THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPREAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

THE HONORABLE KNOX MCMAHON
CIRCUIT JUDGE

CASE NUMBER 2011CP 32-01369

Carolina Refrigeration Services — Respondent

v.

Claude L. Leitzsey, Sr., Claude L. Leitzsey, Jr., Lisa M. Leitzsey and Branch Banking and Trust Company — Defendants

Of whom

Claude L. Leitzsey, Sr., Claude L. Leitzsey, Jr. and Lisa M. Leitzsey are — Appellants

INITIAL BRIEF OF APPELLANT

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April 23, 2013

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STATEMENT OF ISSUES ON APPEAL

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2. Did the Trial Court have evidentiary support for its conclusion that the Appellants did not show good cause why they should not be held in default?

3. Did the Trial Court abuse it discretion by applying more stringent legal standard to the facts than required by Rule 55c in determining if the Appellants had provided a satisfactory explanation for their failure to timely answer the summons and complaint in this matter?

4. Did the Trial Court abuse its discretion under the facts of this matter by holding the Appellants in default?

5. Did the Trial Court abuse its discretion under the facts of this matter by holding that the Appellants did not have good cause for their failure to timely answer the summons and complaint?

STATEMENT OF THE CASE

Respondent served on Appellants and filed on March 31, 2011 a notice of Mechanic's Lien against the property of the Appellants in Lexington County, South Carolina. On April 7, 2011, Respondent served the Appellants with a Summons and Complaint to foreclose the Mechanic's lien. On May 17, 2011, Respondent filed an Affidavit of Default. On June 20, 2011, Appellants filed an Answer. Respondent made a motion to enter a default and grant a default judgment against the Appellants on June 28, 2011. A hearing was held before the Honorable R. Knox McMahon, Circuit Judge, on September 8, 2011. An Order was issued by Judge McMahon on November 21, 2011 holding the Appellants in default and granting the Respondent a personal judgment against the Appellants in the amount of $16,100.00 plus attorney fees and costs in the amount of $ 3,179.00. Appellants made a motion under Rule 59(e) SCRCP to alter the judgment. A hearing was held on July 18, 2012. A decision was rendered on this Motion on November 26, 2012. In this Order, the Court amended the judgment so that it was entered on the subject property and not the Appellants personally and denied all other parts of the motion. This appeal is from those Orders.

FACTS

In June of 2010, Appellants Claude Leitzsey, Jr. and Lisa Leitzsey contracted with Baudo and Associates Home Builders, Inc. (hereafter "Baudo") for the construction of a home on a lot of land they owned with Appellant Claude Leitzsey, Sr. Thereafter, Baudo began construction. As the project progressed, Appellants timely paid Baudo all draw requests as and when it requested. (Affidavit of Appellants dated July 28, 2011)

The Respondent is a heating and air conditioning company and was hired by Baudo as a subcontractor on the Appellants' project. (Affidavit of Appellants dated July 28, 2011)

In late December of 2010, these Appellants were served with the first of several Notices of Mechanics Lien from subcontractors and suppliers of Baudo. The first was from a company called Big Red Enterprises. In January of 2011 Stock Building Supply also served a lien on them. After they were served with these liens, Appellants retained Attorney Kenneth E. Ormand, Jr. and Mr. Ormand began representation of them in these matters arising out of the construction of their home. (Affidavit of Appellants dated July 28, 2011)

On February 2, 2011, Baudo advised Appellants that it was unable to complete the project. On that date the home was incomplete. Appellants then undertook the complex task of completing the house on their own without the assistance of a general contractor. (Affidavit of Appellants dated July 28, 2011)

The contract price with the builder Baudo was $475,184.00. On the date Baudo abandoned the project and breached its contract with them, the Appellants had paid it the sum of $422,594.00. Appellants paid the last draw payment to Baudo before the filing of any of the Mechanics Liens. Appellants completed their home with the assistance of subcontractors. The

cost was substantially higher than the amount remaining on the contract with Baudo. The additional cost was $83,803.22 plus Baudo owed them credits of $4,400.00. This total amount spent by Appellants to complete the house according to the specifications of the agreement with Baudo exceeded the amount due on the contract by $38,332.18. (Affidavit of Appellants dated July 28, 2011)

Before Appellants were served with Respondent's Summons and Complaint, they had received several Mechanic's Lien notices and one lawsuit to foreclose a previously served lien. These notices and pleadings was transmitted by Appellants to Attorney Ormand by electronic mail. Mr. Ormand received these pleadings from Appellants by email and timely filed responsive pleadings in the first lawsuit. (Affidavit of Appellants dated July 28, 2011 and Affidavit of Kenneth E. Ormand, Jr. dated July 26, 2011)

Respondent served Appellants with the Summons and Complaint in this matter on April 7, 2011. This was the second lawsuit. On the same day, Appellant Claude Leitzsey, Jr. converted these pleadings into an electronic format and sent them to Attorney Ormand as an attachment to an email as was their customary practice. (Affidavit of Appellants dated July 28, 2011)

Mr. Ormand did not receive the email for unknown reasons. (Affidavit of Kenneth E. Ormand, Jr. dated July 26, 2011)

On April 16, 2011, another subcontractor of Baudo, Grow Electric, Inc. attempted service of a Summon and Complaint on the Appellants. Service was effective only on Appellant Lisa Leitzsey. Appellants in the same manner as the other suits, converted these pleadings into an electronic format sent them to Mr. Ormand on April 18, 2011 as an attachment to an email note. (Order of Judge Keesley dated January 19, 2012)

Mr. Ormand did not receive this email for unknown reasons. (Order of Judge Keesley dated January 19, 2012)

After the time for Answering both of these cases had expired, Defendant Claude Leitzsey sent an email note to Mr. Ormand about several issues and made reference to this matter with Respondent and the other action with Grow Electric. Mr. Ormand realized that he had not heard of these actions and then immediately checked the records of the Clerk of Court and discovered the filing of these suits. At that time, an entry of default had not been made in either case so answers in both matters were prepared and served on June 20, 2011. This was 44 days after the time for answering. (Affidavit of Kenneth E. Ormand, Jr. dated July 26, 2011)

ARGUMENT

THE TRIAL COURT ABUSED IT DISCRETION BY FINDING THE APPELLANTS HAD NOT GIVEN A SATISFACTORY EXPLANATION FOR THEIR FAILURE TO TIMELY ANSWER THE COMPLAINT IN THIS MATTER BECAUSE THIS FINDING WAS CONTRARY TO THE FACTS AND LAW. (Issues 1, 2, 4 and 5)

THE TRIAL COURT ABUSED ITS DISCRETION BY APPLYING THE WRONG LEGAL STANADARD TO DETERMINE WHETHER A SATISFACTORY EXPLANATION AND GOOD CAUSE HAD BEEN SHOWN FOR THE FAILURE OF THE APPELLANTS TO TIMELY ANSWER THE COMPLAINT IN THIS MATTER. (Issue 3)

THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THE APPELLANTS IN DEFAULT. (Issues 1, 2, 3,4 and 5)

This matter was before the lower court on Respondent's motion for entry of default against the Appellants. The hearing was conducted on affidavits and no testimony taken. The Clerk of Court had not entered a default nor had judgment been rendered. Accordingly, the matter was governed by Rule 55 (c) of the SCRCP and it was treated as a motion for relief from entry of default.

This Rule 55 (c) provides:

"Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).

An affidavit by Respondent's computer expert and argument of Respondent's counsel apparently confused the facts and misled the Court. (Affidavit of William Boling dated September 2, 2011 and Transcript of Hearing dated September 89, 2011 pp 10-12) As a result the Court made the following findings:

"The Court would question why attorney Ormand and three defendants did not request Killoy to inspect the computer system of Leitzsey and determine whether there were any sent or unsent or undelivered emails to Ormand. The Court infers that Killoy was not asked to so search, because there would be no such emails from that end of the process, either."

"The Court further finds that Defendants in fact never transmitted the pleading to their lawyer." (Order of Judge McMahon dated November 21, 2011)

The Court went on to find "Even though further analysis is unnecessary the court finds in its discretion that good cause has not been shown in an analysis of the Wham factors." However, the Court clearly based its decision on its belief that Appellants had not sent pleadings to Attorney Ormand.(Order of Judge McMahon dated November 21, 2011)

These findings by the lower court were not supported by the record and the Appellants made a motion under Rule 59 (e) of the SCRCP. To support the motion, Appellants produced an affidavit from a computer expert witness who explained the situation and cleared the confusion created by the Respondent's expert. The expert explained that the email service used

by the Appellants is Microsoft Hotmail. This service is a "web based" service, that is, storage of "sent," "received" or "undelivered" emails on this type of email service is not on individual computers but on the server computers of Microsoft Corporation around the world. Thus, there was no need to search the Appellants' computer because none of the emails are stored there. (Affidavit of Ryan Brown dated January 13, 2012)

This expert Ryan Brown further stated in an affidavit that he was able to access the Mr. Leitzsey's email account on a computer at the office of Appellants' undersigned counsel. Mr. Brown states that he found in the "sent" folder the email with the attachments that was sent to Mr. Ormand transmitting the pleadings in this matter on the same day that the Leitzsey' s stated in their affidavit. (Affidavit of Ryan Brown dated January 13, 2012) This conclusively proved that Appellants had initiated the email to their attorney. The email message sent by Mr. Leitzsey to Mr. Ormand indicated that copy of the email was simultaneously sent by him to his wife's (Lisa Leitzsey) email account. Mr. Brown located in the "inbox" folder of her Hotmail account a copy of the email that was sent to Attorney Ormand with the attachment. This further confirmed Appellants' affidavit. (Affidavit of Ryan Brown dated July 12, 2012)

Neither the computer expert of the Respondent or the Appellants was able to definitely explain why the emails were not received by Mr. Ormand.

Judge McMahon, after considering the foregoing at the Rule 59 (e) hearing held:

"In the present case, through the Defendant's own admission via filed affidavit, the Defendants made clear that they merely assumed their transmittal of the court documents were effected, while admitted that they failed to exercise reasonable diligence in ascertaining whether

or not the their transmittal was successful. This Court finds a satisfactory explanation by the Defendants for their default to be absent." (Order of Judge McMahon dated November 26, 2012)

The other matter involving the Appellants brought by Grow Electric Company proceeded simultaneously in the Lexington County Court of Common Pleas with this case. The facts in Grow case are virtually identical. Grow was represented by different counsel and Appellants were represented by the undersigned. The Grow case was heard before the Honorable William P. Keesley on a Motion by Grow for a default judgment. Judge Keesley considered the case on essentially the same affidavits from Appellants as the present one and came to a distinctly opposite result. He concluded that the good cause existed and the Leitzseys should not be held in default. Neither party appealed this decision. (Order of Judge Keesley dated January 19, 2012)

Thus we have an unusual situation of two circuit judges in the same county hearing essentially the same facts and reaching different conclusions.

In the case of Sundown Operating Co., Inc. v. Intedge Industries, Inc, 383 S.C. 601, 681 S.E. 2d 885 (2009) the Supreme set forth the standard for review under Rule 55(c) SCRCP and 60(b) SCRCP:

> The decision whether to set aside an entry of default or a default judgment lies solely with in the sound discretion of the trial judge. *Harbor Island Owner's Ass'n v. Preferred IslandProps., Inc.,* 369 S.C. 540,544, 633 SE.2d 497, 499 (2006). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney,* 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct.App.1988). 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. *In re Estate of Weeks,* 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997).

The Court in Sundown set forth the standards for relief under Rule 55(c):

Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55 (c) permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.,* 298 S.C. 462, 465, 381, S.E.2d 499, 501-02 9 (Ct.App.1989). The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.,* 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct.App.1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. *Williams v. Stalnaker,* 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App.1994).

In Sundown, the Court emphasized the standard for relief under Rule 60 (b) is more rigorous than the "good cause" standard of Rule 55(c).

There are many cases involving a "satisfactory explanation" but there are none that define the term with any real specificity. Clearly, a satisfactory explanation is dependent on the facts of each case. In every case where an answer is not timely served, something happened or did not happen that led to the default. Usually these cases involve intentional disregard of the pleadings, simple negligence, gross negligence or merely human error that includes mistake or inadvertence. Rule 55(c) and Rule 60(b) are safety nets for litigants who, under the circumstances and their experience level, have made an honest mistake and should in the interest of justice and equity be forgiven.

Judge McMahon found that the Appellants did not exercise reasonable diligence by not verifying receipt of the pleading by their attorney. He cites four cases in support of his finding that Appellants reliance on email and their failure to confirm receipt was not a satisfactory explanation. These are Richardson v. PV, Inc, 383 S.C. 610, 682 S.E.2d 263 (2009), Limehouse v. Hulsey 397 S. C. 49, 723 S. E. 2d 211 (Ct. App. 2011), Stark Truss Company v. Superior Construction Corporation 310 S C 503, 602 S. E. 2d 99 (Ct. App. 2004) and Williams v. Vanvolkenburg , 312 S. C. 373, 440 S.E. 2d 408 (Ct. App. 1994). Each of these cases cited by Judge McMahon involves acts or omissions of attorneys, insurance companies and/or a corporate officer. The reasoning of these cases consistently considers the professional position or occupation of the parties in order to determine whether or not their conduct was reasonable under facts of each case. The Courts have consistently imposed a higher standard on individuals and entities that have or should have the experience, training or sophistication to follow the proper procedure in litigation. The Appellants are not legal professionals and there is no evidence in the record that shows they should be held to the same high standards as the

professionals in the cases cited by the Court. They should be held to a much lesser standard for determining reasonable conduct.

Therefore, at the conclusion of the hearing on Appellants motion under Rule 59 (e), the following were the facts that establish the context for the actions of the Appellants:

1. The Appellants were the victims of a homebuilder who was unable to complete their home and who did not pay its subcontractors. (Affidavit of Appellants dated July 28, 2011)

2. Appellants finished the construction without the homebuilder and spent more than the contract amount. (Affidavit of Appellants dated July 28, 2011)

3. The Appellants had been served with several Notices of Mechanics liens and were sued by one of the lien claimants prior to the service of the Respondent's action. (Order of Judge Keesley dated January 19, 2012)

4. Appellants had an existing relationship with Attorney Kenneth Ormand. They had consulted with him prior to the default by their homebuilder and retained him to represent them in the cases brought by subcontractors. (Affidavit of Kenneth E. Ormand, Jr. dated July 26, 2011)

5. Electronic mail was the customary means of communication between Appellants and Attorney Ormand and it had a proven record of reliability between them. (Affidavit of Kenneth E. Ormand, Jr. dated July 26, 2011)

6. On the day of service of the Summons and Complaint, Appellants converted the documents into an electronic format and emailed the documents to their attorney. (Affidavit of Appellants dated July 28, 2011)

7. Appellants did the same in the case brought by Grow Electric. (Order of Judge Keesley dated January 19, 2012)

8. There is no explanation of why the email was not received by Mr. Ormand. There is no showing of wrong doing by the Appellants or Attorney Ormand. (Affivdavit of Ryan Brown dated January 13, 2012)

In making his decision as to whether or not the Appellants provided an "satisfactory explanation" for the failure to timely respond to the pleadings, Judge McMahon used a standard that is even more stringent than that required by Rule 60 (b). The standard he used creates a wall that even the most diligent litigant who makes an honest mistake cannot scale. Assuming for the sake of analysis that the Appellants were wrong in not verifying receipt by their attorney of the pleadings, this error by them is not equivalent to a lawyer, insurance company or corporate executive ignoring a legal pleading. The Appellants are lay people who were justified in relying on a form of communication that had proven reliable. At the worse, their conduct was a simple mistake as contemplated by Rule 60 (b) SCRCP.

The case of Ricks v. Weinrauch 293 S. C. 372, 360 S.E.2d 535 (Ct. App. 1987) is instructive on granting relief under Rule 55(c). In this case, the defendant received the pleadings, sent them to her insurance agent, the agent files bankruptcy and closes its office and does not forward the pleadings to the carrier. Before time expired for answering, the defendant returned from vacation but is unable to get the pleadings to her attorney until the time for answering expires because she left the pleading in the trunk of her automobile while it was being serviced. The trial court found good cause and the Court of Appeals found evidentiary support for this decision. The Court of Appeals noted that the Defendant "... acted reasonably by

contacting her attorney and her insurance agent." The Court went on to say "While leaving suit papers in the trunk of her car would not alone, meet the requisite showing of good cause, we hold all factors considered together are sufficient for such a showing."

The Court in Ricks the quoted from a Georgia case that held "...there was good cause for the defendant to believe the suit was being defended by an insurance company, neglect in following the progress was excusable neglect." The Court further said " The law should not blindly impose standards which require individuals, in the conduct of their daily business, to distrust the parties with whom they deal."

Judge McMahon used a legal standard for the conduct of the Appellants that exceeds the rigorous requirements of Rule 60(b) SCRCP for determining a satisfactory explanation and good cause and that is not justified by the facts of this case and thus he abused his discretion in deciding this matter.

Judge Keesley in his Order that he personally drafted in the case brought by Grow Electric against Appellants found as follows:

> "Communication by email is a common place occurrence in the legal profession and in business. It certainly is not foolproof; nor, is regular mail. However, it is relied upon by courts to provide notices of hearing and to communicate important information. Here, it is understandable that a homeowner (who has received various lawsuits communicated about them using email to her attorney, and previously obtained timely action from her attorney) would assume that the attorney received and acted upon the Summons and Complaint that were emailed to him. The answer was filed promptly after discovery of the lost email and less than a month after the initial deadline. The mechanic's lien had

been filed previously and that matter was not neglected. Here, the lawsuit was received by Mrs. Leitzsey on April 16 (which was a Saturday) and forwarded to her attorney on Monday, April 18."

"The court does not find any demonstration of inexcusable neglect on the part of Mrs. Leitzsey. Rather, she appears to have been reasonably diligent in her actions. Had there been only one legal matter pending, perhaps she would have been expected to follow up more quickly. However, the context of the service of process in this case was such that there were several matters ongoing, all of which involved the same general factual scenario. Her attorney was familiar with the situation. She had entrusted these matters to her attorney over a course of several months, and he appears to have always acted to protect her interests. Therefore, it is logical that she would presume that he would receive the email and file an Answer, since he was merely dealing with the same issues again."

" Under any standard, it appears that it would be inequitable to hold Mrs. Leitzsey in default in this case. Any neglect in contacting her attorney was clearly excusable, in the court's view. The cause of the delay is that the emailed communication is somehow stranded out in cyberspace, through no fault of anyone under the defendant's direction or control." (Order of Judge Keesley dated January 19, 2012)

Judge Keesley further said "in short, the court finds Mrs. Leitzsey acted reasonably and appropriately in response to receiving the Summons and Complaint."

Judge McMahon in his initial order held that since the Appellants did not give a satisfactory explanation of the default it was unnecessary to carry the analysis any further and

consider the Wham factors of 1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. He did further find in the initial order "Even though further analysis is unnecessary the court finds in its discretion that good cause has not been shown in an analysis of the Wham factors." No other explanation was given. In the second Order, Judge McMahon did not consider the factors. (Both Orders of Judge McMahon)

In the interest of justice, all factors should be considered. In this matter, the answer was filed within 44 days of the default and shortly after the default was discovered.

The Appellants have meritorious defenses. By allegation in their answer and affidavit, the Appellants have shown they spent more to complete the home that the contract price with their builder Baudo. (Answer of Appellants and Affidavit of Appellants dated July 28, 2011) Under Section 29-5-40 of the S. C. Code Ann., subcontractors such as Respondent can only recover if any amount is owed to their contractor. The section is designed to protect an honest landowner so that he does not have to pay twice for the same work. Secondly, the Appellants have alleged in their answer that the Mechanic's lien of Respondent was defective. S. C. Code Ann. Section 29-5-15 (Supp. 2009) provides:

> To file a mechanic's lien, a contractor must provide the county clerk or register of deeds proof that he is licensed or registered..." and "As proof of licensure or registration, the contractor must record his contractor license number or registration number on the lien document when the lien document is filed. "

CONCLUSION

The Orders of the lower court should be vacated and the answer of the Appellants should be admitted and the matter should proceed to a trial on the merits.

Respectfully submitted,

April 23, 2013

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The Respondent did not do this. The terms of this statute are mandatory and Mechanic's liens are creatures of statute and not part of the common law. The statute must be strictly followed and Respondent did not do this. The Respondent's lien was fatally defective.

The short delay was not prejudicial to Respondent. The time for discovery had not expired at the time of answering. No litigant including the Respondent is prejudiced by a trial on the merits of its claim.

As Judge Keesley points out, electronic mail is pervasive in our society and in the legal and judicial world. Our Supreme Court encourages its use. Judge McMahon is imposing a standard on inexperienced litigants that is not applied to the judicial officers of this state. Many notices are sent by Clerks of Court including notices of roster meetings and receipt of such are not verified. Even with postal mail, our rules provide that service is made when deposited with the US Mail. There is no requirement for receipt verification and lost mail is a fact of life that no one can deny. In this case, the Appellants proved that they initiated the email and this is analogous to mailing a letter.

Judge McMahon abused his discretion by applying a more stringent legal standard for determining whether the Appellants gave a satisfactory explanation for their default than is required by Rule 55(c)and that standard he used is not supported or justified by the facts. In Melton v. Olenik , 379 SC 45, 664 SE 2nd 487 (Ct. App. 2008), the Court of Appeals quoted from a prior case and held that Rule 55 (c) should be "liberally construed to promote justice and dispose of cases on the merits." These innocent Appellants should not be held in default for an electronic glitch and the matter should proceed to a trial on the merits. Simple justice demands this.