

Procedural History

1. The Plaintiff retained Thomas W. Winslow, Esq. of the law firm of Goldfinch Winslow, LLC.
2. On February 2, 2018 the Plaintiff's Summons & Complaint were filed with the office of the Clerk of Court of Horry County.
3. On February 9, 2018 the Defendant, Henry F. Armstrong d/b/a Armstrong Construction and the Defendant Henry F. Armstrong were personally served with the Summons & Complaint in this matter. The Affidavit of Service for each was filed with the Clerk of Court for Horry County on April 7, 2018.
4. On February 9, 2018 the Defendant, Mary E. Armstrong d/b/a Armstrong Construction and the Defendant Mary E. Armstrong were personally served with the Summons & Complaint in this matter. The Affidavit of Service for each was filed with the Clerk of Court for Horry County on April 7, 2018 and April 13, 2018.
5. On or about February 23, 2018 Mr. Winslow, attorney for the Plaintiff, received a letter from the Defendants, Henry and Mary Armstrong. While the letter states that it is written in response to the Complaint filed by the Plaintiff, it ends by advising Mr. Winslow that the Defendants will be proceedings pro se unless they retain an attorney to file counter-claim(s) against the Plaintiff. Mr. Winslow did not file the letter with the Clerk of Court for Horry County as he did not believe it to be an Answer or responsive pleading. The Defendants did not file the letter or any other responsive pleading with the Clerk of Court for Horry County.
6. On April 16, 2018, having received no responsive pleading from the Defendants, Mr. Winslow filed the Plaintiff's Application for Default Judgment and Plaintiff's Notice of Motion and Motion for Default Judgment Against All Defendants with the Clerk of Court for Horry County. *Mr. Winslow served the Defendants with a copy of the Plaintiff's Application for Default Judgment and Plaintiff's Notice of Motion and Motion for Default Judgment Against All Defendants.*
7. The Judgment by Default was granted by the Circuit Court and on April 30, 2018 the Honorable William H. Seals, Presiding Circuit Court Judge entered an Order of Damages in favor of the Plaintiff. *On or about May 7, 2018 the Defendants were served with a copy of Judge Seals Order of Damages.*

8. On May 24, 2018 an Execution Against Property and Affidavit of Mr. Winslow were provided to the Horry County Sheriff for execution against property owned by the Defendants.
9. The Horry County Sheriff filed his return.— Nulla Bona to the Clerk of Court for Horry County which was filed on June 20, 2018.
10. On November 25, 2019 the Plaintiff through his counsel, Kenneth S. Corbet, Esq. began Supplemental Proceedings against the Defendants by filing of the Plaintiff's Petition. On December 3, 2019 the Order for Rule to Show Cause were issued in this matter.
11. On January 2, 2020 a Notice of Hearing was issued in this matter.
12. On February 17, 2020 Patricia Ferguson, Esq. filed a Notice of Appearance for the Defendants.
13. On March 3, 2020 the Defendant's Motion to Set Aside Default Judgment was filed with the Clerk of Court for Horry County.
14. Mr. Corbett was relieved as counsel for the Plaintiff on March 9, 2020 and the Plaintiff's current counsel filed a Notice of Appearance February 25, 2020.
15. On August 11, 2020 the Affidavit of Thomas W. Winslow was filed.
16. On August 12, 2020 the Affidavit of Mary Armstrong was filed with Exhibits A-H.
17. On August 13, 2020 the Affidavit of Henry F. Armstrong was filed with Exhibits A-D.

Applicable Law

Rule 60(b) of the South Carolina Rules of Civil Procedure provides a mechanism to relieve an aggrieved party from a final judgment or order when there is:

b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party.

Rule 60(b) further goes on to say “*The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.*” In addition, Rule 60(b) provides that “*this rule does not limit the power of a court to entertain an **independent action** to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.*” [Emphasis added].

In South Carolina for a judgment to be set aside for fraud upon the court under Rule 60(b)(3) the fraud upon the court must be extrinsic fraud. Extrinsic fraud is that which is not before the court and is not discoverable through the litigation of a party’s case. *Gainey-v. Gainey*, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009). Intrinsic fraud is that which has been presented and considered by the court. *Id.* “*Courts grant relief for extrinsic, but not intrinsic fraud on the theory that intrinsic deceptions should be discovered during the litigation itself, and to permit such relief would undermine the stability of all judgments.*” *Id.* Furthermore, “*the essential distinction between extrinsic and intrinsic fraud for purposes of relief from judgment is the ability to discover the fraud.*” *Ray v. Ray*, 374 S.C. 79, 647 S.E.2d 237 (2007).

Legal Analysis

Defendants’ motion to have the default judgment set aside under Rule 60(b)(3) is improper because the motion has not been made in a timely manner. Rule 60(b) states that a motion seeking a judgment to be set aside for fraud upon the court under Rule 60(b)(3), the motion must be made within one (1) year after the judgment is entered or taken. In the present matter, Judge William H. Seals, Presiding Circuit Court Judge granted and entered a Default Judgment against Defendants on April 30, 2018. The Defendants’ motion to have the Default Judgment set aside was not made and filed until March 3, 2020 which is clearly past one (1) year since the entering of the judgment. Therefore, the Defendant’s motion to have the Default Judgment set aside under Rule 60(b)(3) for fraud upon the court is untimely and cannot be considered by this court.

Defendants incorrectly argue that they are not constrained to the one (1) year to make the motion provision in 60(b). While Defendants are correct that there is not a statute of limitations in regard to actions for setting aside a judgment based upon extrinsic fraud upon the court, they are incorrect in applying that time period to this motion. Rule 60(b) states that the rule does not limit the court to maintain an independent action to

seek relief from a judgment based upon fraud upon the court. Here, we have an untimely motion which has been made in the same action not an independent one. While the Defendants are welcome to file an independent action to have the judgment set aside for fraud upon the court, they have improperly and untimely filed a motion to do so in this action. Therefore, the Defendants' motion to have the default judgment set aside due to fraud upon the court should be denied as it is untimely and improperly before this court.

In addition, the Defendants' motion is based on intrinsic fraud upon the court and must fail despite the fact it is untimely. As stated in the case of *Gainey v. Gainey, supra*, South Carolina courts only grant relief for extrinsic fraud. In this case, Defendants argue that the fraud upon the court is based in Thomas W. Winslow, Esq's representations that there was no Answer by Defendants, in enrolling the Default Judgment. Mr. Winslow states in his affidavit that he did not consider the letter to be an Answer as the Defendants simply state why they were not in the wrong and that they planned to represent themselves unless they were to hire an attorney and pursue counterclaims.

Intrinsic fraud is that which has been before the court and that is discoverable through the litigation process, which would apply to this situation. If there was fraud upon the court being perpetuated, in the course of this litigation, the process of enrolling the Default Judgment, would have unearthed the fact that there was indeed an Answer filed by Defendants with the court. However, there was no Answer only a letter from Defendants stating that they were not in the wrong and their intention to self-represent. When Default Judgment was entered by this court the fact of whether or not Defendants filed an answer was before this court and considered by it.

Furthermore, Defendants were served with the Plaintiff's application and motion for default judgment on April 16, 2018, which would have put them on notice about the fact that there has been no Answer received or filed in this case. As stated in *Ray, supra*, the essential part of intrinsic fraud is being able to discover it. If Mr. Winslow was perpetuating fraud upon the court by misrepresenting that there was not an Answer received, it would have been easily discoverable by Defendants and this court when the motion and application for Default Judgment was served upon the Defendants and filed with the court. Thus, the fraud in the present case meets the definition of intrinsic fraud as defined by the Court of Appeals in *Gainey, supra*, because the "fraud" was presented and considered by the court and was easily discoverable.

Conclusion

Therefore, the Defendants' motion must be denied as it is untimely and improperly before this court. Furthermore, in the event that this court believes there was fraud upon the court, the motion is based upon intrinsic fraud for which South Carolina courts do not grant relief from judgment. Thus, it is hereby ordered that the Default Judgment entered by this court on April 30, 2018 stands.

AND IT IS SO ORDERED.

Executed this the _____ day of December, 2020

HONORABLE MICHAEL G. NETTLES
PRESIDING JUDGE OF THE 15TH CIRCUIT



Horry Common Pleas

Case Caption: Neal W Witkin VS Henry F Armstrong , defendant, et al

Case Number: 2018CP2600716

Type: Order/Other

So Ordered

s/ The Honorable Michael G. Nettles #2140

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