

EXHIBIT A

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) CIVIL ACTION NO.: 2021-CP-01-00076

COUNTY OF ABBEVILLE

)

WILLIAM F. NICKLES, IV,

)

PLAINTIFF,

)

)

V.

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)

**ORDER ON DEFENDANT'S
MOTION TO RECONSIDER AND SETOFF**

HOWAR EQUIPMENT, INC.,
SONOCO PRODUCTS COMPANY,
PALMETTO STATE
TRANSPORTATION, LLC,
KSC LOGISTICS, INC., AND
JOHN DOE CORPORATION.

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DEFENDANTS.

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THIS MATTER came before the Court on Thursday, May 30, 2024 at 11:00 a.m. on Defendant KSC Logistics Inc.'s Motion to Alter or Amend and in the Alternative to Provide for Setoff. Thomas E. Hite, III, counsel for Plaintiff William F. Nickles, IV (hereinafter "Plaintiff Nickles") and Daniel Atkinson, counsel for Defendant KSC Logistics Inc. ("hereinafter Defendant KSC") appeared in person at the Laurens County Courthouse.

Based on the memorandum of law submitted by the parties, witness testimony, oral arguments presented at the hearing, and other evidence submitted to the Court, and for the reasons more fully set forth below, the Defendant's Motion to Alter or Amend is DENIED and the Motion for Setoff is GRANTED.

Brief Summary of the Facts

On April 12, 2021, the Plaintiff filed a Summons and Complaint against Defendant KSC and others for severe and permanent injuries he received after being struck by a faulty reel. Plaintiff's counsel dismissed KSC without prejudice on August 23, 2021. Thereafter, on November

19, 2021, the Plaintiff filed an Amended Summons and Complaint, renaming KSC as a Defendant in the case. The Affidavit of Service filed with the Court shows Plaintiff's process server personally served William Kelley, KSC's President and Registered Agent, with the Amended Summons and Complaint on December 16, 2021.

Plaintiff filed an Affidavit of Default on February 7, 2022. Plaintiff served a Notice of Hearing and Notice of Motion to Set Damages on Default on KSC on November 27, 2023. Counsel for Defendant KSC filed an appearance on December 7, 2023, along with a Motion to Set Aside Entry of Default. The undersigned held a hearing on the Motion to Set Damages on Default on December 18, 2023. On January 30, 2024, the undersigned also heard Defendant's Motion to Set Aside Entry of Default. On February 7, 2024, the undersigned issued an order denying Defendant KSC's Motion to Set Aside Entry of Default for lack of good cause. On February 29, 2024, an Order Assessing Damages was issued in the amount of \$972,117.33 against Defendant KSC.

On March 11, 2024, Defendant KSC's counsel filed a Motion to Alter or Amend pursuant to Rules 59 and 60, South Carolina Rules of Civil Procedure, and, in the alternative, to provide for setoff. Plaintiff Nickles' Counsel filed a Memorandum in Opposition, and the matter was heard on May 30, 2024, as stated above.

Standard of Review

"[T]he power to set aside a default judgment is addressed to the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Fassett v. Evans*, 364 S.C. 42, 49, 610 S.E. 2d 841, 845 (Ct. App. 2005). It is well-established South Carolina law that a party cannot use a Rule 59(e) motion to present an issue the party could have raised prior to judgment but did not. *Hickman v. Hickman*, 301 S.C. 455,

456, 392 S.E. 2d 481, 482 (Ct. App. 1990). Pursuant to Rule 60(b) of the S.C. Rules of Civil Procedure, after the filing of a proper motion, “the court may relieve a party ... from a final judgment, order or proceeding for ... newly discovered evidence which *by due diligence* could not have been discovered in time to move for a new trial under Rule 59(b).” Rule 60(b), SCRCPP (emphasis added). The standard for granting relief from a default judgment under Rule 60(b) is *more rigorous* than the standard for granting relief from an entry of default under Rule 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E. 2d 535, 536 (Ct. App. 1987) (emphasis added). In order to be relieved from a default judgment pursuant to Rule 60(b), “a more particularized showing of mistake, inadvertence, excusable neglect, fraud, misrepresentation, or other misconduct of an adverse party” is required, making it “more difficult for a party to avoid default” once a judgment has been entered. *Sundown Operating Co. v. Intedge Industries, Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888-889 (2009). Finally, “when considering whether to grant relief from final judgments, ‘a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute.’” *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004)(citing *Chewing v. Ford Motor Co.*, 354 S.C. 72, 80, 579 S.E.2d 605, 609 (2003)).

Law and Analysis

Defendant KSC alleges, among other factors, that newly discovered evidence in its possession, namely deposition testimony and e-mails located within the office manager’s control, establish that it had no liability in the matter and that the Court should grant its Motion to Alter or Amend the Default Judgment and Order. In order to obtain relief based on newly discovered evidence under Rule 60, SCRCPP, the moving party must show that the evidence (1) is of such magnitude that had the court known of it earlier, the outcome would likely have been different; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the

issue; and (5) is not merely cumulative or impeaching. *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2004). In analyzing the evidence before the Court and arguments presented by Counsel pursuant to the test set forth in *Lanier*, I find that although the evidence submitted by Defendant KSC is likely enough to establish factors 1, 2, 4 and 5, factor 3 has not been met.

The *Lanier* court expounded upon factor 3, holding “evidence is not newly discovered evidence for the purposes of Rule 60(b)(2) where the evidence was (1) known to the party at the time of trial, and (2) in the party’s possession.” *Lanier*, 364 S.C. at 218, 612 S.E.2d at 459. If either or both of these factors are found in the affirmative, then the party’s attempt to find the evidence “newly discovered” fails. There is no question the evidence was in the party’s possession, as the e-mails Defendant references were accessible to the office manager and located on Defendant’s computer / hardware. Further, as mentioned above, the evidence should have been known to the party because Plaintiff referenced the depositions at issue in a Memorandum filed with this Court and served on Defendant’s Counsel. At a minimum, the Defendant had constructive knowledge of the existence of the evidence at issue. Further, it is without question that the evidence was in the possession of the Defendant.

In *Lanier*, the Court looked at the case of *Lans v. Gateway 2000, Inc.*, 110 F.Supp.2d 1 (D.D.C.2000), in analyzing whether evidence was in the party’s possession. In that case, Lans cited a Clarification Contract as the basis for the Rule 60 motion, noting he was aware of the contract at the time of trial but could not locate it. The *Lans* court explained that “documents in the possession of a party’s agent, such as an attorney or accountant, are deemed to be in the party’s possession because the party retains control over the documents.” *Id.* (citations omitted). In the instant case, the e-mails at issue were in the possession of Defendant KSC’s office manager. KSC’s

President, Chuck Kelley, admits in an Affidavit that only after the arguments on the Motion to Set Aside Default did he “initiate[] a search of third parties’ emails, to which he was not a party,” including emails sent to his office manager. *Defendant’s Memorandum*, p. 5. In fact, in Mr. Kelley’s Second Affidavit, he stated, under oath, that “*following learning of default in this case,*” he had reviewed company emails, found a string of emails from Prysmian employees, counsel and his office manager, which he believed confirmed the reels at issue were not in KSC’s possession. *Second Affidavit of Kelley*, filed March 11, 2024, at ¶ 7-8 (emphasis added). At the hearing of this matter, Mr. Kelley testified that he made reasonable efforts to track down this information as soon as possible but at no time did he deny that it was in the Defendant’s possession at the time of the trial. As President of Defendant KSC, Mr. Kelley had full authority to access those e-mails prior to trial but did not. “South Carolina’s strong policy towards finality of judgments trumps a party’s ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial.” *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004). For these reasons, the Court denies the Motion under Rule 60(b).

As to Defendant’s Motion for Setoff, Plaintiff concedes that setoff is proper pursuant S.C. Ann. §15-38-50 (2005). “When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, *but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater*; and (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.” S.C. Code Ann. § 15-38-50 (emphasis added). Plaintiff Nickles acknowledges settlement with each of the other Defendants prior to issuance of the default

judgment in the amount of \$15,000.00 each, for a total of \$30,000.00. Therefore, setoff in the amount of \$30,000.00 is proper and Defendant's Motion as to this point is granted.

Conclusion

For the reasons stated above, it is therefore ORDERED that Defendant's Motion to Alter or Amend based on Rule 60(b) is hereby DENIED. Defendant's Motion for Setoff is GRANTED, and the default judgement previously rendered shall be set off in the amount of \$30,000.00 making the final default judgment \$942,117.33 against Defendant KSC Logistics, Inc.

AND IT IS SO ORDERED.

The Honorable Judge Donald B. Hocker
Court of Common Pleas
Eighth Judicial Circuit

July _____, 2024
Laurens, South Carolina



Abbeville Common Pleas

Case Caption: William F Nickles Iv VS Palmetto State Transportation Llc ,
defendant, et al
Case Number: 2021CP0100076
Type: Order/Other

Circuit Court Judge

s/Donald B. Hocker, Judge Code 2167

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