a period of approximately five months. At the final hearing, Defendant Robertson first asserted affirmative defenses when cross-examining Mrs. Russell. The Court finds that Defendant's request for relief at the final hearing is untimely.

> Defendant Robertson failed to timely Answer or otherwise plead, and does not deny the allegations in the Complaint. The Court finds that, "[a]t this point there has been no denial that the deposit was made or any other denial." (Hr'g Tr. 11:13-19).

(R. pp. 16, 59-60.)

CONCLUSION

The Master properly exercised his discretion in finding that Appellant failed to establish good cause to set aside entry of default and in finding judgment in favor of the Respondent. For the foregoing reasons, Respondent respectfully requests that the Court deny Appellant's appeal and affirm the Master's Order.



Paul A. McKee, III SCB 77926
409 Magnolia St.
Spartanburg, SC 29303
864-573-5149
864-948-1403 fax
pmckee@hanovertitle.com

Attorney for Respondent

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-in-Equity
Civil Case No. 2018CP4201540

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.

RECEIVED
OCT 24 2019
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent certifies that the foregoing **Final Brief of Respondent** complies with Rule 211(b), SCACR.

Paul A. McKee, III
409 Magnolia St.
Spartanburg, SC 29303
864-573-5149
864-948-1403 fax
pmckee@hanovertitle.com

Attorney for Respondent