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SC Court of Appeals

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IN THE STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE 5TH JUDICIAL CIRCUIT
CASE NO: 2020-CP-40-00938

GERMAINE LAING,
Plaintiff,
v.

TRUIST BANK; BRANCH BANKING AND TRUST COMPANY OF SOUTH CAROLINA; AND ANGELA ALLEY,
Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT AS TO DEFENDANTS TRUIST BANK AND ANGELA ALLEY

This matter came before the Court on January 7, 2021. Present for Plaintiff was Lane D. Jefferies. Present for Defendants was Matthew D. Adkins. After carefully reviewing the submissions of counsel, documents of record, arguments of counsel, and the applicable law, for the reasons set forth below, Plaintiff's Motion for Entry of Default is GRANTED.

Procedural History

Defendants removed this case to federal court, where they then filed several Rule 12 motions. However, after the federal court declared itself lacking in subject matter jurisdiction and remanded the case to state court, Defendants failed to file an Answer or any Rule 12 motions in ***state*** court within the time remaining to do so.

Defendants based their decision not to file an Answer in state court on their prior counsel's belief that the federal filings "stayed Defendants' time to file an Answer to Plaintiff's Complaint [in State Court] until a ruling is issued on Defendants' pending motions [in federal court]."[1] Defendants are mistaken, because after remand there were no longer any motions pending. Accordingly, there was nothing to toll the time to answer. As a result, Defendants are in default.

[1] *Defendants Truist Bank and Angela Alley's Response to Plaintiff's Motion for Entry of Default, or in the Alternative, Motion to Set Aside Entry of Default*, filed September 29, 2021, p. 2.

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Because Defendants have not shown good cause, Defendants cannot be relieved of default. Therefore, Defendant's motion pursuant to Rule 55(c) is DENIED. Plaintiff's Motion for Default must be and here by is GRANTED.

I. Defendants defaulted by failing to answer within the time remaining to do so after remand.

The applicable law is clear. First, motions in federal court cannot and do not remain pending after the federal court remands the case for lack of subject matter jurisdiction. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the ***only*** function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 514, 19 L. Ed. 264 (1868) (emphasis added).[2] As a result, as soon as the federal court remanded this case, there were no longer any

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[2]*See also*, *Sykes v. Texas Air Corp.,* 834 F.2d 488, 490 (5th Cir. 1987) ("the entry of a remand order ***ends the proceeding*** in the federal court") (emphasis added); *City & Cty. of San Francisco v. PG & E Corp.,* 433 F.3d 1115, 1122 (9th Cir. 2006) ("entry of a remand order ***ends the proceeding in the federal court*** and the state (or other) court proceeding gets under way.") (emphasis added); *Pelleport Inv'rs, Inc. v. Budco Quality Theatres, Inc.,* 741 F.2d 273, 279 (9th Cir. 1984) ("We do not address Budco's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) or its motion to transfer the action to a more convenient forum pursuant to 28 U.S.C. § 1404(a). It is clear that ***a remand order ends the federal court's jurisdiction***.") (emphasis added); *Anton Leasing, Inc. v. Engram*, 846 F.2d 69 (4th Cir. 1988) ("once the initial remand order was entered, the ***district court lacked jurisdiction to entertain a motion*** to transfer the case") (emphasis added); *Sanders v. Progressive Direct Ins. Co.,* No. 9:20-CV-2480-DCN, 2020 WL 5017855, at *3 (D.S.C. Aug. 25, 2020) ("The court thus remands the entire action to the Hampton County Court of Common Pleas. ***Bereft of jurisdiction, the court does not consider the motion to dismiss***.") (emphasis added); *Overhead Door Corp. v. Assa Abloy Entrance Sys. Greenville, Inc.,* 234 F. Supp. 3d 716, 723 (D.S.C. 2017) ("Plaintiff's motion to remand is **GRANTED** and this matter is **REMANDED** to the South Carolina Court of Common Pleas for Greenville County. Consequently, AAES US's motion to dismiss is **RENDERED MOOT**.) (emphasis in original); *Senior Ride Connection v. ITNAmerica*, 225 F. Supp. 3d 528, 536 (D.S.C. 2016) ("Because the Court lacks subject-matter jurisdiction over this matter, it ***cannot reach Plaintiff's motion to transfer, which is made*** *moot* ***by remand*** to state court.") (emphasis added); *Finch v. U.S. Fid. & Guar. Co.,* No. 3:19-CV-01827, 2020 WL 2988944, at *1 (D.S.C. June 4, 2020) ("Plaintiff's motion to remand is granted because the Court lacks subject matter jurisdiction over this action. Accordingly, all other pending motions . . . are denied as moot."); *Limehouse v. Hulsey*, 397 S.C. 49, 60, 723 S.E.2d 211, 217 (Ct. App. 2011), *rev'd on*

motions pending (either in federal or state court), and thus, "pending motions" could not have tolled the time to answer.

Second, when the state court resumed jurisdiction upon remand, it had "a duty to proceed as though no removal had been attempted." *Limehouse* at 112 (internal quotations omitted). As a result, upon remand the state court clock started ticking again. Whatever time the parties had left on the state court clock at the time of removal to answer discovery, file responsive pleadings, move to change venue, etc., they still had left immediately upon remand when the state clock started ticking again. However, they did not get any ***extra*** time; just however much they had left. This is the unmistakable holding in *Limehouse v. Hulsey*. *Id.* (The Supreme Court agrees that "there [is] no authority in this state to support Hulsey's position that a removing party is entitled to a fresh thirty days to answer a Complaint upon remand."). Instead, "the time for filing an Answer [is] tolled until the state court resume[s] jurisdiction." *Id.* at 113.

Based on the above, the *Limehouse* court held that the trial judge properly "ruled that any unexpired portion of the thirty-day time period to answer was tolled during the time the case was removed to federal court. Therefore, Hulsey had until August 5, 2006, to file an Answer to the Complaint . . . Because Hulsey removed the case fourteen days after he was served, Judge Pieper [properly] found Hulsey had sixteen days following the remand order to file his Answer." *Limehouse v. Hulsey*, 404 S.C. 93, 111 and FN 10, 744 S.E.2d 566, 576 (2013). Likewise, the *Limehouse* court also found no fault with the trial judge's decision not "to decide whether Hulsey was entitled to five additional days for mailing pursuant to Rule 6(e), SCRCP because Hulsey's Answer was filed twenty-four days outside of the tolled time frame." *Id.*

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other grounds, 404 S.C. 93, 744 S.E.2d 566 (2013) ("***remand ends the federal court's jurisdiction***") (emphasis added).

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Limehouse is directly on point. It does not matter how much of the original thirty days to answer or responsively plead remained when this case was remanded. Nor does it matter whether Defendants were entitled to an extra five days under Rule 6(e), or to an extra thirty days under the Supreme Court of South Carolina's Operation of the Trial Courts During the Coronavirus Emergency Order dated April 3, 2020 – because Defendants still had not answered as of the date Plaintiff's motion was heard, 155 days after remand. Regardless of how much time remained on the state court clock on the date the case was remanded, under no conceivable stretch of the rules are Defendants entitled to an additional 155 days on top of that to file their Answer.

Based on the above, this Court holds that Defendants defaulted by failing to answer within the time remaining to do so after remand.

II. Defendants did not show good cause for relief from default.

Having held that Defendants are in default, the next question is whether they are entitled to be relieved from default by showing good cause and satisfying the *Wham* factors. For the reasons set forth below, Defendants are not entitled to relief.

The first dispositive issue that prevents relief from default in this case is lack of good cause. To be relieved from an entry of default, Defendants must ***first*** "put forth a satisfactory explanation for the default." *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 681 S.E.2d 885, 888 (S.C. 2009) (citing *Wham v. Shearson Lehman Bros., Inc.*, 381 S.E.2d 499, 501–02 (S.C. Ct. App.1989)). Only after a showing of good cause does the court consider such factors as existence of a meritorious defense, prejudice to Plaintiff, timeliness of seeking relief, etc. (the "*Wham* factors").

If Defendants do not put forth a satisfactory explanation for the default – in other words, do not show good cause for failing to answer the complaint – then the analysis ends, and the court does not consider the *Wham* factors. *See Regions Bank v. Owens*, 741 S.E.2d 51, 55 (S.C. Ct. App.

2013) ("Because we find the master did not err in finding Owens failed to show good cause for failing to answer the complaint, ***we need not consider the Wham factors***.) (emphasis added); *Sundown*, 681 S.E.2d at 888 (holding a court need consider the *Wham* factors ***only*** "[o]nce a party has put forth a satisfactory explanation for the default"); *Dixon v. Besco Eng'g, Inc.*, 463 S.E.2d 636, 639 (S.C. Ct. App.1995) (holding the trial court is not required to make specific findings of fact on the record for each *Wham* factor if the record contains sufficient evidentiary support for the finding of lack of good cause).

Attorney negligence is not good cause. "In South Carolina, negligence on the part of an attorney is imputable to the client and ***will not*** be the basis of finding good cause to set aside entry of default." *Limehouse v. Hulsey*, 397 S.C. 49, 71, 723 S.E.2d 211, 223 (Ct. App. 2011) (emphasis added), *rev'd on other grounds*, 404 S.C. 93, 744 S.E.2d 566 (2013).[3] Accordingly, as recently as 2013, our Supreme Court found no fault with a trial court judge's decision that "attorney confusion about the deadline for when an answer was due" after remand is not good cause to set aside entry of default. *Limehouse v. Hulsey*, 404 S.C. 93, 112, 744 S.E.2d 566, 576 (2013).

Default in this case resulted from the attorney's failure to file an answer after remand, specifically "attorney confusion about the deadline for when an answer was due." *Id.* Because attorney negligence cannot be the basis for a finding of good cause, this Court need not consider the *Wham* factors before holding that default cannot be set aside.

[3] That negligence of an attorney is not good cause is so long-standing and well-established as to be practically axiomatic. *See, e.g.*, *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct.App.1987) ("courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant."); *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009) ("the law is clear that an attorney or insurance company's misconduct is imputable to the client."); *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App.1994) (observing that an attorney's negligence in failing to answer is imputable to the defendant).

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Although not necessary to this Court's holding, this Court observes that even if good cause had been shown, Defendants still would not be entitled to relief from default, because Defendants did not come forward with any evidence to satisfy the *Wham* factors. At the hearing on this matter, Defendants presented only arguments of counsel – which are, of course, not evidence. *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 646 (2012).

Absent any supporting evidence, even if this Court had reached the *Wham* factors, relief from default would not be proper. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) ("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.***") (emphasis added).

WHEREFORE, for the reasons set forth above, Defendant's Motion to Set Aside is DENIED. Defendant's Motion to Amend Request to Admit is moot. Plaintiff's Motion for Default is GRANTED, and a hearing to determine the amount of Plaintiff's damages shall be set at the Court's and the parties' earliest convenience.

IT IS SO ORDERED.

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The Honorable DeAndrea Gist Benjamin

Columbia, South Carolina
March _____, 2021

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Richland Common Pleas

Case Caption: Germaine Laing vs Truist Bank , defendant, et al

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So Ordered

s/DeAndrea Gist Benjamin, #2161