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SC Court of Appeals

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO 2020CP042058

Brittany Holbrooks,

Plaintiff,

v.

South Carolina Department of Transportation, Bagwell Fence Company, Inc, and the Lane Construction Corporation,

Defendants.

ORDER GRANTING DEFENDANT LANE CONSTRUCTION CORPORATION'S MOTION TO SET ASIDE ENTRY OF DEFAULT & ORDER DENYING BAGWELL FENCE'S MOTION TO DISMISS AND STRIKE LANE'S ANSWER

On August 31, 2022, this matter was called for hearing on (1) Defendant Lane Construction Corporation's ("Lane") Motion to Set Aside Entry of Default and upon (2) Defendant Bagwell Fence's ("Bagwell Fence") Motion to Dismiss Lane's Crossclaim and to Strike Lane's Answer. Participating at the hearing were David R. Price, Jr. and Ronnie L. Crosby for the Plaintiff, Elizabeth A. Martineau for Defendant Lane, and Richard E. McLawhorn for Defendant Bagwell Fence ("Bagwell Fence"). Also present for the hearing was A. Todd Darwin, attorney for South Carolina Department of Transportation ("SCDOT").

PROCEDUREAL HISTORY & FACTS RELEVANT TO THIS ORDER

Plaintiff, Brittany Holbrooks, seeks recovery for injuries she sustained as a passenger in a vehicle versus guardrail highway accident that occurred on or about March 23, 2019, on I-85 in Anderson County, South Carolina.

- Plaintiff filed her original Complaint on October 27, 2020 naming only Defendants South Carolina Department of Transportation ("SCDOT") and Bagwell Fence Company, Inc. ("Bagwell Fence"). Lane was not a party to the original Complaint.
- Thereafter on December 28, 2020, Plaintiff filed an Amended Complaint against SCDOT and Bagwell Fence. Lane was not a party to the Amended Complaint. The Amended Complaint was similar to the original Complaint, and alleged Plaintiff's injury arose out of the 2017-2018 Interstate Guardrail Program."
- On March 18, 2021, Plaintiff, SCDOT, and Bagwell Fence entered into a Consent Scheduling Order. Lane was still not a party to this case. The Consent Scheduling Order allowed the Order to be modified in whole or in part, at any time upon written consent of all parties or by written order of the Court.
- Plaintiff, SCDOT, and Bagwell Fence undertook discovery, and on May 19, 2021, Plaintiff was deposed. Lane was not a party to the case at this time.
- Erik R. Garcia, the driver of the vehicle, was deposed on August 13, 2021. Again, Lane was not a party to this case at the time of the driver's deposition.

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- On September 28, 2021, Plaintiff supplemented her discovery and identified expert witnesses. Lane was not a party to the case at the time of this designation.
- Almost a year after filing her original Complaint, on October 13, 2021, Plaintiff filed a Second Amended Complaint. The Second Amended Complaint did include Lane as a Defendant.
- The Second Amended Complaint alleged that Lane "is engaged in the sale, installation and maintenance of guardrails used throughout the State of South Carolina and was responsible for the installation of the guardrail involved in the subject collision."
- The Second Amended Complaint alleged that Lane was awarded a bid as General Contractor on March 8, 2001 and "[a] a result, Lane installed guardrails, including the guardrail involved in the subject collision…"
- According to the Second Amended Complaint the accident in question occurred approximately eighteen years (18) after Lane was allegedly awarded the contract.
- Plaintiff filed her Certificate of Service as to Lane showing that Lane was served with a copy of the Second Amended Complaint through its duly registered agent in South Carolina on October 21, 2021.
- Lane failed to answer or otherwise respond to the Second Amended Complaint within the time permitted under the SC Rules of Civ. Procedure.
- Plaintiff filed an affidavit of default on December 7, 2021, and the Court made an Entry of Default as to Lane on December 10, 2021.
- Lane was served and Ms. Washington contends in her affidavit that she received a copy of the Notice of Default hearing on January 26, 2022. Ms. Washington alleges in her affidavit that she searched her email and discovered that she had missed opening an October 26, 2021 email from Lane corporate attaching notice of service of the Second Amended Complaint; the original complaint naming Lane for the first time. (Washington Aff.).
- The Undersigned Elizabeth Martineau, of Martineau King, filed her Notice of Appearance on behalf of Lane on January 31, 2022.
- The Undersigned thereafter reached out to Plaintiff's counsel to inquire if they would agree to set aside the entry of default. They declined.
- On February 3, 2022, Lane filed and served its Motion to Set Aside the Entry of Default.
- On February 4, 2022, Lane served its first set of discovery upon the Plaintiff. Plaintiff has not answered this discovery.
- On February 25, 2022, Lane filed and served its Answer to the Second Amended Complaint.
- On March 4, 2022, Lane filed its Amended Answer & Crossclaims to the Second Amended Complaint. Lane asserted crossclaims against Defendant SCDOT and Bagwell Fence for equitable indemnity.

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- On March 8, 2022, Bagwell Fence filed its Motion to Dismiss Lane's Crossclaim, and to Strike Lane's Answer.
- On April 22, 2022, Lane filed an Affidavit of Lane's Area Claims Manager, Nicole D. Washington. In her affidavit, Ms. Washington identified her position with Lane, and asserted and alleged the reasons she believes she missed the email notifying her of the Second Amended Complaint, what actions she took when she realized an entry of default had been entered against Lane, and her investigation and conclusion that Lane did not install the guardrail in question. (Washington Aff.).
- On August 19, 2022, investigating officer, Officer JD Brown was deposed. Lane was present and participated in this deposition.
- On August 29, 2022, Lane filed an Affidavit of Jeffrey D. Nichols. In his affidavit Mr. Nichols identified his position with Lane, his role on the original I-85 road widening project that took place in the early 2000s, and provided the identity of the company that he understood purchased and installed the guardrail that was done on that project. He identified the entity that did the guardrail work on the original project was the Sharon Company, Inc.
- The Court set the hearing on Lane's Motion to Set Aside the Entry of Default and on Bagwell Fence's Motion to Dismiss Lane's Crossclaim and motion to Strike its Answer for August 31, 2022.

STANDARD FOR SETTING ASIDE ENTRY OF DEFAULT UNDER RULE 55(C)

I. For Good Cause Shown Standard for Setting Aside Entry of Default

Because no default judgment has been entered against Lane, the standard the Court should use to determine, in the Court's discretion, if the entry of default should be set aside is the *for good cause shown s*tandard under Rule 55(c) of the South Carolina Rules of Civil Procedure. Rule 55(c) states:

> 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 aside in accordance with Rule 60(b).

R. 55(c), S.C. R. Civ. P.

The *for good cause shown* standard is different and less onerous that the *excusable neglect* standard under Rule 60(b) for an actual default judgment. *Sundown Operating Co. v. Intedge Indus*., 383 S.C. 601, 681 S.E.2d 885 (S.C. 2009). In *Sundown*, our state Supreme Court acknowledged that in the past there was "confusion in the case law regarding the standards for relief set forth in Rule 55(c) [*for good cause shown*] and Rule 60(b) [*excusable neglect*]." *Id.*, 607. (Emphasis added). Our state Supreme Court further explained:

> 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.'"

Id.

(Emphasis added). Our state Supreme Court then reiterated what has become known as the *Wham* Factors a court should use in determining whether mere good cause exists to set aside an entry of default. *Id.* Under *Wham v. Shearson Lehman Bros., Inc*., 298 S.C. 462, 465, 381 S.C.2d 499, 501-02 (Ct. App. 1989), once the moving party puts 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.

Id. See also Sundown, 383 S.C., 608.

Unlike the mere good cause standard, the excusable neglect standard under Rule 60(b), not applicable to this case, would require a party to show "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b), S.C. R. Civ. P. (Emphasis added). Conduct that our courts have held do not rise to the level of excusable neglect include:

- failure of a party to monitor the progress of their case;
- lack of understanding of the legal process; and
- failure to forward a copy of the summons and complaint to the insurance carrier.

*Paul Davis Sys. V. Deepwater of Hilton He*ad, LLC, 362 S.C. 2020, 2025, 607 S.E.2d 358, 361 (Ct. App. 2004) (analyzing the Rule 60(b) *excusable neglect standard*); *Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 987 (Ct. App. 2001) (same). *See also, Hilton Grps, PLC v. Branch Banking & Tire Co*., No. 2:05-937-DCN, 2007 U.S. Dist. LEXIS 50354, at *7-8 (D.S.C. July 11, 2007) (describing the corresponding and essentially identical federal version of Rule 60(b)). The South Carolina District Court in *Hilton Grps*., described that *excusable neglect* "may encompass delays caused by inadvertence, mistake or carelessness…" *See also, Wham,* 298 S.C., 500-501.

II. Entry of Default Should be Set Aside to Promote The Interests Of Justice And To Have Matters Heard On The Merits

Finally, our courts have made clear that when ruling on a Rule 55(c) for good cause motion, the rule should be liberally construed to promote justice and dispose of cases on the merits." *Bage v. Southeastern Roofing Col of Spartanburg, Inc*., 373 S.C. 457, 471, 646 S.E.2d 153, 160 (Ct. App. 2007) (emphasis added). Courts should construe Rule 55(c) setting aside entry of defaults "liberally" to "see that justice is promoted," and "to strive for disposition of the cases on their merits." *Ricks v. Weinrauch*, 293 S.C. 372, 374-75, 360 S.E. 2d 535, 536 (Ct. App. 1987) (emphasis added) (where the Court of Appeals set aside an entry of default for good cause shown). S*ee also Dawson v. Charleston County Sch. Dist.* 2017 S.C. C.P. LEXIS 280, *5 (Charleston County. May 5, 2017) (where the Charleston County, Court of Common Pleas set aside an entry of default for good cause shown).

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LANE MEETS THE *FOR GOOD CAUSE* STANDARD RELEVANT TO RULE 55(C) AND THIS COURT SHOULD LIFT THE ENTRY OF DEFAULT AGAINST IT

I. Lane has Provided a Satisfactory Reason for the Default

The affidavit submitted by Nicole D. Washington, Lane's Area Claims Manager, provides a satisfactory explanation as to why Lane did not timely answer the Second Amended Complaint. Lane does not submit this affidavit for the purpose of arguing that Lane can meet the excusable neglect standard. Lane submits this affidavit to show that Ms. Washington unfortunately simply did not see nor open the email that would have alerted her to the existence of the Second Amended Complaint naming Lane. This omission was an unfortunate, but good faith, mistake during a time of working from home and school upheaval. She did not purposefully ignore or knowingly sit on a legal action against Lane in this instance. (Washington Aff.).

This omission was not due to a failure to monitor the case, lack of understanding of legal process, or knowing failure to send a copy of the complaint to an attorney or insurance company. This omission was from an oversight of not seeing or appreciating that there existed a Second Amended Complaint naming Lane in a lawsuit. (Washington Aff.). Showing of good cause under Rule 55(c) does not require showing one acted free of mistakes or an act of inadvertence. *Ricks*, 293 S.C. 372. Lane need not meet the higher threshold to show excusable neglect.

Once Ms. Washington received and opened the January 26, 2022 email with the entry of default, she sprang into action in order to protect Lane's interest as best she could. (See Washington Aff.). She immediately contacted the undersigned and undertook an investigation of the allegations asserted against Lane in the Second Amended Complaint. *Id.*

II. Lane Can Satisfy the Wham Factors

a. <u>Timing of Relief</u>

Within five days after receiving the notice of entry of default (and within two and one half months after the Second Amended Complaint was served) Lane's counsel filed her notice of appearance. Three days later, Lane's counsel filed her Motion to Set Aside Entry of Default, on February 3, 2022. Lane, thereafter, answered, served discovery, and filed an amended answer.

Here Lane acted promptly to move to set aside the entry of default, assert an answer, and serve discovery. Lane's counsel has subsequently collected all of the prior pleadings and discovery in the matter, reviewed depositions, and attended the deposition of Officer Green. Lane clearly can meet this factor for setting aside the entry of default.

b. <u>Lane's Meritorious Defense</u>

As set forth above, this matter arises out of an automobile versus guardrail accident that occurred on March 23, 2019. Plaintiff's Second Amended Complaint – as to Lane – alleges that Lane is "engaged in the sale, installation and maintenance of guardrails used throughout South Carolina." The Second Amended Complaint further alleges that Lane "installed guardrails, including the guardrail involved in the subject collision."

To establish that a party has a meritorious defense, a party need not show that it would prevail on the merits, only that its defense is meritorious. *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989). A meritorious defense need only be one "worthy of a hearing or

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judicial inquiry because it raises a question of law deserving of some investigation or a real controversy as to real facts arising from conflicting or doubtful evidence." *Id.* (quoting *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978)).

Lane alleges that it did not install the guardrail in question. Lane also alleges that it did not design, assemble, sell, supply, distribute, or maintain the guardrail or the guardrail material that is the subject matter of this Second Amended Complaint. (See Nichols Affidavit).

Mr. Nichols affidavit alleges that Lane did work on the I-85 project back in the early 2000s. The affidavit further alleges and describes SCDOT, Lane's and, the Sharon Company's role on the project. South Carolina adheres to the traditional rule that holds an employer is not generally liable for the torts of an independent contractor related to the performance of contracted for work. (Nichols Aff.). *See Duane v. Presley Constr. Co*. 270 SC 682, 683, 244 S.E. 2d 509, 510 (1978). *See also, Cherry v. Myers Timber Co*., 404 S.C. 596, 601, 745 S.E. 2d 405, 407 (Ct. App. 2013). However, thus far no contract as to Lane has been produced or located in this action.

Finally, during argument, counsel for Lane proffered previous deposition testimony in this case, including testimony of the responding officer, Officer Brown, which potentially could be additional grounds to support a meritorious defense.

c. <u>Plaintiff Would Suffer No Prejudice If This Court Set Aside The Default</u>

Here the parties have proceeded with discovery prior to bringing Lane into the case and since Lane has been a named defendant. There has been no adverse effect on the ability of the Plaintiff or other Defendants to collect evidence or take depositions.

By setting aside the default, the Plaintiff will have to do only that which she would have had to do in the first place, which is to litigate the claim through trial on the merits. Accordingly, setting aside default will allow both parties an opportunity to establish their case and provide a just result.

Dawson v. Charleston County Sch. Dist, 2017 S.C. C.P. LEXIS 280 *6.

CONCLUSION

For these reasons, and for good cause shown, Defendant Lane is entitled to an order setting aside and/or otherwise relieving it from default pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure. Because this Court has Allowed Lane's Motion to Set Aside the Entry of Default, Bagwell Fence's Motion to Dismiss and Motion to Strike Lane's Answer due to the entry of default should be and is DENIED.

ACCORDINGLY, it is hereby ORDERED that Lane's Motion to Set Aside Entry of Default is GRANTED and Bagwell Fence's Motion to Dismiss Lane's Crossclaim and Motion to Strike Lane's Answer is DENIED.

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SO ORDERED.

____

The Honorable Cordell J. Maddox, Judge Presiding

Anderson County, SC

_____ October 2022.

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Anderson Common Pleas

Case Caption:	Brittany Holbrooks VS Transportation South Carolina Department of , defendant, et al
Case Number:	2020CP0402058
Type:	Order/Set Aside Judgment

So Ordered

s/ J. Cordell Maddox Jr.

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