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

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SC Court of Appeals

PTA-FLA, Inc.,

Appellant-Respondent,

v.

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

Respondent-Appellant.

FINAL RESPONDENT'S BRIEF OF APPELLANT-RESPONDENT PTA-FLA, INC.

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STATEMENT OF ISSUES ON APPEAL

Appellant-Respondent would restate the Respondent-Appellant's first two issues on cross-appeal as:

1. Did the Trial Court abuse its discretion in denying the Defendant's motion to set aside entry of default?

2. Did the Trial Court err in restoring this action to the roster?

STATEMENT OF THE CASE

Appellant, PTA-FLA, Inc. ("PTA-FLA") filed a Summons and Complaint on March 3, 2015. (R. p. 29). The Respondent, TW Telecom Holdings, Inc. ("TWT") was served on March 16, 2015. (R. p. 29). An entry of default was entered on May 6, 2015. PTA-FLA's Complaint asserted causes of action against TWT for (1) Breach of Contract; (2) Breach of Contract Accompanied by Fraudulent Act; (3) Fraud in the Inducement; and (4) Promissory Estoppel. (R. p. 29). TWT appeared and filed an answer together with a motion to set aside entry of judgment and for a late answer on May 12, 2015. (R. p. 29). Judge G. Thomas Cooper, Jr. denied the motion by order of July 16, 2016. (R. pp. 29-30). A motion for reconsideration was denied by Judge Cooper in an order filed August 26, 2015. (R. pp. 29-30).

The case was dismissed under Rule 40(j) pursuant to a consent stipulation of dismissal filed on April 1, 2016. (R. p. 351). The Form 4 Order was filed on April 7, 2016. (R. p. 27). Plaintiff filed its Motion to Restore on April 6, 2017. (R. p. 27). On or about April 12, 2017, Defendant filed an Opposition to Plaintiff's Motion to Restore. (R. p. 27). In an Order dated October 4. 2017, Judge G. Thomas Cooper, Jr. concluded that "South Carolina Rule of Civil Procedure 40(j) does not bar the restoration of a case to the trial docket more than a year after it is stricken as Defendant contends." (R. p. 27). Judge G. Thomas Cooper, Jr. further stated,

"[w]hile there may be some question as to whether or not Plaintiff may have an issue with the statute of limitations, the law is clear that Plaintiff may restore its case more than a year after it is stricken notwithstanding South Carolina Rule of Civil Procedure 40(j)." (R. p. 27). However, this issue was fully resolved in the Trial Court's order dated October 4, 2017 denying Defendant's Motion for Summary Judgment ("MSJ Order"). (R. pp. 19-24). In the MSJ Order, Judge G. Thomas Cooper, Jr. determined that Defendants did not have standing to bring a motion for summary judgment. (R. pp. 22-23). After laying out the various entitlements a defaulting party has under South Carolina law—including notice of the damages hearing, and cross-examining witnesses and objecting to evidence—the Trial Court noted:

> There is no further South Carolina authority on additional rights a party in default could possibly have, and Defendant was unable to provide any support for the notion that a defaulted party should be able to subsequently file a motion for summary judgment. This dearth of authority is because it is axiomatic that a defaulted party has forfeited its rights to participate in the case. Defendant filed a motion to set aside the entry of default and that was denied. Its subsequent motion for reconsideration was denied. Defendant has no other legal rights as a party in default. It does not have the right to file a motion for summary judgment and therefore has no standing to file this motion.

(R. pp. 22-23).

Furthermore, the Trial Court determined that PTA-FLA's Motion to Restore was filed within one year of the date it was stricken because it was filed before the anniversary of the Form 4 Order filing, which was the operative date for when the complaint was stricken pursuant to Rule 40(j), and resolved the ambiguity in the Stipulation in favor of the non-moving party, PTA-FLA. (R. pp. 23-24).

The case came before Judge Robert E. Hood for a trial of damages held on January 31, 2019 and December 3, 2019. (R. p. 29). Judge Hood's order awarded damages in the amount of $9,218.42 and was filed on January 13, 2020. (R. pp. 33, 38). PTA-FLA then timely filed a

notice of appeal thereafter on February 11, 2020. (R. p. 404). TWT then served its notice of cross-appeal on February 17, 2020. (R. pp. 407-08). The Court *sua sponte* dismissed the cross appeal based on the ground that TWT did not file a Rule 60(b) motion. (R. p. 39). TWT filed a petition for rehearing which was granted and the cross appeal was reinstated by order of May 22, 2020. (R. p. 41).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING TWT'S RULE 55(c) MOTION TO SET ASIDE ENTRY OF DEFAULT

"The decision to set aside entry of default or a default judgment lies solely within the sound discretion of the trial judge." Sundown Operating Co. v. Intedge Indus., 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) (internal citation omitted). "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Id. 383 S.C. at 607, 681 S.E.2d at 888. Absent a **clear showing of an abuse of that discretion**, the trial court's decision will not be disturbed on appeal. Id. 383 S.C. at 606, 681 S.E.2d at 888 (emphasis added).

The Trial Court, in a well-reasoned six-page Order filed on July 16, 2015, identifies Sundown Operating Co. as the operative legal standard, which TWT agrees applies in this case. (R. p. 8; TWT Initial Br. p. 7-11). The Trial Court also acknowledges the Wham Factors that should be evaluated if a movant puts forth a satisfactory explanation for the default. (R. p. 8 (emphasis added)). The Trial Court simply determined that, in its judgment, TWT had not provided a satisfactory explanation for the default in order for the Trial Court to review the factors. (See R. pp. 7-10).

While Mr. McManis filed an affidavit in support of the motion, TWT's "single gatekeeper of lawsuits" was properly served with the Summons and Complaint "but neglected to realize such." (See R. p. 7). In fact, the Trial Court found that while Mr. McManis asserted that the day he received the Summons and Complaint in his inbox he was in meetings all day organizing an HR project, and that he was also present in an HR meeting the following day for most of the day then left to pick up his four children from various activities, Mr. McManis' affidavit "fails to account for any activity on Friday, March 20, 2015, two days following his receipt of the Summons and Complaint, that might have prevented him from checking his email for any service against [TWT] or Level 3." (R. p. 7).

Making further factual findings based off of Mr. McManis' affidavit, the Trial Court found that Mr. McManis did not provide adequate explanation for why he would not have seen the Summons and Complaint for the week of March 31-April 3, 2015 or weeks of April 6-10 or April 13-17, 2015 when TWT could still file a timely answer. (R. p. 7). Further, the Trial Court found that TWT did not account for the weeks of April 20-24 or April 27-May 1, 2015 or "[i]n other words, McManis allowed the Summons and Complaint to sit on his desk or in his email for seven (7) weeks before assigning it to outside counsel and most of that time he attributes only to "exceptional circumstances." (R. p. 8).

Finally, the Trial Court found, "McManis simply states in his affidavit that though he is an attorney and though he is responsible for reviewing and delegating time-sensitive legal matters, and though he receives notifications of service via email, he neglected to read his email because he was busy." (R. p. 8). The Trial court also noted that the affidavit indicated neither TWT nor McManis "took precautions to implement a system that would allow another individual within the company to handle incoming legal matters in McManis' absence." (R. p. 8).

While, the Trial Court did cite to a case that was vacated, as TWT notes, it is not the only case or point of law that the Trial Court based its decision on, and therefore cannot be an abuse of discretion. (TWT Initial Br. p. 9; R. p. 8). The Trial Court also relies on Sundown Operating Co. and further cites to the same for the proposition "'the trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for finding that of the lack of good cause.'" (R. p. 9 (quoting Sundown Operating Co,383 S.C. at 604, 681 S.E.2d at 886)]. The Trial Court in its sole and sound discretion held that TWT had not met its burden of showing good cause and in fact "McManis' affidavit fails to prove that he, an attorney who is expected to understand the time-sensitive nature of legal proceedings, was anything but reckless in failing to check his email where McManis 1) receives notifications of legal matters by email; and 2) is the sole gate-keeper of lawsuits for [TWT]." (R. p. 4).

The Trial Court further relied on Roche v. Young Bros., Inc. of Florence, 318, S.C. 207, 212, 456 S.E.2d 897, 900 (1995) for the proposition that "South Carolina courts have recognized mishandling of service of process and losing track of a summons and complaint within a corporation is not good cause to set aside default." (R. pp. 4-5). While Roche specifically addressed a motion to set aside default judgment, where mishandling of service of process and losing track of a summons and complaint within a corporation clearly does not meet the more heightened requirement under Rule 60(b) it is reasonable for the court to determine it does not meet the good cause requirement based on the facts at hand. Furthermore, the cases are distinguishable because, in Roche the person served was the vice-president of the company, here it was the internal counsel for TWT who would have an even more particularized understanding of the importance of responding to a summons and complaint and in fact, the Trial Court emphasized that fact as a part of why good cause could not be shown. (R. pp. 7-8).

The Trial Court in a well-reasoned order addressed many facts on the record and appropriate case law in deciding that TWT's request for a motion to set aside entry of default should be denied. TWT has failed to meet the exceedingly high standard of making a clear showing of abuse of discretion on part of the Trial Court, and the Trial Court's Order should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN RESTORING THE CASE

A. Waiver of Appeal of Summary Judgment Issue

TWT filed a two-page opposition to PTA-FLA's motion to restore, that opposition cites only to Rule 40(j), SCRCP and references and incorporates all the arguments in its Memorandum in Support of its Motion for Summary Judgment it filed contemporaneously. (R. pp. 357-58).

In its Initial Brief, TWT has appealed the decision by the Trial Court to restore the case to the docket, but has not appealed the decision to deny TWT's Motion for Summary Judgment. Though TWT notes the Order denying Summary Judgment ("MSJ Order") in its Cross Notice of Appeal, any appeal of that order has not been addressed in its Initial Brief. (R. pp. 407-408). TWT has therefore waived any argument to appeal the Order denying Summary Judgment. Wright v. Craft, 372 S.C. 1, 20, 640 S.E. 2d 486, 497 (Ct. App. 2006) (quoting Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.")

"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). Additionally, a default

party my file a motion to set aside the entry of default. See Limehouse v. Hulsey, 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 no right for a defaulting party to file a motion for summary judgment.

In the MSJ Order, Judge G. Thomas Cooper, Jr. determined that Defendants did not have standing to bring a motion for summary judgment. (R. pp. 22-23). After laying out the various entitlements a defaulting party has under South Carolina law—including notice of the damages hearing, cross-examining witnesses, and objecting to evidence—the Trial Court noted:

> There is no further South Carolina authority on additional rights a party in default could possibly have, and Defendant was unable to provide any support for the notion that a defaulted party should be able to subsequently file a motion for summary judgment. This dearth of authority is because it is axiomatic that a defaulted party has forfeited its rights to participate in the case. Defendant filed a motion to set aside the entry of default and that was denied. Its subsequent motion for reconsideration was denied. Defendant has no other legal rights as a party in default. It does not have the right to file a motion for summary judgment and therefore has no standing to file this motion.

(R. pp. 22-23).

Furthermore, the Trial Court determined that PTA-FLA's Motion to Restore was filed within one year of the date it was stricken because it was filed before the anniversary of the Form 4 Order filing, which was the operative date for when the Complaint was stricken pursuant to Rule 40(j), and resolved the ambiguity in the Stipulation in favor of the non-moving party, PTA-FLA. (R. pp. 23-24). Because this determination was made in the MSJ Order, it should be conclusive for purposes of the Motion to Restore and the MSJ Order has not been appealed, therefore, the Order to Restore should be affirmed.

Furthermore, statute of limitations is an affirmative defense which was waived by TWT when it defaulted on the Complaint. TWT's rights and abilities as a defaulted party are greatly restricted and affirmative defenses have not been listed as something that a defaulting party has a

right to raise, if it were even applicable in this case.

B. Motion to Restore was Properly Granted and Should be Affirmed

Rule 40(j), SCRCP provides:

> **(j) Case Stricken From Docket by Agreement.** A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made **within 1 year of the date stricken**, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations **on the date the case was stricken shall remain** and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.
>
> (Emphasis added).

The Form 4 order was filed on April 7, 2016, the motion to restore was filed on April 6, 2017, within one year of the date stricken.

As the Trial Court noted in its Order to Restore, nothing in Rule 40(j) limits restoring the case after a year. (R. p. 27). Judge G. Thomas Cooper, Jr. concluded that "South Carolina Rule of Civil Procedure 40(j) does not bar the restoration of a case to the trial docket more than a year after it is stricken as Defendant contends." (R. p. 27). However, when the Order to Restore is combined with the MSJ Order it is clear that this case was restored pursuant to Rule 40(j). The Trial Court rightfully found that the "Stipulation was filed April 1, 2016. On April 4, 2016, the Honorable Alison Renee Lee executed a Form 4 Order simply stating: 'Consent Stipulation of dismissal attached pursuant to 40 J.' However, the Form 4 Order was not filed until April 7, 2016. Plaintiff filed its Motion to Restore April 6, 2017 within one year of the filing of the Form 4 Order, the date that complaint was stricken pursuant to 40(j)." (R. p. 23).

Assuming *arguendo*, that TWT is right, and the case should not have been restored pursuant to Rule 40(j) SCRCP, and TWT has not waived the affirmative defense of statute of limitations, it has still failed to adequately plead the affirmative defense of statute of limitations and it is therefore not available to them now on appeal. Davie v. Atkinson, 281 S.C. 102, 103, 313 S.E.2d 648, 649 (Ct. App. 1984). The trial court held that the appellant's causes of action were barred by the statutes of limitation although respondents answered but did not plead a statute of limitation. Id. The Court of Appeals held, "[t]he appealed order is fatally erroneous because the reason for entry of judgment for respondents is based upon appellants' causes of action being barred by the statutes of limitation; this defense was not pleaded by respondents and therefore not available to them." Id. "A statute of limitation is an affirmative defense which must be raised by answer." Id. "Furthermore, a limitation statute is a statute of grace, permitting the avoidance and evasion of liability in applicable cases; and while given recognition when pleaded, it has never been favored by the courts." Id. (citing Scovill v. Johnson, 190 S.C. 457, 3 S.E.2d 543 (1939)).

Davie was further clarified as it "simply stands for the proposition that the statute of limitations must be pleaded at some point. The case does not hold that the statute of limitations is forever waived if not initially pleaded." Austin v. Conway Hospital, Inc., 292 S.C. 334, 337, 356 S.E.2d 153, 155 (Ct. App. 1987). At no point, in its motions at the Trial Court or in its Initial Brief here has TWT established what statutes of limitation are applicable, when they run, or any particularity to any of those dates or requirements to adequately plead a statute of limitation defense. Even assuming all these things on TWT's behalf, TWT still has failed to plead or establish any statute of limitation defense. The order to restore this case should be affirmed.

III. THE DEFENDANT DID NOT PROPERLY PRESERVE ITS CROSS APPEAL

The Court of Appeals properly dismissed Respondent's notice of cross 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).

TWT 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 implicated 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).

TWT 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. TWT is in default for failure to appear and file an answer. The present case is distinguished from Balloon Plantation.

TWT further argues that Judge Cooper already decided the issue and therefore Judge Hood could not reverse Judge Cooper's decision. (TWT Initial Br. p. 19). TWT argues that a ruling on Rule 60(b) by Judge Hood would be violate the "long-standing rule in this State that one judge of the same court cannot overrule another." Charleston Cty. Dep't of Soc. Servs. V. Father, Stepmother, & Mother, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995). However, TWT had asked Judge Cooper to side aside an entry of default pursuant to Rule 55(c), SCRCP, but would be asking Judge Hood for relief from a default judgment pursuant to Rule 60(b), SCRCP. In TWT's Initial Brief it spends two pages providing a distinction between the standards for the two rules. (TWT Initial Br. pp. 4-5). It should have given Judge Hood the opportunity to address the issue under the Rule 60(b) standard.

TWT did not properly preserve its cross appeal.

IV. PTA-FLA ASKS THE COURT TO AFFIRM FOR ANY GROUND ON THE RECORD PURSUANT TO RULE 220(c)

Pursuant to Rule 220(c), SCACR, PTA-FLA requests that this Court affirm the Trial Courts rulings, orders, decisions or judgments upon any ground or grounds appearing in the Record on Appeal. Overland, Inc. v. Nance, 423 S.C. 253, 254, 815 S.E.2d 431, 432 (2018).

CONCLUSION

For the reasons stated above, this Court should affirm the judgments of the circuit court.

Respectfully submitted,

October 20, 2020

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR

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