STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	FIFTEENTH JUDICIAL CIRCUIT
Linda Acker,	Civil Action No.: 2024-CP-26-04023
Plaintiff,	
v.	**ORDER**
Westgate Myrtle Beach, LLC,	
Defendant.	
Westgate Myrtle Beach, LLC,	
Third-Party Plaintiff,	
v.	
Home Depot U.S.A., Inc.	
Third-Party Defendant.	

Third-Party Defendant Home Depot U.S.A., Inc. (hereinafter, "Third-Party Defendant"), moved pursuant to Rules 12, 55(c), and 60(b) of the South Carolina Rules of Civil Procedure, for relief from the default judgment entered against it on February 13, 2026, and to compel arbitration. Having reviewed the file, pleadings, and submissions of the parties, and hearing oral arguments from counsel of record on July 14, 2026, the court hereby finds that Third-Party Defendant is not entitled to relief from the default judgment and is not entitled to compel arbitration. The Court, after careful and deliberate consideration of the law and rules, hereby DENIES Third-Party Defendant's Motion for Relief from Judgment and to Compel Arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

A Contract for Services was executed by Third-Party Plaintiff Westgate Myrtle Beach, LLC's (hereinafter, "Third-Party Plaintiff") and Third-Party Defendant on November 18, 2019. Pursuant to the Contract for Services, Third-Party Defendant agreed to provide, "Labor and Material to replace various size cabinet doors, drawers, and hardware per customer provided specifications for (27) B Units and (27) A Units." The services were contracted to be completed on January 10, 2020.

On December 19, 2022, Linda Acker's (hereinafter, "Plaintiff") counsel served a letter on Third-Party Plaintiff's registered agent advising Third-Party Plaintiff that Plaintiff sustained an injury at Third-Party Plaintiff's resort on September 19, 2022, involving a cabinet. Third-Party Plaintiff's counsel contended that Plaintiff's claim was the result of Third-Party Defendant negligently installing a cabinet board using glue instead of hardware.

Third-Party Plaintiff first attempted to tender the defense and indemnity of Plaintiff's claim to Third-Party Defendant, on December 14, 2023. This initial tender letter was served via email and U.S. Mail to Teresa Wynn Roseborough, Executive Vice President, General Counsel and Corporate Security for Third-Party Defendant. Third-Party Plaintiff served a second tender letter on March 21, 2024, via email and U.S. Mail to Teresa Wynn Roseborough, Executive Vice President, General Counsel and Corporate Security for Third-Party Defendant. This second tender letter advised Third-Party Defendant of Plaintiff's $100,000.00 demand and stated, "failure to respond to this letter within thirty (30) days will be treated as Home Depot USA, Inc.'s denial of Westgate Resorts' tendering of the defense and indemnification of this claim and may lead to further action being taken against Home Depot USA, Inc."

On March 28, 2024, Third-Party Plaintiff's counsel received correspondence from Benjamin Bence, Senior Resolution Manager for Gallagher Bassett Services, Inc., the third-party administrator handling claims on behalf of Third-Party Defendant, acknowledging Third-Party Plaintiff's tender letter and requesting that all future correspondence be forwarded to his attention. Third-Party Plaintiff's counsel spoke with Bence on April 10, 2024, and followed up with Bence regarding receiving a response to the tender letter on May 02, 2024, and May 10, 2024. Third-Party Plaintiff's counsel represented that they did not hear from Bence again after the April 10, 2024, phone call.

On June 11, 2024, the Plaintiff filed the underlying negligence/premises liability action against Third-Party Plaintiff in the Horry County Court of Common Pleas, Case No. 2024CP2604023. On June 27, 2024, Third-Party Plaintiff's counsel served a third tender letter on Benjamin Bence via email, advising Bence that suit had been filed, providing a copy of Plaintiff's Complaint, tendering the defense and indemnity of Plaintiff's claims, informing Bence Plaintiff had demanded $25,000.00 to settle her claims, and stating, "failure to respond to this letter before July 01, 2024, will be treated as Home Depot USA, Inc.'s denial of Westgate Resorts' tendering of the defense and indemnification of this claim and may lead to further action being taken against Home Depot USA, Inc."

On January 27, 2025, Third-Party Plaintiff filed their Notice of Motion and Consent Motion to Amend Third-Party Plaintiff's Answer to Add Third-Party Complaint. A Consent Order granting Third-Party Plaintiff's Motion was entered on April 09, 2025. Third-Party Plaintiff asserted causes of action against Third-Party Defendant for breach of contract, negligence, contractual indemnity, equitable indemnity, breach of the covenant of good faith and fair dealing, and contribution. Third-Party Plaintiff's Third-Party Complaint demanded actual, consequential, and punitive damages, and requested that Third-Party Plaintiff be awarded the costs of the suit incurred and such other and further relief as the Court deems proper.

On March 27, 2025, Plaintiff executed a Receipt and Full, Final, and Complete Release in exchange for Third-Party Plaintiff agreeing to pay Thirteen Thousand Five Hundred and 00/100 Dollars ($13,500.00).

On April 25, 2025, Third-Party Plaintiff's counsel mailed a copy of the Third-Party Summons and Third-Party Complaint Against Home Depot U.S.A., Inc., via Certified Mail to Corporation Service Company, the registered agent Third-Party Defendant Home Depot U.S.A., Inc. The return receipt states that the Third-Party Summons and Complaint was received on April 29, 2025.

Third-Party Defendant did not file or submit a Notice of Appearance, Answer, or other pleading within thirty-five (35) days of service of the Third-Party Summons and Complaint on their registered agent. Third-Party Plaintiff filed their Affidavit of Default on June 12, 2025, and this Court entered its Order for Default on June 25, 2025. On September 04, 2025, Third-Party Plaintiff filed its Notice of Motion and Motion for Default Damages Hearing. A default damages hearing was scheduled to take place during the non-jury trial roster term beginning on February 09, 2026. On January 30, 2026, Third-Party Plaintiff's counsel served notice of the default damages hearing via certified mail upon the Third-Party Defendant's registered agent. Third-Party Defendant did not appear for the damages hearing on February 09, 2026, or file a responsive pleading before the hearing.

On February 13, 2026, the Honorable David P. Caraker, Jr., entered an Order Granting Third-Party Plaintiff's Motion for Default Judgment, ordering Third-Party Defendant to pay Third-Party Plaintiff "$144,650.97 in actual damages, plus, post-judgment interest at the highest rate allowable by law." This amount, $144,650.97, is the sum of: Third-Party Plaintiff's legal fees, expenses, and costs, which totaled $28,915.26; Third-Party Plaintiff's settlement with Plaintiff, which totaled $13,500.00; and the amount Third-Party Plaintiff paid Third-Party Defendant pursuant to the Contract for Services, which totaled $102,235.71. Third-Party Defendant's counsel first appeared on March 16, 2026.

LEGAL STANDARD

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). Rule 55(c) of the South Carolina Rules of Civil Procedure states, "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Rule 60(b) of the South Carolina Rules of Civil Procedure states:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> **(1)** mistake, inadvertence, surprise, 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 other misconduct of an adverse party;
> **(4)** the judgment is void;
> **(5)** the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

"The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief." Rouvet v. Rouvet, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (citing BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006)).

> 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). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other

> misconduct of an adverse party." 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. v. Intedge Indus., 383 S.C. 601, 608, 681 S.E.2d 885, 888-89 (2009) (citations omitted). Furthermore,

> Our courts have noted, in determining whether to set aside a default judgment under Rule 60(b), the trial judge should consider the following relevant factors: (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 parties.

McClurg v. Deaton, 380 S.C. 563, 573, 671 S.E.2d 87, 93 (Ct. App. 2008) (compiling cases).

LEGAL ANALYSIS

The Court finds that the Third-Party Defendant's Motion should be denied because: 1) Third-Party Defendant has waived their right to compel arbitration; 2) Third-Party Defendant did not establish sufficient proof of mistake, inadvertence, surprise, or excusable neglect to entitle them to relief from the default judgment pursuant to Rule 60(b); 3) The common law factors do not weigh in favor of Third-Party Defendant; and, 4) The judgment amount is equitable and supported by the evidence. Each is discussed in turn below.

1) Third-Party Defendant Has Waived their Right to Compel Arbitration.

Third-Party Defendant is not entitled to compel arbitration due to their waiver of their right to assert enforcement of the arbitration provision. In a procedurally similar case, the South Carolina Court of Appeals held that the plaintiff "properly served Appellants with notice of its claims. Appellants failed to timely answer or respond to those claims. Thus, Appellants effectively waived their right to assert enforcement of the arbitration provision." Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 444 S.C. 328, 345, 907 S.E.2d 129, 138 (Ct. App. 2024). In reaching their conclusion, the Court looked to a decision of the Arkansas Supreme Court, which cited the following New York trial court holding:

> Though arbitration clauses are generally enforceable, they cannot be used to bypass the statutory provisions requiring that pleadings be answered or to thwart a proper motion for a default judgment. The Defendant effectively waived its right to enforce the arbitration clause when it failed to answer or appear in response to the summons and complaint under circumstances where there was no reasonable excuse for such default.

Id., at 444 S.C. 344, 907 S.E.2d 137 (citing Tri-State Delta Chemicals, Inc. v. Crow, 347 Ark. 255, 61 S.W.3d 172, 173 (Ark. 2001) (quoting Charming Shoppes, Inc. v. Overland Constr., Inc., 186 Misc. 2d 293, 717 N.Y.S.2d 860, 863 (N.Y. Sup. Ct. 2000))). Ultimately, the South Carolina Court of Appeals held that, "Appellants contend the master erred in denying their motion to stay and compel arbitration pursuant to the contract between the parties based on Appellants' default constituting a waiver of the right to arbitrate. We disagree." Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 444 S.C. 328, 342, 907 S.E.2d 129, 136 (Ct. App. 2024).

In this case, Third-Party Defendant failed to timely answer or appear in response to Third-Party Plaintiff's Third-Party Summons and Complaint. Under the circumstances, there was no reasonable excuse for such default, and Third-Party Defendant has not offered a reasonable excuse. Third-Party Defendant's motion asserts that, "Although its agent purportedly accepted service of the Summons and Third-Party Complaint, Home Depot never received those documents." Third-Party Defendant's Memorandum in Support clarifies that Home Depot's litigation department never received those documents but is silent as to whether they were received by Home Depot but were not forwarded to their litigation department. Furthermore, Third-Party Defendant does not dispute that the same registered agent provided them with a copy of the notice of the default damages hearing. Nonetheless, Third-Party Plaintiff's service of the Third-Party Summons and Complaint is statutorily binding upon Third-Party Defendant. See S.C. Code Ann. § 15-9-210(a)

(“A domestic business or nonprofit corporation’s registered agent is the agent of the corporation for service of any process, notice, or demand required or permitted by law to be served, and the service is binding upon the corporation.”)

Third-Party Defendant has waived any right to compel arbitration through its prolonged delay and litigation conduct. Third-Party Defendant remained silent about arbitration throughout the entire litigation, allowed the case to proceed from pre-suit through final judgment without once seeking arbitration, and only raised arbitration after receiving an unfavorable judgment. Therefore, this Court finds that Third-Party Defendant is not entitled to arbitration.

2) Third-Party Defendant did not establish sufficient proof of mistake, inadvertence, surprise, or excusable neglect to entitle them to relief from the default judgment pursuant to Rule 60(b).

Rule 60(b) of the South Carolina Rules of Civil Procedure enumerates limited scenarios in which a court may elect to grant a defendant relief from a default judgment. Third-Party Defendant’s motion relies upon allegations that the judgment is void due to preemption by the federal arbitration act and that Third-Party Plaintiff did not provide Third-Party Defendant with sufficient notice of the default damages hearing. As discussed above, Third-Party Defendant’s argument regarding arbitration is without merit because they waived the right to enforce the arbitration clause when they failed to answer or appear in response to the summons and complaint under circumstances where there was no reasonable excuse for such default.

Third-Party Defendant incorrectly asserts in their Memorandum in Support that, “Here, Home Depot was not served until February 4, 2026—only five calendar days (three business days) before the Monday, February 9, 2026, hearing.” Third-Party Defendant was served on January 30, 2026, when the notice of the hearing was placed in the mail, not on February 04, 2026, when Third-Party Defendant received the notice. See Rule 5(b), SCRCP (“Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.") Because January 30, 2026, was ten (10) days before the February 09, 2026, hearing, Third-Party Plaintiff complied with Rule 6(d)'s ten (10) day notice requirement. Accordingly, there was no surprise or potential misconduct.

Third-Party Defendant also argues that the judgment is inequitable. However, Third-Party Defendant does not argue that it is no longer equitable that the judgment should have prospective application, which is contemplated by Rule 60(b) of the South Carolina Rules of Civil Procedure. Instead, Third-Party Defendant argues in their Memorandum in Support that the judgment is inequitable because "Home Depot [was] given insufficient time to prepare for the judgment hearing" and "because they included the entire contract amount while Westgate did not seek that contract amount in its Third-Party Complaint." As discussed above, Third-Party Defendant had sufficient notice and time to prepare for the default damages hearing. Additionally, as discussed further below, this Court finds that the judgment reflecting the entire contract amount is supported by the evidence and reflects Third-Party Plaintiff's actual damages as specified in the Third-Party Complaint.

3) The Common Law Factors Do Not Weigh in Favor of Third-Party Defendant.

The common-law factors do not weigh in favor of this Court exercising their discretion to provide Third-Party Defendant with relief from the judgment. These factors are, "(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 parties." McClurg v. Deaton, 380 S.C. 563, 573, 671 S.E.2d 87, 93 (Ct. App. 2008) (compiling cases).

Third-Party Defendant sought relief from the judgment approximately one month after the judgment was entered. Therefore, the first two factors do not weigh against Third-Party Defendant.

This Court finds that the third factor weighs against Third-Party Defendant because they have failed to demonstrate a meritorious defense. As discussed below, the judgment reflecting the entire judgment amount was not inequitable as it reflects the actual damages suffered by Third-Party Plaintiff as a result of Third-Party Defendant's breach of the contract. Regardless, inequity of a judgment is not a meritorious defense to liability. In arguing defenses to liability, Third-Party Defendant avers that they may not have been the proximate cause of the Plaintiff's injuries for two reasons.

First, Third-Party Defendant argues that they cannot be liable for their subcontractor's alleged negligence. This assertion lacks merit because Third-Party Defendant has not addressed whether they used reasonable care in selecting a careful and competent subcontractor. Third-Party Plaintiff's negligence cause of action asserted that Home Depot breached their duties to Third-Party Plaintiff in various ways, including in "failing to use reasonable care in selecting a competent and careful subcontractor such that the interests of Westgate would not be injuriously affected[.]"

Second, Third-Party Defendant argues that Third-Party Plaintiff's maintenance efforts may have altered the work completed by Third-Party Defendant's subcontractor. This assertion is purely speculative because it is completely unsupported by any evidence. Notably, "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). Merely asserting that discovery would likely show maintenance efforts altered the work completed by Third-Party Defendant's subcontractor does not satisfy Third-Party Defendant's burden of presenting evidence. Therefore, this Court finds that Third-Party Defendant has not demonstrated a meritorious defense.

In discussing the fourth factor, the prejudice to the other parties, this Court notes that Third-Party Plaintiff must either pay for the substandard work in all fifty-four (54) units to be evaluated for deficiencies and fixed or accept the risk of additional claims being asserted due to their guests becoming injured in a similar manner. Furthermore, granting Third-Party Defendant relief from this judgment would undoubtedly result in prejudice to Third-Party Plaintiff due to the amount of time that has passed since the incidents giving rise to this litigation took place. It is highly unlikely that witnesses will be able to reliably recall details and events because it has been approximately six (6) years and four (4) months since the subject work was performed and over three (3) years and nine (9) months since the Plaintiff's alleged injury. At this stage, setting aside the judgment would require Third-Party Plaintiff to relitigate issues long after the relevant events occurred, when memories have inevitably faded and the availability of witnesses and other evidence may have been compromised. Rule 60(b) was not intended to reward a party's lack of diligence at the expense of another party, which will undoubtedly occur if the requested relief is granted.

Overall, the four factors do not weigh in support of Third-Party Defendant.

4) The Judgment Amount is Equitable and is Supported by the Evidence.

This Court finds that the judgment reflecting the entire contract amount is supported by the evidence and reflects Third-Party Plaintiff's actual damages as specified in the Third-Party Complaint. Although Third-Party Plaintiff did not explicitly request that this Court award the entire contract amount in their Third-Party Complaint, Third-Party Plaintiff's prayer for relief demanded actual, consequential, and punitive damages, as well as "such other and further relief as the Court deems proper." Moreover, Third-Party Plaintiff's breach of contract cause of action alleged that:

> 89. Home Depot received valuable consideration in exchange for agreeing to replace the cabinet doors, drawers, and hardware for fifty-four (54) units at the Resort.

> 90. Home Depot breached the terms of the Contract for Services in the following ways: …
>
> > b. Failing to replace the cabinet doors, drawers, and hardware in a timely and professional manner using competent personnel having expertise suitable to their assignments;

Third-Party Compl., ¶¶ 89-90. Clearly, Third-Party Plaintiff was not alleging that Third-Party Defendant only breached the contract with respect to the work performed in the unit in which the Plaintiff stayed. Counsel for Third-Party Plaintiff contends it is extremely unlikely that Third-Party Defendant only performed substandard work in one of the fifty-four (54) units. Paying for a contractor to re-do the work that Third-Party Defendant failed to perform correctly the first time would undoubtedly cost more now than it did in 2019. Third-Party Plaintiff must either pay for the potentially substandard work in all fifty-four (54) units to be evaluated for deficiencies and fixed or accept the risk of additional claims being asserted due to their guests becoming injured in a similar manner. Whichever option Third-Party Plaintiff elects to proceed with could reasonably be expected to result in a cost to Third-Party Plaintiff that is in excess of the original contract amount. Therefore, the judgment is neither unfair nor inequitable and reflects Third-Party Plaintiff's actual damages as specified in the Third-Party Complaint.

CONCLUSION

Third-Party Defendant has waived any right to compel arbitration by failing to timely answer or otherwise respond to Third-Party Plaintiff's Third-Party Complaint. Moreover, Third-Party Defendant has failed to establish any basis for relief under Rule 60(b), SCRCP. Third-Party Defendant bears the burden of presenting evidence proving the facts essential to entitle it to relief under Rule 60(b), and it has not made a showing of excusable neglect or a meritorious defense. Additionally, the common law factors do not weigh in support of Third-Party Defendant. Lastly, the judgment reflecting the entire contract amount is supported by the evidence and reflects Third-Party Plaintiff's actual damages as specified in the Third-Party Complaint.

THEREFORE, after careful and deliberate consideration of the law and rules, the Court hereby DENIES Third-Party Defendant's Motion for Relief from Judgment and to Compel Arbitration.

IT IS SO ORDERED.

THE HONORABLE G.D. MORGAN JR.
FIFTEENTH JUDICIAL CIRCUIT

Dated:

Horry Common Pleas

Case Caption: Linda Acker VS Westgate Myrtle Beach LLC , defendant, et al

Case Number: 2024CP2604023

Type: Order/Other

So Ordered

G.D. Morgan Jr.

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