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.

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SC Court of Appeals

FINAL REPLY BRIEF OF APPELLANT

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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/FACTUAL SUMMARY

Appellants set forth the procedural and factual summaries of the case in the Initial Brief of Appellants and incorporate those summaries herein. By way of quick 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, 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. p. 162, ¶¶ 31-32)*. Respondent Truslow alleges that he is owed $35,132.55 in attorneys' fees and costs from his representation of Appellants in the Federal Action. *(R. p. 162, ¶ 34)*. The disputed funds are being held in trust by Rikard & Protopapas. *(R. p. 162, ¶ 39)*. Respondent Truslow filed this action seeking recovery of these disputed funds. *(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)*. Importantly, the Order of Publication 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 actually 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, but Appellants' counsel mistakenly calendared the due date for the Answer as November 17, 2016. *(R. p. See Transcript p. 396, lines 8-10)*.

On November 14, 2016, Respondent e-mailed 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; pp. 152-153).* 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. pp. 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. p. 158; p. 138).*

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).*

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 July 11, 2017, the Honorable Alison Renee Lee heard oral arguments on Appellants' Motion to Set Aside Entry of Default and Default Judgment. *(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.

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). 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).*

South Carolina courts have previously held that answers promptly filed after discovering a good faith calendaring mistake are sufficient grounds to set aside entry of default. 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 *Mictronics v. S.C. Dep't of Rev.*, the Court of Appeals also found a good faith 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 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.

It is undisputed that Appellants' attorney made a good faith mistake in calendaring. It is further undisputed that Appellants' filed an answer within eight days of discovering the mistake. As such, the entry of default should have been set aside. Moreover, Appellants should have been allowed to have their motion to set aside entry of default decided on its merits before a judgment was entered.

Other than an eight-day delay, the Initial Brief of Respondent set forth no prejudice suffered by 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).

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 and further erred in denying Appellants' Motion to Alter/Amend.

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).* 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).* The Trial 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.

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. pp. 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.

Finally, Respondent failed to establish he would suffer 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)*. It is not prejudicial to have to prove the merits of your case and, moreover, delay in the absence of any other factors, 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). In his Initial Brief, Respondent admits that no Rule 55(b)(4) examination under oath occurred. Respondent argues that such an examination would be "superfluous" and was, therefore, not required. However, the plain language of Rule 55(b)(4) is clear and unambiguous - the examination under oath is required "in actions for the recovery of money only." *S.C.R.C.P. Rule 55(b)(4) (2018).* There is no exception or qualifying language to this requirement. Further there is no provision allowing the examination under oath to be in the

form of an affidavit. 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.

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). The Court must give the words of the rule "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).* Rule 55(b)(4) required Respondent to be examined under oath concerning any payments made prior to obtaining a default judgment against Appellants and Respondent failed to undertake any such examination.

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 his Initial Brief, Respondent admits that the Order for Publication failed to include this requirement but argues that it "doesn't matter." South Carolina courts feel otherwise, as they have held that publication statutes demand strict compliance. *Caldwell v. Wiquist*, 402 S. C. 565, 575, 741 S.E.2d 583, 587 (S.C. App. 2013).

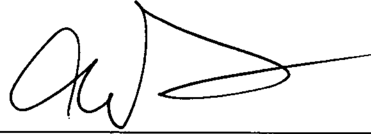
In *Caldwell v. Wiquist*, the Court of Appeals reversed the trial court's denial of a motion to set aside default judgment when the Plaintiff's affidavits requesting service by publication failed to comply with the statutory requirement that the supporting affidavits contain language that the Defendant 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. The *Caldwell* Court stated that the affidavits were "facially defective" for failing to set forth the language required under the publication statute and reversed the trial court. *Id.* at 575, 741 S.E.2d at 588.

Since South Carolina requires strict compliance with the statutes governing service by publication, and it is undisputed that 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,



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August 28, 2018