

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-10-03054

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FEB 11 2014

Willie Preston, individually and as the Personal Representative of the Estate of Martha Preston, Deceased

Coastal Anesthesia Associates; and Christine Thompson, MD

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: James B. Hood (SC #70212)

Attorney for: Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

FILED
 2014 JAN 17 AM 9:52
 JULIE J. ANDERSON
 CLERK OF COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF CHARLESTON)
)
 Willie Preston, individually and as the) C/A No. 2013-CP-10-03054
 Personal Representative of the Estate of)
 Martha Preston, Deceased,)
) Plaintiff,)
)
 Versus)
)
 Surgical Care Affiliates, LLC,)
 Charleston Surgery Center, L.P.; Laura)
 Bilancione, R.N.; Coastal Anesthesia)
 Associates; and Christine Thompson,)
 M.D.,)
)
 Defendants.)

FILED
 2014 JAN 17 AM 9:55
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

**ORDER DENYING DEFENDANT
 COASTAL ANESTHESIA
 ASSOCIATES, LLC'S¹ MOTION TO
 DISMISS FOR LACK OF SUBJECT
 MATTER JURISDICTION AND
 GRANTING DEFENDANT'S MOTION
 TO SET ASIDE ENTRY OF DEFAULT**

THIS MATTER comes before the Court on Defendant Coastal Anesthesia Associates, LLC's (hereinafter "Coastal Anesthesia") Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, to Set Aside the Entry of Default. Based upon the motions and briefs submitted, accompanying exhibits and affidavits, arguments of counsel, and after carefully considering all of the same, the Court hereby denies Coastal Anesthesia's Motion to Dismiss for Lack of Subject Matter Jurisdiction and grants Coastal Anesthesia's Motion to Set Aside Entry of Default.

WJP

FACTS

This is a medical malpractice action filed against the above-named defendants, wherein Plaintiff alleges that Defendants were negligent in performing his wife's knee surgery and her subsequent treatment in April of 2012. On November 13, 2012, Plaintiff filed a Notice of Intent naming as defendants Surgical Affiliates, LLC, Charleston Surgery Center, L.P., Nurse Doe, Christine Thompson, M.D. (hereinafter "Dr. Thompson") and ABC Anesthesia Group. (See Defendant's Exhibit 1, Plaintiff's Notice of Intent to File Suit, 2012-CP-10-7413, hereinafter

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¹ Improperly identified as "Coastal Anesthesia Associates."

“Notice of Intent”). Notably, Plaintiff did not name Coastal Anesthesia as a party to the Notice of Intent.

Current counsel for Coastal Anesthesia filed a Notice of Appearance on behalf of Dr. Thompson, but not on behalf of Coastal Anesthesia and not on behalf of ABC Anesthesia Group. (See **Defendant’s Exhibit 2**). On December 10, 2012, Plaintiff filed certificates of service evidencing service on Surgical Care Affiliates, LLC, Charleston Surgery Center, L.P., and Dr. Thompson. (See Exhibit 3, Certificates of Service). The Plaintiff did not serve Coastal Anesthesia with the Notice of Intent. (See **Defendant’s Exhibits 4 and 5**, Affidavits of Randall Kerns, M.D. (“Dr. Kerns”) and Wendy B. Sanders, MBA CMPE CANPC (“Sanders”)), as Plaintiff did not know its identity.

A pre-suit mediation occurred on April 1, 2013, and James Hood of Hood Law Firm, LLC attended on behalf of Dr. Thompson; Chad McGowan of McGowan, Hood, & Felder attended for Plaintiff, and Jack Gresh of Hall, Booth, Smith P.C. attended on behalf of the Defendant nurse and surgery center. The mediation ended with the parties at an impasse. (See **Exhibit 6**, Mediation Results Form). Neither “ABC Surgical Group” nor Coastal Anesthesia participated in pre-suit mediation. After mediation Mr. Hood identified the Anesthesia Group as Coastal Anesthesia.

On May 24, 2013, Plaintiff restyled his caption and filed his Complaint, naming, for the first time, Coastal Anesthesia. On July 8, 2013, Plaintiff attempted service of the Complaint on Coastal Anesthesia via certified mail return receipt requested to Coastal’s registered agent Randall Kerns, M.D. Jody Hawkins signed for the Complaint. (See **Defendant’s Exhibit 7**). However, I find that Jody Hawkins is not, has never been, and was not on July 8, 2013 an employee, agent or representative of Coastal Anesthesia. (See **Defendant’s Exhibit 4**, Aff. of Sanders). Ms. Hawkins is, and was on July 8, 2013, an employee, agent or representative of Charleston Surgery Center, L.P., one of the Defendants who has settled this case with the Plaintiff. Id.

On September 23, 2013, Coastal Anesthesia filed an Answer to Plaintiff's Complaint. Plaintiff filed his Application for Default Judgment and Request for a Damages Hearing on September 26, 2013. This Court entered an Order of Default on November 25, 2013. On December 5, 2013, Coastal Anesthesia filed this Motion to Dismiss for lack of subject matter jurisdiction, or in the alternative, to Set Aside the Entry of Default. At the hearing, the court sua sponte amended the Order of Default filed on November 25, 2013, with the consent of the parties at the hearing, and subsequently issued an amended order to reflect an entry of default rather than a default judgment.

LAW AND ANALYSIS

A. Failure to Comply with South Carolina Code § 15-79-125 Does Not Affect This Court's Subject Matter Jurisdiction

Coastal Anesthesia contends that this court lacks subject matter jurisdiction over the Complaint, as the Plaintiff failed to comply with the Notice of Intent process set forth in S.C. Code Ann. § 15-79-125. Subject matter jurisdiction "refers to a court's constitutional or statutory power to adjudicate a case." Johnson v. S. Carolina Dep't of Prob., Parole, & Pardon Servs., 379 S.C. 279, 284 (2007).

S.C. Code Ann. § 15-79-125 limits the circuit court's ability to hear a medical malpractice suit until the substantive pre-litigation requirements set forth in the statute have been fully fulfilled. Prior to filing a summons and complaint, a plaintiff must "contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness." S.C. Code Ann. § 15-79-125(A). The Notice of Intent "must name all adverse parties as defendants" and is required to "be served upon all named defendants." Id. Following Service of the Notice of Intent, "[w]ithin ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference" § 15-79-125(C). A plaintiff may only file a summons and complaint after the parties are unable to reach a resolution at pre-suit mediation. § 15-79-125(E).

This court finds that while failure to comply with the Notice of Intent procedures under § 15-79-125 may lead to dismissal of a complaint, it was not the legislative intent to completely deprive the circuit court of subject matter jurisdiction over the action.

THEREFORE, this court denies Coastal Anesthesia's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

B. Coastal Anesthesia Demonstrated Good Cause Warranting Relief from Entry of Default

Rule 55(c) of the South Carolina Rules of Civil Procedure provides that a court may set aside an entry of default where "good cause exists." Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989). The decision whether to grant relief from an entry of default is solely within the sound discretion of the trial court. Id. The trial court should consider the following factors in deciding whether good cause exists: 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. Id. at 465, 381 S.E.2d 499, 501-02.


Good cause is a relatively low standard compared to the more rigorous standard applied to setting aside default judgments pursuant to Rule 60(b), SCRPC. See Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263, 266 (2009) ("The standard for granting relief from an entry of default is good cause under Rule 55(c), SCRPC, while the standard is more rigorous for granting relief from a default judgment under Rule 60(b), SCRPC"). The defaulting party should also "provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

This court finds that Coastal Anesthesia has shown good cause and should be granted relief from the entry of default. A review of the Wham factors supports a finding that the Entry of Default should be set aside. As to the first factor, the timing of the motion for relief, the Order Entering Judgment against Coastal Anesthesia was filed on November 25, 2013. As the Clerk's

office was closed for the Thanksgiving holiday, Coastal Anesthesia filed a Motion to Set Aside Default Judgment on December 5, 2013. No significant events have taken place in this case since the court entered default judgment, and therefore, Coastal Anesthesia meets the timing element of good cause.

As to the second factor, a meritorious defense, the claim against Coastal Anesthesia is premised upon the alleged vicarious liability of Dr. Thompson. Therefore, the defenses raised in her Answer (Defendant's Exhibit 9) and affidavit are sufficient to satisfy the meritorious defense requirement. (See Defendant's Exhibit 14, Affidavit of Dr. Thompson).

As to the third factor, the degree of prejudice to Plaintiff, this lawsuit was very recently filed and thus far only written discovery has been exchanged. Therefore, the delay in time does not prejudice the Plaintiff, and allowing this case to proceed will not prejudice the Plaintiff.



As Coastal Anesthesia explained in its Motion to Set Aside Entry of Default, at no point in time did Dr. Kerns, Ms. Sanders, or anyone else authorized to receive process on behalf of Coastal Anesthesia, ever receive service of a Notice of Intent to File Suit naming Coastal Anesthesia as a party to the Notice of Intent. At no point in time did Plaintiff or Plaintiff's counsel contact Dr. Kerns, Ms. Sanders, or anyone else authorized to receive service on behalf of Coastal Anesthesia, to make Coastal Anesthesia aware that Plaintiff intended to include it as a party to the Notice of Intent.

Additionally, service of Summons and the Complaint on Coastal Anesthesia was insufficient under Rule 4, SCRPC. The Plaintiff argued in its Memorandum in Opposition to this motion that Coastal Anesthesia waived any objections to improper service by failing to raise these objections in its Answer to Plaintiff's Complaint, or in a timely motion made pursuant to Rule 12, SCRPC. Plaintiff points to Rule 12(h)(1), SCRPC, which states that an insufficiency of service of process defense is waived if a party fails to raise the defense in a pre-answer motion or in the answer. However, as this court entered default against Coastal Anesthesia, and Coastal Anesthesia did not have the permission of the Plaintiff or the leave of court to answer the

Plaintiff's Complaint, the answer submitted by Coastal Anesthesia was null and cannot act to waive a defense of insufficiency of service of process. The court further concludes that it would not serve the interests of justice to permit a plaintiff to hold a defendant in default based upon the date an answer was filed, when no entry of default was entered, and simultaneously conclude that certain defenses were waived because not asserted in the untimely answer. Therefore, Coastal Anesthesia may properly object to the sufficiency of service as a basis to set aside the entry of default.

Corporations, such as Coastal Anesthesia, may be served by delivering the summons and complaint to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." Rule 4(d)(3), SCRCF. Service was improper in this case as Jody Hawkins signed for the Complaint, which Plaintiff had sent via regular mail to Coastal's registered agent Dr. Kerns, who is not, never has been, and was not on July 8, 2013 an employee, agent or representative of Coastal Anesthesia. Ms. Hawkins is an employee of Charleston Surgery Center, L.P., one of the Defendants who has settled this case with the Plaintiff. Plaintiff contends that Ms. Hawkins delivered the summons and complaint to Dr. Kerns and therefore effected personal service on him under Rule 4(d), SCRCF. However, under Rule 4(c), SCRCF, service may not be made by "a party to the action" upon another party. As an employee and agent of Charleston Surgery Center, L.P., another Defendant in this case as of July 8, 2013, Ms. Hawkins was unable to serve Coastal Anesthesia. Therefore, service on Coastal Anesthesia was improper under Rule 4, SCRCF.

In light of the fact that Coastal Anesthesia had not been named in the Notice of Intent and was not properly served with the Complaint, Dr. Kerns, with knowledge of the lawsuit against Dr. Thompson, could reasonably conclude that no further actions were needed on the part of Coastal Anesthesia. Because Dr. Thompson was in the process of defending the lawsuit, and given the fact that the only avenue of recovery against Coastal Anesthesia is premised upon the alleged vicarious liability (or non-delegable duty of care) of its independent contractor Dr.

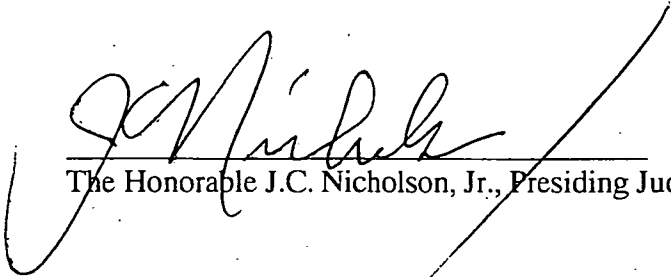
Thompson, it was reasonably for Dr. Kerns to conclude that her defenses applied equally to Coastal Anesthesia. Further, Coastal Anesthesia was not given the opportunity to participate in the mandatory pre-suit mediation process.

The interests of justice would be best served by setting aside default, as they require compliance with SCRCP Rule 4 in order to apprise a party of a pending action. Furthermore, Plaintiff failed to follow the requirements set forth under § 15-79-125 with respect to Coastal Anesthesia, and as such, Coastal Anesthesia never received proper notice of Plaintiff's potential suit against it or an opportunity to participate in pre-suit mediation, as is required by South Carolina statutes. Therefore, the interests of justice will be served by setting aside default and allowing the case to be resolved on the merits. Finally, the policy of the law favors bringing trials on the merits whenever possible.

This court finds that Coastal Anesthesia has adequately provided an explanation for the default and provided reasons why vacating the entry of default serves the interests of justice.

THEREFORE, Coastal Anesthesia has met all of the elements of good cause and this Court grants Defendant's motion to set aside the Entry of Default. Coastal Anesthesia will have 30 days upon proper service of the Summons and Complaint to Answer or otherwise responsively plead to the Complaint.

1/15, 2014
Charleston, South Carolina


The Honorable J.C. Nicholson, Jr., Presiding Judge

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JOHN HUGHES COOPER
1476 BEN SAWYER BLVD STE 7
MOUNT PLEASANT SC 29464-4587

*Received
1-24-2014*

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/denying defnt Coastal Anesthesia mot to dismiss

CASE NO: 2013CP1003054

Willie Preston , plaintiff, et al VS Surgical Care Affiliates LLC , defendant, et al

This judgment was entered on the 17th day of January, 2014, and a copy mailed first class on Tuesday, January 21, 2014, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.

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