

STATE OF SOUTH CAROLINA)
)
COUNTY OF MARION)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT

C/A No. 2015-CP-33-280

PARTNERS 95, LLC and HSGCHG)
Investments, LLC,)
)
Plaintiffs,)

v.)

Riverdale Funding, LLC and)
Woodbridge Mortgage Investment)
Fund 3, LLC)
)
Defendants.)

ORDER

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SC Court of Appeals

This matter came before me upon the motion of Defendants, Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC (collectively hereinafter "Defendants"), to set aside their default. For the reasons set forth below, I deny Defendants' motion.

I. Defendants have failed to demonstrate good cause for setting aside the entry of default.

"For good cause shown the court may set aside an entry of default." Rule 55, SCRPC. The "good cause" standard requires a party seeking relief from an entry of default to provide an explanation for the default and give reasons why vacation of the default would serve the interests of justice. Sundown Operating Co., Inv. v. Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Where a defendant fails to demonstrate good cause for failing to answer the complaint, a court need not go any farther. See Regions Bank v. Owens, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (2013) ("Because we find the master did not err in finding [the defendant] failed to show good cause for failing to answer the complaint, we need not consider the *Wham* factors."). "A party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is

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applied to an attorney.” Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (cited with approval in Regions Bank). It is always a matter of regret that a party should not have his day in court. Williams v. Ray, 232 S.C. 373, 384, 102 S.E.2d 368, 373 (1958). Where, however, the defendant was duly served with the summons and complaint, he has a duty to answer the complaint thereafter. Id. Therefore, “[h]e must suffer the consequence of his failure to answer. Id.

This matter was commenced by the filing of the Summons and Complaint on March 17, 2015. Thereafter, Defendants were served via certified mail, return receipt requested, restricted delivery addressed to their registered agent, A Registered Agent, Inc. (“Defendants’ Registered Agent”), as is evidenced by the Affidavits of Service filed with the Court on April 2, 2015. After more than thirty (30) days, exclusive of the date of service, had elapsed since the service of the Summons and Complaint, no Answers or other pleadings were filed or served. An Affidavit of Default was filed with the Court on May 8, 2015. The Affidavit of Default was served on Defendants’ Registered Agent, as evidenced by the Certificate of Service also filed on May 8, 2015. On August 10, 2015, Plaintiffs filed their Notice of Motion and Motion for Order of Reference and served Defendants’ Registered Agent with this motion, as is evidenced by the Certificate of Service filed August 10, 2015. On October 16, 2015, Plaintiffs filed the Notice of Hearing. It was likewise served on Defendants’ Registered Agent as evidenced by the Certificate of Service filed October 16, 2015. It was not until Defendants’ were served with the Notice of Hearing that any action was taken.

The Defendants were served multiple times with documents in connection with this case. According to the Mr. Rubenstein’s affidavit, during the period of time in which the Defendants’ Registered Agent would have been served, Diana Balayan, the person in typically in charge of

receiving service was out on maternity leave. (Affidavit of Eugene Rubenstein ¶ 4). However, in this case, those tasked with “filling in” for Ms. Balayan failed to review the Summons and Complaint. *Id.* ¶ 6. Mr. Rubenstein further states that this failure to “fill in” for Ms. Balayan presumably caused Defendants’ failure to respond to the Notice of Default. *Id.* at ¶ 7. Mr. Rubenstein continued to state that the Notice of Motion and Motion for Order of Reference was *received* by Mr. Balayan on or about August 17, 2015, and that it was forwarded to in-house attorneys who again failed to take any action. *Id.* at ¶ 8. Mr. Rubenstein stated that he, himself, “briefly looked at the document (the Notice of Motion and Motion for Order of Reference), did not read it carefully, and took no further action.” *Id.* at ¶ 13. Each time Defendants were served with documents was another opportunity for the Defendants to realize their default and take action, yet each time, until the service of the Notice of Hearing, Defendants failed to take action. Defendants have admitted in Mr. Rubenstein’s affidavit that they received the notices, and failed to act. The Defendants have failed to demonstrate good cause for setting aside default.

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Defendants contend that good cause for their failure to act is demonstrated by their misunderstanding the nature of the case and the requirement to answer a Complaint. I find this unpersuasive under the reasoning set forth in Regions Bank, *supra* and Hill, *supra*. Because Defendants have failed to demonstrate good cause, their motion to set aside default is DENIED.

II. The Wham factors also weigh against setting aside defendant’s default.

Even if the Court believed that good cause existed to set aside default, the Wham factors weigh against setting aside Defendants’ default. “Once a party has put forth 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, 383 S.C at 607, 681 S.E.2d at 888 (citing Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)).

Defendants contend that “as soon as Defendants learned of the nature of the lawsuit and the entry of default, they immediately set into action to retain counsel to defend this matter.” Affidavit of Eugene Rubenstein. However, Defendants failed to act even given multiple opportunities on which to act, i.e. the service of the Summons and Complaint, the service of the Affidavit of Default, and the service of the order of reference. From the time of the filing and service of the Summons and Complaint to when Defendants took action, over seven months had elapsed. South Carolina appellate courts have upheld denial of motions to set aside default for less amounts of time than the seven months present in this case. See e.g. Sundown, supra; Dixon, supra; Regions Bank, supra. This factor weighs against setting aside Defendant’s default.

Furthermore, Defendants have failed to present any evidence of a meritorious defense. Not only must a movant make a proper showing he is entitled to relief on a specified ground, but he must also make a prima facie showing of a meritorious defense. McClurg v. Deaton¹, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2009) *affirmed by* McClurg v. Deaton, 395 S.C. 85, 716 S.E.2d 887 (2011). In McClurg, the court noted that the defendant failed to present any evidence, by affidavit or otherwise, to suggest it had a meritorious defense, and therefore upheld the denial of the motion to set aside the default judgment. 380 S.C. at 576, 671 S.E.2d at 94. The only affidavit Defendants’ submitted was that of Mr. Rubenstein, which addressed only the circumstances surrounding the Defendants’ going into default.

¹ While McClurg involved a denial of a motion to set aside default judgment, the factors are largely similar as under Rule 60 the factors to consider 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, 380 S.C. at 573, 671 S.E.2d at 93.

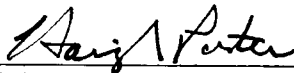
Plaintiffs have justifiably relied on Defendants' default. Despite Defendants' allegations that this is in the early stages of litigation, over seven months passed since the filing of the Summons and Complaint to Defendants' action. Setting aside Defendants' default would only further delay Plaintiffs recovery of the sums due to them by virtue of Defendants' failure to consummate the loan.

Because of the extended period of time for Defendants to take action, the lack of evidence of a meritorious defense, and the prejudice to Plaintiffs, the Wham factors weigh against setting aside Defendants' default. Therefore, even addressing the Wham factors, the Court finds setting aside Defendants' default would not be merited.

For the foregoing reasons, Defendants Motion to Set Aside default is DENIED.

AND IT IS SO ORDERED.

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Haigh Porter, Special Referee for
Marion County

December 16, 2015
Florence, South Carolina