STATE OF SOUTH CAROLINA COUNTY OF CHESTERFIELD Steven Carol Miller, Plaintiff, v. Gene Carson Jordan, Defendant.	)	IN THE COURT OF COMMON PLEAS FOURTH JUDICIAL CIRCUIT CASE NO. 2019-CP-13-173 **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT**

This matter comes before this Court on Defendant Gene Carson Jordan's June 24, 2020 Motion for Relief from the February 12, 2020 Judgment and Plaintiff Steven Carol Miller's October 14, 2022 Motion to Dismiss/Strike Defendant's Motion for Relief from Judgment. A hearing was held on October 2, 2023 before the undersigned as Special Referee. Plaintiff's Motion was denied, Defendant's Motion was taken under advisement, and Plaintiff was directed to submit a memorandum addressing Defendant's arguments. Plaintiff's memorandum was filed on December 8, 2023, and Defendant filed a Reply on December 11, 2023. This Court having considered all relevant evidence, pleadings presented, and applicable case law and statutory law **GRANTS IN PART AND DENIES IN PART** Defendant's Motion based upon the following:

FINDINGS OF FACT

Plaintiff filed a Summons and Complaint in Chesterfield County, South Carolina, Court of Common Pleas on March 18, 2019. Plaintiff had been attacked by a dog belonging to the Defendant and alleged Negligence, Gross Negligence, Negligence Per Se, and Animal Injury Liability causes of action. The Complaint was served upon Defendant on March 20, 2019 via Certified Mail, Restricted Delivery. Defendant failed to file a timely response.

An Entry of Default and Motion for Order of Reference was filed on May 3, 2019. On May 6, 2019, the Court found the Defendant in default and an order was issued referring the matter to my office. The next day, May 7, 2019, Defendant's insurer, Alder Adjusting Corporation, ("Alder") mailed a letter to the Defendant denying coverage. On May 13, 2019, Alder sent a letter to Plaintiff's counsel requesting a letter of representation and forwarding all evidence in Plaintiff's possession that supported the allegations contained in the lawsuit against the Defendant that was filed and served nearly two months prior. The next day, May 14, 2019, Alder sent another letter to Plaintiff's counsel informing him that coverage had been denied and attached a copy of the May 7, 2019 letter to Defendant.

A Certificate of Service, dated September 13, 2019, indicates notice was sent to the Defendant, however he did not appear at the September 16, 2019 damages hearing. No representative for Alder or assigned counsel for Defendant were present at the damages hearing, either. The Special Referee rendered a total judgment for $833,00.00 on February 12, 2020. Defendant appealed the Default Judgment to the South Carolina Court of Appeals on April 22, 2020, seeking leave from the Court to file a Rule 60(b) motion with the trial court. This motion was granted on May 14, 2020.

On June 18, 2020, Defendant filed Notice of Motion and Motion for Relief. Defendant amended this filing on June 24, 2020. Plaintiff filed a Motion to Dismiss/Strike Defendant's motion on October 14, 2022, citing an unreasonable and prejudicial delay in Defendant seeking to have their motion to be heard. On October 2, 2023, oral arguments were held for Plaintiff's Motion.

CONCLUSIONS OF LAW

"A party making a motion under Rule 60(b) 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). "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)." *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App.1987). "The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default." *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888-89 (S.C. 2009).

"Under Rule 55(c), *SCRCP*, a default may be set aside 'for good cause shown.' On the other hand, the criteria for obtaining relief from judgment mandates a showing, inter alia, of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b), *SCRCP*. As a practical matter, these factors are relevant under both rules." *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993).

South Carolina Rules of Civil Procedure Rule 60(b) states:

> On motion and upon such terms are as just, the court may relieve or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or the misconduct of an adverse party;
>
> (4) the judgment is void; or
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should prospective application. Rule 60(b), *SCRCP*.

In determining whether to grant a motion to vacate a judgment under Rule 60(b), the trial considers a much more stringent analysis than a "good cause" standard of a Rule 55(c) motion: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party. *New Hampshire Ins. Co.*, 312 S.C. 47 at 50. (*quoting* Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985)). "The movant has the burden of presenting evidence proving the facts essential to entitled him to relief." *Bowers*, 304 S.C. at 67, 403 S.E.2d at 129.

Defendant has failed to meet their burden as to why this court should vacate the entry of default. There is ample evidence that Defendant's insurer was on notice of the lawsuit but failed to act in a timely manner to prevent the default. However, Defendant has persuaded this Court that the Defendant was not properly noticed for the damages hearing. Thus Defendant's motion is **GRANTED IN PART** to rescind the judgment amount but is **DENIED IN PART** to set aside the actual entry of default.

1. Defendant's argument that Plaintiff's Complaint is deficient is an argument that should have been made prior to the default judgment.

Once a default judgment has been rendered, the Defendant can no longer argue the merits of Plaintiff's allegations. "A defendant in default admits liability..." *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 757 S.E.2d 557, 558 (Ct. App. 2014) (*quoting Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012). Any liability argument Defendant could have made was extinguished after the default was entered.

Even if Defendant could make this deficiency argument, a meritorious defense is <u>*also*</u> required to vacate the default judgment. The Court in *McClurg v. Deaton* emphasized the importance of a meritorious defense:

> A meritorious defense is more than merely a factor to consider under certain 60(b) grounds for setting aside default judgments. In particular, our courts have held that in order to obtain relief from a default judgment under Rule 60(b)(1) or 60(b)(3), not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense. *McClurg v. Deaton*, 671 S.E.2d 87, 92, 380 S.C. 563 (Ct. App. 2008).

This defense needs to be "...one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence..." *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 900 (S.C. 1988). Defendant has not made a sufficient argument that the facts of the case are not just as alleged in the complaint. It is undisputed that a dog belonging to the Defendant bit the Plaintiff. The Plaintiff was in a lawful place when he was bitten, and the Defendant is liable for Plaintiff's injuries.

Defendant's argument that Plaintiff's Complaint does not sufficiently plead a duty owed to the Plaintiff by the Defendant falls short. Plaintiff is not required to cite verbatim codified South Carolina Law in his Complaint. S.C. Code Ann. § 47-3-110 clearly establishes strict liability in a situation such as this:

> If a person is bitten or otherwise attacked by a dog while the person is in a public place or is lawfully in a private place, including the property of the dog owner or person having the dog in the person's care or keeping, ***the dog owner or person having the dog in the person's care or keeping is liable for the damages suffered by the person bitten or otherwise attacked***. S.C. Code Ann. S.C. Code Ann. § 47-3-110(a) (2012) (emphasis added).

Plaintiff makes an indirect reference to this law in Paragraph 6 of the Complaint stating that Defendant engaged in "unlawful acts". (Complaint pg. 2). Plaintiff makes a direct reference to this law in Paragraph 10 of the Complaint:

> Under South Carolina law, someone who harbors, cares for, and controls a dog, and someone or some entity which controls the use of property where the dog runs at large has a duty not to allow the property's use or a dog staying at or about said property to harm other human beings. If such harm occurs, the Defendant, as controller of the dog, is strictly liable for a person's injuries and damages. (Complaint pg. 3).

South Carolina Rules of Civil Procedure 8(a) states, "[a] pleading which sets forth a cause of action . . . a short and plain statement of the facts showing that the pleader is entitled to relief, and a prayer or demand for judgment for the relief to which he deems himself entitled." Rule 8(a), *SCRCP*. "The grant of a motion to dismiss for failure to state facts sufficient to constitute a cause of action cannot be upheld if facts alleged in the complaint and inferences reasonably deducible therefrom, if proven, would entitle the Plaintiff to relief ***on any theory of the case***." *Newton v. South Carolina Public Railways Com'n*, 462 S.E.2d 266, 319 S.C. 430 (S.C. 1995) (emphasis added). The facts of the Plaintiff's Complaint were sufficiently plead.

2. South Carolina Law does not require that Special Referee damages hearing be transcribed.

Defendant cites no direct authority that clearly states that there must be a court reporter or at least a transcription necessary to hold an unliquidated damages hearing by special referee. In *Winesett,* the Court explained the proper procedure for defending against a default judgment is to file a motion to vacate. *Winesett v. Winesett*, 287 S.C. 332, 338 S.E.2d 340, 341 (S.C. 1985). By way of historical background, the Court noted, "[a]n early justification for this rule was that a defendant who does not appear and answer has no status in court which will enable him to appeal from the judgment rendered." *Id.* at 341. The Court goes on to elaborate, "[a]n additional justification is that a party appealing a default judgment will ordinarily be precluded from raising any issues on appeal because they were not first presented below." *Id.* The Court lastly notes,

"...the appellant will often not be able to meet his burden of providing this Court with a record sufficient to permit an adequate review." *Id.*

"[A]ppellant has [the] burden of presenting an adequate record which is sufficiently complete to permit this Court to review lower court's actions..." *State v. Knighton*, 512 S.E.2d 117, 334 S.C. 125, 136 (Ct. App. 1999). Defendant, as the movant of a Rule 60(b) motion, has the same burden of creating the record from which to make their argument to the trial court. "A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief." *McClurg*, 671 S.E.2d at 94.

As Defendant's motion has been **GRANTED IN PART**, Defendant will now have an opportunity to create whatever record he so chooses at the new hearing. If Defendant believes a court reporter is necessary, Defendant can schedule and arrange coordination with my office prior to the hearing.

3. Plaintiff's Certificate of Service is insufficient to prove proper notice was given.

Defendant argues that there was not sufficient time between the mailing of the notice and the damages hearing. Rule 5(a), SCRCP, requires service of notice of a damages hearing on a defaulting defendant where, as is the case here, the matter involves unliquidated damages. The South Carolina Supreme Court has "set a practice of claimant's counsel giving the defendant four days' notice of the time and place of hearing," *Wiggins v.* Todd, 296 S.C. 432, 434, 373 S.E.2d 704, 705 (Ct. App. 1988), *citing Lewis* and *Renney.*

Plaintiff maintains that Rule 55(b)(2) of the *South Carolina Rules of Civil Procedure* controls this situation and states that the defendant of an unliquidated damages hearing "...shall be served with written notice of the motion or application for judgment at least 3 days prior to the hearing on such application." Rule 55(b)(2), *SCRCP.* Rule 5(b)(1) states that "[s]ervice by

mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint." Rule 5(b)(1), *SCRCP*.

Plaintiff mailed a Notice of Hearing to Defendant on September 13, 2019, three days prior to the hearing according to the filed Certificate of Service. Out of an abundance of caution to see the ends of justice are met with a fair opportunity to be heard, this Court finds that service was not properly perfected for Plaintiff's Notice of Damages Hearing and thus the judgment amount that was rendered from that hearing must be reconsidered.

CONCLUSION

WHEREFORE, based on the finding of fact and conclusions of law set forth above, **IT IS THEREFORE, ORDERED, ADJUDGED** and **DECREED** that Defendant's Motion for Relief from Judgment is **GRANTED IN PART AND DENIED IN PART.** . The parties are instructed to schedule an additional damages hearing with this Court as soon as possible.

AND IT IS SO ORDERED!

Wallace H. Jordan, Jr.
Special Referee for Chesterifeld County

Florence, South Carolina
October 7, 2024