

RECEIVED

THE STATE OF SOUTH CAROLINA

Jun 01 2021

In the Court of Appeals

SC Court of Appeals

Appeal from Colleton County and Dorchester County
Court of Common Pleas

Patrick R. Watts, Special Referee

Appellate Case No. 2020-001489

John Murray Gibbs,

Respondent,

v.

Henderson Gibbs, Jr.,

Appellant.

FINAL BRIEF OF RESPONDENT

Andrew T. Shepherd
Shepherd Law Firm, LLC
204 Brighton Park Blvd., Suite B
Summerville, SC 29486
(843) 900-3575
(843) 800-8415 (fax)
andrew@sheplawfirm.com
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF ISSUES ON APPEAL 1
STATEMENT OF THE CASE..... 1
ARGUMENT..... 3
CONCLUSION 8

TABLE OF AUTHORITIES

Cases

<i>Bowers v. Bowers</i> , 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991).....	5
<i>Pollard v. County of Florence</i> , 314 S.C. 397, 444 S.E.2d 534 (S.C. App. 1994).....	7
<i>Raby Constr., L.L.P. v. Orr</i> , 358 S.C. 10, 594 S.E.2d 478 (2004).....	8
<i>State v. Morris</i> , 376 S.C. 189, 206, 656 S.E.2d 359, 368 (2008).....	3

Court Rules

Rule 59, SCRCP	3,7
Rule 60, SCRCP	3,5,8

STATEMENT OF ISSUES ON APPEAL

1. The Special Referee did not abuse discretion in denying Appellant's Motion to Set Aside Judgment, and the decision was adequately supported by evidence.

STATEMENT OF THE CASE

On April 6, 2015 and April 8, 2015, respectively, John Murray Gibbs ("Respondent") initiated actions for partition of real property in the Court of Common Pleas for both Colleton County and Dorchester County regarding properties owned by the Respondent and Henderson Gibbs, Jr. ("Appellant") as tenants in common. Appellant, *pro se*, answered the Complaints, generally denying the allegations. Pursuant to a Consent Order for Reference entered by the Honorable Perry M. Buckner on March 14, 2016 in the Colleton County Court of Common Pleas, and by the separate Order for Reference to Special Referee entered in the Dorchester County Court of Common Pleas by the Honorable Diane S. Goodstein to which Appellant consented, Patrick R. Watts, Esquire, was appointed to serve as Special Referee in the interest of judicial economy to hear both matters, to take testimony, make findings of fact and conclusions of law, and to enter final judgment.

Following entry of Orders of Reference and Appointment of Special Referee, Respondent scheduled and noticed a final hearing for December 13, 2018 which was continued at the request of the parties. Respondent again

noticed final hearing by serving the Appellant with written Notice of Hearing together with the statutory Notice of right of first refusal via U.S. Mail on April 8, 2019 as reflected by the Affidavit of Service filed April 8, 2019. The final hearing was scheduled for April 22, 2019. At the April 22, 2019, hearing, Respondent was present and testified. Appellant failed to appear and did not request a continuance from the Court. (R. p. 39). The Court received Respondent's testimony on April 22, 2019, and upon Motion of Respondent's Counsel, the Court granted leave to the Respondent to hold the record open in order to obtain appraisals, with further leave to seek such assistance of the Court as may be necessary to command access to the property by Respondent's appraiser. The Court further directed that upon securing appraisals, the final hearing would reconvene for purposes of receiving additional evidence and testimony, and to enter final judgment.

Respondent again scheduled and noticed the final hearing by serving the Appellant with written Notice of Hearing together with the statutory Notice of the right of first refusal via U.S. Mail on November 13, 2019, as reflected by the Affidavit of Service filed November 14, 2019. The hearing was scheduled for and held on December 4, 2019. At the hearing, Respondent presented evidence through witnesses. Appellant did not appear or request a continuance from the Court. (R. pp. 39-40). Although not appearing for trial,

Appellant left a voicemail with the Special Referee while the hearing was underway. (R. p. 40)(R. pp. 55-56, 59).

On December 19, 2019, the Court received Notice of Electronic Filing of a Notice of Appearance by an attorney for Appellant. No further motions, notices, or other filings were made in the case until July 17, 2020, when the Special Referee entered a Final Order. On July 24, 2020, Appellant's Motion to Set Aside Judgment was filed and served, together with Notice of Appearance of new counsel for the Appellant.

A hearing on Appellant's Motion was held August 27, 2020. The Court entered an Order Denying Appellant's Motion on October 7, 2020. (R. pp. 51-63, 64-74). On November 6, 2020, Appellant timely filed his Notice of Appeal.

ARGUMENT

A trial court abuses its discretion when a decision is based upon an error of law or upon factual findings that are without evidentiary support. *State v. Morris*, 376 S.C. 189, 206, 656 S.E.2d 359, 368 (2008). Contrary to the Appellant's argument, the Special Referee's denial of Appellant's Motion to Set Aside Judgment under Rules 59 and 60, SCRPC, is supported by both the evidence presented and by the Special Referee's assessment as to the credibility of that evidence—or more importantly, the lack thereof. (R. pp.

60, 71).

Appellant premised his Motion to Set Aside Judgment on the fact Appellant's wife underwent open heart surgery on the day immediately preceding the date that had been scheduled for conclusion of the Final Hearing in the case, thereby precluding Appellant from participating as a result of his wife's ongoing care. (R. pp. 58, 69). Specifically, Appellant alleged in his Motion that "As a result of this medical emergency with his wife, Defendant Henderson was unable to travel to and attend the hearing." (R. pp. 56, 67). In support of this contention and his Motion, Appellant filed an Affidavit attesting that he was unable to attend the final hearing on December 4, 2019, and that he attempted to contact the Special Referee on the date of the hearing to request a continuance but was unsuccessful. (R. p. 112). Appellant also filed a physician's letter in support of his Motion dated July 22, 2020, which letter stated Appellant "was unable to be in court on [the date of the final hearing] to care for his spouse." (R. p. 111). Appellant argues that but for his absence from the hearing on December 4, 2019, he would have been able to present evidence and testimony contradicting the Respondent's evidence that ultimately affected the manner and form of partitioning the properties between the Appellant and the Respondent. Appellant's argument fails in several respects.

Appellant contends that the Special Referee's denial of the Motion to Set Aside Judgment constitutes a decision drawing factual conclusions without any evidentiary support. In doing so, Appellant attempts to shift the burden to either: (i) the *Respondent* to prove that the Appellant's claims of an emergency should not simply be accepted at face value, or (ii) the *Special Referee* to conduct an evidentiary hearing as to the sufficiency of the Appellant's own evidence. However, it was the Appellant—not the Respondent—who had the burden of convincing the Special Referee in post-trial motions that the Appellant could not participate in the final hearing for the reasons he claims. "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). In denying Appellant's Motion, the Special Referee did not draw any factual conclusions without evidentiary support. Rather, the Special Referee looked to the evidence presented by the Appellant, and made specific findings based on not only the sufficiency of the evidence presented at the motion hearing, but also upon the Appellant's own contradictory communications and representations which he made directly to the Court.

Where the Appellant represented to the Court in his own Motion that he was incapable of travelling to or attending the hearing, the Appellant's own

voicemail to the Special Referee while the December 4, 2019, hearing was underway specifically stated Appellant could be present in an hour if the matter could be rescheduled. (R. pp. 59, 62, 70, 73). Also addressed by the Special Referee, and standing in stark contrast to the Appellant's assertion of an emergency situation, was the total absence of any communication to the Special Referee by the Appellant or by Appellant's post-trial/pre-judgment counsel that such an exigent circumstance even existed—at least not until Appellant received notice of entry of an adverse judgment. (R. p. 59, 70). The Special Referee further denotes the lack of any description within the July 22, 2020, physician's letter that an emergency situation existed on December 4, 2019, that precluded Appellant from at least notifying the Court such an issue had arisen and impacted the proceedings. (*Id.*; R. pp. 59, 70). While the Special Referee's ultimate conclusion regarding the evidence presented is contrary to the conclusion the Appellant would prefer, the conclusion was not reached without evidentiary support.

In denying Appellant's Motion to Set Aside Judgment, the Special Referee further considered the Appellant's absence for trial on April 22, 2019, and the fact that the same is completely unexplained by the Appellant. As reflected by the Record, April 22, 2019, was the date that the final hearing on the partition cases was duly and properly noticed, and when the trial actually

convened—only to be forced to continue the proceedings into December 2019 due to a necessity for the Court’s intervention so that Plaintiff’s appraiser could gain access to the properties at issue. (R. pp. 54-55, 65-66). Considering the evidence and facts before Special Referee which consisted of: (i) the Appellant’s self-serving affidavit and a single physician’s letter containing no reference to an emergency, (ii) the Appellant’s unexplained absence and failure to appear at the first date of trial whereat he would have been able to present evidence or cross examine witnesses, and (iii) the Appellant’s own contradictory communications to the Court and sheer lack of any reference to an emergency situation prior to realizing the impact of an adverse judgment, the Special Referee did not abuse discretion in denying Appellant’s Motion to Set Aside Judgment.

Appellant’s contention that he should be afforded an evidentiary hearing on his Rule 59 Motion is without merit as the Special Referee possessed full discretion to decide the matter on briefs alone without oral argument; of which Appellant was fully afforded an opportunity for oral argument. “Under Rule 59(f), SCRCF, a Rule 59(e) motion ‘may in the discretion of the court be determined on the briefs filed by the parties without oral argument.’” *Pollard v. County of Florence*, 314 S.C. 397, 444 S.E.2d 534 (S.C. App. 1994). Similarly, whether to grant or deny a motion under

Rule 60(b) lies within the sound discretion of the judge. *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004). A court may relieve a party from a final judgment for mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(1), SCRCP. Having reviewed the limited evidence proffered by the Appellant at a time when he was provided full opportunity to present and argue his Motion, and having considered the sufficiency of that evidence in relation to the record of the case and the Appellant's own actions and contradictory representations to the Court, the Special Referee exercised sound discretion in denying Appellant's Motion for the reasons set forth in his Order, which discretion should not be disturbed on appeal.

CONCLUSION

For the reasons stated herein, the Court should affirm the Order of the Special Referee denying Appellant's Motion to Set Aside Judgment.

Respectfully submitted,

June 1, 2021

s/ Andrew T. Shepherd
Andrew T. Shepherd, Esquire
Shepherd Law Firm, LLC
204 Brighton Park Blvd., Suite B
Summerville, SC 29486
(843) 900-3575
andrew@sheplawfirm.com
S.C. Bar No. 76859
Counsel for Respondent

RECEIVED
Jun 01 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from Colleton County and Dorchester County
Court of Common Pleas

Patrick R. Watts, Special Referee

Appellate Case No. 2020-001489

John Murray Gibbs,

Respondent,

v.

Henderson Gibbs, Jr.,

Appellant.

CERTIFICATION OF COUNSEL

Pursuant to Rule 211(b) of the South Carolina Appellate Court Rules, the undersigned, attorney in this matter for the Appellant, certifies that the Appellant's Final Brief is identical to the brief previously served under Rule 208 with the revisions allowed under Rule 211 (b) (1) and (2).

[Signature of Counsel on Following Page]

Respectfully Submitted,

s/Andrew T. Shepherd
Andrew T. Shepherd
Shepherd Law Firm, LLC
204 Brighton Park Blvd., Suite B
Summerville, SC 29486
(843) 900-3575
(843) 800-8415 (fax)
andrew@sheplawfirm.com
Counsel for Respondent

June 1, 2021