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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Letitia H. Verdin, Judge

Appellate Case No.: 2021-000269
C.A. Case No.: 2020-CP-11-00632

Bobby E. Leopard, Luther Harris, and Donna Harris ..... Appellants,

v.

Perry W. Barbour, ...Respondent.

INITIAL BRIEF OF RESPONDENT

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2. DID THE CIRCUIT COURT, AFTER DETERMINING THAT THE ENTRY OF DEFAULT SHOULD BE SET ASIDE, PROPERLY DETERMINE THAT RESPONDENT'S AFFIRMATIVE DEFENSES HAD NOT BEEN WAIVED?
3. DOES THE DOCTRINE OF EQUITABLE ESTOPPEL APPLY WHERE APPELLANTS HAVE FAILED TO DEMONSTRATE ANY ACT OR REPRESENTATION BY RESPONDENT UPON WHICH THEY RELIED TO CAUSE THEM TO FAIL TO TIMELY COMMENCE THEIR ACTION?
4. DOES THE DOCTRINE OF CLEAN HANDS APPLY WHERE THE ASSERTED WRONGFUL ACT IS UNRELATED TO APPELLANTS' FAILURE TO TIMELY COMMENCE THEIR ACTION?

STATEMENT OF CASE

On June 16, 2016, Luther Harris, Donna Harris and Bobby Leopard (Appellants) were injured in a vehicular accident on Interstate 85 in Spartanburg County. They instituted suit in Spartanburg County against Perry Barbour (Respondent) and his employer Southland Transportation Co., alleging that a vehicle operated by Barbour had struck the rear of the vehicle they occupied (Spartanburg County Complaint). That action was subsequently dismissed pursuant to the Order of Judge Derham Cole for failure to timely commence the litigation due to the failure to properly serve the defendants (Order Dismissing Spartanburg County action). That Order is now the subject of an ongoing appeal (Appellate Case No. 2020-001110).

Subsequent to the filing of that appeal, Appellants on March 10, 2020 instituted this action against Wendall Barbour in Cherokee County (Cherokee County Complaint). This action involves the same accident, the same injuries, and the same parties (except Southland Transportation Co., which would potentially have vicarious liability under respondeat superior).Service was attempted to be made upon Wendall Barbour at the same address as utilized in the initial Spartanburg action (Certificate of Service) despite the fact that Appellants knew that Wendall Barbour no longer resided at that address. As expected, Wendall Barbour made no response or appearance since he never received the Complaint. Appellants did not supply either the attorney for Wendell Barbour or his insurer with a courtesy copy of the Complaint or notice that it had been filed. An Entry of Default was thereafter filed with Appellants seeking a Default Judgment.

Respondent, after receiving notice of the default entry, moved to vacate the default under

Rule 55, SCRCP, asserting that good cause existed to set aside the default in light of the ongoing appeal on the same matter, the timely response after notice of the default, the existence of a meritorious defense, and the absence of any prejudice should the motion to set aside be granted (Motion to Set Aside). The Court, through Judge Letitia Verdin, granted the motion to set aside the default (Order of 2/16/21). Additionally, since there was no factual issue regarding the application of the Statute of Limitations, the Court dismissed the action with prejudice (Order of 2/16/21).

Appellants thereafter filed a Motion for Reconsideration, which was denied (Order of 3/19/21). Notice of Appeal was then filed.

STANDARD OF REVIEW

A circuit court's decision to set aside an entry of default is not to be disturbed on appeal absent a clear showing of an abuse of discretion. Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 275 S.E. 2d 321 (Ct. App. 1988). Such an abuse of discretion occurs only when the circuit judge is controlled by an error of law or the ruling is without evidentiary support. In re Estate of Weeks, 329 SC 251, 495 S.E. 2d 454 (Ct. App. 1997).

ARGUMENTS

I. THE CIRCUIT COURT PROPERLY DETERMINED THAT "GOOD CAUSE" EXISTED TO PERMIT THE ENTRY OF DEFAULT TO BE SET ASIDE AND AN ANSWER FILED.

Pursuant to Rule 55, SCRCP, a court may, for good cause shown, set aside an entry of default. Pursuant to this rule, Respondent moved to set aside the entry of default in this case based upon the fact that Appellants had attempted to serve Respondent at an address known to be outdated, while another case involving the same parties and facts was pending on appeal (Notice of Appeal for Spartanburg County case). Respondent further demonstrated that he acted as quickly as it was determined that a second suit was filed and set forth the existence of a valid affirmative defense (Motion to Set Aside). The circuit court, acting within its discretion, agreed that the entry of default should be set aside (Order of 2/16/21).

Appellants initially argue that the circuit court applied that wrong standard, asserting that because an entry of default had been entered, the more rigorous standard of Rule 60, SCRCP, should have been utilized. Appellants are confused. Rule 60 provides that a court may relieve a party from a final judgment, order, or proceeding upon a showing of mistake, inadvertence,

decision of whether to set aside the default:

1. the timing of the Motion for Relief
2. the evidence of a meritorious defense; and
3. the degree of prejudice to the Plaintiff if relief is granted

Appellants argue that the Motion to set aside default was made fifty-seven (57) days after the entry of default. They ignore the fact that notice of the entry of default was received only after a February 1, 2021 letter from Appellants' attorney was received. According to Maxwell v. Genez, 350 SC 563, 567 S.E. 2d 496 (Ct. App. 2002), the focus of the court with regard to the timeliness of a motion is upon when the response was made after notice was received. Obviously, if notice has not been received, then a defaulting party cannot act to protect his rights. On the other hand, a court will not grant equitable relief where a party procrastinates and sits on his rights. In this case, the response was timely based upon when notice was received.

Appellants go on to argue that a meritorious defense was lacking. This argument disregards the assertion that filing was not made within the statute of limitations and the assertion of another pending action involving the same parties and same accident (Respondent's Answer). Appellants argue that these affirmative defenses have been waived due to the default. The argument is circular in nature. The proposed Answer was submitted to demonstrate that there existed valid, affirmative defenses to be considered if the default were to be set aside. The existence of these potential affirmative defenses was a factor to be considered if the default was to be set aside. Appellants argue illogically that because there was a default, these defenses may not be considered.

Appellants also argue that the defense asserting that another case involving the same

parties and facts is pending cannot be utilized as a potential affirmative defense since that case was dismissed without prejudice. The prior case was in fact dismissed without prejudice since it had not been properly commenced due to the Appellants' failure to properly serve the defendants in that case (Spartanburg County Order dismissing case). According to Appellants' argument, if the case was not commenced, it does not exist. However, this argument ignores the fact that the Order dismissing the prior case is the subject of an ongoing appeal. Until that appeal is resolved, the prior Order of dismissal is not final and could be subject to change. For example, if Appellants were to prevail in that appeal, the matter would necessarily be remanded to Spartanburg County for potential trial while the present action is possibly still pending.

Finally, Appellants argue they have been prejudiced by the dismissal of their claim due to their inability to recover damages through a judgment. However, this is not the type of prejudice the Wham Court envisioned. Instead, there must be some type of prejudice due to lost witnesses or evidence or inability to conduct discovery if the matter reinstated. See Maxwell v. Genez, supra. In the instant case there is no evidence of any lost witness, evidence or discovery opportunity. In fact, at the time the motion to set aside the default was made, the courts had been dramatically slowed due to the Covid-19 pandemic with little to no opportunity for trial. As a result, any time lost in pursuing litigation was inconsequential and not prejudicial.

II. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE EXISTENCE OF VIABLE AFFIRMATIVE DEFENSES WARRANTED VACATING THE ENTRY OF DEFAULT

Pursuant to Wham v. Shearson Lehman Bros., Inc., supra, one of the factors to be considered by a court in determining whether "good cause" exists to permit a default to be set

aside is whether the defendant has a meritorious defense. Appellants argue that all meritorious defenses were waived by virtue of the default. In other words, a default exists because meritorious defenses were not timely raised; in order to have an entry of default set aside, there must be a showing of the existence of a meritorious defense; however, because the default serves as a waiver of all defenses, no meritorious defense can be asserted. The argument is circular and would preclude the possibility of default ever being set aside.

Respondent submitted a proposed Answer with his motion to set aside the default, including a general denial, pendency of another action with same parties and issues, and the three-year statute of limitations (Respondent's Answer). These meritorious defenses demonstrated to the court the existence of the Respondent's basis for conflict resolution through litigation. Appellants' argument would be applicable only after the circuit court determined that setting aside the default was inappropriate. The determination to set aside a default is based in part upon the evidence of meritorious defenses. Once the default is set aside, there would no longer be a waiver since the default no longer exists. However, if the determination had been to deny the motion to set aside the default, then the Appellants' argument regarding waiver would have been controlling. Since the circuit court, in its discretion, ruled that the entry of default should be set aside, it could then consider the asserted affirmative defenses.

III. IN THE ABSENSE OF ANY ACT OR REPRESENTATION BY THE RESPONDENT WHICH CAUSED THE APPELLANTS TO COMMENCE THEIR ACTION AFTER THE TIME ALLOTTED BY THE STATUTE OF LIMITATIONS, EQUITABLE ESTOPPEL TOLLING THAT STATUTE IS INAPPROPRIATE.

The Appellants sustained injuries in a vehicular accident occurring on June 10, 2016

(Complaint). They filed their Complaint in Cherokee County on August 27, 2020 (Complaint), more than four years after their accident and beyond the three-year statute established by section 15-3-530, S.C. Code (1976, as amended). Based upon these undisputed facts the circuit court dismissed the action.

Appellants now argue that the statute of limitations should have been tolled under the doctrine of equitable estoppel. Under South Carolina law, a party may be estopped from a asserting the statute of limitations as a defense if the delay that otherwise would give operation to the statute has been induced by the defendant's actions. Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 526 S.E. 2d 218 (2000). In order for equitable estoppel to be applicable, however, the party to be estopped must have misrepresented or concealed material facts which were unknowingly relied upon by the aggrieved party. Maher v. Tietex Corp., 331 S.C. 391, 500 S.E. 2d 204 (Ct. App. 1998). Appellants assert that they were misled by the failure of the Respondent to update his mailing address in order that they might properly serve him.

It must first be noted that Appellants' assertions have to do with their failure to timely serve the Respondent in the Spartanburg action, which is the subject of another appeal. As noted in that appeal, Appellants failed to properly commence their action due to a failure to timely serve the Respondent due to their procrastination in initiating service under section 15-3-350, S.C. Code (1976, as amended). Section 15-3-350 provides for substitute service when certain conditions are met. Pursuant to section 15-3-380, if the attempt to serve an individual under section 15-3-350 is unsuccessful, the envelope in which service by certified mail was attempted and affidavits of mailing are then filed with the Clerk of Court. Pursuant to section 15-3-380, when the envelope and affidavit have been filed, "the filing thereof shall have the same force and

legal affect as if such process had been personally served upon such defendant." In other words, actual service upon the defendant would no longer be necessary. This is in fact the procedure followed by Respondents in this instance.

Because it was unnecessary to actually serve the Respondent, so long as substitute service pursuant to sections 15-3-350 and 15-3-380 are adhered to, Appellants' arguments regarding equitable estoppel are of no consequence since there was no reliance upon the outdated address in this instance. Instead, Appellants filed this action after the statute of limitations had passed. Their arguments regarding estoppel are concerned with service rather than filing. Pursuant to Rule 3, SCRCP, to commence an action requires both timely filing and service. Because filing with the Cherokee County action was not timely, any delay with service was of no consequence.

Appellants go on to argue, however, asserting the "interest of justice" doctrine utilized in New York, that the court should have allowed the action to move forward. See Henneberry v. Borstein, 91 A.D. 3d 493, 937 N.Y. S. 2d 177 (2012). Pursuant to rule in New York, a court, upon good cause or in the interest of justice, is to extend the time for service. South Carolina does not recognize the extension of time for "the interest of justice". Moreover, the New York rule applies to the extension of time for service. Appellants' problem in this case is that filing was not made within the applicable statute of limitations. Even the New York rule would not help.

IV. THE DOCTRINE OF UNCLEAN HANDS IS INAPPLICABLE WHERE THE ASSERTED CONDUCT IS UNRELATED TO THE ISSUE PRESENTED.

Finally, appellants argue that the equitable doctrine of unclean hands should act to preclude the affirmative application of the statute of limitations. Appellants again rely upon the

alleged failure of the Respondent to file a change of address so that he might properly be served. As noted above, the statutory substitute service utilized by Appellants in this action does not mandate personal service if the applicable statutes are complied with. Moreover, the statute of limitations is applicable in this case because suit was not timely filed. As a result, any misdirection caused by a failure to file a change of address would have nothing to do with the dismissal based upon the statute of limitations. The equitable maxim of clean hands is not to be utilized by reason of acts unconnected to the transaction giving rise to the defense. See 27 Am. Jur. 2d Equity §142.

CONCLUSION

The granting of a motion to set aside an entry of default is based upon the "good cause" standard established under Rule 55 (c), SCRCP. This rule is to be liberally construed to promote justice and dispose of cares on their merits. In re Estate of Weeks, supra. The decision on whether to grant relief is solely within the discretion of the trial judge. Maxwell v. Genez, supra. Appellants have failed to demonstrate that the trial court relied upon inadequate facts or improper law and therefore the ruling on the motion to set aside the entry of default should be affirmed. Likewise, the dismissal of the case due to violation of the applicable statute of limitations should be affirmed since the undisputed facts confirm its application and Appellants' argument on clean hands and equitable estoppel are irrelevant as to timely filing.

TURNER PADGET GRAHAM & LANEY, P.A.

June 9, 2021

By: David L. Moore, Jr.
David L. Moore, JrAttorneys for
Respondent Perry Barbour

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Bobby E. Leopard, Luther Harris, and Donna Harris ..... Appellants,

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DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following to be included in the Record on Appeal:

1. Order Dismissing Case in Luther Harris, et al. v. Perry Wendell Barbour, et al. 2019-CP-42-02092, dated March 10, 2020

2. Notice of Appeal in Luther Harris, et al. v. Perry Wendall Barbour, et al. 2019-CP-42-02092, dated August 3, 2020

3. Order of Default and Order for Hearing to Ascertain Damages, filed November 12, 2020

4. Order of Default and Order for Hearing to Ascertain Damages, filed December 16, 2020

5. Certificate of Service, filed Devember 17, 2020

6. Order Granting Motion to Vacate Entry of Default, issued February 16, 2021

7. Order Denying Appellant's Motion for Reconsideration, issued March 9, 2021

8. Summons and Complaint, Luther Harris, et al. v. Perry Wendall Barbour, et al., dated June 7, 2019

9. Proof of Service upon Perry Wendell Barbour in Luther Harris, et al. v. Perry Wendall Barbour, et al.
   - Certified letter of SCDMV to Barbour
   - Envelopes from SCDMV – marked "Return to Sender"

10. Summons and Complaint, 2020-CP-11-00632, filed August 27, 2020

11. Affidavit of Default, filed November 10, 2020

12. Motion for Entry of Default and Exhibits, filed November 28, 2020

13. Respondent's Motion to Vacate and Exhibits, filed February 11, 2021

14. Respondent's Brief in Support of Motion to Set Aside Entry of Default, filed February 11, 2021

15. Respondent's Answer, filed February 11, 2021

16. Appellants' Response in Opposition to Respondent's Motion to Set

17. Appellants' Response in Opposition to Respondent's Motion to Dismiss, filed February 26, 2020

18. Proof of Mailing to Wendell Barbour, filed February 16, 2021

19. Appellant's Motion for Reconsideration of the Order Granting the Motion to Vacate and Motion to Dismiss and Exhibits, filed February 26, 2021

20. Notice of Appeal, dated March 11, 2021

June 9, 2021

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Perry W. Barbour . . . . . Respondents.

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina's Amended Order 2020-05-29-02, I am filing a copy of the Brief of Respondents upon the Honorable Jenny Abbott-Kitchings, Clerk of Court of South Carolina Court of Appeals through e-mail and serving a copy of the same upon Appellants, by and through Mr. Donald L. Smith, Esquire, by email through the following addresses:

Honorable Jenny Abbott-Kitchings ctappfilings@sccourts.org
Mr. Donald L. Smith, Esq. attorneydonaldsmith@gmail.com

s/David L. Moore, Jr.
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The Honorable Jenny Abbott Kitchings
Clerk of the Court South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina, 29211

Re: Luther Harris, Donna Harris and Bobby Leopard vs.
Perry Wendell Barbour and Southland Transportation Co.
C.A. No.: 2019-CP-11-00632
Appellate Case No. 2020-000269
TP File No.: 00472.01050

Dear Ms. Kitchings:

Please find enclosed the following documents for filing in the above-captioned appealed case:

1. Initial Brief of Respondent;
2. Designation of Matter to be Included in Record on Appeal; and
3. Proof of Service.

Sincerely,

/s/ David L. Moore, Jr.
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Enclosures

Cc: Mr. Donald L. Smith, Esq.