STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	
COUNTY OF DILLON)	**DOCKET NO.: 15-CP-17-313**
)	
Thomas J. Grossetti, Jr.,)	
)	
Plaintiff,)	
)	
vs.)	**ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT**
)	
Nicolette S. Blue,)	
)	
Defendant.)	
)	

This matter comes before me as Special Referee pursuant to a Motion to Set Aside Default Judgment filed by the Defendant. A hearing was conducted at my office located at 105 Chase Street in Florence, South Carolina, on January 11, 2016, beginning at 10:00 a.m. George D. Jebaily, Esquire, was present on behalf of the Plaintiff, and Brett H. Bayne, Esquire, was present on behalf of the Defendant. A court reporter was also present. Based on the reasons set forth below, the Defendant's motion is DENIED.

Procedural History

This matter was referred to me as Special Referee by the Presiding Judge of the Fourth Judicial Circuit on August 27, 2015, for the purpose of conducting a hearing to determine damages following the Court's entry of default against the Defendant. A hearing was held at my office on September 22, 2015, and I issued an Order and Judgment the following day based on the evidence presented by the Plaintiff. On October 8, 2015, counsel for the Defendant filed a Motion to Set Aside Default Judgment, which I was provided pursuant to a letter dated December 18, 2015. By consent of counsel, a hearing was set at my office in Florence for January 11, 2016, with regard to the Defendant's Motion to Set Aside Default Judgment.

Defendant's Motion

Although captioned Motion to Set Aside Default, the Defendant's motion is more appropriately a motion to set aside default *Judgment*, as an Order and Judgment had already been entered against the Defendant prior to the filing of the motion. Therefore, counsel agrees that Rule 60(b), SCRCP, is applicable, specifically Rule 60(b)(1), SCRCP, which provides that the Court may relieve a party from a final judgment based on *"mistake, inadvertence, surprise, or excusable neglect."*

In support of her motion to set aside the judgment, Defendant has submitted the Affidavit of Kim Cofresi, a claims representative of Omni Indemnity Company, which is the liability insurer for the Defendant. The four-page Affidavit sets forth a history of communications via phone with Plaintiff's counsel for many months regarding settlement discussions, the filing of the Complaint, and Omni's request for copies of any suit papers that were filed. In short, Omni contends that it relied on Plaintiff's counsel to send it copies of the suit papers, and because the papers were never sent, it did not take any action in regard to responding to the lawsuit.

The Defendant agrees that service of process and notice of all proceedings to the Defendant have been proper. There is no challenge to jurisdiction.

Applicable Law

Rule 60(b)(1), SCRCP, provides as follows:

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.

...

Our appellate courts have held that "in determining whether to set aside a default judgment under Rule 60(b), SCRCP, 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*, 671 S.E.2d 87, 93 (S.C. App. 2008). Furthermore, the party seeking relief under Rule 60(b)(1) "has the burden of presenting evidence proving the facts essential to entitle him to relief." Id. at 94.

Analysis

I find that Motion to Set Aside the Default Judgment was filed promptly upon receiving notice of the Order and Judgment. Notice was received on October 5, 2015, and the Motion was served by counsel three days later on October 8, 2015. Therefore, factors (1) and (2) are not at issue. Regarding factor (4) – prejudice to the Plaintiff – the Defendant contends there will be no prejudice, and the Plaintiff has presented no evidence to the contrary. Therefore, the issues at the heart of this matter are two-fold: whether the Defendant has a meritorious defense; and whether the Defendant has generally demonstrated "mistake, inadvertence, surprise, or excusable neglect."

The Defendant cites two cases in support of its motion: *Edwards v. Ferguson*, 175 S.E.2d 224 (S.C. 1970), and *McClurg v. Deaton*, 671 S.E.2d 87 (S.C. App. 2008) as controlling. *Edwards* is cited for the proposition that a Plaintiff's attorney's failure to provide suit papers to a liability insurer is grounds for relief from a default judgment. In *Edwards*, the insurer was notified that suit had been filed and served, but took no action. Here, Omni was advised by Plaintiff's counsel on June 10, 2015, that the lawsuit had been filed. Paragraph 10 of the Affidavit of Kim Cofresi states, "I spoke with Mr. Jebaily and he informed me suit had been

filed." Unlike the factual history in *McClurg*, the parties admit that there are no underhanded dealings, nor that the Plaintiff's attorney made any misrepresentations to Omni. Simply put, Omni was expecting copies of the suit papers, but did not receive them from Plaintiff's counsel after many requests.

I find *Edwards* to be distinguishable. First, *Edwards* was decided before the *Rules of Civil Procedure* were enacted. It relied upon a pre-1976 statute that is not even quoted in the opinion. Second, *Edwards* placed great reliance on the public policy implications that State Farm had issued a "certified policy" through an "assigned risk." There is no evidence of such a situation here. Third, and most compelling, *Edwards* was decided 46 years ago in 1970, long before technology, personal computers, online public documents, and the like. Omni admits that it was aware that suit had been filed based on Plaintiff's counsel's statement. However, it took no action to hire an attorney to handle the matter nor did it contact the Dillon County Clerk of Court via phone, mail, email, in person, or via the Court's website, to obtain a copy of the Complaint (the accident occurred in Dillon County and the Defendant resided in Dillon County). While *Edwards* found State Farm's neglect to be excusable, I find that the neglect of Omni was *not* excusable based on the vast resources available to insurers, litigants, and the general public in 2015. Omni knew suit had been filed but took no action other than to wait for the Plaintiff's attorney to send it a copy.

However, regardless of the distinction with *Edwards*, the Defendant's motion utterly fails under the third prong to be considered by the Court - *the existence of a meritorious defense*. In *Edwards*, the Defendant presented evidence of intoxication, comparative negligence, and a dispute as to the driver of the vehicle as defenses in order to prevail on its motion. In *McClurg*, the Court of Appeals found that the Defendant had failed to present any evidence to support a

meritorious defense. There was no evidence presented of a liability dispute. Although the Defendant raised a dispute as to damages as a defense by attempting to introduce settlement offers, the Court never went as far as to adopt disputed damages as a valid reason to support a meritorious defense.

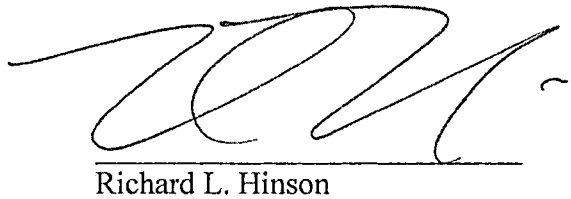
In this case, the Defendant admits there is no meritorious defense as to liability for the accident. Liability is clear and admitted. Instead, the Defendant contends in arguments by counsel that she intends to dispute the extent of damages and reasonableness of the Plaintiff's medical treatment. However, no factual evidence has been presented to support this argument. There is no affidavit from the Defendant. The affidavit from Omni does not address this issue. There are no medical records submitted. There are no affidavits, statements, records, documents, or evidence of any type contradicting the Plaintiff's damages. Simply put, there is absolutely no evidence in the record of any defense to the merits of the case, much less a *meritorious* defense.

Conclusion

For the foregoing reasons, I find that the Defendant has failed to meet her burden under Rule 60(b)(1), SCRCP. Therefore, the Defendant's Motion to Set Aside Default Judgment is hereby DENIED.

IT IS SO ORDERED.

Florence, South Carolina
January 11, 2016



Richard L. Hinson
Special Referee