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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
James E. Chellis, Master-in-Equity for Dorchester County
Case No. 2010-CP-18-1742

Appellate Case No. 2020-000561

Jaber Investments, LLC..... Appellant,

v.

Sleep King, LLC and Christopher C. Morris..... Respondent,

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, Jaber Investments, LLC filed an action against Respondents Sleep King, LLC and Christopher C. Morris in the Berkeley County Court of Common Pleas (case number 2009-CP-08-0599) for breach of a commercial lease. Respondents went into default.

A hearing was held before the Honorable Kristi Harrington on October 20, 2009, resulting in a Form 4 Order dated October 21, 2009, ordering judgment for the Plaintiff in the amount of $112,792.44 and attorney fees in the amount of $1,818.19. The Form 4 order stated "FORMAL ORDER TO FOLLOW." (R. p. 6)

On January 15, 2010, Judge Harrington signed an "Order for Entry of Default & Judgment by Default in Favor of Plaintiff Against Defendants" which order was filed by the Berkeley County clerk of court on January 19, 2010 at 5:09 p.m. (R. pp. 7-9)

The judgment was filed in the judgment rolls of Dorchester County on June 28, 2010. (R. p.10).

An execution against property was returned "Nulla bona" by the Sheriff of Dorchester County on September 2, 2010. (R. p. 11).

On December 11, 2019, Appellant moved for supplemental proceedings directed to the Respondents for the discovery of assets that might be applied toward payment of Appellant's judgment. (R. pp. 16-17).

Judge Goodstein granted the motion and issued her Rule to Show Cause on January 2, 2020, directing Respondents to appear before the Honorable James E. Chellis, Master in Equity for Dorchester County on the 21st day of January, 2020, at 11:00 a.m. and further directing the Respondents to bring to the hearing several categories of financial records in aide of discovery of assets which might be applied toward satisfaction of the Appellant's judgment. (R. pp. 12-15).

The Respondents were served with the Rule to Show Cause on January 14, 2020, by personal service upon Christopher C. Morris. (R. p. 37)

Appellant, through counsel, appeared at the January 21, 2020 hearing. Neither the individual Respondent nor a representative of the entity Respondent appeared.

Upon Respondents' failure to appear, Judge Chellis instructed counsel for the Appellant to submit an amended order for supplemental proceedings and procure a new date and serve both the original and amended order upon the Respondents, preferably using the Sheriff of Dorchester County for service (R. p. 27, line 21 – p. 28, line 10).

On February 4, 2020, counsel for the Appellant presented a proposed Rule To Show Cause and an Amended Order For Supplemental Proceedings having previously obtained from Judge Chellis' clerk, a new hearing date and time of March 12, 2020 at 10:00 a.m. (R. pp. 18-22).

By email dated February 10, 2020, Judge Chellis notified Appellant's counsel that he was declining to re-schedule the supplemental proceedings hearing based upon the case of *Gordon v. Lancaster*, 425 S.C. 386, 823 S.E. 2nd 173 (2018) (R. p. 38).

On February 24, 2020, counsel for the Appellant emailed a letter to Judge Chellis requesting that he re-consider his determination not to issue the order re-scheduling the supplemental proceedings in view of Respondents' failure to appear on the original hearing date (R. pp. 39-40). Judge Chellis responded by email on February 25, 2020, indicating that he would enter an order denying the re-scheduling of the supplemental proceedings.

The Order Denying the Rule to Show Cause and Amended Order for Supplemental Proceedings was filed by Judge Chellis on March 3, 2020, and this appeal followed (R. pp. 1-5).

ARGUMENT

I. DID THE MASTER IN EQUITY ERR IN DETERMINING THAT THE APPELLANT SECURED ITS JUDGMENT AGAINST RESPONDENTS ON OCTOBER 22, 2009, SO THAT THE APPELLANTS' PETITION FOR SUPPLEMENTAL PROCEEDINGS WAS FIFTY-TWO (52) DAYS AFTER EXPIRATION OF THE TEN YEAR JUDGMENT PERIOD, INSTEAD OF JANUARY 19, 2010, THE DATE OF ENTRY OF JUDGE HARRINGTON'S FORMAL ORDER, SUCH THAT APPELLANT'S PETITION WAS FILED WITHIN THE PERIOD OF ACTIVE ENERGY OF THE JUDGMENT?

In his order, the Master in Equity stated that "Plaintiff procured judgment against the Defendant on October 22, 2009, in the amount of $114,610.63." (R. p. 1). In his footnote number 1, the Master stated "Ten years from the date of the judgment was October 20, 2009." The Master correctly stated that Appellant petitioned the Honorable Diane S. Goodstein for supplemental proceedings on December 11, 2019, but in footnote number 2 stated that the petition was "52 days after expiration of the ten years from the date of the judgment." (R. p. 1).

Later in his order, the Master in Equity found that Appellant's request for supplemental proceedings "...fails since it is 52 days after expiration of the judgment." (R. p. 2).

The Master in Equity erred in each of the above findings because the entry of judgment was not final until the "Order for Entry of Default and Judgment by Default in favor of Plaintiff Against Defendants" signed by Judge Harrington and entered January 19, 2010 (R. pp. 7-9).

A default hearing was held before Judge Harrington on October 20, 2009. A "Form 4" Order was prepared and signed by Judge Harrington on October 21, 2009. The Form 4 order indicates that it was entered by the Clerk on October 22, 2009 (R. p. 6). This is undoubtedly the genesis of Judge Chellis' determination that Appellant's petition for supplemental proceedings was not filed within the period of active energy of the judgment.

The "Form 4" order has five (5) "choices" that may be checked by the Court. Here, none are checked including the choice "DECISION BY THE COURT."

Beneath the five (5) "choices" on the Form 4 Order is printed the following:

> IT IS ORDERED AND ADJUDGED: ( ) See attached order;
> ( ) Statement of Judgment by the Court:
>
> MOTION FOR ENTRY OF DEFAULT AND JUDGMENT BY DEFAULT AS TO DEFENDANTS FILED ATTORNEY HALVERSON IS GRANTED. JUDGMENT FOR THE PLAINTIFF FOR MONIES OWED UNDER LEASE OF $112792.44 AND ATTORNEY FEES IN THE AMOUNT OF $1818.19; FORMAL ORDER TO FOLLOW.

"Any judgment or decree, leaving some further act to be done by the Court before the rights of the parties are determined, is interlocutory [and not final]." See *Culbertson v. Clemons*, 322 S.C. 20, 23, 471 S.E. 2nd 163 (1996).

Specifically in regard to a Form 4 Order, the Court of Appeals has previously held that, while such an order may be final;

> "...If the form 4 order is NOT efficacious as final order, the circuit court must specifically and with certitude signify:
>
> 1.) a more formal order will be filed;...."
>
> *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 605, 471 S.E. 2nd 163 (Ct. App. 2002).

Since Judge Harrington specifically indicated "FORMAL ORDER TO FOLLOW", judgment was not finally entered until her formal order was filed on January 19, 2010 (R. pp. 7-9).

A party need not appeal a form or short order indicating a more full and complete order is to follow until written notice of the entry of the more complete order. See Rule 203(b)(1) , S.C.R.A.P.

As provided in Section 15-39-30, Code of Laws of South Carolina, Annotated (1976), judgments retain their active energy for ten (10) years from the date of original entry:

> "Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions." Id.

The active energy period of the judgment did not begin until it became final upon Judge Harrington's "Order for Entry of Default and Judgment by Default in favor of Plaintiff Against Defendants" filed January 19, 2010. (R. pp. 7-9). The Master in Equity therefore erred in finding that the Appellant's judgment expired prior to the December 11, 2019, filing of its petition for supplemental proceedings.

II. DID THE MASTER IN EQUITY ERR IN REFUSING TO ISSUE AN AMENDED RULE TO SHOW CAUSE FOR SUPPLEMENTAL PROCEEDINGS ON THE GROUND THAT THE JUDGMENT'S ACTIVE ENERGY HAD EXPIRED, WHEN THE RESPONDENTS' FAILURE TO APPEAR AND BE EXAMINED ABOUT THEIR ASSETS, DEPRIVED THE APPELLANT OF THE OPPORTUNITY TO MOVE FOR AN ORDER OF EXECUTION AGAINST ASSETS WITHIN THE PERIOD OF THE JUDGMENT'S ACTIVE ENERGY?

Judge Goodstein's Rule to Show Cause ordered Respondents to appear before the Master in Equity on January 21, 2020, at 11:00 a.m. and to produce certain business records to enable identification of assets which could be applied toward Appellant's judgment (R. pp. 12-15).

The rule to show cause was served on the Respondents on January 14, 2020 (R. p. 37).

In failing to appear, the Respondents violated Judge Goodstein's order.

The hearing date, January 21, 2020, was the last date of the ten year period after entry of judgment, pursuant to Rule 6(a), S.C.R.C.P. which provides in pertinent part as follows:

> "(a) Computation. In computing any period of time, prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a

> Saturday, Sunday, or a State or Federal holiday, in which event the period runs until the end of the next day which is neither Saturday, Sunday nor such holiday...."

The judgment was entered on January 19, 2010. January 19, 2020 was a Sunday. January 20, 2020, was Martin Luther King Day, a federal and state holiday. Therefore, neither the 19th nor the 20th of January, 2020 would have counted in the computation of the ten year period.

This was recognized from the bench by Judge Chellis (R. p. 25, lines 15-20).

Had the Respondents appeared and identified assets against which an execution could issue, Judge Chellis could have issued such order on the hearing date and within the period of time prescribed by Section 15-39-30.

Respondents' failure to comply with Judge Goodstein's rule to show cause frustrated the Court's ability to enter an order of execution on January 21, 2020, and the Appellant's ability to collect its judgment.

"Supplementary proceedings are equitable in nature." "*A-Fast Photo, Express, Inc. v. First National Bank of Chicago*, 369 S.C. 80, 84, 630 S.E. 2nd 285 (Ct. App. 2006). Equitable principles and maxims should apply.

By failing to appear as ordered, the Respondents have acted with unclean hands and should not benefit by acquiring immunity from the Court's authority to order that assets be applied to satisfy the Appellant's judgment.

While the doctrine of unclean hands is most often invoked by a Defendant opposing a Plaintiff's equitable claims, the case of *Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E. 2nd 735, 738 (1943) seems to indicate a general applicability of the doctrine among parties to equitable litigation:

> "In the case just cited, it was held that the rule must be understood to refer to some misconduct in regard to the matter in litigation of

> which the opposite party can, in good conscience complain in a court of equity." (Citations omitted). See also the discussion in 4 A.L.R. 58, and the cases is cited in subsection (c) on that page, for authority for the proposition that the party to a suit complaining of a wrong must have been injured thereby in order to justify the application of the principal of "unclean hands" to the case of his opponent." Id. at 23 S.E. 2nd 738.

It would be fundamentally unfair to allow the Respondents to take advantage of the expiration of their judgment without execution, when their misconduct by failing to comply with Judge Goodstein's order allowed them to escape the duly authorized processes of the Court.

Appellant is mindful of the case of *Gordon v. Lancaster*, 425 S.C. 386, 823 S.E. 2nd 173 (2018), which overruled *The Linda Mc Company, Inc. v. Shore*, 390 S.C. 543, 703 S.E. 2nd 499 (2010) which held that if a party takes action to enforce its judgment within the ten year statutory period the resulting order would be effective even if issued after the ten year period has expired. In *Linda Mc*, supplemental proceedings were commenced during the ten year period but the order was issued one day after the expiration of the period. Here, the Appellant could have moved for an order of execution against assets disclosed by the Respondents within the period of active energy of the judgment had the Respondents appeared as ordered.

In *Linda Mc*, the Supreme Court recognized that although Section 15-39-30 is not a statute of limitations, it operates like a statute of limitation under the facts presented, such that an action to enforce the judgment carries on to its legal conclusion if filed during the active energy of the judgment. In reversing *Linda Mc*, the *Gordon v. Lancaster* court adopted Justice Beatty's position in *Linda Mc* that Section 15-39-30 is clearly a statute of repose (426 S.C. 393, Supra) meaning a judgment creditor has the right to be free of the threat of collection of a judgment after the ten year active energy period has expired. But in this case, the application of a bright-line

rule granting the right of repose to the Respondents would be nothing more than a reward for their own misconduct by failure to comply with Judge Goodstein's rule to show cause.

CONCLUSION

The Master in Equity's Order Denying Rule to Show Cause & Amended Order for Supplemental Proceedings filed March 3, 2020, should be reversed with remand to re-schedule a subsequent supplemental proceedings hearing as the Master initially ruled from the bench, and with leave to issue such orders as may be advisable concerning enforcement of Appellant's judgment.

September 15, 2020

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), S.C.A.C.R.

September 15, 2020

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