

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

DiscoverFresh Foods, Inc.,
Plaintiff,

v.

Jesus Concepcion, Kendry S. Tavarez a.k.a.
Kendry Solange Feliz, and National Risk
Solutions, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

**ORDER DENYING DEFENDANT'S
MOTION TO STAY, MOTION TO
VACATE, MOTION TO SET ASIDE
DEFAULT JUDGMENT, MOTION FOR
DISMISSAL, AND MOTION FOR
APPOINTMENT OF GUARDIAN AD
LITEM**

C.A. No.: 2022-CP-23-00240

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SC Court of Appeals

This matter came before the Court on October 6, 2025, for a hearing on a Motion to Stay and Vacate Default Judgment filed on February 11, 2025, a Motion for Appointment of Guardian Ad Litem filed on April 1, 2025, and a Motion to Set Aside Default Judgment, Final Judgment, and Dismiss filed on August 27, 2025, by Defendant Jesus Concepcion ("Mr. Concepcion"). Appearing at the hearing were Mr. Concepcion, unrepresented, and Sarah Timmons, Esquire on behalf of Plaintiff.

Having reviewed the pleadings, the Motion, the briefs and exhibits submitted by the parties, and the record, and after considering and reflecting upon the arguments of the parties, the Motions are **DENIED**.

PROCEDURAL HISTORY

A Summons and Complaint was filed for this matter on January 18, 2022, and the Summons and Complaint was served on Mr. Concepcion on March 9, 2022. Plaintiff filed an Affidavit of Default and Motion for Default on October 19, 2022. An Order of Default was then

issued by the Honorable Letitia Verdin on October 25, 2022. Default Judgment was entered against Mr. Concepcion and other Defendants by the Honorable G. D. Morgan on October 2, 2024.

Mr. Concepcion has filed the following Motions in this matter: 1) a Motion to Stay on June 7, 2023, after default was entered but before the Default Judgment was entered; 2) a Second Motion to Stay on October 23, 2023; 3) a Third Motion to Stay and Vacate Default Judgment on February 11, 2025; 4) a Motion for Appointment of Guardian Ad Litem on April 1, 2025; and 5) a Motion to Set Aside Default and Dismiss the Complaint on August 27, 2025. Because no hearing had been afforded to Mr. Concepcion on any of these Motions, the Court ordered on April 21, 2025, that an in-person hearing be scheduled to address all these issues.

ANALYSIS

First, the Court will address Mr. Concepcion's various Motions to Stay. The grounds for these Motions are generally that the action and execution on the Judgment should be stayed because of his initial incarceration in New York and subsequent transfer to South Carolina and he had retained counsel to file an Answer. Upon careful review of the record, Mr. Concepcion does not establish a basis for a Stay of the proceedings and cites no authority for such a stay.

Next, the Court will address Mr. Concepcion's Motion to Vacate and Motion to Set Aside Default Judgment. The record establishes that Mr. Concepcion was properly served through the New York prison system on March 9, 2022. In the hearing, Mr. Concepcion conceded that he was properly served and that he had no issues with that service. Nonetheless, Mr. Concepcion failed to file an Answer for over seven months before Default was entered against him. Mr. Concepcion argued that he had retained an attorney to file an Answer but the attorney failed to do so. As an exhibit to his Motion filed on February 11, 2025, Mr. Concepcion presented a Representation Agreement which he had entered with the Law offices of John M. Mussetto, LLC to represent him

in this matter. There was no indication that the firm ever filed a Notice of Appearance with the Court nor requested an extension to Answer. The Court finds that this does not rise to the level necessary to set aside the default judgment. Rule 55(c), SCRPC, requires that a party must establish "good cause" to set aside the entry of default. However, once judgment is entered, default judgment may only be set aside according to the provisions of Rule 60(b). Because judgment had been entered when these motions were filed, Rule 60(b), and not Rule 55(c), is applicable. When applying Rule 60(b), Mr. Concepcion has failed to establish "mistake, inadvertence, surprise or excusable neglect;" new discovered evidence; fraud, misrepresentation, etc. by an adverse party; void judgment; or that the judgment was satisfied, discharged, etc. SCRPC 60(b)(1-5). Mr. Concepcion argues that during incarceration he did not have access to the law library, had limited access to a telephone and relied on his purported counsel. None of these mitigating factors fall within the categories listed in Rule 60(b). Further, Mr. Concepcion clearly had access to the Court system as shown by his filing numerous motions over more than a 2-year period. Similarly, under the same analysis, even if Rule 55(c) was applicable, Mr. Concepcion has also failed to establish "good cause." Therefore, the Court finds that Mr. Concepcion has failed to establish a basis for setting aside the entry of Default under Rule 55(c) or Default Judgment under Rule 60(b).

In his last Motion filed on August 27, 2025, Mr. Concepcion seeks a dismissal of the action based on alleged fraud committed by the Plaintiff during his deposition on July 9, 2024, and again reiterates his incarceration in both New York and South Carolina. The deposition in question was taken after Mr. Concepcion had been held in default. Mr. Concepcion fails to establish a basis for dismissing the action, especially in light of the Court's ruling validating the Default Judgment against him. Thus, this Motion is denied as well.

Finally, the Court will address Mr. Concepcion's Motion for Appointment of Guardian Ad Litem ("GAL"). Mr. Concepcion not only asserts that a GAL should be appointed, but that this is also a basis for setting aside the Default and Default Judgment for the failure of the Court to appoint one. Rule 17(c), SCRCF, requires the following:

A person imprisoned outside this State shall appear by guardian ad litem in an action by or against him; but if imprisoned in this State, and not a minor or incompetent, the court may, in its discretion appoint a guardian ad litem ...

A GAL can be appointed upon application of "relative or friend" or by "any party to the action" within 30 days after being served. SCRCF 17(d)(4,6), none of which occurred here. As confirmed by Mr. Concepcion, at the time of filing his Motion on April 1, 2025, he was imprisoned in this State and being housed at the Spartanburg Detention Center awaiting sentencing on federal charges. Based on the holding in McCuen v. McCuen, 348 S.C. 179 (2002), Rule 17 does not impose a mandatory requirement for the appointment of a GAL. Although McCuen was an appeal from Family Court, the ruling of the Court is very germane to the issue before this Court: "While the language of Rule 17(c) does not expressly so provide, it is clear from applicable case law that the right to appearance by guardian ad litem is not absolute." McCuen at 182. The Courts have found that there is a distinction between a party that is limited by infancy or mental deficiency and the "physical restraint of imprisonment," which allows for an imprisoned party to "waive the appointment of a guardian ad litem." Id. (quoting In the Matter of Bishop, 272 S.C. 306, 309 (1979)). This possibility of a waiver by an imprisoned party is not limited by the use of the word "shall" in SCRCF Rule 17. Id. at 184. In Green v. Boney, 233 S.C. 49, 66, the Supreme Court held that a defendant in a civil suit waived his right to appointment of a GAL by filing pleadings with the Court and failing to raise the issue of the appointment of GAL until the case was called to trial.

In the case before the Court, Mr. Concepcion was not restrained from availing himself of the Court system as evidenced by his filing of a Motion to Stay prior to the Default Judgment being issued, and two additional Motions before filing his Motion for Appointment of a GAL thirty-seven months after he had been served with the Summons and Complaint and six months after final judgment had been entered against him. Therefore, the Court finds that Mr. Concepcion waived his right to the appointment of a GAL during his incarceration in New York and subsequently in South Carolina. No Motion was filed by Mr. Concepcion nor anyone on his behalf, until after the Default Judgment was entered, so this would not be a basis for setting aside or vacating the Default Judgment.

Therefore, Concepcion's Motions are respectfully denied, and the Court affirms the Default Judgment filed on October 2, 2024.

IT IS SO ORDERED.

E-Signature of Judge Gravely to follow

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Case Caption: DiscoverFresh Foods Inc , plaintiff, et al vs. Jesus Concepcion ,
defendant, et al

Case Number: 2022CP2300240

Type: Order/Other

So Ordered

s/ Honorable Perry H. Gravely, #2755

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ELECTRONICALLY FILED - 2025 Oct 14 10:01 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2300240