

92292

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Richland County
Court of Common Pleas
Robert E. Hood, Circuit Judge
G. Thomas Cooper, Jr., Circuit Judge

RECEIVED
MAR 02 2020
SC Court of Appeals

Case No. 2017-CP-40-06433
Appeal No. 2020-000218

PTA-FLA, Inc,

Appellant- Respondent,

v.

TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10, inclusive,

Defendants,

Of which TW Telecom Holdings is

Respondent-Appellant.

**PETITION FOR REHEARING
OF DISMISSAL OF CROSS APPEAL**

Pursuant to Rule 240(j), SCACR, the Respondent-Appellant TW Telecom Holdings petitions for rehearing of the order dismissing its cross appeal as issued by the Honorable John D. Geathers, acting for the Court, of date February 25, 2020. Telecom respectfully submits that in dismissing the cross appeal, the Court has overlooked or misapprehended the procedural history of this case and the nature of the orders under appeal, and thereby has misapplied the ruling in Winesett v. Winesett 383 S.C. 601, 681 S.E.2d 885 (2009).

The Plaintiff/Appellant PTA-FLA has appealed from the final judgment entered on the trial judge's award of damages after a default damages hearing. The Defendant/Respondent Telecom

has served and filed a cross appeal from interlocutory orders, including the order denying its Rule 55(c), SCRCPP, motion to set aside entry of default and the order granting the Plaintiff's untimely motion to restore the case under Rule 40(j), SCRCPP. Contrary to the Court's order of dismissal, settled precedent does not require that Telecom make a Rule 60(b), SCRCPP, motion for relief from the final judgment awarding damages to preserve its right to cross appeal for review of the interlocutory order refusing to set aside entry of default or the order restoring the case to the roster.

Clarification of the Pertinent Procedural History

Although the Record on Appeal has not been filed with this Court, the procedural history as recited in the trial court's orders submitted with the notices of appeal set forth the necessary facts to consider the appellate jurisdiction question posed by the Court's order of dismissal.

The Defendant was served with a summons and complaint on March 16, 2015. On filing of an Affidavit of Default and a Motion for Entry of Default, the Clerk of Court made an entry of default on May 6, 2015. The Defendant appeared and filed an answer together with a motion to set aside entry of default and for a late answer on May 12, 2015. The Trial Court (Judge G. Thomas Cooper, Jr.) denied the motion by order of July 16, 2015. A timely motion for reconsideration was denied by Judge Cooper in an order filed August 26, 2015.

The case was dismissed under Rule 40(j) pursuant to a consent stipulation of dismissal filed on April 1, 2016. On April 6, 2017 the Plaintiff PTA-FLA moved to restore the case and the Defendant Telecom opposed the restoration and moved for summary judgment on statute of limitations because the untimely restoration negated the tolling allowed by Rule 40(j). By orders filed on October 5, 2017, Judge Cooper granted the motion to restore and denied the motion for summary judgment.

The case came before the Trial Court (Judge Robert E. Hood) for a trial of damages held on January 31, 2019 and December 3, 2019. Judge Hood's order awarding damages in the amount of \$9,218.42 was filed on January 13, 2020. The **PLAINTIFF** served a notice of appeal seeking review of that award. Only after receipt of the notice of appeal, did the Defendant file a cross appeal seeking review of Judge Cooper's orders of July 16, 2015 and August 26, 2015 on the Rule 55(c) motion and the orders of October 5, 2019 regarding the Rule 40(j) order restoring the case untimely.

Discussion -- Appellate Review of Default Matters

Since the parties have not yet filed initial briefs, the issues to be raised on appeal have not been stated or argued. However, based on Judge Hood's final order presented with the notice of appeal, it would be fair to reason that Appellant/Respondent PTA-FLA seeks to challenge the amount of the judgment. While reserving the right to further refine the presentation of issues and argument in its future briefing, Respondent/Appellant Telecom proffers that by the cross appeal, it seeks to challenge (1) the trial court's refusal to set aside the entry of default under the mere good cause standard of Rule 55(c), and (2) entry of judgment on a claim barred by the statute of limitations due to the Plaintiff's failure to timely restore the case within one year after the filing of the stipulation of dismissal.

The Court *sua sponte* dismissed the cross appeal based on the ground that the Respondent/Appellant Telecom did not file a Rule 60(b) motion, stating:

This appeal arises out of an order of the circuit court granting PTA-FLA Inc.'s motion for default judgment. Because a defaulting party may not appeal from a default judgment, we dismiss the notice of appeal filed by TW Telecom Holdings, Inc. See *Winesett v. Winesett*, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985) (explaining a direct appeal does not lie from a default judgment; instead, the proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP). A partial remittitur will be sent as provided by Rule 221 (b) of the South Carolina Appellate Court Rules. The notice

of appeal filed by PTA-FLA, Inc. will be allowed to proceed. All future filings should utilize the above caption.

Telecom respectfully submits that the order of dismissal should be vacated and the cross appeal should be reinstated on the grounds that: (1) appellate preservation rules did not require Telecom to make an unnecessary Rule 60(b) motion after having already made a Rule 55(c) motion, and (2) the interlocutory orders are reviewable on appeal from the final judgment pursuant to S.C. Code Ann. § 14-3-330(1) and applicable case law.

1. Interlocutory orders are subject to review on appeal from final judgment.

Telecom could not file an immediate appeal from the Rule 55(c) order (or the associated order denying the motion for reconsideration) because the law is well settled that an order on a Rule 55(c) motion is not appealable until after final judgment. Ateyeh v. United of Omaha Life Ins. Co., 293 S.C. 436, 361 S.E.2d 340 (Ct. App. 1987); Thynes v. Lloyd, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (Ct. App. 1987); Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 428 S.C. 261, 266, 834 S.E.2d 204, 206 (Ct. App. 2019). Likewise, Telecom could not file an immediate appeal from the order granting the motion to restore. Shields v. Martin Marietta Corp., 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) (“The decision on a motion to restore the case to the active docket is not a final judgment and is interlocutory and, therefore, not immediately appealable.”). However, the law is equally clear that those intermediate orders are reviewable on appeal from final judgment:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, *that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;*... (emphasis added).

S.C. Code Ann. § 14-3-330; 15 S.C. Jur. *Appeal and Error* § 15 (“After final judgment has been entered, however, a party may seek review of all decisions by the trial court that are material to the judgment.”)

Although Telecom chose not to appeal from the final judgment entered on the trial court’s damages award, Telecom still is entitled to seek review of the interlocutory orders by cross appeal in response to PTA-FLA’s appeal from the final judgment. See Morgan v. Smith, 59 S.C. 49, 37 S.E. 43, 44 (1900) (an intermediate order of one judge could be reviewed on appeal from a final decree of another judgment); Link v. Sch. Dist. of Pickens Cty., 302 S.C. 1, 7, 393 S.E.2d 176, 179 (1990) (party does not have to challenge final judgment to appeal interlocutory orders).

2. Appellate preservation rules did not require Telecom to make an unnecessary or ill-reasoned Rule 60(b) motion after the final judgment was entered.

As a ground for dismissal, the Court cites to a decision in Winesett v. Winesett, 287 S.C. 332, 333, 338 S.E.2d 340, 341 (1985), for the proposition that a direct appeal does not lie from a default judgment and that the proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRPC. Telecom maintains that this proposition is inapposite because Telecom first made a Rule 55(c) motion to set aside entry of default and final judgment was entered on the trial judge’s damage award after a default damages hearing.

One of the more recent seminal cases on default is Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), which had a procedural history comparable to this case. In Sundown, the defendant made a Rule 55(c) motion to set aside entry of default which was denied, and then after a damages hearing was held and judgment entered, both parties appealed. In that opinion, the Supreme Court purposefully sought to clarify confusion in the case law regarding the application of the differing standards for relief set forth in Rule 55(c) and Rule

60(b). There was no holding or discussion in that opinion regarding any jurisdictional issue about the defendant not having made a Rule 60(b) motion after final judgment was entered.

As the Sundown Court explained the distinction between Rule 55(c) and Rule 60(b), it is clear that the timing of the defaulting defendant's awareness of the default is the pertinent factor to whether Rule 55(c) or Rule 60(b) is the proper process to seek relief. If default has been entered, but judgment has not yet been entered, the defendant's option is a motion under Rule 55(c) to move to set aside the entry of default. In contrast, if a default judgment already has been entered, the defendant must move for relief from that judgment under Rule 60(b), SCRPC. Neither Winesett nor Sundown hold that the defaulting defendant must make a Rule 60(b) after a Rule 55(c) has denied. Nothing in the Rules or legal logic support any requirement that a Rule 60(b) motion must be made in circumstances such as here where a Rule 55(c) motion has been made and ruled upon.

The appropriate limitation/qualification on the holding referenced from Winesett is explained in the context of basic appellate principles by the Court in Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 157–58, 399 S.E.2d 439, 442 (Ct. App. 1990):

In support of its argument, The Balloon Plantation relies on Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985). There, the Supreme Court held that “a default judgment may not be appealed to this Court. The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRPC.” Id. at 334, 338 S.E.2d at 341. The Court gave three reasons for requiring this procedure: (1) “a defendant who does not appear and answer ‘has no status in court which will enable him to appeal from the judgment rendered’”; (2) “a party appealing a default judgment will ordinarily be precluded from raising any issues on appeal because they were not first presented below”; and (3) “the appellant will often not be able to meet his burden of providing this Court with a record sufficient to permit an adequate review.” Id. at 333, 338 S.E.2d at 341.

The procedure required by the Court in Winesett is not required in the instant case. Here, unlike there, the defendants did appear and answer. They are not in default because of their failure to do so. Rather, they are in default because the circuit judge decided they should be in default. Here, unlike there, the trial court explicitly ruled

on the question of whether the defendants should be in default. This Court is not being asked to rule on an issue not first presented below. There is no point in requiring the defendants to ask the circuit judge to rule on the same question twice. Here, unlike there, the appellants are able to provide this Court with a sufficient record on appeal. Rule 60(b) provides that a court may relieve a party from a final judgment, order or proceeding for "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc." The defendants do not seek relief based on any of these grounds. Therefore, a motion pursuant to Rule 60(b) would not make any sense. *Nam ratio legis est anima legis; cessante ratione legis cessat et ipsa lex* (or, so they say). (Footnote omitted)

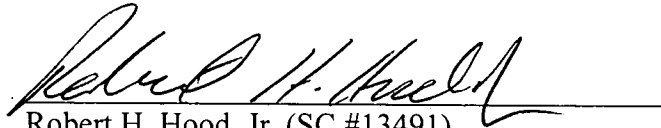
Under a comparable analysis, the Defendant Telecom did appear by making a Rule 55(c) motion to set aside entry of default in which the mere good cause standard was raised and ruled upon. After the damages hearings, the trial court entered a final judgment setting the damages from which an appeal was timely taken by the Plaintiff PTA-FLA who is dissatisfied with the amount of the award. A Rule 60(b) motion on specified grounds with a higher standard (per Sundown) was not required and would have served no logical or jurisprudential purpose, particularly in this case, where the Defendant Telecom chose not to appeal the final judgment entered on the damage award. However, Telecom is entitled to cross appeal to seek review of the interlocutory orders forming a foundation for the final judgment brought to this Court for review by operation of PTA-FLA's appeal.

CONCLUSION

WHEREFORE, based on the foregoing, the Respondent/Appellant Telecom respectfully submits that the order dismissing its cross appeal should be vacated and the cross appeal should be reinstated because Telecom was not required to make a Rule 60(b) motion after having already made a Rule 55(c) motion and the interlocutory orders are reviewable in conjunction with PTA-FLA's appeal from the final judgment.

Respectfully submitted,

HOOD LAW FIRM, LLC

A handwritten signature in cursive script, appearing to read "Robert H. Hood, Jr.", written over a horizontal line.

Robert H. Hood, Jr. (SC #13491)

John O. Radeck, Jr. (SC #77849)

Deborah H. Sheffield, *Of Counsel* (SC #2757)

172 Meeting Street ~ P.O. Box 1508

Charleston, South Carolina 29402

Phone: (843) 577-4435

Facsimile: (843) 722-1630

**Attorneys for the Respondent/Appellant
TW Telecom Holdings, Inc.**

February 28, 2020

Other Counsel of Record:

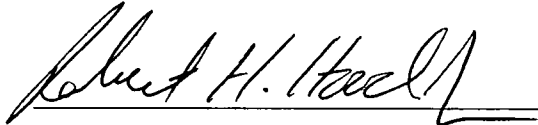
Joshua E. Austin, Esquire
2101 Main Street (29201)
P.O. Box 8839
Columbia, SC 29202
Ph (803) 363-1323 / Fax (866) 333-1984
E: joshuaaustin@cleartalk.com
Attorneys for the Appellant-Respondent

RECEIVED
MAR 02 2020
SC Court of Appeals

Certificate of Service

I, secretary to Robert H. Hood, Jr., attorney for the Respondent-Appellant do hereby certify that on **February 28, 2020**, I served a copy of the Petition for Rehearing of Dismissal of Cross Appeal on Counsel for Appellant-Respondent, via U.S. Mail, first class, postage prepaid to the following address:

Joshua E. Austin, Esquire
2101 Main Street (29201)
P.O. Box 8839
Columbia, SC 29202



Robert H. Hood, Jr.

February 28, 2020

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: PTA-FLA, Inc. v. TW Telecom Holdings, Inc., a Delaware corporation; and DOES 1-10, inclusive
C/A No. 2017-CP-40-06433, Richland CP
Appellate Case No. 2020-000218
HLF File No. 576.000

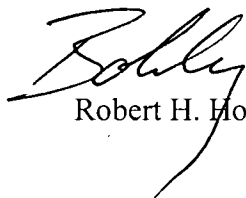
Dear Ms. Kitchings:

Enclosed please find the original and seven copies of the Petition for Rehearing of Dismissal of Cross Notice of Appeal for Respondent/Appellant TW Telecom Holdings, Inc. and a Certificate of Service in the above-referenced matter. Please return a clocked-in copy in the envelope provided.

By copy of this letter, we are serving all counsel with a copy of the Petition. Should you have any questions, please do not hesitate to contact me or my paralegal, Melinda Accardo.

Kind regards,

Yours truly,



Robert H. Hood, Jr.

RHHjr./mde
Enclosure

cc: Joshua E. Austin, Esquire

RECEIVED

MAR 02 2020

SC Court of Appeals