STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHEROKEE	)	CIVIL ACTION NO.: 2022-CP-11-00021
	)	
ANGELICA SHELEST, Plaintiff,	)	
	)	**ORDER DENYING DEFENDANTS' MOTION TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT**
v.	)	
	)	
MARTIN MAINA GITAU AND MARK ONE FREIGHT & LOGISTICS, LLC, Defendants.	)	

This matter came before me for hearing on April 1, 2025, for a hearing on Defendants' motion to set aside entry of default and default judgment. Present for Plaintiff Angelica Shelest was William F. Barnes, III, and Kathleen C Barnes. Present for Defendants Martin Maina Gitau ("Gitau") and Mark One Freight & Logistics, LLC, ("Mark One") was D. Dalton Barfield. Alexandria Jones was present for non-party Rift Valley Carriers. After carefully considering the parties' arguments and exhibits, and reviewing the applicable law and pleadings, the Court denies Defendants' motions.

This case arises out of a July 24, 2020 collision in which Defendant Mark Gitau, while driving a tractor-trailer owned by Defendant Mark One, hit a vehicle driven by Plaintiff Angelica Shelest. Shelest slowed down to make a left turn. Gitau was traveling behind her and failed to notice that she was turning. To avoid running into the back of Plaintiff's vehicle, Gitau swerved to the left and collided with Plaintiff as she was turning. A detailed account of Plaintiff's injuries is written in the Judgment and incorporated herein.

On January 11, 2022, Plaintiff filed a Complaint against Defendant Gitau and John Doe Trucking Company. (Cmplt.). The Summons and Complaint were delivered to Gitau's personal address by the South Carolina Department of Motor Vehicles. (DMV LTR about Green Card filed March 25, 2022). Gitau did not answer.

On May 26, 2022, Plaintiff filed an Amended Complaint against Gitau and replaced John Doe with Defendant Mark One. Mark One owned the tractor-trailer driven by Gitau on the day of the collision, and Gitau is the owner of Mark One. (Am. Cmplt.). On November 8, 2022, the Amended Summons and Complaint were properly served through personal service on Gitau individually and as the registered agent for Mark One. (Gitau & Mark One Affs. of Serv.). Defendants do not dispute that they received proper service.

Gitau and Mark One failed to answer or appear, and they are in default. (Order of Default). On June 26, 2023, this case was referred to the undersigned pursuant to Rule 53, SCRCP. (Order of Reference).

On September 20, 2023, Plaintiff sent Defendants notice of the damages hearing by first class mail in accordance with Rule 55(b), SCRCP. (Exh. to Judgment). The damages hearing occurred on October 3, 2023, and neither Defendant appeared. On February 26, 2024, the Court entered a judgment against Defendants in the amount of $5,136,817.82 in actual damages. (Judgment).

Ten months later, on December 19, 2024, Defendants filed a motion to set aside default under Rules 55(c) and 60(b), SCRCP. (Mot.). On March 28, 2025, Defendants filed a memorandum in support of the motion along with Defendant Gitau's affidavit and exhibits.

Defendants argued that, on the day of the accident, Gitau was driving for Rift Valley Carriers and not for Mark One. (Memo. pp. 2, 5). Defendants assert that, when Gitau received service of the Amended Complaint, Gitau called the owner of Rift Valley and notified him of the lawsuit. (Aff.). They state that Gitau is a "Kenyan immigrant" who is "unfamiliar with the United States legal system" and "believed that informing Rift Valley of the lawsuit was the extent of his responsive duty." (Memo. pp. 5, 9). Gitau's affidavit states he was driving for Rift Valley Carriers and not Mark One at the time of the accident. (Aff.). He attached pay stubs from

Rift Valley, but none shows payment for July 24, 2020—the date of the collision. (Exh. to Aff.). He attached a 2021 Form 1099 showing payments received from Rift Valley but the collision occurred in 2020. (Exh. to Aff.). Defendants submitted a crash report showing a crash for Rift Valley on July 24, 2020.

Plaintiff argued in opposition at the hearing and submitted exhibits to show that Gitau is familiar with and has used the U.S. legal system, argued the evidence shows Gitau was driving for Mark One at the time of the collision, and argued that Defendants misstate the evidence of actual damages to challenge the judgment amount.

ANALYSIS

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006).[1] After reviewing the applicable law and considering the parties' respective exhibits and affidavit, and exercising my discretion, I deny the motion for the independent reasons stated below.

A "court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect . . . ." Rule 60(b)(1), SCRCP. "In determining whether a default judgment should be set aside under Rule 60(b)(1), the promptness with which relief is sought, the reasons for the failure to act promptly, the existence of a meritorious defense, and the prejudice to the other parties are relevant." *Tobias v. Rice*, 379 S.C. 357, 366, 665 S.E.2d 216, 221 (Ct. App. 2008) (internal quotation and alteration marks omitted). When a party fails to put forth a satisfactory explanation for the default under

[1] Although Defendants cited to Rule 55(c), SCRCP, in their motion and opening argument, they acknowledged at the hearing that, because a judgment has been entered, Rule 60(b) and not Rule 55(c) applies to this case. (Tr. of hearing p. 25); *see Campbell v. City of N. Charleston*, 431 S.C. 454, 460, 848 S.E.2d 788, 792 (Ct. App. 2020) ("Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP."). Because Rule 55 does not apply, the Court analyzes the motion under only Rule 60(b).

Rule 60(b)(1), there is no need to address these factors. *Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct. App. 2013).

Defendants do not meet the threshold for a particularized showing of mistake, inadvertence, or excusable neglect under Rule 60(b)(1). Further, even if they could meet that standard, I find the other relevant factors do not support relief in these circumstances.

I. Defendants do not show mistake, inadvertence, or excusable neglect under Rule 60(b), SCRCP

"Rule 60(b) requires a more particularized showing of mistake" than the Rule 55(c) standard. *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). "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." *Id.* at 608, 681 S.E.2d at 888-89.

Defendants ask the Court to grant relief under Rule 60(b)(1) because (1) Gitau is supposedly unfamiliar with the United States legal system, and (2) Rift Valley and not Mark One is the proper defendant. Neither of these is a basis for relief under Rule 60(b)(1).

A. Lack of familiarity with the legal system

Defendants argue that Gitau is unfamiliar with the United States legal system and believed that his sole obligation upon receipt of service of process was to make one phone call to Rift Valley. The Court rejects this argument on three independent bases—first, it is a legally unsound basis for relief; second, the facts show Gitau is familiar with the legal system; and, third, there is no excusable neglect for failing to answer under the circumstances of this case.

Legally, "failure to understand the legal process is not excusable neglect under Rule 60(b)." *Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001); *see also Hillman v. Pinion*, 347 S.C. 253, 257, 554 S.E.2d 427, 429 (Ct. App. 2001) ("[B]ecause this is a mistake

of law, not fact, we find this is not the type of mistake, surprise, inadvertence, and excusable neglect generally contemplated by Rule 60(b)(1)."). "It is always a matter of regret that a party should not have his day in court. However, . . . [where] the appellant was duly served with the summons and complaint, [i]t was his duty to answer the complaint. . . ." *Hill*, 345 S.C. at 310, 547 S.E.2d at 897 (internal quotation marks omitted). Alleged unfamiliarity with the legal system is not a valid basis for excusable neglect under Rule 60(b)(1).

Second, even if it could be legally sufficient, I find that Defendants failed to prove Gitau is unfamiliar with the legal system. Gitau's affidavit does not state that he is unfamiliar with the U.S. legal system. That argument is made by counsel, which is not evidence. *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are also not evidence."). The evidence shows that he was familiar with the legal system.

Plaintiff presented an exhibit of a court record from Georgia in which Gitau filed and served a family court action. (Tr. of Hearing p. 16). Gitau is the owner of Mark One—a federal interstate motor carrier. Plaintiff presented paperwork from the Georgia Secretary of State showing Gitau as the registered agent for Mark One. Gitau applied for and obtained for Mark One a US DOT number from the Federal Motor Carrier Safety Administration. The evidence shows, and I find, that Defendants are familiar with the legal system.

Third, even if Gitau was unfamiliar with the legal system, that is still not a sufficient excuse for failing to answer the lawsuit under the circumstances. In February 2022, Gitau first received notice of the Summons and Complaint filed against him and John Doe. He did nothing in response to that notice. After receiving personal service of the Amended Summons and Complaint naming Mark One, Gitau called Rift Valley. That is the entirety of Defendants' actions taken in response to service of a lawsuit that included discovery requests.

Gitau does not state that he sent a copy of the Complaint to Rift Valley. (Aff.). Gitau does not state the Rift Valley told him it would file an answer on behalf of Mark One or Gitau. (Aff.). Defendants had actual knowledge that Rift Valley did not file an answer for them when they received notice of the damages hearing. They still did nothing to respond or appear, and Gitau did not even contact Rift Valley again to ask whether it answered for Defendants. In short, Defendants never had any assurance that Rift Valley would file an answer for them.

At the hearing, after Plaintiff argued that lack of familiarity with the legal process was not legally sufficient or shown in this situation, Defendants argued in reply that their "notifying the correct entity [Rift Valley] of this lawsuit should be enough for excusable neglect." (Tr. pp. 25-26). The Court disagrees. First, that does not explain why Gitau, individually, is excused from answering. Second, the requirement to answer a complaint is the law. Rule 12(a), SCRCP ("A defendant shall serve his answer within 30 days after the service of the complaint upon him" (emphasis added)). The Amended Summons plainly states the Defendants are "required to answer the Complaint in this action" within 30 days and that "if you fail to answer the Complaint," the Plaintiff "will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint." If Mark One believed it was incorrectly named, the proper remedy is to file an answer and assert that as a defense. Notifying the alleged "correct" party about the lawsuit is insufficient. "A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court." *McCall v. IKON*, 363 S.C. 646, 652, 611 S.E.2d 315, 318 (Ct. App. 2005) (internal quotation marks omitted).

The alleged lack of familiarity with the legal system is not a valid legal or factual basis for relief under Rule 60(b)(1).

B. Proper party defendant

Defendants argue that they are entitled to relief under Rule 60(b)(1) because Rift Valley—not Mark One—is the proper defendant. This is based on their argument that Gitau was driving for Rift Valley at the time of the collision. The evidence does not establish that Gitau was driving for Rift Valley to the exclusion of Mark One. Gitau's paystubs and Form 1099 do not show that he was driving for Rift Valley on July 24, 2020. There is a crash report showing Rift Valley was in a crash on July 24, 2020, in a location that may be the accident at issue in this case. However, it is not definitive proof that this accident is the same one in the crash report. Regardless, it does not establish that Mark One is an improper defendant.

Plaintiff argued, and the Court agrees, that the liability of Rift Valley and Mark One are not mutually exclusive. *See, e.g.*, *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co., LLC*, 425 S.C. 276, 294-95, 821 S.E.2d 509, 518 (Ct. App. 2018) ("The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury." (internal quotation marks omitted)). Defendants have not presented any legal authority to show that only either Mark One or Rift Valley can be a proper defendant. On the contrary, the tractor-trailer that hit Plaintiff was owned by Mark One. That Mark One may have agreed to pick up a load for Rift Valley would not absolve it of liability. Further, Plaintiff is the master of her complaint and may choose who to sue for her injuries. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 615, 879 S.E.2d 746, 757 (2022) ("It is a fundamental principle of law that the plaintiff is the master of his own complaint and is the sole decider of whom to sue for his injuries.").

That Defendants allege Gitau was driving for Rift Valley is not mistake, inadvertence, or excusable neglect under Rule 60(b)(1).

"The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief." *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503

(2006). Defendants failed to meet their burden to prove a mistake, inadvertence, or excusable neglect under Rule 60(b)(1). This makes it unnecessary for the Court to address the remaining factors. *Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct. App. 2013); *see also ITC Commer. Funding, Ltd. Liab. Co. v. Crerar*, 393 S.C. 487, 496, 713 S.E.2d 335, 339-40 (Ct. App. 2011) ("Having concluded the trial court did not abuse its discretion in finding the Appellant was not entitled to relief on any of the grounds specified in Rule 60(b), SCRCP, we need not address whether the Appellant has a meritorious defense."). However, even if Defendants could make the threshold showing, the Court still denies the motion because they fail to satisfy the remaining factors.

II. Defendants did not promptly seek relief

The Judgment was entered on February 26, 2024, and Defendants filed the Rule 60(b) motion on December 19, 2024—ten months later. They argue this is timely because it was filed within one year of the Judgment and within a month of Mark One's insurer learning about the Judgment. (Memo. in Supp. p. 6).

A "party has a duty to monitor the progress of his case." *Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001). Defendants received service of and knew about the lawsuit and the damages hearing. Yet, they ignored the legal process even with knowledge that Rift Valley had not filed an answer on their behalf. The procedure rules that govern the time periods to respond to a lawsuit are intended "to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. They do not allow a party to ignore the legal process and then ask for relief when it does not like what happened in its intentional absence. I find that Defendants did not timely seek relief.

III. There is not a meritorious defense

Defendants assert three meritorious defenses—(1) Rift Valley is really the proper defendant, (2) Plaintiff "stopped suddenly in the roadway" and may be liable for the accident, and (3) the medical bills total "$46,270.54" and the judgment is "in excess of 100 times the Plaintiff's medical bills." (Memo. in Supp. p. 7). None of these weigh in favor of granting relief.

A meritorious defense "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." *Williams v. Watkins*, 384 S.C. 319, 326, 681 S.E.2d 914, 918 (Ct. App. 2009) (internal quotation marks omitted).

As to the proper defendant, that is addressed above. That Rift Valley may be a potential Defendant does not make Mark One an improper one. Regardless, Rift Valley's inclusion as a defendant has no effect on Gitau's liability. That Rift Valley is a potential defendant is not a meritorious defense. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 615, 879 S.E.2d 746, 757 (2022).

As to Plaintiff's liability, the sole evidence is Gitau's affidavit stating that "immediately prior to the collision, the Plaintiff stopped her vehicle in the roadway without warning." (Aff. of Gitau). At the hearing, Plaintiff presented photos from the accident scene that showed no skid marks from a sudden stop and the accident report in which the responding officer estimated Plaintiff's speed as 15 mph and Defendants' speed as 45 mph. Considering the evidence in my discretion, I find that Defendants' argument does not rise to the level of a real controversy of a meritorious defense.

As to the damages amount, Defendants argue that the $5,136,817.32 judgment amount is more than 100 times Plaintiff's medical bills of $46,270.54. (Memo. in Supp. p. 7). At the hearing, Plaintiff argued this is an incorrect comparison because Defendants did not include the amount Plaintiff's future medical expenses, which totaled $743,407.28. (Judgment pp. 4, 8). On

reply argument, Defendants did not address this discrepancy. Therefore, the Court believes this argument is conceded. Regardless, even if it is not conceded, the Court disagrees that the ratio of the actual medical damages (past and future) to the judgment is a meritorious defense and incorporates the damages findings from the Judgment into this order. Further, Defendants' opportunity to challenge the damages was at the hearing of which they received proper notice.

Defendants have not shown a meritorious defense to warrant relief in this case.

IV. Prejudice to Defendants

Defendants argue that setting aside the default judgment will not prejudice Plaintiff. Their argument is based on the premise that Rift Valley—and not Mark One—is a proper defendant in this case. (Tr. of Hearing p. 10; Memo. in Supp. p. 8). As explained above, the Court disagrees with this premise and with the use of a motion to set aside a default judgment as a means to argue that Mark One is incorrectly named as a defendant. Regardless, the argument would still have no effect on a judgment against Defendant Gitau.

As another, independent basis for finding this factor does not weigh in Defendants' favor, the Court finds that Plaintiff would suffer prejudice. This accident occurred on July 20, 2020. Plaintiff filed and served the amended complaint by November 8, 2022, well within the statute of limitations. In response, Defendants did nothing and first raised an argument that Rift Valley is a proper party on March 28, 2025 in Defendant Gitau's affidavit. Defendants waited until after the three-year statute of limitations passed to assert that Rift Valley should be named as a defendant. Assuming for the sake of this motion that Defendants are correct (which as explained above, the Court does not find), there is obvious prejudice to Plaintiff. It is unclear when Rift Valley had knowledge of the lawsuit.

Defendants' argue that they believed in November 2022 (upon service of the Amended Complaint) that the lawsuit should have been brought against Rift Valley. (Aff. of Gitau). The

proper procedure was to answer the lawsuit and assert that defense. It is prejudicial to Plaintiff for Defendants to ignore the legal process, wait over two years to notify Plaintiff of that defense—with actual knowledge and notice that Plaintiff continued to litigate against Defendants—and then expect relief.

While it is desirable to decide a controversy on the merits, I find that Plaintiff would suffer prejudice if the judgment is set aside.

For these numerous and independent reasons, Defendants' motion is **DENIED**.

AND IT IS SO ORDERED.

April
May 30, 2025
Spartanburg, South Carolina

The Honorable Scott F. Talley
Special Referee