

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

CASE NUMBER: 2014CP4004165

Ashley S Griffith

Pathology Service Associates LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

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.
- 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 : _____

RECEIVED
 JAN 28 2015
 SC Court of Appeals

INFORMATION FOR THE PUBLIC 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 |
|---|---------------------------------------|--------------------------------|
| | | \$ |
| | | \$ |
| | | \$ |

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 _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 30 December 2014 to attorneys of record or to parties (when appearing pro se) as follows:

J. Todd Kincannon

Erin Richardson Stuckey
William C. Wood Jr.

Elizabeth Scott Moise

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Ashely S. Griffith,) Civil Action No. 2014-CP-40-4165
)

Plaintiff,)

vs.)

Pathology Service Associates, LLC,)

Defendant.)

RECEIVED

JAN 28 2015

SC Court of Appeals

RICHLAND COUNTY
FILED
2014 DEC 18 PM 4:27
JANET E. TORRINE
CLERK OF DISTRICT COURT

ORDER SETTING ASIDE ENTRY OF DEFAULT

This matter is before the Court upon the motion of the named defendant in this matter, Pathology Service Associates, LLC (“PSA”), to set aside the entry of default. A hearing on Defendant’s Motion was held on October ^{9th} 8, 2014. For the reasons set forth below, the motion is granted.

I.

Procedural and Factual Background

On October 28, 2013, Plaintiff filed a lawsuit (*Griffith v. Professional Pathology Services PC*, C/A No. 2013-CP-40-6571)(“Griffith I”) alleging that Professional Pathology Services PC (“PPS”) wrongfully placed two credit charges totaling \$98 on her credit report. She claims this action caused her \$245,000 damages. The complaint against PPS alleged two claims: defamation and violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”). PPS answered the complaint on November 25, 2013.

SCANNED

On April 9, 2014, Plaintiff filed a document captioned as an Amended Complaint. She deleted PPS from the caption and body of the complaint and added PSA as the defendant. She alleged the same two claims for the credit reports, but deleted footnote 5 of the original complaint which referenced the *Eiser* case, filed by Plaintiff's counsel, which claimed that Eiser, not Plaintiff, suffered the same \$245,000 in damages claimed by Plaintiff in this case and specifically stated that Plaintiff had been able to "evade the payment" of the \$245,000 "she had been contractually required to provide to Eiser." She did not make a motion to amend the complaint to drop and add parties or otherwise get Court approval for the amendment. Plaintiff filed no document dismissing PPS from the case under Rule 41.

The Amended Complaint names only "Pathology Service Associates LLC" as a party and specifically states it is a "South Carolina limited liability company with a principal place of business in Florence County, South Carolina." (Amended Compl. ¶ 2.) Neither the summons nor the Amended Complaint mentions PST Services, Inc. The pleadings contain no reference to any mergers, corporate affiliations, use of trade names, or other facts suggesting that any party other than the named and described party was being sued. The named and described entity in the pleadings, Pathology Service Associates LLC, was dissolved and terminated as a matter of law on January 21, 2014, as reflected in the public records of the South Carolina Secretary of State.

On June 10, 2014, Griffith filed a Motion for Entry of Default and Judgment by Default against PSA, seeking a default judgment in the amount of \$1,038,961.57 plus interest. Thereafter, on June 20, 2014, based on Plaintiff's submissions and without a hearing, this Court issued the Default Judgment Order. Even though the pleadings upon which default was taken were devoid of any reference to PST or any allegations of mergers, corporate

affiliations, use of trade names, or other facts suggesting that any party other than the named and described party was being sued, the Default Judgment Order referred to the Defendant as both “Pathology Service Associates LLC” and “Defendant Pathology Service Associates now known as PST Services, Inc.”

This suit (“Griffith II”) was filed ten days later on June 30, 2014. An Affidavit of Default was filed July 31, 2014. PSA filed an answer on August 12, 2014 and also moved for relief from entry of default in a motion filed the same day.

The complaint purports to be a suit upon the judgment entered in Griffith I and an independent claim under SCUTPA based on failure to pay that judgment. As in Griffin I, only “Pathology Service Associates LLC” is named in the summons and complaint. This defendant is alleged to be “the same Defendant against whom a judgment was granted in [Griffin I].” There are no allegations of trade names, affiliates or merger in the complaint.

On August 15, 2014, Plaintiff obtained a Transcript of Judgment, which was filed in the Florence County Court of Common Pleas on August 26, 2014. In the typed transcript, the judgment debtor was originally shown to be “PST Services, Inc. formerly known as Pathology Service Associates, LLC,” but Plaintiff’s counsel had marked through the words “PST Services, Inc. formerly known as” (and initialed the changes), leaving the party’s name as “Pathology Service Associates, LLC.” The Execution Against Judgment identifies the judgment debtor as “Pathology Service Associates, LLC.”

Plaintiff recently unilaterally—and again without leave of court—began changing the caption in numerous filings in this case to change the name of the defendant to “Pathology Service Associates, LLC n/k/a PST Services, Inc.”

II.

Legal Discussion

PSA's motion is granted and the entry of default is vacated for the following reasons.¹

A.

Assuming the matter, and thus the entry of default have not been voluntarily terminated by Plaintiff, the proceedings leading to the default were a nullity because the entity named in the caption and described in the body of the complaint was, at the time of the filing of the complaint, a dissolved and terminated legal entity under South Carolina law as stated in the records of the South Carolina Secretary of State submitted at the hearing. *See* S.C. Code Ann. § 33-44-805. Under South Carolina law, an action against a nonexistent defendant is a legal nullity in its entirety. *See McCullar v. Estate of Campbell*, 381 S.C. 205, 207-08, 672 S.E.2d 784, 785 (2009); *see also Glenn v. E. I. DuPont De Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157-58 (1970) (“A civil action may be maintained only in the name of a person in law, an entity, which the law of the forum may recognize as capable of possessing and asserting a right of action. A suit brought in a name which is not a legal entity is a nullity and the action fails.”); *Blackwood v. Spartanburg Commandery No. 3, Knights Templar*, 185 S.C. 56, 193 S.E. 195, 197 (1937) (“‘But if there is a lack of legal entity, the whole action fails. . .

¹ At or near the time of the hearing on the motion, Plaintiff filed a purported stipulation of dismissal. Even though Plaintiff named only one defendant and an appearance has been made on behalf of the named defendant in this proceeding, Plaintiff's motion proceeds upon the premise that there is more than one defendant and that she can stipulate to a dismissal and end the Rule 60 proceedings without voluntarily dismissing her case in its entirety. A Rule 60(b) motion is considered a continuation of the original case so long as it seeks nothing more than relief from the judgment. *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 760-63 (6th Cir. 2002). Because Plaintiff's stipulation dismisses a defendant and there is only one named defendant in the case, Plaintiff's stipulation effectively ends all pending matters against the only named defendant. Plaintiff has voluntarily ended her lawsuit and the entry of default is of no further legal effect. Alternatively, the stipulation as stated is simply a nullity due to its faulty initial premise.

. If an action is brought in the name of that which under the lex fori has no legal entity, it is as if there was no plaintiff in the record and therefore no action before the Court.’” (quoting *Commercial & Sav. Bank of Lake City v. Ward*, 146 S.C. 77, 143 S.E. 546, 548 (1928))). Pathology Service Associates LLC—the only named Defendant, which was alleged to be a South Carolina limited liability company—did not exist at the time Plaintiff filed her Complaint, so the proceedings leading to the entry of default are nullities in their entirety.

To the extent Plaintiff asserts this is a “misnomer” situation in which he mistakenly sued the wrong entity, the argument is rejected for the reasons set forth more fully in the order relieving Defendant from default judgment in Griffith I, which are incorporated by reference. Because Plaintiff knowingly chose to proceed against a non-existent South Carolina entity, the subsequent proceedings, including the entry of default, are a nullity and vacated.

Further, as set forth more fully below in discussing the good cause standard, I find that Plaintiff’s decision to plead in the manner chosen despite knowledge of the merger and termination caused confusion and prejudiced those potentially responsible for responding on behalf of Defendant, its successors, or other affiliated entities. *See McCall*, 363 S.C. at 653, 611 S.E.2d at 318 (finding of misnomer requires showing of no prejudice to misnamed party).

B.

PSA, even if properly named in the suit, is entitled to relief from entry of default because the complaint fails to state a claim upon which relief may be granted. “A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein. ... It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore

reversible error.” *Mutual Sav. and Loan Ass'n v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (S.C. 1980). *See also Joe Hand Promotions, Inc. v. Yakubets*, No. 12-4583, 2014 WL 960787, at *4 (E.D. Pa. Mar. 11, 2014) (quoting 10A Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice and Procedure* § 2688 (3d ed. 2013) (holding that in a default, the court’s initial inquiry must be “ ‘whether the unchallenged facts constitute a legitimate cause of action.’ ” and that “[c]onclusory allegations and the parties’ legal theories or ‘conclusions of law’ are not entitled to the same presumption and are not deemed admitted.”).

Two claims are alleged. Both are insufficient. They are insufficient in the first instance because both are premised upon the existence of the default judgment in Griffith I. For the reasons set forth in the order entered in that matter, that judgment has been vacated; thus, no further claim for damage may be predicated on that judgment. Relief from entry of default is, therefore, appropriate.

Further, the Complaint cites a 1978 opinion of the Supreme Court of Vermont which held that action of debt on a judgment had not been abolished in Vermont. There is no South Carolina case law suggesting an action on a judgment exists today as a separate cause of action under which the plaintiff may recover damages separate and apart from the judgment he seeks to collect. In South Carolina, a judgment requiring the payment of money may be enforced by writ of execution as provided the South Carolina Code. *See* S.C. Code Ann. §§ 15-35-180, 15-39-10 *et seq.*; *see also, Katzburg v. Katzburg*, 2013-000171, 2014 WL 3734371 (S.C. Ct. App. July 30, 2014) (“In South Carolina, money judgments generally are enforced by way of writs of execution issued to the sheriff.”); S.C. R. Civ. P. 69 (“Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise.”). Thus, entry of default is inappropriate and is vacated.

In addition, to recover on a South Carolina Unfair Trade Practices Act (“SCUTPA”), S.C. Code Ann. § 39-5-10 *et seq.*, claim, a plaintiff must prove four elements, by a preponderance or greater weight of the evidence: (1) a violation of SCUTPA; (2) proximate cause; (3) damages. *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 482, 458 S.E.2d 431, 438 (Ct. App. 1995).

In addition, a claimant must further allege and prove that the defendant’s actions adversely affected the public interest. *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004). This adverse impact “must be proved by specific facts.” *Jeffries v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994). Therefore, conduct that only affects the parties to a transaction will not serve as a basis for a SCUTPA claim. *Id.* “Without proof of specific facts disclosing that . . . members of the public were adversely affected by [the unfair conduct] or that they were likely to be, all we are left with is a ‘speculative [claim] of adverse public impact’ and that will not suffice for a recovery under the UTPA.” *Id.* at 527, 451 S.E.2d at 23. Although a claimant may prove an adverse impact on the public interest by showing that the acts or practices have the potential for repetition, the potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence;² or (2) by showing the [Defendant’s] procedures created a potential for repetition

² The factors to be considered in determining the admissibility of prior similar conduct in SCUTPA claims are (1) the length of time between each of the past incidents, and the incident under consideration; (2) the degree of similarity between the facts of previous incidences and the incident under consideration; (3) the degree of similarity between the conduct of the defendant in each of the incidents; (4) the degree of similarity between the advantage foreseeably obtained under the facts of each prior incident by the unfair conduct in each case; (5) the degree of similarity of harm to others in each incident; and (6) the number of prior incidents as compared with the relative number of prior opportunities to conduct the unfair conduct. *Burbach v. Investors Mgmt. Corp. Int’l*, 326 S.C. 492, 498, 484 S.E.2d 119, 122

of the unfair and deceptive acts.” *Singleton*, 358 S.C. at 379, 595 S.E.2d at 466. However, courts have also noted that “[i]n the course of human endeavor, every action has some potential for repetition. The mere proof that the actor is still alive and engaged in the same business is not sufficient to establish this element.” *Jeffries*, 316 S.C. at 529, 467 S.E.2d at 24.

In *Bracken v. Simons First National Bank*, 2014 WL 2613175, at *6-7 (D.S.C. June 9, 2014), the court dismissed a SCUTPA claim based on the defendant’s omissions of facts on the plaintiff’s credit reports for failure to allege the “public interest” element. The court stated that “[w]ithout proof of specific facts disclosing that members of the public were adversely affected by the unfair conduct or that they were likely to be so affected, the result is a “ ‘speculative claim of adverse public impact’ and that will not suffice under the UPTA.” *Id.* at *7 (quoting *Jeffries*; 316 S.C. at 528, 451 S.E.2d at 23); *see also Ameristone Tile, LLC v. Ceramic Consulting Corp.*, 966 F. Supp. 2d 604, 621-22 (D.S.C. 2013) (dismissing a SCUTPA claim when the complaint merely stated that “Defendants’ acts have the potential for harmful effects to the public interest because they are capable of repetition” because the allegations were conclusory and without facts demonstrating that the defendants conducted the same kind of actions in the past or that their procedures or business practices created a potential for repetition in the future); *Ethox Chem., LLC v. Coca Cola Co.*, No. 6:12-cv-01682-TMC, 2013 WL 41001, at *3 (D.S.C. Jan. 3, 2013) (finding insufficient to establish adverse effects on public interest the allegation that “Coca-Cola has been accused of engaging in unfair methods of competition and deceptive business practices” in the past and that “there is a legitimate threat that Coca-Cola will continue to engage in unfair practices and repeat its

deceptive business practices, and, as a result, Coca-Cola's actions adversely affect the public interest").

In this case, Plaintiff's complaint contains no allegations regarding effect on the public interest, as opposed to the private interest of Plaintiff, nor does the complaint contain any non-conclusory allegation of repetitive conduct relating to non-payment of judgments. Therefore, the entry of default is vacated on this additional ground.

C.

An entry of default may be set aside under Rule 55(c) of the South Carolina Rules of Civil Procedure for "good cause shown." Rule 55(c), SCRPC. The "good cause" standard set forth in Rule 55(c) is broader and more liberal than the standard for relief from a default judgment under Rule 60(b). See *Top Value Homes, Inc. v. Harden*, 319 S.C. 302, 304, 460 S.E.2d 427, 428 (Ct. App. 1995). Under Rule 55(c), the party seeking relief from an entry of default must show good cause for the default and give reasons why relief from the entry of default would serve the interests of justice. See *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

A party's reasons for failing to timely appear or answer are relevant in deciding whether "good cause" exists to set aside the entry of default. See *New Hampshire Inc. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 378 (Ct. App. 1993). When deciding whether good cause exists to set aside the entry of default, the Court should consider the following three factors: (1) the timing of the motion for relief; (2) the existence of a meritorious defense; and (3) any prejudice to the plaintiff. See *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989).

The Court has carefully considered the affidavits of Michael Gormley, a Senior Legal Specialist for McKesson Corporation, and Todd Kincannon, Plaintiff's counsel, as well as all the submissions from both parties, and finds that Mr. Gormley's affidavits are reliable and convincing and that Defendant has made a particularized showing of good cause for its failure to answer the complaint timely.

McKesson Corporation received a copy of Plaintiff's Summons and Amended Complaint in *Griffith I*.³ Although the service letter, which was delivered to Corporation Service Company, is directed to "PST Services, Inc. f/k/a Pathology Service Associates, LLC," the Summons and Amended Complaint named PSA as the only defendant. As discussed above, PST Services, Inc. was not named in any of the pleadings nor were there any allegations regarding affiliated companies or trade names.⁴ The Griffith II complaint was received on or about June 30, 2014. It, too, contained no reference to PST Services or any other entity other than the defendant named in Griffith I.

At the time McKesson received the documents, Senior Legal Specialist Michael Gormley was not personally familiar with the PSA entity, so he conducted a preliminary investigation and mistakenly concluded that PSA was not a McKesson entity.⁵ PSA became an entity owned by McKesson on December 21, 2012, as part of McKesson's acquisition of a company called MED3000 Group, Inc. ("MED3000").⁶ It was not directly and independently acquired. At the time of the acquisition of MED3000, one action was pending against PSA, an employment action.⁷ However, the employment action was listed in McKesson's litigation

³ 8/12/14 Gormley Aff. ¶ 4.

⁴ *Id.* ¶ 5.

⁵ *Id.* ¶ 1, 6.

⁶ *Id.* ¶ 7.

⁷ *Id.*

database as being associated with MED3000, not PSA. Gormley did not work on the employment action. To Gormley's knowledge, no other lawsuits were filed against PSA after the MED3000 acquisition, thus there was no entry directly identifying PSA as a McKesson entity.⁸ Gormley was personally unfamiliar with PSA.⁹

Further, Plaintiff sent notices of the default in both Griffith I and this case to an outdated address. I find that PSA did not receive these documents through the mail that would have earlier alerted McKesson to the default situation. Although Mr. Gormley's determination was incorrect, I find that his initial confusion and determination are supported by the record as well as Plaintiff's pleadings and related documents that exacerbated the confusion. There is no evidence to suggest that PSA, through Gormley, intentionally disregarded the pleadings or neglected to take any care or only slight care to determine whether PSA was a McKesson-related entity for which a response should be made. The "good cause" standard is met in this instance.

2.

Upon learning of the default judgment, PSA contacted its present counsel to investigate the matter and move to set aside the entry of default. PSA's counsel then filed the original Motion within three business days of learning of the Griffith II matter and the failure to timely answer. Counsel filed an answer. Therefore, PSA has acted in a timely manner and is prepared to proceed and actively participate in the action.

3.

A "meritorious defense" is "one which is worthy of a hearing or judicial inquiry

⁸ *Id.* ¶ 8.

⁹ *Id.*

because it 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.” *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989). The “defense need not be perfect nor one which can be guaranteed to prevail at a trial.” *Id.*; *see also Micronics, Inc. v. S.C. Dep’t of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (setting aside default).

In this case, Plaintiff made two claims: a suit on the judgment and another claim for failure to promptly pay the judgment pursuant to SCUTPA. As set forth in the order relieving PSA from default judgment in Griffith I, relevant portions of which are incorporated by reference, I find that Defendant has presented evidence of several meritorious defenses to the underlying judgment on which this case is predicated. As particularly noted, both parties have referenced two other lawsuits, which are related to the facts alleged in the Griffin I pleadings and contradict or at least call into question some of the damages and causation allegations made in this lawsuit and in Griffin I. I take judicial notice of the documents filed in *Dana Eiser v. JPMorgan Chase Bank, N.A.* (filed in Richland County, SC Court of Common Pleas on September 11, 2013, No. 2014-CP-4005476 and removed to the South Carolina federal district court, No. 3:13-cv-02751-JFA (D.S.C.) and *Ashely S. Griffith v. HyCite Enterprises LLC, et al.* (filed in Lexington County, SC Court of Common Pleas on April 10, 2014, No. 2014-CP-4005476) as further support for finding that PSA may have meritorious defenses to Plaintiff’s claims upon vacation of the entry of default.

4.

Plaintiff will not be prejudiced if the Court sets aside entry of default and allows the parties to proceed on the merits of the case. Prejudice must, at a minimum, be more than the

delay resulting from default and the burden of litigating the case on the merits. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997); *see also Berthelsen v. Kane*, 907 F.2d 617 (6th Cir. 1990) (finding that delay alone is insufficient for establishing necessary prejudice to warrant refusal to set aside default judgment).

Plaintiff has advanced several theories of prejudice, most involving her unreasonable and risky dismissal of pending lawsuits or parties, entering into a contract to buy expensive real estate, and quitting her job—all allegedly based on the default judgment that her husband-lawyer would have realized was subject to being set aside because he knew—among other things—that the defendant was a dissolved limited liability company when the Amended Complaint was served.

Plaintiff claims prejudice from her settlement and dismissal of a lawsuit that she claims was likely to yield a seven-figure verdict against Hy Cite Enterprises LLC; National Healthstyles Cooking 4 You, Inc.; 21st Century Marketing Concepts; and David's Bridal, Inc. That lawsuit alleged on April 8, 2014 that defendant National Healthstyles had wrongfully reported \$4,193 on her credit and had “intentionally and willfully caused to be published to one or more credit bureaus false and damaging information about Plaintiff that caused and will continue to cause Plaintiff’s damages.” The lawsuit also claimed damages for failure to deliver cookware that she claims was defective, along with other alleged misrepresentations.

Beyond the fact that the *Hy Cite* lawsuit shows the \$98 charges that were placed on her credit report by SCA Collections did not cause her to lose a bank loan, dismissal of the lawsuit does not prove prejudice. Despite the lengthy affidavit attempting to explain the reasonableness of dismissing an entire pending lawsuit that he claims was worth about \$1 million, taking that step without having the judgment money in hand is unreasonable and,

instead, appears to be a misguided strategy to manufacture prejudice that does not exist.

She further claims prejudice because she dismissed with prejudice the original defendant in the lawsuit, Pathology Service Associates, LLC, which had “pointed the finger” at PSA. This, again, is not a reasonable course of action when Plaintiff and her counsel would have been aware of the risk of the judgment being set aside and still took the risk.

Plaintiff also claims that she is prejudiced by entering into a contract to purchase a \$975,000 property on the lake that she cannot otherwise afford. As with dismissal of the lawsuits discussed above, entering into a contract without having the funds in hand is unreasonable—particularly since she is aware that default judgments are subject to being overturned. Further, no third parties are prejudiced because the contract allows the sellers to continue marketing the property until Plaintiff provides the necessary funds at closing, and the sellers have the option to terminate the contract at any time and void the contract if the sellers elect to enter into a contract with another party.¹⁰

Plaintiff also claims that in anticipation of her move to Chapin, she quit her job in West Columbia and began preparing her current house to be marketed and sold to repay Dana Eiser the remaining money owed to her (although the *Eiser* complaint alleged that no payments were to be due for two years) and the original complaint in this matter admitted that Plaintiff has evaded any obligation to Eisner. Again, quitting a job and preparing a house for sale before the money is in hand and the move is made is not reasonable and any prejudice is of Plaintiff’s own making.

As illustrated above, PSA has acted in a timely manner, possesses meritorious defenses, and allowing this case to proceed on the merits will result in no prejudice to the

¹⁰ Exhibit U, 7/17/14 Contract of Sale, Residential.

Plaintiff or third parties. Therefore, the entry of default is vacated and PSA's answer shall be deemed timely filed.

III.

Wherefore, it is ORDERED that entry of default is vacated.



Robert E. Hood
Judge, Fifth Judicial Circuit

Columbia, South Carolina

12/18, 2014

CERTIFICATE OF SERVICE

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Pathology Service Associates, LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Proposed Order Granting Motion to Set Aside Entry of Default a

Counsel Served:

J. Todd Kincannon
The Kincannon Firm
P.O. Box 7901
Columbia, SC 29202

RICHLAND COUNTY
FILED
2014 DEC 18 PM 4: 27
JEANETTE H. MORRIS
C.C.P. & C.S.

J. Todd Kincannon

October 24, 2014

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