

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2020-000218

RECEIVED
Apr 21 2020
SC Court of Appeals

PTA-FLA, Inc.,

Appellant,

v.

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

Respondents.

**APPELLANT’S RETURN TO RESPONDENT’S PETITION FOR
REHEARING OF DISMISSAL OF CROSS APPEAL**

Pursuant to Rule 240(e), SCACR, Appellant PTA-FLA, Inc files this Return to Respondent’s Petition for Rehearing of the Order Dismissing Respondent’s cross-appeal as issued by the Honorable D. Geathers, acting for the Court, dated February 25, 2020. The Court of Appeals on February 25, 2020 sua sponte dismissed Respondent’s cross-appeal citing Winsett v. Winsett, 287 S.C. 332, 324, 327 S.E.2d 340, 341 (1985) stating that 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), SCRCF.

Appellant asks this court to deny Petitioner’s Petition for Rehearing of

Dismissal of Cross Appeal because the defaulted partying failed to request the court set aside the judgment pursuant to Rule 60(b), SCRCF.

I. Pertinent Procedural History

While the Record on Appeal has not been filed with this Court, Appellant agrees with Respondent that the procedural history as recited in the trial court's order submitted with the notices of appeal set for the necessary facts to consider the appellate jurisdiction decision rendered by the Court's Order of Dismissal.

The Defendant, respondent, was served with a summons and complaint on March 16, 2015. An entry of default was entered on May 6, 2015. The Defendant appeared and filed an answer together with a motion to set aside entry of judgment and for a late answer on May 12, 2015. Judge G. Thomas Cooper, Jr. denied the motion by order of July 16, 2016. A motion for reconsideration was denied by Judge Cooper in an order filed August 26, 2015.

The case came before Judge Robert E. Hood for a trial of damages held on January 31, 2019 and December 3, 2019. Judge Hood's order awarded damages in the amount of \$9,218.42 and was filed on January 13, 2020. Appellant then timing filed a notice of appeal thereafter and only then did 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) and the orders of October 5, 2017 denying Respondents motion for summary judgment.

II. Discussion

The parties have not filed their initial briefs, therefore Appellant reserves all rights to further refine and address issues and arguments in future briefs, including

any response to a Cross-Appeal if subsequently allowed.

The Court of Appeals properly dismissed Respondent's notice of appeal. "A default judgment may not be appealed to this Court. The proper procedure challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP. An appeal may then be taken from the denial of this motion." Winesett v. Winesett, 287 S.C. 323, 334, 338 S.E.2d 340, 341 (1985); see also Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 375 S.C. 423, 424, 653 S.E.2d 274, 275 (2007) (where defaulted appellant timely filed a Rule 60 motion prior to filing an appeal).

Respondent refers to the procedural similarities between the case at hand and the procedure in Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009). However, a big difference between the two cases is that the court in Sundown Operating Co. filed an order of reference to the master which caused Rule 53, SCRCP.

Rule 53, SCRCP, importantly states "When a matter has been referred, any appeal from any order or judgment issued by the master or special referee shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules." As such, Rule 60(b) would not come into play in that specific situation. No order of reference was filed in the present case. As such Respondent had a duty to file a motion pursuant to Rule 60(b).

Finally, Respondent also discusses Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 157-158, 399 S.E.2d 439, 442 (Ct. App. 1990). Balloon Plantation involved a party that was involved in the case but subsequently was put in

default as a sanction. Balloon Plantation, 303 S.C. at 154, 399 S.E.2d at 440. Comparing Balloon Plantation to Winsett the Court of Appeals stated, “[h]ere, unlike [Winsett], 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.” Balloon Plantation, 303 S.C. at 157, 399 S.E.2d at 442. Respondent is in default for failure to appear and file an answer. The present case is distinguished from Balloon Plantation.

As to the cross appeal for the trial court’s denial of Respondent’s Motion for Summary Judgment that argument is equally barred. “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.” Roche v. Young Bros., 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (internal citations omitted). “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 82, 504 S.E.2d at 314. Additionally, a default party may file a motion to set aside the entry of default. See Limehouse v. Hulse, 404 S.C. 93, 111, 744 S.E.2d 566, 576 (2013). This is the extent of actions a defaulting party has the right to take. There is not right for a defaulting party to file a motion for summary judgment.

III. Conclusion

For the reasons stated herein, and articulated by the Court of Appeal in its Order dated February 25, 2020, Respondent’s Petition should be denied.

Respectfully submitted,

Columbia, SC
April 20, 2020

/s/ Joshua E. Austin
Joshua E. Austin
PTA-FLA, Inc.
Post Office Box 8839
Columbia, South Carolina 29202
(803) 466-6488

**Attorney for Appellant
PTA-FLA, Inc.**

RECEIVED

Apr 21 2020

SC Court of Appeals

CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief of Appellant on Respondents on April 20, 2020 by serving the document to the attorneys of record's AIS E-mail Addresses as prescribed under section g(3) of the Order from The South Carolina Supreme Court dated March 20, 2020 entitled Operation of the Appellate Courts During the Coronavirus Emergency. Those email addresses are as follows:

Robert H. Hood, Jr.
bobbyjr.hood@hoodlaw.com


John O'Conner Radeck, Jr.
john.radeck@hoodlaw.com

Attorneys for Respondent

Pursuant to the March 20, 2020 Order, a copy of the sent email is attached hereto.

Columbia, SC
April 20, 2020

/s/ Joshua E. Austin
Joshua E. Austin
PTA-FLA, Inc.
Attorney for Appellant

From: Joshua Austin joshuaaustin@cleartalk.net 
Subject: Appeal No. 2020-000218 PTA-FLA, Inc., Appellant v. TW Telecom Holdings, Inc, respondent Appellant's Return to Petition for Rehearing of Dismissal of Cross Appeal
Date: April 20, 2020 at 5:27 PM
To: Bobby Hood, Jr. bobbyjr.hood@hoodlaw.com, John Radeck john.radeck@hoodlaw.com



Good Afternoon Bobby and John,

I hope this finds you well.

Please find attached PTA-FLA, Inc.'s return to TW Telecom Holdings, Inc's Petition for Rehearing of Dismissal of Cross Appeal in case 2020-000218.

I am electronically serving this on you both pursuant to that South Carolina Supreme Court order dated March 20, 2020 entitled Operation of the Appellate Courts During the Coronavirus Emergency.

Best Regards,

Joshua

Joshua Austin, Esq.
In-House Counsel
P.O. Box 8839
Columbia, South Carolina 29202
joshuaaustin@cleartalk.net
(c) 803.466.6488

RECEIVED
Apr 21 2020
SC Court of Appeals

This electronic mail may be attorney/client privileged and may contain confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify me by telephone (803) 466-6488 and delete the message immediately. Thank you.



Return to
Petitio...eal.pdf