STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

Civil Action No.: 2014-CP-13-574

Cora Lea Nichols,

Plaintiff,

vs.

Cardinal Logistics Management Corporation and Ronnie Lee Clark,

Defendants.

ORDER

The motions of the Defendants to Set Aside the Entry of Default came for hearing before me on March 23, 2015. M.W. Cockrell, III appeared for the Plaintiff and P. Jason Reynolds appeared for the Defendants. After full consideration of the arguments of counsel for the parties, it appears and I find that Defendants have failed to present the essential evidence necessary to grant relief from the Entry of Default in this matter. Accordingly, Defendants' Motion to Set Aside the Entry of Default is denied.

The facts governing this decision are undisputed. The action involves an auto accident in Chesterfield County, South Carolina. Suit commenced with the filing of a Summons and Complaint on August 27, 2014; the Defendant, Ronnie Lee Clark, was personally served on September 18, 2014, and Defendant, Cardinal Logistics Management Corporation ("CLMC") was served via their registered agent on September 18, 2014. The Affidavit of Personal Service on Defendant Clark was filed with the Clerk of Court on October 2, 2014. The registered mail receipt of service on the registered agent for CLMC was filed with the Clerk of Court on October 29, 2014. From the record, the Defendants' Answers were due on October 18, 2014 (Clark) and October 19, 2014 (CLMC). This matter was referred to my office by Order of Reference of Circuit Judge Paul M. Burch, on October 31, 2014. The Defendants appeared at the hearing scheduled, by and though their attorney. Additionally, the Defendants filed an Answer to the Complaint on November 7, 2014. Finally, on November 15, 2014, Defendants filed this Motion to Set Aside the Entry of Default.

The Defendants were properly served and failed to file a timely Answer. This fact was presented to the Court and Entry of Default was required per Rule 55(a), SCRCP. Rule 55(a), SCRCP provides that when a defendant fails to answer "and that fact is made to appear by affi-

davit or otherwise, the clerk shall enter his default upon the calendar (file book)." Rule 55(a) mandates the clerk (not the judge) make the entry of default. The plain language of the rule shows that entry of default is a mandatory ministerial function to be performed by the Clerk of Court. Regardless of how the Court is notified, whether by Plaintiff's "affidavit or otherwise," the Clerk of Court must make the entry of default. Accordingly, the Court cannot enlarge the time allowed for Defendants to answer.

An entry of default may be set aside "for good cause shown." Rule 55(c), SCRCP. This rule squarely puts the burden of showing good cause on the moving party, in this case, Defendants Clark and CLMC. If the Defendants fail to show good cause why they were unable to answer the Complaint, the court's refusal to set aside an entry of default will be upheld as supported by the evidence. *Williams v. Vanvolkenburg*, 312 S.C. 373, 440 S.E.2d 408 (Ct. App.1994); *Wham v. Sheraton Lehman Brox.*, Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App.1989).

Defendants assert that their counsel's letter of September 10, 2014, informing Plaintiff's Counsel that Defendants had retained the firm of Sweeny, Wingate & Barrow, P.A. and requesting that said counsel be notified once service was accomplished on Defendants, constituted an appearance of counsel. Accordingly, Defendants reason that all further communication with Defendants should have been through said counsel. It is contradictory to the point of defense counsel, who makes this letter out to be a demand for all lines of communications afforded a represented litigant be made through his firm, but simultaneously asserts he, as Defendant's counsel, is without authority to accept service on behalf of Defendants. Through this letter to Plaintiff's counsel, counsel for Defendants demands the courtesy of being notified once Plaintiff effectuates personal service on the party defendants. This forces Plaintiff's counsel to communicate with the party Defendants in the most direct manner, through personal service. Then, without ever making a formal appearance with the Court and without accepting service on behalf of Defendants, counsel cries foul when Plaintiff continues to communicate with the Defendants directly. Rule 5(b) SCRCP, states in pertinent part "whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court." Defense counsel's request that he be informed once service was achieved lends strongly towards a presumption that for procedural purposes, he had not made a formal appearance. Further, the South Carolina Court of Appeals has held that a letter asserting an attorney client relationship, on its own, is not enough to consti-

tute an appearance. *Boland v. South Carolina Public Service Authority*, 315 S.E.2d 143, 281 S.C. 293 (S.C. App., 1984).

Defendants were served with the Summons and Complaint on September 18, 2014. More than thirty days elapsed after service without Defendants having served any sort of responsive pleading. On October 31, 2014, Plaintiff filed her Affidavit of Default and Motion for Entry of Default and Order of Reference. Defendants were found to be in default and the matter was referred to this Court. Defendants cite no reason for their default other than Plaintiff's counsel's failure to inform defense counsel once service had been effected. Plaintiff was under no duty to do so. Accordingly, I find that Defendants have failed to show good cause warranting the vacation of the default entered. Rule 55(c), SCRCP.

Defendants produced no affidavits in support of their motion. It is not clear as to what delayed the pleadings being delivered to counsel for the Defendants. However, as a matter of law, "the negligence of an attorney or insurance company is imputable to a defaulting litigant." *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 281 (Ct. App.1987).

The question remains whether Defendants have shown good cause as to why this Court should set aside the default. In making this determination, the Court should consider the following factors: (1) the timing of Defendants' motion for relief; (2) whether Defendants have a meritorious defense; and (3) the degree of prejudice to the Plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989). Although the standard for setting aside a default judgment and an entry of default differ under the SCRCP, as a practical matter, the Court must consider the same factors for both. *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993).

Defendants' attorney acted with some promptness in filing this Motion. However, the fact remains that Defendants have simply failed to present a valid reason for the failure to timely file an Answer, thereby failing to make a *prima facie* case as to good cause to set aside the default. *See Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995).

Losing or misplacing a lawsuit does not constitute good cause to set aside entry of default as a matter of law. *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 456 S.E.2d 897 (1995) ("Losing a summons and complaint within the corporation is not a ground to set aside a default judgment"); *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987)(leaving the suit papers in the trunk of defendant's car would not, alone meet the requisite showing for good

cause) and *Ammons v. Hood*, 288 S.C. 278, 341 S.E.2d 816 (Ct. App. 1986) (default upheld were court rejected man's claim that he did not know default would be taken against him if he failed to answer).

It would be an abuse of discretion for this Court to set aside the entry of default in this case because the Defendants have failed to show good cause for the failure to timely answer the Summons and Complaint. This Court has duly weighed the *Wham* factors and finds there is not any evidence to overcome the simple fact that Defendants simply did not timely respond when the suit papers were properly served upon them. Producing no evidence of any excuse for failing to answer a Summons and Complaint is not good cause as a matter of law, for this Court to set aside the entry of default. Therefore, Defendants' Motion to Set Aside the Entry of Default is denied.

IT IS THEREFORE ORDERED that Defendants are adjudged to be in default;

IT IS FURTHER ORDERED that the Motion to Set Aside Any Entry of Default is denied; and

AND IT IS SO ORDERED.

Franklin B. Joyner
Special Referee
Chesterfield County

Cheraw, South Carolina
5-26, 2016

STATE OF SOUTH CAROLINA COUNTY OF CHESTERFIELD Cora Lea Nichols, Plaintiff, vs. Cardinal Logistics and Ronnie Lee Clark, Defendants.	IN THE COURT OF COMMON PLEAS FOURTH JUDICIAL CIRCUIT CASE NO: 2014-CP-13-574 **CERTIFICATE OF SERVICE**

I, Amanda Gainey, an employee of Cockrell Law Firm PC, do hereby certify that I did send the following documents in connection with the above referenced matter via United States Mail, by depositing the same in a United States Postal Service mailbox on June 1, 2016:

- **ORDER**

addressed as follows:

P. Jason Reynolds, Esquire
Sweeny Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, South Carolina 29211

Amanda Gainey

June 1, 2016
Chesterfield, South Carolina

2016 JUN 1 PM 3 41
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

A True Copy, Attest
Faye L. Sellers
CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, SC