THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

Mikell R. Scarborough, Master-In-Equity

Appellate Case No.: 2019-002052

CASE NO. 2016-CP-10-1143

Palmetto Construction Group, LLC (Respondent)

v.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward (Appellants).

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S.C. SUPREME COURT

RESPONDENT'S RETURN TO WRIT FOR CERTIORARI

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I. COUNTER-STATEMENT OF THE FACTS

Respondent Palmetto Construction Group, LLC ("PCG") filed suit against Appellants on February 12, 2016 (**App'x 179**), alleging misappropriation of funds from a construction project for the Department of Veterans Affairs, failure to pay subcontractors and suppliers, and defaults on agreements with PCG and the surety, leaving PCG responsible to pay Appellants' debts (of over $1.4 million) to the surety and the subcontractors.

A. Trial Court Proceedings

Respondents were personally served with the summons and complaint on March 14, 2016. **App'x 0236**. Respondents did not answer within 30 days, and Appellants moved for default on April 18, 2016 (**App'x 0233**) and a default order was entered on April 21, 2016. **App'x 0173**. The matter was referred to the Master in Equity for a damages hearing. **App'x 0173**.

A default damages hearing was scheduled on June 6, 2016. **App'x 0649**. On June 3, 2016, Appellants filed a motion to be relieved from default (**App'x 0254**) and attached an affidavit that sought to explain why the default occurred, stating:

> when I received the Summons and Complaint for the instant action, I thought that it was related to my arrangements with [the surety]. I am not an attorney and did not understand that the above captioned action was separate and apart from the bond claims that I have been working directly with [the surety] to address.[1]

Affidavit of Reuben Mark Ward at ¶¶ 9–10, **App'x 0245**. Neither the affidavit nor the motion cited arbitration as a reason for failing to answer. On July 11, 2016, Appellants filed a motion to compel arbitration. **App'x 0260**.

[1] There was no suit filed by the surety.

Appellants motions were denied by Order dated July 14, 2016. **App'x 0174.** The Order set a default damages hearing for October 4, 2016 and was served on all parties by the Court on July 18, 2016.

Appellants filed a motion to reconsider pursuant to Rule 59 SCRCP on July 27, 2016. **App'x 0295.** The motion to reconsider was scheduled to be heard by the Court on October 11, 2016. **App'x 0656.**

Appellants wrote the Court on September 7, asking that the motions be heard in advance of the damages hearing. **App'x 0658.** At that time, the Court elected to keep the hearing as originally scheduled with the damages hearing on October 4 and the motion to reconsider be heard on October 11.

B. Notices of Appeal and Appellate Proceedings

However, on September 30, 2016, Palmetto was served with a notice of appeal (**App'x 0669**), and immediately filed a motion to dismiss. **App'x 0501.** The parties appeared before the trial court on October 4 (**App'x 0641**), and a record of the parties' positions was made as the procedural posture of the case was unusual, considering there was no timely appeal of the interlocutory order denying the motion to lift the default and the Rule 59 motions remained pending.

On October 5, Palmetto's counsel received a letter from the Court of Appeals returning its motion to dismiss on the grounds that the Court had no record of such an appeal. (**App'x 0709**) Also on October 5, Palmetto was served by facsimile with a copy of another notice of appeal, different than the one previously served, which attached the July 14, 2016 Order and portions of the transcript of hearing. **App'x 0688.** On October 6, 2016, Palmetto's counsel was served by facsimile with yet another version of the notice of appeal. **App'x 0699.** On October 17, 2016,

Palmetto's counsel received a letter from the Court of Appeals stating that the October 6 notice of appeal was being returned to Ms. Arial together with the transcript as the transcript is not the equivalent of an order and is not properly included with a notice of appeal. Plaintiff moved to dismiss that appeal (**App'x 1971**), which the Court of Appeals granted on November 10, 2016. **App'x 0177**.

Following the entry of the trial court's October 28, 2016 Order denying Defendants' motion to amend their answer and Defendants' motion to stay and compel arbitration (**App'x 0175**), Appellants' counsel filed a third notice of appeal on November 14, 2016. **App'x 0677**.

Plaintiff moved to dismiss this third appeal as interlocutory and on the basis that the denial of Defendants' motion to compel arbitration was not appealable because the motion to compel arbitration was improper for a defendant in default. The Court of Appeals denied the motion on February 1, 2017, reserving the issue of appealability to the appeal in chief. **App'x 0178**.

Oral argument was held on April 2, 2019. On June 26, 2019, the Court of Appeals entered an order dismissing Defendants' appeal on the grounds argued by Plaintiff. Ct. App. Order at 7, **App'x 0010** ("We find the master's July 14, 2016 and October 28, 2016 orders are not appealable. Moreover, because Appellants were in default, they waived their right to assert arbitration as a defense.").

II. ARGUMENT

Appellants' petition for a writ of *certiorari* should be denied.

A. The Questions in Appellants' Petition Are Not Novel

Appellants argue their petition raises novel questions of law for this Court to resolve; namely, whether Appellants' default status constituted a waiver of the arbitration right such that there was no appealable issue before the Court of Appeals. When properly framed as follows,

the questions raised are not novel and, as the Court of Appeals found, are to be answered in the negative.

1. Whether a default order — rather than a default judgment — is immediately appealable.

It is well-settled that the answer to this question is "no." As noted by the Court of Appeals:

> The denial of a motion to set aside a default *judgment* is immediately appealable as it is a final judgment on the merits. *See Ateyah v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 437, 361 S.E.2d 340, 340 (Ct. App. 1987). However, the denial of a motion to set aside an *entry of default* is not appealable until after final judgment. *Thynes v. Lloyd*, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (Ct. App. 1987).

Ct. App. Order at 2 (**App'x 0006**) (emphases added).

2. Whether a party in default has standing to seek affirmative relief.

This Court has said the following about parties in default:

> It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability.

Roche v. Young Bros., of Florence, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (citations omitted). Having conceded liability, a party in default has limited recourse before the courts:

> Though a defaulting party may be entitled to notice of the damages hearing, that party is limited to cross-examining witnesses and objecting to evidence.

Id. at 81–82, 504 S.E.2d at 314. Further, a party's "status as a defaulting party [is] not vitiated simply because it later chose to challenge the default judgment rendered against it." *Id.* at 82, 504 S.E.2d at 315.

Accordingly, the Court of Appeals' was not faced with a novel issue when it ruled:

> Appellants' default should not be excused because they chose to file a claim for arbitration to remove their default status. Therefore, the

> master correctly found Appellants' motion to stay and compel arbitration was not proper due to Appellants' default status.

Ct. App. Order at 4 (**App'x 0008**).

B. Appellants Waived Their Arbitration Right

The Court of Appeals properly found that, under South Carolina law, Appellants' conduct constituted a waiver of the right to arbitrate.

1. Admission of Allegations

A defaulting party is deemed to have admitted the truth of the allegations against it, thus conceding liability. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978) ("By defaulting, a defendant forfeits his right to answer or otherwise plead to the complaint. In essence, the defaulting defendant has conceded liability." (internal quotation omitted)). One of the allegations in the complaint was that jurisdiction was vested in the trial court and that venue was proper there. *Complaint* at ¶ 6 (**App'x 0187**). Admission of that allegation constitutes an "emphatic repudiation" of the right to compel arbitration. *See Bland v. Green Acres Grp.*, 12 So.3d 822, 824 (Fla. App. 2009) ("Assuming proper service and actual knowledge of the case, it is difficult to imagine a more emphatic repudiation of the right to arbitrate than an admission that a court is a proper forum to determine the claim."). This Court properly held that Appellants waived their arbitration right.

2. Affirmative Defense

Courts in this State have long understood that the right to arbitration can be waived by failing to raise arbitration as a defense in a pleading. *See Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 466, 381 S.E.2d 499, 502 (Ct. App. 1989) (quoting 5 Am. Jur. 2d *Arbitration & Award* § 51 at 556–57 for the proposition that "one's right to arbitrate given by contract may be waived by failing to raise the right in an answer"); *see also Partain v. Upstate Auto Grp.*, 386 S.C.

488, 490, 689 S.E.2d 602, 603 (2010) ("Upstate Auto asserted three affirmative defenses in its Answer, including an arbitration agreement with Partain."); *Howard v. S.C. Dept. of Highways*, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000) ("Affirmative defenses are waived if not pled."); *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002) ("a defendant's failure to raise arbitration as an affirmative defense shows his intent to litigate rather than arbitrate").

A party in default has waived its right to plead and therefore waived the right to raise the affirmative defense of arbitration.[2] To regain the right, it must present good cause for the default to be lifted. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).[3] It should not be permitted to circumvent this requirement by seeking to compel that which it waived.

3. Cedar Surgery *Case*

Appellants rely on a case out of Utah for the proposition that a defaulting party may nonetheless move to compel arbitration. This reliance is misplaced.

The basis for finding non-waiver in *Cedar Surgery* was that the defaulting party's *very first* action in the case included raising its arbitration right. *Cedar Surgery Center v. Bonelli*, 96 P.3d 911, 912, 2004 UT 58 (2004) ("On July 12, 2002, the Bonellis made their first appearance in the case by filing a rule 60(b) motion for relief from default *and a motion to compel arbitration* . . . ." (emphasis added)).

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[2] *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978).

[3] As noted *supra*, a party in default can do little beyond move to be relieved from default and, should that motion be denied, move for reconsideration. If reconsideration is denied, it can participate in a damages hearing; but even then, it is only allowed to cross examine the plaintiff's witnesses. *See Limehouse v. Hulsey*, 404 S.C. 93, 113–16, 744 S.E.2d 566, 577–79 (2013).

Here, in contrast, arbitration was not mentioned either in Appellants' motion to be relieved from default or the affidavit setting forth Appellants' purported justification for their default. Rather, Appellants' motion to compel arbitration was not filed until *after* Appellants moved to be relieved from default, and after the Master had indicated the motion to lift the default was unlikely to succeed. *See* Hearing Tr. (June 6, 2016) 11:22–24 (**App'x 00639**) ("There's not much I saw in that affidavit that would give me indication that I would grant that motion. I can tell you that right now.")

Additionally, the Court in *Cedar Surgery* was reviewing an order *lifting* a default; that ruling—like the Master's ruling in this case denying relief from default—would be reversible only if the trial court abused its discretion. *Cedar Surgery*, 96 P.3d at 913; *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) ("The trial court's decision [of whether to set aside an entry of default] will not be disturbed on appeal absent a clear showing of abuse of that discretion."). Neither the *Cedar Surgery* court nor the Court of Appeals found an abuse of discretion.

A distinguishable case from another jurisdiction is not a basis for a writ of *certiorari* to issue.

4. Prejudice

Appellants argue that the record lacks a showing of prejudice that would justify a finding of waiver of the arbitration right. A party cannot point to a lack of evidence thereof when its own conduct is the reason for the absence of that evidence. *See Champion v. Whaley*, 280 S.C. 116, 121–22, 311 S.E.2d 404, 407 (Ct. App. 1984) ("The defendant cannot take advantage of the uncertainty caused by his own wrongdoing."). Such is the case here.

Immediately before the default damages hearing was to take place—a hearing at which Palmetto was to give testimony of what the damages it had and would continue to suffer—

Appellants served their first notice of appeal. This deprived the trial court of jurisdiction to conduct the hearing, and it prevented evidence being offered of the nature of the harm suffered by Palmetto and the prejudice that it would—and ultimately did[4]—suffer as a result of Appellants' delay. Appellants cannot rely on an absence of that evidence to argue the absence of waiver.

III. CONCLUSION

The Master in Equity found, and the Court of Appeals affirmed, that Appellants were properly in default and had waived their right to arbitration. Accordingly, there was no appealable issue before the Court of Appeals, and it so ruled. Appellants' petition fails to set forth adequate grounds for this Court to revisit these rulings. The petition for a writ of *certiorari* should be denied.

Respectfully Submitted:

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This 13th day of January, 2020
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[4] Palmetto went bankrupt. Further, because the principals of Palmetto were personal guarantors of the debt that Appellants defaulted upon, the principals of Palmetto likewise went bankrupt.

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PROOF OF SERVICE

I certify that I have served the Respondent's Return to Appellants' Petition for Certiorari on opposing counsel of record by depositing a copy in the United States Mail, Postage prepaid, on January 13, 2020, addressed as follows:

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