

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )  
 )  
James H. Bailey Jr., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Development Systems International, LLC, )  
David W. Auterson, John R. Curtis, Dianne )  
N. LaRose, James P. LaRose, Robert C. )  
MacConnell, and Sandra M. Morckel, )  
 )  
Defendants. )

IN THE COURT OF COMMON PLEAS  
Civil Action No. 2011-CP-26-07558

**ORDER DENYING MOTION TO SET  
ASIDE ORDER OF DEFAULT  
AND  
GRANTING DEFAULT JUDGMENT  
AGAINST DEFENDANTS DAVID W.  
AUTERSON, JAMES P. LAROSE, ROBERT  
C. MACCONNELL, AND SANDRA M.  
MORCKEL**

The Court considered two matters in the above case during a hearing on April 8, 2013, at the Horry County Courthouse in Conway, South Carolina. First, the Court considered a Motion to Set Aside Order of Default filed by Defendants David W. Auterson, John R. Curtis, Dianne N. LaRose, James P. LaRose, Robert C. MacConnell, and Sandra M. Morckel, wherein Defendants seek an Order setting aside the Court's previous Order of Default as to those Defendants.

The second matter came before the Court upon a previous Order of Default entered by the Honorable Judge Larry B. Hyman, Jr. in favor of Plaintiff James H. Bailey, Jr. and against Defendants David W. Auterson, John R. Curtis, Dianne N. LaRose, James P. LaRose, Robert C. MacConnell, and Sandra M. Morckel. In the Order of Default, Judge Hyman ruled that a damages hearing be conducted by the Court to determine the amount of damages to which Plaintiff is entitled. After hearing arguments of counsel on the Motion to Set Aside Order of Default and taking the matter under advisement for further consideration, the Court proceeded with the damages hearing and took testimony from Plaintiff James H. Bailey, Jr.

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**SC Court of Appeals**

Present at the hearing were Plaintiff James H. Bailey, Jr. and his counsel, Audra M. Byrd of Turner Padgett Graham & Laney P.A. Attorney George E. Graham appeared at the hearing on behalf of Defendants David W. Auterson, John R. Curtis, Dianne N. LaRose, James P. LaRose, Robert C. MacConnell, and Sandra M. Morckel.

Prior to the hearing, counsel for the parties advised the Court that on January 31, 2013, Defendant Dianne N. LaRose filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code. As a result of her filing, the Motion and damages hearing with regard to Defendant Dianne LaRose were stayed, and the Court did not address any matters related to Defendant Dianne LaRose. The Court proceeded only with the Motion and damages hearing as they pertain to the remaining, individual Defendants, who are currently in default.

After hearing arguments of counsel, receiving testimony from Plaintiff, and carefully reviewing the Court's file, the evidence presented and the applicable case law, the Court makes the following findings of fact and conclusions of law:

**RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

1. The Summons and Complaint were filed in this case on September 12, 2011.
2. The Summons and Complaint were served on Defendant John R. Curtis on September 15, 2011, by certified mail, return-receipt requested, restricted delivery, and an Affidavit of Service, with the attached PS Form 3811, bearing Defendant Curtis' signature was filed with the Court on September 21, 2011.
3. The Summons and Complaint were served on Defendant Sandra M. Morckel on September 19, 2011, by certified mail, return-receipt requested, restricted delivery, and an Affidavit of Service, with the attached PS Form 3811, bearing Defendant Morckel's signature was filed with the Court on September 27, 2011.

4. The Summons and Complaint were served on Defendant David W. Auterson on September 22, 2011, by certified mail, return-receipt requested, restricted delivery, and an Affidavit of Service, with the attached PS Form 3811, bearing Defendant Auterson's signature was filed with the Court on September 27, 2011.
5. The Summons and Complaint were served on Defendant Robert C. MacConnell on October 11, 2011, by a process server who personally delivered copies of the same to his home, and an Affidavit of Service was filed with the Court on October 18, 2011.
6. The Summons and Complaint were served on Defendant James P. LaRose on October 12, 2011, by a process server who personally delivered copies of the same to his home, and an Affidavit of Service was filed with the Court on October 18, 2011.
7. The above-named Defendants failed to file or serve a response to the Summons and Complaint within the time allowed under the South Carolina Rules of Civil Procedure, and on November 15, 2011, Plaintiff's counsel filed with the Court a Motion and Affidavit of Default as to these defendants. An entry of default was entered by the Clerk on the same date.
8. Thereafter, on January 9, 2012, the Honorable Judge Larry B. Hyman, Jr. executed an Order of Default as to Defendants Auterson, Curtis, Morckel, LaRose, and MacConnell. In his Order, Judge Hyman ruled that a hearing would be held to determine the amount of Plaintiff's damages. The Order was filed with the Clerk of Court on January 12, 2012.
9. A damages hearing was scheduled by the Court to take place on January 14, 2013. Plaintiff's counsel mailed a Notice of Hearing to Defendants on January 3, 2013, advising Defendants that the default damages hearing was scheduled for January 14, 2013. Defendants do not dispute having received notice of the hearing.

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10. On January 11, 2013, Defendants, through their counsel, George E. Graham, filed a Motion seeking to set aside the Court's previous Order of Default pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure.
11. As a result, at the January 14, 2013 damages hearing, the Court orally granted a thirty-day continuance of the hearing so as to allow Defendants additional time in which to file affidavits or other materials in support of their Motion. The Honorable Steven H. John entered a written Order to this effect on February 4, 2013.
12. In his Order, Judge John ruled that if Defendants were not successful in setting aside the Order of Default, Plaintiff and his counsel would be entitled to reimbursement of attorneys' fees and costs incurred as a result of the continuance requested by Defendants. He further ordered that Plaintiff or his counsel submit an affidavit of all such fees and costs prior to the next scheduled damages hearing.
13. On February 14, 2013, Defendant John. R. Curtis filed an affidavit with the Court in support of the Motion to Set Aside Order of Default. No other Defendant has filed an affidavit or any other material in support of their request that the previously-entered Order of Default be set aside by this Court.
14. The damages hearing, previously continued, was scheduled for hearing on April 8, 2013, and written notice of the hearing was sent by the Clerk of Court to all parties, through their attorneys, on February 26, 2013. Again, Defendants do not dispute having received notice of the damages hearing.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

As an initial matter, the Court finds that Defendants David W. Auterson, John R. Curtis, James P. LaRose, Robert C. MacConnell and Sandra M. Morckel have been properly served with

*John H. John*

the Summons and Complaint pursuant to Rule 4(d)(1) and (d)(8) of the South Carolina Rules of Civil Procedure. Further, the Court finds that the Order of Default entered against Defendants Auterson, Curtis, Morckel, LaRose, and MacConnell on January 12, 2012, was proper pursuant to Rule 55(b)(2) of the South Carolina Rules of Civil Procedure.

**I. MOTION TO SET ASIDE ORDER OF DEFAULT**

*Legal Standard for Relief*

After an Order of Default has been entered, a party seeking to be relieved from the Order must do so under Rule 60(b) of the South Carolina Rules of Civil Procedure. Rule 60(b) provides, in relevant part, that a party seeking relief must establish mistake, inadvertence, surprise, excusable neglect, newly discovered evidence . . . fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b)(1) - (3).

"The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the 'good cause' standard established in Rule 55(c)." Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009) (citing Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987)). The differing standards for relief under Rules 55 and 60 evince a clear intent to make it more difficult for a party to set aside an order of default, as opposed to an entry of default, which generally occurs earlier and carries less finality. Id. at 608, 681 S.E.2d at 888-889. Under Rule 60(b), the moving party "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); see also, 46 Am. Jur. 2d Judgments § 780, at 940 (1969) ("The general rule is that no court has authority to open or vacate a judgment without some material evidence to support the claims on which the application for relief depends.").

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A. Defendants Auterson, LaRose, MacConnell and Morckel

In this case, Defendants seek relief under Rule 60(b)(1) of the South Carolina Rules of Civil Procedure and allege they are entitled to relief based upon mistake, inadvertence, surprise, or excusable neglect. However, no Defendant, with the exception of Defendant Curtis, has submitted any evidence whatsoever in support of their Motion.<sup>1</sup> As a result, the Court finds that Defendants David W. Auterson, James P. LaRose, Robert C. MacConnell and Sandra M. Morckel have failed to carry their burden of proof, and therefore, their Motion to Set Aside Order of Default must be denied. See McCall v. A-T-O, Inc., 276 S.C. 143, 147, 276 S.E.2d 529; 530-531 (1981) (holding the trial court abused its discretion in vacating a default judgment where the trial court's finding of excusable neglect was without evidentiary basis).

B. Defendant John R. Curtis

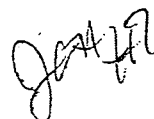
As noted above, Defendant Curtis submitted an affidavit in support of Defendants' Motion to Set Aside Order of Default. In his Affidavit, Defendant Curtis admits that all Defendants were served with the Summons and Complaint, and he alleges that they took the documents to Drake Kaiser, Esquire, the corporate attorney for their company, Development Systems International, LLC. Affidavit of John R. Curtis, January 14, 2013, at ¶ 5. According to his Affidavit, unbeknownst to the individual Defendants, Attorney Kaiser answered only on behalf of the company. Curtis Aff. at ¶ 5 - 6. Defendant Curtis alleges that he and the remaining Defendants "were ignorant and did not realize that Mr. Drake [Kaiser] had not answered on behalf of the non corporate Defendants." Curtis Aff. at ¶ 6. This assertion is the sole basis upon which Defendant Curtis relies in seeking relief from the Order of Default.

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<sup>1</sup> Defendant John R. Curtis filed an affidavit in support of the Motion to Set Aside Order of Default, purportedly on behalf of the remaining Defendants. However, the Court finds that Defendant Curtis cannot properly submit an affidavit on behalf of these Defendants, and the Court will consider the affidavit only as to Defendant Curtis' Motion.

The facts presented in this case are similar to those presented in the case of Little v. Orkin Exterminating Co., Inc., 270 S.C. 305, 241 S.E.2d 909 (1978). In Little, Orkin Exterminating Company sought relief from default based upon mistake and excusable neglect when its branch manager mailed copies of the Summons and Complaint to the company's corporate counsel but failed to take any further action or make any inquiry to determine whether the company's counsel had received or responded to the pleadings. Id. at 307-308, 241 S.E.2d at 910. In this case, Defendant Curtis did even less than the manager in Little. He failed to confirm that the company's corporate counsel would be representing him, individually, in this action, and nowhere in the record before this Court does it appear that Defendant Curtis ever made any inquiry as to the status of his representation or the case itself. Quite simply, the record reveals that Defendant Curtis merely provided copies of the Summons and Complaint to the corporate attorney for Development Systems International and took no further action to ensure that a timely response would be filed on his behalf with the Court.

It is well established that "a party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." Goodson v. Am. Bankers Ins. Co., 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). When a defendant is properly served with a summons and complaint, it is his duty to answer the complaint, and if he fails to do so, "he must suffer the consequence of his failure to answer." Williams v. Ray, 232 S.C. 373, 383-84, 102 S.E.2d 368, 373 (1958). Even assuming it was the negligence or inadvertence of Development Systems International's corporate counsel that resulted in Defendant Curtis' default, our courts have consistently held that an attorney's negligence in failing to answer is imputable to the defaulting Defendant. Sundown Operating Co., Inc., 383 S.C. at 609, 681 S.E.2d at 889; Williams v.



Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994); Roberts v. Peterson, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987).

Based upon the foregoing, the Court finds that Defendant Curtis has failed to carry his burden of proof for relief under Rule 60 of the South Carolina Rules of Civil Procedure. Defendant Curtis' affidavit evinces a lack of diligence which negates any allegation of mistake, inadvertence, surprise or excusable neglect. The affidavit establishes that Defendant Curtis, who from the documents on file in this case is an astute businessman, simply took the Summons and Complaint to an attorney without confirming that the attorney would represent him in this action. The Court finds that this inattention is not inexcusable, and Defendant Curtis should not be surprised that he did not have representation in this matter.

Finally, Defendant Curtis has failed to present any evidence, or even to assert, that he has a meritorious defense which would entitle him to relief from default. The existence of a meritorious defense is a requirement for relief from default. See Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988) (holding that the adoption of the South Carolina Rules of Civil Procedure did not change the requirement that a meritorious defense exist for relief from default to be granted); Square Constr. Co. v. Washington Metro. Area Transit Auth., 657 F.2d 68, 71 (4th Cir. 1981) (holding that in considering a Rule 60(b)(3) motion the threshold matter is whether the movant has demonstrated the existence of a meritorious claim or defense).

For all of the reasons above, Defendant John R. Curtis has failed to meet his burden of proof for relief from default, and therefore, his Motion to Set Aside Order of Default must be denied.

## II. AWARD OF DAMAGES TO PLAINTIFF

"It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability." Roche v. Young Bros., 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (citing Howard v. Holiday Inns Inc., 271 S.C. 238, 246 S.E.2d 880 (1978); Schenk v. National Health Care, Inc., 322 S.C. 316, 471 S.E.2d 736 (Ct. App. 1996); State ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 334 S.E.2d 528 (Ct. App. 1985)). Therefore, as a preliminary matter, the Court notes that for purposes of the damages hearing conducted pursuant to Rule 55(b)(2) of the South Carolina Rules of Civil Procedure, the allegations of Plaintiff's Complaint are deemed admitted, and although the defaulting Defendants are entitled to notice of the damages hearing, these Defendants are "limited to cross-examining witnesses and objecting to evidence." Id. at 81-82, 504 S.E.2d at 314.

During the hearing, the Court permitted Plaintiff James H. Bailey, Jr. to testify as to the damages he has sustained as a result of the conduct of Defendants, as alleged in his Complaint. Counsel for Defendants was permitted to cross-examine Plaintiff on the issue of damages. During his testimony, Plaintiff established that as a result of Defendants' conduct, he incurred lost wages and commissions in the amount of \$401,000.00. However, Plaintiff conceded that of this amount, he had received \$6000.00 for his employment in 2010. Additionally, Plaintiff testified that as a result of Defendants' actions, including his wrongful termination, he was forced to obtain loans in the amount of \$120,000.00 to cover his daily living expenses. Further, Plaintiff established that he had incurred costs in prosecuting this action, including service and filing fees, in the amount of \$748.35. Finally, pursuant to the Order of Judge Steven H. John, Plaintiff's counsel filed with the Court an affidavit of fees and costs incurred as a result of the

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continuance of the January 14, 2013 damages hearing. The affidavit contains an itemized statement of fees and costs, and the total amount claimed in the affidavit is \$4269.10.

While Plaintiff requested an award of punitive damages and attorney's fees (beyond those specifically authorized in Judge John's previous Order), the Court finds that Plaintiff has not presented the Court with clear and convincing evidence to support such an award at this point in the litigation. Similarly, Plaintiff requested additional damages in the amount of \$40,000.00, representing his capital contribution to Development Systems International, LLC. However, the Court finds an award of these damages is not proper because Plaintiff maintains an equity position with the company.

Therefore, based upon the documents filed with the Court, as well as the testimony of Plaintiff, the Court finds that Plaintiff is entitled to the following damages:

<u>Description</u>	<u>Amount</u>
Salary and Commissions (less the amount received, \$6000.00)	\$395,000.00
Loans	\$120,000.00
Costs	\$748.35
Attorney's Fees and Costs (Pursuant to the Order of Judge John)	\$4269.10
<b>TOTAL</b>	<b>\$520,017.45</b>

### CONCLUSION AND ORDER

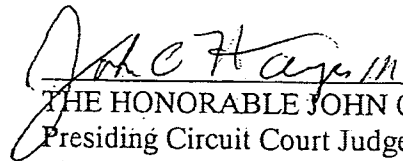
Based upon the foregoing,

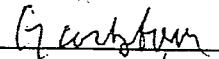
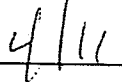
It is hereby **ADJUDGED, ORDERED AND DECREED**, that the Motion to Set Aside Order of Default filed by Defendants David W. Auterson, John R. Curtis, James P. LaRose, Robert C. MacConnell and Sandra M. Morckel is hereby DENIED;

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It is further **ADJUDGED, ORDERED AND DECREED**, that Plaintiff is entitled to a judgment against Defendants David W. Auterson, John R. Curtis, James P. LaRose, Robert C. MacConnell and Sandra M. Morckel, in the amount of Five Hundred Twenty Thousand Seventeen and 45/100 Dollars (\$520,017.45).

**AND IT IS SO ORDERED.**

  
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THE HONORABLE JOHN C. HAYES, III  
Presiding Circuit Court Judge  
Fifteenth Judicial Circuit #11

  
\_\_\_\_\_, South Carolina  
  
\_\_\_\_\_, 2013