

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
JESSICA TAYLOR, individually and)
on behalf of others similarly situated,)
)
Plaintiff,)
)
vs.)
)
CHARLESTON SOUTHERN)
UNIVERSITY,)
)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2020-CP-10-02357

**ORDER SETTING ASIDE
DEFAULT ENTERED AGAINST
CHARLESTON SOUTHERN
UNIVERSITY**

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SC Court of Appeals

This matter comes before the Court on a motion filed by Defendant Charleston Southern University (“Defendant”) on January 6, 2023, seeking to set aside default entered against it on June 21, 2021 (“Defendant’s Motion”). The Court has carefully reviewed the parties’ filings and the arguments of counsel at the hearing on March 16, 2023. Having considered all arguments and submissions and, for the reasons stated below, the Court grants Defendant’s Motion.

FACTUAL BACKGROUND

This is a putative class action brought by named Plaintiff Jessica Taylor (“Plaintiff”) against Defendant. Plaintiff brings claims for breach of contract, breach of implied contract, unjust enrichment, and conversion against Defendant and seeks reimbursement of tuition and fees from Defendant based on Defendant’s closure of its campus and use of online instruction to complete its classes during the Spring Semester of 2020 in response to the threat posed by the COVID-19 pandemic.

PROCEDURAL POSTURE

On May 28, 2020, Plaintiff filed the summons and complaint in this action, and Defendant accepted service on June 24, 2020. On July 24, 2020, Defendant removed the action to federal

court. Defendant filed a motion to dismiss in federal court on July 31, 2020. Plaintiff filed an amended complaint in federal court on August 17, 2020, and a motion to remand on August 21, 2020. With the consent of the parties, the federal court entered an order extending the time allowed by the Federal Rules of Civil Procedure for Defendant to respond to the amended complaint in federal court, allowing a response ten days after issuance of the federal court's order on Plaintiff's motion to remand. On February 28, 2021, the federal district court judge entered an order remanding the matter to state court. The same day, the federal district court clerk transmitted a copy of the remand order to the Charleston County Clerk of Court, and the Charleston Clerk promptly recorded the remand order received from the federal court. The remand order filed in this Court is not a certified copy, bearing no seal of the federal district court nor the clerk's attestation that the remand order is a true copy. To date, no certified copy of the remand order has been filed in state court.

On June 21, 2021, on motion of Plaintiff, the Court entered default against Defendant. On June 28, 2021, one week after the entry of default, Defendant filed its initial motion to set aside the entry of default. Over the next several months, Plaintiff's counsel conducted discovery from Defendant, including Defendant's production of documents, written discovery responses, as well as Defendant's Rule 30(b)(6) deposition on December 13-15, 2021. On January 3, 2022, Defendant withdrew its initial motion to set aside entry of default for purposes of facilitating mediation. Mediation took place on May 31, 2022, and on November 21, 2022, but was unsuccessful. On January 6, 2023, Defendant filed the present Motion seeking relief from the entry of default.

FINDINGS

The Court finds that the entry of default is void because this Court does not have power to exercise jurisdiction in this case due to the lack of a certified remand order. Although a federal

court must mail a certified remand order for jurisdiction to resume in state court upon a remand, mailing alone is not sufficient. The certified remand order must also be filed as part of the record in the state court. The time for answering a complaint pauses while the case is removed to federal court and resumes only when the state court receives a certified remand order, not when the federal court mails it. To the extent a good cause analysis is necessary under Rule 55, SCRCF, the Court further finds that good cause exists to set aside default entered against Defendant, and Plaintiff has not shown prejudice that would warrant refusal to set aside the entry of default in any event.

I. Jurisdiction

The South Carolina Supreme Court found in *Limehouse v. Hulsey*, that the lack of a certified copy of the remand order precluded the court from resuming jurisdiction. 404 S.C. 93, 96, 744 S.E.2d 566, 568 (2013) (“[W]e find the state court proceedings are void as the lack of a certified remand order precluded the state court from resuming jurisdiction over the cases.”). It would be error for this Court to proceed with the exercise of jurisdiction in the absence of a certified remand order. *Id.* at 108, 744 S.E.2d at 575 (finding lower courts “erred in finding the state court had jurisdiction to conduct the proceedings as the absence of the certified order precluded jurisdiction from resuming in the state court”). All state court proceedings undertaken in the absence of a certified remand order are void. *Id.* at 109, 744 S.E.2d at 575 (“Because the absence of a certified order precluded jurisdiction from resuming in the state court, we hold the state court proceedings conducted after the federal court’s entry of the remand order are void.”). Because no certified remand order exists here, all proceedings that have taken place since remand – including the entry of default – are void.

Plaintiff argues that jurisdiction resumes in the state court after remand when the federal court mails a certified remand order to the state court and that proof of mailing is sufficient to find a resumption of state court jurisdiction. She submits an affidavit of a federal clerk to prove mailing

of the certified remand order in this case. In support of her argument that mailing alone transfers jurisdiction, Plaintiff relies upon the applicable federal statute, 28 U.S.C. § 1447(c), which references mailing but not receipt. Plaintiff urges that any doubt regarding application of this federal statute should be resolved in Plaintiff's favor, citing a statement in *Limehouse* that "removal statutes must be strictly construed, and any doubts are to be resolved in favor of state court jurisdiction and remand." *Id.* at 106, 744 S.E.2d at 573. This Court rejects these arguments for several reasons.

First and foremost, Plaintiff's position cannot be reconciled with *Limehouse* and would result in unfairness and confusion for litigants when cases are remanded to state court. In *Limehouse*, after finding the federal court must mail a certified remand order to the state court to transfer jurisdiction, the Supreme Court repeated three times that the state court could exercise jurisdiction only after it also received the certified remand order. *See id.* at 96, 744 S.E.2d at 568 ("[W]e . . . vacate the state court proceedings, and remand to the circuit court to recommence the cases from the procedural point at which the state court received a certified remand order from the federal court."); *see also id.* at 109-110, 117, 744 S.E.2d at 575, 579. The Supreme Court further held that the defendants' time for answering was tolled until the state court received a certified copy of the remand order mailed from the federal court. *See id.* at 117, 744 S.E.2d at 579 ("[W]e find the time for filing responsive pleadings was tolled during the removal proceedings as no subsequent pleadings could be filed in state court until jurisdiction resumed."); *see also id.* at 110-13, 744 S.E.2d at 575-77 (addressing "the computation of time for filing responsive pleadings following the state court's receipt of a certified remand order"). Accordingly, this Court rejects Plaintiff's argument that jurisdiction resumed in state court when the federal court mailed a certified remand order to the state court because it is not consistent with the ruling in *Limehouse*

that the state court must also receive the certified remand order. Because jurisdiction did not resume in state court in the absence of a certified remand order, Defendant's time for answering in state court has not yet begun to run, and Defendant may not be held in default.

Plaintiff relies on an affidavit from Virginia Druce, a federal court deputy clerk, attesting that she recalls mailing a certified copy of the remand order to the Charleston County Clerk of Court in this case two years ago. Notwithstanding Ms. Druce's recollection as set forth in her affidavit (which this Court does not question), neither her affidavit, the federal court record, nor the state court record contains a certified copy of the remand order. Just as in *Limehouse*, the only copy of the remand order in the record here is an uncertified copy. Accordingly, the affidavit of Ms. Druce is insufficient to cure the absence of the certified remand order, and this Court's jurisdiction has not recommenced in this case.

Further, the only jurisdictional trigger that would be workable and fair for litigants is the state court's receipt and filing of the certified remand order. Attorneys must be able to rely on court records to know when they are subject to state court jurisdiction and when their clock for answering resumes in state court after a remand. Otherwise, defendants would have no record notice of when the clock for answering in state court resumes, and confusion would prevail.

This Court also rejects Plaintiff's argument that entry of default should not be vacated because 28 U.S.C. § 1447(c) must be strictly construed in favor of presuming state court jurisdiction. In support of her argument, Plaintiff refers to a sentence in *Limehouse* that states: "Because removal proceedings encroach upon a state court's jurisdiction, removal statutes must be strictly construed, and any doubts are to be resolved in favor of state court jurisdiction and remand." 404 S.C. at 106, 744 S.E.2d at 573. First, the South Carolina Supreme Court construed this very statute in *Limehouse* and found that state court jurisdiction may not resume in the absence

of a certified remand order, and the clock for answering resumes only upon the state court's receipt of such an order. This Court is bound to follow the *Limehouse* Court's interpretation of 28 U.S.C. § 1447(c), and it may not devise a different interpretation as Plaintiff urges.

Further, the rule of statutory construction raised by Plaintiff does not apply here. This rule applies to determining whether federal jurisdiction is properly established for removal purposes, where any doubt is to be resolved in favor of remand back to state court. *See Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534 (6th Cir. 1999) (cited in *Limehouse*) (“In interpreting the statutory language, we are mindful that the statutes conferring removal jurisdiction are to be construed strictly because removal jurisdiction encroaches on a state court's jurisdiction. Thus . . . federal jurisdiction should be exercised only when it is clearly established, and any ambiguity . . . should be resolved in favor of remand to the state courts.”) Here, Defendant is not challenging the correctness of the federal court's decision to remand this case to state court, so this rule of construction is not a relevant consideration.

The Court further rejects Plaintiff's argument that Defendant waived any objection to jurisdiction by not raising it sooner and instead responding to Plaintiff's discovery and attempting to negotiate settlement before filing the subject Motion. First, one week after entry of default, Defendant filed a motion to set it aside, and Defendant withdrew that motion without prejudice to facilitate mediation. Accordingly, Defendant preserved its rights. Second, subject matter jurisdiction cannot be waived. *See Paschal v. Causey*, 309 S.C. 206, 209, 420 S.E.2d 863, 865 (Ct. App. 1992) (“Subject matter jurisdiction of a court depends upon the authority granted to the court by the constitution and laws of the state. Subject matter jurisdiction cannot be waived or conferred by consent.”). Thus, Defendant could not and did not waive the challenge to jurisdiction. This Court cannot ignore the absence of jurisdiction in this case.

In sum, this Court's jurisdiction did not recommence because this Court did not receive a certified copy of the remand order from the federal district court. Defendant's time to answer in state court remains tolled, all proceedings in state court (specifically including the entry of default) are void, and this Court has no power to enter default.

II. Good cause under Rule 55

In the alternative, to the extent a good cause analysis is necessary under Rule 55, SCRCP, the Court finds the absence of a certified copy of the remand order in the federal and state court records is in itself good cause to set aside default entered against Defendant for failure to answer timely. This Court has wide discretion in deciding whether to set aside an entry of default, and “[t]his discretionary element makes it clear that the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default.” *In re Est. of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). South Carolina also has a strong public policy in favor of litigation being decided on the actual merits of the case, rather than due to a procedural error by a party. *See In re Moore*, 342 S.C. 1, 5 n.7, 536 S.E.2d 367, 369 n.7 (2000) (“Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits.”).

The South Carolina Supreme Court has stated that the Rule 55(c) “standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice,” and that once “a party has put 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.” *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607–08, 681 S.E.2d 885, 888 (2009) (citing *Wham v.*

Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989)). With respect to the Court's evaluation of the interests of justice here, Defendant's counsel at the time of the entry of default, Wilbur Johnson, has submitted an affidavit explaining the reason for the default. The Court has reviewed Mr. Johnson's affidavit and finds that setting aside default here serves the interests of justice. *See Jordan v. Hartford Fin. Grp., Inc.*, 435 S.C. 501, 507, 868 S.E.2d 400, 403 (Ct. App. 2021) (in a workers compensation matter setting aside procedural default resulting from a calendaring error and holding, "The touchstone here is good cause, a standard designed to excuse honest, harmless human mistakes so a case may be judged on its merits rather than its missteps.").

The Court also finds that Defendant has meritorious defenses. To obtain relief from default, the defaulting party "does not have to establish that he would prevail on the merits, but only that his defense is meritorious." *Thompson v. Hammond*, 299 S.C. 116, 121, 382 S.E.2d 900, 903 (1989). The Court finds that Defendant has several meritorious defenses to Plaintiff's claims, as evidenced by Defendant's motion to dismiss filed in the federal district court before the entry of the remand order, and Defendant indicates it will file a similar motion to dismiss in state court after jurisdiction properly resumes in this Court.

With respect to the timeliness of the motion to set aside default, Plaintiff argues that Defendant's Motion was filed too late because the federal court remanded this case two years ago. The Court disagrees and finds the timing of Defendant's Motion does not weigh against good cause for setting aside the entry of default in this case. As noted above, Defendant promptly filed its motion for relief from the entry of default only a week after the default was entered. Defendant later withdrew that motion, while reserving the right to re-file it, only for purposes of pursuing and facilitating mediation, and the Court always commends the parties' good faith efforts to mediate. Mediation took place over two days several months apart, and following the failure of mediation

to produce a settlement, Defendant filed the present Motion seeking relief from the entry of default. The Court finds that in light of these circumstances, time that has elapsed since Defendant's first motion to set aside entry of default does not weigh against Defendant in establishing good cause.

Last, the Court finds that Plaintiff has not shown any cognizable prejudice that would result from this Court granting Defendant relief from the entry of default. Mere delay and the burden of litigating the case on the merits are not sufficient for establishing necessary prejudice to warrant refusal to set aside entry of default. *See Krantz v. KLI, Inc.*, No. 6:09-CV-01623-JMC, 2011 WL 1642375, at *4 (D.S.C. May 2, 2011) ("Generally, there is no cognizable prejudice in requiring a plaintiff to prove a defendant's liability."); *see also Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 419 n.6 (4th Cir. 2010) ("As numerous decisions make clear, prejudice may not be found from delay alone or from the fact that the defaulting party will be permitted to defend on the merits."). Plaintiff did not and cannot show that the delay will result in loss of evidence, missing witnesses, increased difficulties in discovery, or anything else significant enough to rise to the level of requisite prejudice. The Court finds that, contrary to Plaintiff's argument, the fact that Plaintiff took Defendant's Rule 30(b)(6) deposition and obtained other discovery from Defendant while the Court was without jurisdiction does not constitute the type of prejudice that would warrant keeping Defendant in default. The Court fails to see how Plaintiff is prejudiced by obtaining information from Defendant through discovery merely because this information was exchanged when the Court had no jurisdiction.

Having fully considered all of Plaintiff's and Defendant's arguments and considering all applicable factors, the Court concludes that good cause exists under Rule 55, SCRPC, to set aside default entered against Defendant.

CONCLUSION

The Court finds that it does not have power to exercise jurisdiction to proceed in this case due to the lack of a certified copy of the remand order from the federal district court as required by the South Carolina Supreme Court in *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013). As a result, the Court holds that default entered against Defendant is void because the Court did not have the power to enter it. In the alternative, to the extent necessary, the Court also finds good cause exists under Rule 55, SCRPC, to set aside the entry of default, and Plaintiff has not shown any requisite prejudice to warrant refusal of granting Defendant relief from default under the circumstances in this case. In light of the foregoing, the Court grants Defendant's Motion and sets aside default entered against Defendant.

AND IT IS SO ORDERED.

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Charleston Common Pleas

Case Caption: Jessica Taylor VS Charleston Southern University

Case Number: 2020CP1002357

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134