THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2017-002469
Case No.: 2016-CP-40-0378

Neal Truslow,

Respondent,

v.

Stephen Bretzinger, Lindsey Holsinger, and Rikard & Protopapas,

Defendants

Of Whom Stephen Bretzinger and Lindsey Holsinger are the Appellants.

FINAL BRIEF OF APPELLANT

Alexandre N. MacClenahan
The MacClenahan Law Firm, LLC
223 W. Stone Avenue
Greenville, South Carolina 29609
864-382-3340/FAX:864-751-2963
alex@macclenahanlaw.com
Attorney for Appellants Stephen Bretzinger and Lindsey Holsinger

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. **BECAUSE APPELLANTS SHOWED GOOD CAUSE, THE CIRCUIT COURT ERRED BY FAILING TO RULE ON APPELLANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT, OR, ALTERNATIVELY, ERRED IN DENYING APPELLANT'S MOTION TO ALTER/AMEND**

II. **BECAUSE APPELLANTS SATISFIED THE REQUIREMENTS OF RULE 60(b); THE TRIAL COURT ERRED IN DENYING THEIR MOTION TO SET ASIDE DEFAULT JUDGMENT**

III. **BECAUSE RESPONDENT FAILED TO CONDUCT THE REQUIRED RULE 55(B)(4) EXAMINATION UNDER OATH BEFORE OBTAINING A DEFAULT JUDGMENT AGAINST A DEFENDANT SERVED VIA PUBLICATION, THE TRIAL COURT ERRED IN DENYING THE MOTION TO SET ASIDE DEFAULT JUDGMENT**

IV. **SINCE SOUTH CAROLINA REQUIRES STRICT COMPLIANCE WITH PUBLICATION STATUTES, APPELLANTS WERE NOT PROPERLY SERVED VIA PUBLICATION BECAUSE RESPONDENT TRUSLOW FAILED TO MAIL A COPY OF THE SUMMONS AND COMPLAINT TO APPELLANTS' LAST KNOWN ADDRESS**

STATEMENT OF THE CASE

On June 16, 2015, Neal Truslow filed a Complaint against Stephen Bretzinger, Lindsey Holsinger and Rikard & Protopapas, LLC alleging, in pertinent part, a breach of contract against Mr. Bretzinger and Ms. Holsinger. *(R. p. 25).* On November 14, 2016, Respondent's counsel emailed Appellants' counsel a copy of Plaintiff's Affidavit of Default, Motion for Default Judgment and proposed Order for Default Judgment. *(R. pp. 150-151).* On November 15, 2016, Appellants' served their Answer and requested that Respondent set aside entry of default. *(R. pp. 157-165, 188-189).* Pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure, on November 16, 2016, Appellants served all parties with their Motion to Set Aside Entry of Default and mailed it to the Clerk's office for filing. *(R. p. 137-156).* The Clerk of Court filed the Answer on November 18, 2016 at 12:03pm and the Motion to Set Aside Entry of Default on November 18, 2016 at 12:03pm. *(R. pp. 157-165, 137-156).*

On November 18, 2016, the Honorable DeAndrea G. Benjamin signed the proposed Order for Default Judgment but the clerk of court did not file the signed order until November 29, 2016 at 11:58am. *(R. pp. 5-8).* Appellants did not receive a copy of the Order until December 5, 2016. *(R. p. 170, ¶5).* Pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure, on December 22, 2016, Appellants served a Motion to Set Aside Default Judgment and mailed a copy to the clerk for filing. *(R. pp. 166-196).*

On July 11, 2017, the Honorable Alison Renee Lee heard oral arguments on Appellants' Motion to Set Aside Entry of Default and Default Judgment (At this hearing, Judge Lee also heard oral arguments on Respondent Truslow's Motion to Compel). *(R. pp. 15-20).* On September 21, 2017, Judge Lee issued and filed an Order denying Appellants' Motion to Set

Aside Default Judgment but that Order did not address Appellants' Motion to Set Aside Entry of Default. *(R. pp. 15-20).* Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, on October 2, 2017, Appellants' filed a Motion to Alter/Amend Order Denying Set Aside of Entry of Default and a Motion to Alter/Amend Order Denying Set Aside Default Judgment (hereinafter collectively "Motion to Alter/Amend"). *(R. pp. 220-294; pp. 295-391).* On October 30, 2017, without oral argument, Judge Lee signed an Order Denying Motion to Reconsider and the clerk filed the Order on October 31, 2017. *(R. pp. 21-24).* On November 27, 2017, Appellants' served the Notice of Appeal in this matter.

FACTUAL SUMMARY

This case arises out of a dispute concerning Respondent Truslow's participation as an attorney for Appellants in a federal action captioned as *Stephen Bretzinger and Lindsey Holsinger vs. Crestwood Homes, LLC et al., Case No.: 0:13-CV-2771-JMC* (hereinafter, the "Federal Action:"). In the Federal Action, Appellants hired the law firm of Nosal and Jeter to represent them. *(R. p. 161, ¶ 26).* That law firm, associated Truslow and Truslow, P.A. to assist in the litigation of the Federal Action. *(R. p. 161, ¶ 27).*

In the Federal Action, a dispute arose between Appellants' and Respondent Truslow when Respondent Truslow agreed to settle the case for $100,000.00 without obtaining Appellants' permission. *(R. 162, ¶¶ 31-32).* As a result of the dispute, Respondent refused to continue as associated counsel and Appellants hired Rickard and Protopapas, LLC to represent them and attempt to set aside the settlement in the Federal Action. *(R. 162, ¶ 33).* Respondent Truslow notified Appellants' and Rikard and Protopapas that he was placing a charging lien for his alleged unpaid attorney fees and costs on the settlement proceeds in the Federal Action. *See (R. 162, ¶ 34).* Ultimately, the defendants in the Federal Action obtained an order enforcing the

settlement agreement and the settlement funds of $100,000.00 were tendered to Rikard and Protopapas. *(R. p. 162, ¶ 35)*. Rikard and Protopapas placed the settlement funds in a trust account and withheld $35,132.55, the amount Respondent Truslow claims he is owed, and distributed the balance to Appellants. *(R. p. 163, ¶ 39)*. Appellants objected to Rikard and Protopapas distributing any funds to Respondent Truslow; on the grounds that Truslow was not entitled to recover fees for binding them to a settlement that they did not give consent to accept. Respondent Truslow then filed this action claiming he properly settled the Federal Action and seeking recovery of attorney fees and costs that he claimed were owed for his work in the matter. *(R. pp. 25-46)*.

Pursuant to S.C. Code Section 15-9-740, Respondent Truslow attempted to serve Appellants via publication. *(R. pp. 53-90)*. Respondent Truslow obtained an Order of Publication and that Order failed to direct Respondent Truslow to mail a copy of the Summons to Appellants' last known address. *(R. pp. 3-4)*. Further, the record is devoid of any evidence that a copy of the Summons and Complaint were mailed to Appellants' last known address. If Appellants were properly served, which is denied, the time for filing an Answer expired on November 7, 2016.

On October 24, 2016, Appellants' counsel e-mailed Respondent Truslow's counsel to notify her of his representation and request a copy of all pleadings. *(R. pp. 144-145)*. Respondent's counsel responded that same day and provided a copy of the pleadings and an order for service via publication. *(R. pp. 146-149)*. Appellants' counsel mistakenly calendared the due date for the answer as November 17, 2016. *(R. p. 396, lines 8-10)*.

On November 14, 2016, Appellants' counsel received, via e-mail, copies of Respondent Truslow's Affidavit of Default and Motion for Default Judgment. *(R. pp. 150-151)*. The

following day, Appellants' counsel e-mailed an Answer and requested that Respondent Truslow consent to set aside the entry of default. *(R. pp. 152-153).* In her e-mail response, counsel for Respondent Truslow refused to consent because "your clients have been impossible to deal with." *(R. pp. 154-155).*

On November 16, 2016, Appellants served their Motion to Set Aside Entry of Default. *(R. pp. 137-156).* On November 18, 2016, the Clerk filed the Answer at 10:23 a.m. and filed the Motion to Set Aside Entry of Default at 12:03pm. *(R. pp. 157-165; pp. 137-156).* On November 18, 2016, the Honorable DeAndrea G. Benjamin signed a Default Judgment against Defendants Bretzinger and Holsinger, without addressing Appellants' pending Motion to Set Aside Entry of Default. *(R. pp. 5-8).* The Clerk of Court did not file the Default Judgment until November 29, 2017 at 11:44am. *(R. p. 7).* The Form 4 accompanying the Default Judgment provides that "The judgment was entered on the 29 day of Nov, 2016" and lists Appellants' counsel as an attorney of record. *(R. p. 6).* Appellants' counsel received a copy of the Default Judgment on December 5, 2016. *(R. pp. 170, ¶ 5).* On December 28, 2017, Appellants' served a Motion to Set Aside Default Judgment. *(R. pp. 166-196).*

After the filing of the Motion to Set Aside Default Judgment, the parties engaged in extensive written discovery. The discovery requests exchanged and responded to by both Respondent and Appellants sought information beyond the scope of the default judgment.

On January 5, 2017, Respondent Truslow served Requests to Admit and Requests for Production of Documents on Appellants' counsel. *(R. pp. 435-438; pp. 439-444).* Respondent's requests to produce sought, among other things: Appellants' bank statements and all correspondence relating to a prior federal action exchanged between Appellants and Defendant Rikard and Protopapas; and the Requests to Admit sought admissions concerning, among other

things, Appellants' receipt of settlement funds and sought Appellants' admission that they were avoiding paying money owed to Respondent (an issue that goes directly to liability). *(R. pp. 435-438; pp. 439-444).*

On February 1, 2017, Appellants' served their responses to the Request to Admit and served their first set of Requests to Admit. *(R. pp. 445-450; pp. 451-474).* On February 21, 2017, Respondent Truslow responded, without objection, to Appellants' Requests to Admit that sought admissions beyond the default judgment, including, admissions concerning the underlying fee agreement and admissions concerning the assignment of fees. *(R. pp. 480-484).*

On February 3, 2017, Respondent Truslow served Appellants' with Plaintiff's First Set of Interrogatories. *(R. pp. 475-479).* The interrogatories sought, among other things: a list of potential witnesses; a list of all documents relating to the case; and e-mail addresses and cell phones used by Appellants' since January 1, 2016. *(R. pp. 475-479).*

On February 24, 2017, Appellants served their responses to the Request for Production of Documents. *(R. pp. 485-493).* On March 1, 2017, Appellants' served their first set of requests to produce, along with supplemental responses to the Respondent's document requests. *(R. pp. 512-517; pp. 494-511).*

On March 20, 2017, Appellants' served answers to interrogatories and a second supplemental response to Respondent's request to produce. *(R. pp. 518-524; pp. 525-527).*

On March 29, 2017, Respondent Truslow served responses to Appellants' Request for Production. *(R. pp. 528-531).* On that same day, after consultation between the parties, Respondent Truslow served a Motion to Compel Appellants' to answer Request to Produce No. 4 in more detail. *(R. pp. 197-219).*

A hearing was held on July 11, 2017 on Respondent Truslow's Motion to Compel and on August 30, 2017, the Circuit Court ordered Appellants' to provide a supplemental response to Respondent's Request to Produce No. 4. *(R. pp. 9-14).* Appellants served their response on September 6, 2017. *(R. pp. 532-599).*

As set forth above, the Circuit Court ultimately denied Appellants' motion to set aside entry of default, set aside default judgment and motions to alter/amend its order denying the relief sought and Appellants' filed this appeal.

STANDARD OF REVIEW

A determination as to whether to set aside and entry of default or default judgment is left to the sound discretion of the trial court judge. *Sundown v. Intedge Industries*, 383 S.C. 601, 606, 681 S.E.2d 885, 887 (S.C. 2009) *citing Harbor Island Owners' Ass'n v Preferred Island Props, Inc. 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006).* The decision of the trial court will be set aside upon a clear showing of abuse of discretion. *Id. citing Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 460, 162-163, 375 S.E.2d 321, 322-323 (Ct. App. 1988).* An abuse of discretion occurs when the order is controlled by an error of law or when the order's factual conclusions lack evidentiary support. *Tobias v. Rice,* 379 S.C. 357, 363, 665 S.E.2d 216, 219 (Ct. App. 2008) *citing Tri-County Ice & Fuel, Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (S.C. 1990).*

ARGUMENTS

I. BECAUSE APPELLANTS SHOWED GOOD CAUSE, THE CIRCUIT COURT ERRED BY FAILING TO RULE ON APPELLANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT, OR, ALTERNATIVELY, ERRED IN DENYING APPELLANT'S MOTION TO ALTER/AMEND

Pursuant to Rule 55(c), the standard for granting relief from an entry of default is a finding of good cause. *Sundown v. Intedge Industries*, 383 S.C. 601, 606, 681 S.E.2d 885, 889

(S.C. 2009). In order to establish good cause, a moving party need only provide an explanation for the default and give reasons why vacating the entry of default would serve the interests of justice. *Id.* After providing a satisfactory explanation, the trial court must also consider the timing of the motion to set aside; whether the defendant has a meritorious defense; and the degree of prejudice to the plaintiff is the motion is granted. *Id. citing Wham v. Shearson Lehman Bros., Inc. 298 S.C. 462, 465, 381 S.E.2d 499, 501-502 (Ct. App. 1989).*

The criteria to set aside an entry of default are much less rigorous than those required to set aside default judgment; and an entry of default may be set aside for reasons that would be insufficient to set aside a default judgment. *Id.* Pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure, in order to set aside a default judgment, the trial court must look at whether there is mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, or misrepresentation. *S.C.R.C.P. Rule 60(b).* While the 60(b) criteria are relevant to determining whether good cause exists, no court should find good cause lacking based solely on the absence of a Rule 60(b) factor. *Sundown* at 608, 681 S.E.2d at 889. Indeed, the factors are only relevant to the extent that proof of any one of the factors will establish good cause. *Id.*

Since Appellant's Answer and Motion to Set Aside Entry of Default were served and filed prior to the filing of the Default Judgment, Appellants should have been allowed to have their motion decided on its merits before a judgment was entered. At the July 11, 2017 hearing on Appellants' Motion to Set Aside Entry of Default, Appellants' counsel specifically argued that the default judgment should never have been entered because there was a filed Answer and a pending Motion to Set Aside Entry of Default. *(R. pp. 402, lines 10-13).* Appellant also, through pleadings and oral arguments, presented evidence of good cause. Appellants' counsel notified counsel for Respondent Truslow that he would be representing Appellants in the action,

and opposing counsel acknowledged the representation in e-mail. *(R. pp. 144-145; pp. 146-149).* Appellants' counsel also informed the court that he erroneously calendared the due date for the Answer. *(R. p. 396, line 10).* Upon learning of the entry of default, Appellants promptly served an Answer and requested that Respondent consent to set aside the entry of default. When that was refused, Appellant filed a Motion to Set Aside Entry of Default.

Appellants' Answer set forth numerous meritorious defenses; including:

1. That Respondent was not a proper party to the action *(R. pp. 158-159, ¶¶ 2-7)*;
2. That Respondent's own pleadings show that he did not enter into a contract with Appellants *(R. p. 159, ¶ 9);*
3. That Respondent entered into a settlement agreement in the Federal Action without their knowledge and consent. *(R. p. 162, ¶¶ 31-32)*;
4. That Respondent made misrepresentations to Appellants. *(R. p. 159, ¶ 13);* and
5. That Respondent's unclean hands prevented him from recovering in this action. *(R. p. 159, ¶ 11).*

At oral argument, Appellants also set forth their meritorious defenses concerning Respondent's unauthorized settlement of the Federal Action and the amount of the attorney fee and costs. *(R. p. 409, lines 20-24).* A meritorious defense does not require a party to establish that they would prevail on the merits; rather it must raise a question of law deserving of some investigation or a real controversy of facts arising from conflicting or doubtful evidence. *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 904 (S.C. 1988). In their pleadings and at oral arguments, Appellants presented evidence of real controversies of fact and law; including whether Respondent was a proper party to the action; whether Respondent entered into a contract with Appellants; and whether Respondent entered into a settlement agreement without Appellants' consent.

Finally, other than an eight day delay, Respondent would not have suffered any prejudice if the entry of default was set aside. Appellants' served their Answer eight days late; the Answer was due on November 7, 2016 and Appellants' served their Answer on November 15, 2017. *(R. pp. 157-165)*. Eight days is not a long delay in the proceedings and would have resulted in no prejudice to Respondent. While South Carolina courts have not explicitly ruled on the issue, the 4th Circuit has held that when deciding a motion to set aside entry of default, "delay in and of itself does not constitute prejudice to the opposing party." *Colleton Preparatory Acad. Inc. v. Hoover Universal, Inc.* 616 F.3d 413, 418 (4th Cir. 2010).

Moreover, by the time of the hearing on the Motion to Set Aside, the parties had engaged in written discovery that went well beyond the issues of default. Appellants provided a detailed exposition on the discovery requests in the Factual Summary above, but the parties clearly engaged in written discovery that went to issues of liability and damages. The parties continued to participate in the litigation of the case through discovery so Respondent cannot claim that he would have suffered a prejudicial delay if the entry of default was set aside. Finally, the monies that Respondent seeks to recover are being held in trust by Rikard & Protopapas so Respondent faced no risk that the monies he sought would be uncollectable. Simply put, Respondent would suffer no prejudice if the entry of default was set aside.

In the Order issued after the July 11, 2017 hearing, the Court made no ruling on Appellants' Motion to Set Aside Entry of Default, and simply ruled that Appellants' Motion to Set Aside Default Judgment was denied. *(R. p. 20)*. As a result, Appellants' filed Rule 59(e) motions requesting that the Court alter or amend its judgment. *(R. pp. 220-294; pp. 295-391)*.

The court issued an Order, without oral argument, denying Appellants' motion. *(R. pp. 21-24)*. In that Order, the Court found that the Default Judgment was entered without the

Court's knowledge that a Motion to Set Aside Entry of Default was filed. *(R. p. 24)*. Despite this finding, and without any further findings as to good cause, the Court erroneously held that Appellants' failed to provide a satisfactory explanation to show good cause and that Appellants' did not provide sufficient reason as to why setting aside the entry of default would promote the interests of justice. *(R. p. 24)*.

In *Columbia Pools, Inc. v. Galvin*, the South Carolina Court of Appeals, found that an answer filed one day late due to a party's mistake about the date of service was sufficient to set aside default judgment. 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986). In that case, Defendant mistakenly informed his attorney that he was served with the Summons and Complaint on March 4, 1982, when in reality he was served on March 3, 1982. *Id.* at 60, 339 S.E.2d at 524. Defendant filed its answer one day late and Plaintiff obtained a default judgment. *Id.* at 60, 339 S.E.2d at 525. Pursuant to S.C. Code Section 15-27-130 (the predecessor to Rule 60(b)), Defendant moved to set aside the default judgment. *Id.* The trial court found that there was no excusable neglect, but the Court of Appeals reversed on the grounds "there was a good faith mistake of fact, and, no attempt to thwart the judicial system. *Id.*

In *Mictronics v. S.C. Dep't of Rev.*, the Court of Appeals also found a mistake of fact existed when a party mistakenly calendared a hearing date. 345 S.C. 506, 548 S.E.2d 223 (S.C. App. 2001). The *Mictronics* case arises out of an appeal from the Administrative Law Division where the administrative law judge ("ALJ") issued a dismissal against the Plaintiff after Plaintiff's representative failed to appear at a rescheduled hearing. *Id.* at 508, 548 S.E.2d 223. The ALJ rescheduled a previously set hearing and his office called Plaintiff's representative to inform him of the new hearing date. *Id.* Plaintiff's representative understood the new hearing date to be June 22 and made a note in his file, but the actual rescheduled date was May 22. *Id.*

When the Plaintiff's representative failed to appear at the hearing, the ALJ treated Plaintiff's failure to appear as a default and dismissed the matter. *Id.* Upon receiving notice of the dismissal, Plaintiff's representative promptly contacted the ALJ to explain his mistake and request that the matter be reopened. *Id.* The ALJ denied the request and Plaintiff appealed to the circuit court. *Id.* at 509, 548 S.E.2d 223. The circuit court remanded the matter to the ALJ to make findings of fact and conclusions of law about whether Plaintiff should be relieved from default. *Id.* The ALJ concluded that Plaintiff received notice of the hearing and that the failure to attend could not be attributed to mistake, inadvertence, surprise, or excusable neglect. *Id.* Plaintiff again appealed and the circuit court found that the ALJ abused its discretion because it applied an excusable neglect standard instead of a good cause standard. *Id.* On appeal, the Court of Appeals found that the ALJ properly applied the Rule 60(b)(1) standards but that even under those more stringent standards, Plaintiff was entitled to relief from the default. *Id.* The Court of Appeals found that Plaintiff's mistake was a good faith error and that Plaintiff promptly sought relief from his error. *Id.* at 511, 548 S.E.2d 223. The Court found that given Plaintiff's good faith mistake, prompt action to remedy the mistake, existence of a meritorious defense and a lack of prejudice to the opposing party, the ALJ must set aside the default and allow the case to proceed on its merits. *Id.* at 512, 548 S.E.2d 223.

Similar to the parties in *Columbia Pools* and *Mictronics*, Appellants' answer was filed late because their counsel mistakenly calendared the due date for November 17, 2016 instead of November 7, 2016. There is no evidence presented that the calendaring mistake was anything other than a simple good faith mistake of fact; nor is there any evidence that filing the Answer eight days late was an attempt to thwart the judicial system.

It is undisputed that Appellants served their Answer and made an official appearance on November 15, 2016 and served a Motion to Set Aside Entry of Default on November 16, 2016. It is further undisputed that the Answer was served eight days past the due date because Appellants' counsel mistakenly calendared the due date for November 17, 2016 instead of November 7, 2016. Under South Carolina law, the mistake satisfied the Rule 60(b) requirements to set aside a default judgment. Pursuant to the holding in *Sundown*, establishing any one factor of the Rule 60(b) requirements is sufficient to show good cause. *Sundown* at 608, 681 S.E.2d at 889. Having established the existence of good cause, the trial court erred in refusing to set aside the entry of default.

II. BECAUSE APPELLANTS SATISFIED THE REQUIREMENTS OF RULE 60(b)(1); THE TRIAL COURT ERRED IN DENYING THEIR MOTION TO SET ASIDE DEFAULT JUDGMENT

Rule 60(b)(1) of the South Carolina Rules of Civil Procedure provides that a default judgment may be set aside on the grounds of "mistake, inadvertence, surprise, or excusable neglect." *S.C.R.C.P. Rule 60(b)(1) (2018).* As set forth above, pursuant to the holdings in *Columbia Pools* and *Mictronics,* Appellants' established the existence of mistake, inadvertence, surprise, or excusable neglect because Appellants' counsel made a good faith error in calendaring the due date for November 17, 2017 instead of November 7, 2017.

In *Columbia Pools,* the South Carolina Court of Appeals, found that an answer filed one day late due to a party's mistake about the date of service was sufficient to set aside default judgment. 288 S.C. 59, 339 S.E.2d 524 (S.C. App. 1986). Similarly, in *Mictronics,* the Court of Appeals also found a mistake of fact existed when a party mistakenly calendared a hearing date. 345 S.C. 506, 548 S.E.2d 223 (S.C. App. 2001).

In determining whether to set aside default judgment pursuant to Rule 60(b), the trial court should consider (1) the promptness with which Appellants sought relief; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense and (4) the prejudice to the other party. *Mictronics* at 510-511, 548 S.E.2d 223 (citations omitted).

Rule 60(b) provides a party must file a motion for relief within a reasonable time and, for purposes of Rule 60(b)(1), within one year. *S.C.R.C.P., Rule 60 (2018).* In its Order from the July 11, 2017 hearing, the Court explicitly held that the filing of the motion to set aside default judgment was "certainly prompt." *(R. p. 19).* Appellants also provided an explanation as to the failure to act promptly - their counsel mistakenly calendared the due date for November 17, 2016 instead of November 7, 2016. The mistake of an attorney cannot be used as grounds for relief unless the mistake would be excusable if attributed to the client. *Graham v. Town of Loris*, 272 S.C. 442, 451, 248 S.E.2d 594, 599 (S.C. 1978). Under the *Columbia Pools* and *Mictronics* holdings, good faith mistakes of dates are excusable mistakes and explain the failure to file a timely Answer. Appellants also established the existence of meritorious defenses.

The trial court incorrectly stated that Appellants' Answer failed to provide any meritorious defense. Appellants' Answer specifically alleges that Respondent is not the real party in interest; that Respondent was not assigned the settlement proceeds; that Respondent's own pleadings show that he did not enter into a contract with Appellants; that Respondent entered into a settlement agreement in the Federal Action without Appellants' knowledge and consent; and that Respondent made misrepresentations to Appellants. *(R. p 157-165).* Further at oral argument, Appellants' counsel restated these defenses to the Court. *(R. p 409, lines 20-22).* Appellants need not establish that they will prevail at trial or that they have a perfect defense;

rather Appellants need only show that there is a genuine question of law or a real controversy of essential facts arising from conflicting or doubtful evidence. *Mictronics* at 511, 548 S.E.2d 223.

Appellants contended in their pleadings and oral arguments, that Respondent's own documents show he is not a real party in interest, that Respondents' own documents show that he was not a party to the alleged contract; and that Appellants have conflicting evidence as to whether Respondent obtained Appellants' consent to enter into a settlement in the Federal Action.

Finally, Respondent would suffer no prejudice if default judgment were set aside. The trial court's only determination of prejudice is that Respondent has been waiting a long time to recover the monies he claims to be owed. *(R. p. 20).* First of all, this conclusion incorrectly assumes, that Respondent is owed the money. What the trial court is really saying is that Respondent would be prejudiced by having to prove the merits of his case. This is not prejudice. Further, delay, in and of itself, does not constitute prejudice. *Colleton Preparatory Acad. Inc. v. Hoover Universal, Inc.* 616 F.3d 413, 418 (4th Cir. 2010).

Having satisfied the requirements of Rule 60(b)(1), set forth meritorious defenses, and showed that Respondent would suffer no prejudice; the trial court erred in refusing to set aside default judgment.

III. BECAUSE RESPONDENT FAILED TO CONDUCT THE REQUIRED RULE 55(B)(4) EXAMINATION UNDER OATH BEFORE OBTAINING A DEFAULT JUDGMENT AGAINST A DEFENDANT SERVED VIA PUBLICATION, THE TRIAL COURT ERRED IN DENYING THE MOTION TO SET ASIDE DEFAULT JUDGMENT

Rule 55(b)(4) of the South Carolina Rules of Civil Procedure provides, in pertinent part, as follows:

> [i]n actions for the recovery of money only, when the summons has been served by publication and the defendant is a non-resident of the State, no default judgment shall be rendered unless the plaintiff

> or his agent **at or before the time of making the application for judgment** shall have been examined under oath respecting any payments that have been made to the plaintiff or any one for his use on account of the demand mentioned in the complaint, and shall show by affidavit that an attachment has been issued in the action and levied upon property belonging to the defendant, which affidavit shall contain a specific description of such property, and a statement of its value and shall be filed with proof of publication." (emphasis added)

S.C.R.C.P. Rule 55(b)(4) (2018). The following facts are undisputed:

1. Respondent attempted to serve Appellants via publication;
2. At the time Respondent attempted to serve Appellants, Appellants were non-residents of the State of South Carolina; and
3. Respondent filed this action to recover money.

Given these undisputed facts, Rule 55(b)(4) clearly required Respondent to be examined under oath concerning any payments made prior to obtaining a default judgment against Appellants. Respondent did not undertake any such examination.

Despite Respondent's failure to comply with the requirement of Rule 55(b)(4), the trial court refused to set aside the default judgment. The trial court erroneously held that such an examination was not required because "the Complaint alleges the money owed to Plaintiff has not been paid and is being held in trust by Defendant Rikard & Protopapas, a law firm. An attachment to levy on property of Defendants was not necessary because the money was being held in the law firm trust account." *(R. pp. 18-19).*

When interpreting the language of a court rule, the trial court must utilize the same rules of construction applied when interpreting a statute. *Hiott v. State*, 375 S.C. 354, 358; 652 S.E.2d 436, 438 (S.C.App. 2007). "Therefore the words of the [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." *Id. quoting State v. Brown, 344 S.C. 302, 307, 543 S.E.2d 568, 571 (S.C. App. 2001).*

The plain language of Rule 55(b)(4) is clear. The examination under oath is required "in actions for the recovery of money only." *S.C.R.C.P. Rule 55(b)(4) (2018).* The rule requires the party seeking default to provide an examination under oath about payments made; there is no exception or qualifying language that limits the requirements of the examination to cases in which an attachment to levy on a defendant's property is necessary nor is there any language that dismisses with the need of the examination if the money is being held in trust. Moreover, the Rule requires more than sworn testimony or a simple affidavit – it explicitly requires an examination under oath. In other provisions of Rule 55, the drafters allow for the use of affidavits, but in 55(b)(4) they required an examination under oath.

If they so desired, the drafters of Rule 55(b)(4) could have limited the examination under oath to actions to recover money when an attachment to levy on property is necessary; however, they made no such limitation. The drafters could also have made an exception to the examination when the money to be recovered is being held in trust. Instead, the drafters clearly, and unambiguously, provided that an examination under oath is required in action for the recovery of money only.

The trial court erred in adding an exception to Rule 55(b)(4) that no examination is required because the money is being held in trust and no attachment to levy is necessary. Since Respondent failed to make the required examination under oath, the default judgment is void and should be set aside.

IV. SINCE SOUTH CAROLINA REQUIRES STRICT COMPLIANCE WITH PUBLICATION STATUTES, APPELLANTS WERE NOT PROPERLY SERVED VIA PUBLICATION BECAUSE RESPONDENT TRUSLOW FAILED TO MAIL A COPY OF THE SUMMONS AND COMPLAINT TO APPELLANTS' LAST KNOWN ADDRESS

Respondent attempted to serve Appellants via publication pursuant to S.C. Code Section 15-9-710 *et. seq*. S.C. Code Section 15-9-740 provides, in pertinent part, as follows:

> The order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, most likely to give notice to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks. **The court, judge, clerk, master or judge of probate shall also direct that a copy of the summons be forthwith deposited in the post office direct to he person to be served at his place of residence**, unless it appears that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him. (emphasis added).

S.C. Code Section 15-9-740 (2018). In order to avoid resolving litigation by default, South Carolina courts require strict compliance with publication statutes. *Caldwell v. Wiquist*, 402 S. C. 565, 575, 741 S.E.2d 583, 587 (S.C. App. 2013).

In *Caldwell v. Wiquist*, the Court of Appeals reversed the trial court's denial of a motion to set aside default judgment when the Plaintiff's affidavits requesting service by publication failed to comply with the statutory requirement that the supporting affidavits contain language that the Defendant cannot be found within the State. *Id. at* 402 S.C. 565, 575, 741 S.E.2d at 590 The Court of Appeals held that "South Carolina courts have repeatedly required strict compliance with publication statutes." *Id.* at 572, 741 S.E.2d at 587. Since the affidavits were "facially defective" for failing to set forth the language required by S.C. Code Section 15-9-710, the default judgment was void. *Id.* at 574-575, 741 S.E.2d at 588. The *Caldwell* Court stated that its reversal of the trial court was "consistent with the policy of our state to resolve cases on the merits." *Id.* at 575, 741 S.E.2d at 588.

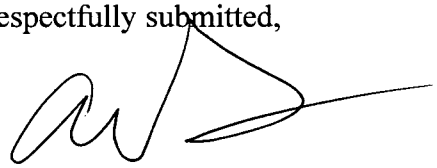
In this case, Respondent obtained an Order for Publication on September 12, 2016. *(R. pp. 3-4).* The Order for Publication failed to direct Respondent to mail a copy of the Summons to Appellants' last known address, nor was there any evidence submitted that Respondent did not know Appellants' last known address. *(R. pp. 3-4).* Further, there is nothing in the record to indicate that such a directive was made or that Respondent mailed a copy to Appellants' last known address. As in *Caldwell*, the Order for Service by Publication does not comply with the requirements of South Carolina's statutes governing service by publication.

Since South Carolina requires strict compliance with the statutes governing service by publication, and the Order for Service by Publication does not comply with these requirements; the trial court erred in refusing to set aside default judgment and refusing to alter/amend its order denying such relief.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court, set aside entry of default and default judgment, and allow this case to proceed on its merits.

Respectfully submitted,



Alexandre N. MacClenahan
The MacClenahan Law Firm, LLC
223 W. Stone Avenue
Greenville, South Carolina 29609
864-382-3340/FAX:864-751-2963
alex@macclenahanlaw.com
Attorney for Appellants Stephen Bretzinger and Lindsey Holsinger

August 28, 2018