EXHIBIT B

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	Civil Action No. 2017 CP-10-0644
	)	
AEP2, LLC f/k/a 2AM GROUP, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER DENYING MOTION TO SET ASIDE ENTRY OF DEFAULT**
	)	
BMW OF NORTH AMERICA, LLC,	)	
	)	
Defendant.	)	

FILED
2017 JUL 21 PM 2:03
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter came before the Court for a hearing on BMW's motion to set aside the entry of default and Plaintiff's motion for a damage hearing on June 13, 2017. Present at the hearing were Thomas H. Pope III and John P. Freeman, counsel for Plaintiff AEP2 and Ashley B. Abel, counsel for Defendant BMW. Also present was Arthur E. Perry, on behalf of the Plaintiff.

The Summons and Complaint in this case were filed on February 8, 2017. BMW was served on February 10, 2017 with the Summons and Complaint via its agent for service of process, CT Corporation, Inc. BMW is admittedly in default. By Order dated March 23, 2017, The Honorable Deadre Jefferson issued an Order entering default against BMW. After the period for answering the Complaint had expired, BMW filed a notice of removal of the case to U.S. District Court for the District of South Carolina on March 23, 2017. On April 20, 2017, the Plaintiff filed its motion for a damages hearing. On April 26, 2017, BMW filed a motion to set aside the entry of default.

At the hearing in this matter on June 13, 2017, this Court heard and considered argument on the Defendant's motion to set aside the entry of default. Included in the record were the following documents: BMW's motion to set aside entry of default (with exhibits); affidavit of

BMW corporate counsel, Richard Spitaleri; affidavit of Ashley Abel; Plaintiff's motion to set damages hearing; BMW's response to the Plaintiff's motion for damages hearing; Plaintiff's memorandum in opposition to BMW's motion to set aside entry of default (with exhibits and affidavits); BMW's memorandum in opposition to the Plaintiff's motion for damages hearing and in support of motion to set aside default; second affidavit of Spitaleri; and second affidavit of Ashley Abel.

This Court has considered all of the filings of both the Defendant and the Plaintiff. The Court has also carefully considered the arguments of counsel at the hearing. For the reasons set forth herein, BMW's motion to set aside the entry of default is denied.

BACKGROUND FACTS

Commencing in January 2012, 2AM Group, LLC began managing the BMW Warehouse in Ontario, California. All employees at the BMW Warehouse were members of the Teamsters Local 495. Plaintiff had 5-year Service Agreement to run said warehouse. AEP2, LLC is the successor to 2AM Group, LLC which sold its assets in February 2014 to a company named Sustained Quality, LLC. In November 2014, Plaintiff learned from the Conference of Teamsters Pension Trust (CTPT) that as a result of the sale of assets, it owed the Teamsters a withdrawal liability of $605,699.06. The Complaint asserts that as a result of the Services Agreement between 2AM Group, LLC and BMW that BMW had a duty to indemnify 2AM Group for "any withdrawal liability" which was incurred during the term of that Service Agreement. Plaintiff alleges further in the Complaint that it has paid the full withdrawal liability to the CTPT and that BMW is obligated to fully indemnify Plaintiff for same ($605,699.06), plus prejudgment interest.

In 2016, Plaintiff sued SC attorney, James Buxton, alleging professional negligence for failing to advise it about, or protect it from, the withdrawal liability issue. Late in discovery in

that case, documents were revealed indicating that BMW possibly had a contractual duty to indemnify Plaintiff for the withdrawal liability under the 2011 Service Agreement and/or the 2014 Assignment, Assumption and Consent Agreement. Discovery in late 2016 showed also the possibility that Plaintiff's corporate attorney, Walter Harris, may have been negligent for failing to counsel Plaintiff about the withdrawal liability. Suit was commenced against attorney Harris on February 7, 2017 (Case No. 2017-CP-10-626). Both the Buxton suit and the Harris suit have been stayed pending resolution of this BMW suit by court orders which are included in this record. The day after the Harris suit was filed, Plaintiff filed its Summons & Complaint against BMW herein based on documents produced late in the Buxton case. Judge Thomas L. Hughston's Order of Stay in the Harris case noted that: "...the result in the BMW case will obviate and likely make moot the issues in the instant [Harris] case."

FACTS RELEVANT TO BMW'S MOTION

The Summons and Complaint were served on BMW on February 10, 2017. On March 23, 2017, BMW filed its notice of removal in the United States District Court for the District of South Carolina. BMW's notice of removal was not timely, as it was outside the time in which BMW was required to respond to the Complaint. In the federal court, the Plaintiff moved to remand the case, and the Court granted its motion[1] based on the consent from BMW that it was, in fact, served with the Summons & Complaint through its registered agent on February 10, 2017. BMW's motion to set aside the entry of default (with attached proposed but unsigned Answer) was filed 43 days after BMW was in default.

BMW agrees that Rule 55, SCRCP, applies to its motion but argues that it has "good cause" for default to be set aside. BMW further contends that its motion to set aside default is timely, that

[1] A certified copy of the Order of Remand was mailed by the Clerk of the United States District Court to the Charleston County Clerk of Court and it was filed in this Court on May 3, 2017.

it has a meritorious defense, and that Plaintiff would not be prejudiced by lifting default. Hence, BMW maintains it should prevail on this motion. In support of the motion, BMW submitted affidavits of Richard Spitaleri, one of BMW's 15 general counsel in New Jersey who said that the basis for good cause was that the Summons & Complaint were "lost in the proverbial shuffle." As explained below BMW's lost-in-the-shuffle defense is inadequate.

As reflected by the record, Bruce Wallace, counsel for Defendant James Buxton in the case of AEP2 v. Buxton, et al. (Case No. 2016-CP-10-204), was proposing in March 2017 to take the deposition of Courtney Anderson, a BMW general counsel. Mr. Wallace's affidavit reflects that he received a call from Mr. Spitaleri on February 21, 2017 and that Mr. Spitaleri wanted to know what Mr. Wallace would ask BMW counsel Anderson at the deposition. In this call, Mr. Wallace, a member of the Charleston Bar, reported that in his 30-minute conversation with Spitaleri he (Wallace) specifically informed Spitaleri that he intended to ask attorney Anderson at her deposition to confirm that BMW had a duty to indemnify Plaintiff AEP2 for the withdrawal liability incurred by Plaintiff when the assets of AEP2's predecessor, 2AM Group, LLC, were sold in 2014 to Sustained Quality, LLC. Further on the same day (February 21), Mr. Wallace sent a date stamped copy of the Summons & Complaint that Plaintiff had filed against BMW via email to Mr. Spitaleri which clearly reflected that the original Summons & Complaint were filed on February 8, 2017.

In Paragraph 6 of Spitaleri's second affidavit, he states that the Complaint was forwarded to him on February 13, 2017. Spitaleri also admitted that Mr. Wallace emailed a copy of the Complaint to him on February 21, per his request. However, BMW and Mr. Spitaleri contend that the Complaint was "lost in the proverbial shuffle" and/or was not assigned to outside counsel for

a prompt response because of a "clerical error." This Court finds that neither excuse constitutes good cause under Rule 55, SCRCP.

According to BMW, its failure to answer the Complaint was due to a minor technical error. See Defendant's Motion to Set Aside Default, at 4, "Defendant's conduct amounts only to an omission caused by a clerical person's carelessness." However, the so-called "clerical person" was in truth BMW's own in-house legal counsel who was charged with handling the company's legal process. As is apparent from Mr. Spitaleri's affidavits, his job at BMW's corporate counsel's office[2] was to assign law suits against BMW to outside counsel for defense. Even if the first copy of the Summons and Complaint had been "lost," Mr. Spitaleri was placed on inquiry notice when he fortuitously got the second copy of the Complaint via email from Mr. Wallace on February 21. There is no basis in the record for him to have been "confused" or to have caused him not to take the reasonable step of immediately ascertaining the date of service. This case does not involve mere innocuous "clerical error." Despite repeatedly receiving copies of the Summons and Complaint, Mr. Spitaleri elected to ignore the legal process served on his client; he was careless in the extreme.

The facts indicate that instead of acting diligently, Mr. Spitaleri turned a blind eye to his job functions and to the Summons and Complaint in this case, despite being twice copied with the legal process and despite being a lawyer who was charged by BMW with handling suits against BMW.[3] Whatever intra-corporate protocols BMW had for handling filed pleadings were ignored.

[2] There are 15 BMW corporate counsel at the BMW headquarters in New Jersey.

[3] In the first Spitaleri affidavit, he states that BMW has "internal requirements and protocols in place to facilitate timely responses to legal process" (Paragraph 5). BMW did not provide a copy of such protocols or explain how they applied to this case or how they were not followed.

Local South Carolina counsel, Ashley Abel, had no role to play in the default of BMW, as the affidavits clearly indicate that Abel was told by Spitaleri that service of the Complaint was on February 21. There is no reason to believe that Mr. Spitaleri made any diligent effort to ascertain when service was effected. BMW's corporate legal office never contacted its agent for service CT Corporation, the Clerk of Court of Charleston County, or Plaintiff's counsel to learn the date of service. Contact with any of these would have been a simple and quick way to ascertain that service was on February 10. Mr. Spitaleri clearly turned a blind eye to the obvious, despite having the contents of the Complaint explained to him and despite receiving the Complaint on February 13 and February 21. If Mr. Spitaleri misfiled the suit papers served on him by Plaintiff and emailed to him by Mr. Wallace, that misunderstanding or misfiling does not equal good cause for relief from entry of default. BMW has no good cause for getting relief under Rule 55.

APPLICABLE STANDARD FOR RELIEF FROM AN ENTRY OF DEFAULT UNDER RULE 55

Our Supreme Court recently reiterated the standard for a party seeking relief from an entry of default. In White Oak Manor, Inc., v. Lexington Insurance Company, 407 S.C. 1, 753 S.E.2d 587 (2014), our Supreme Court ruled as follows:

> The standard for granting relief from an entry of default under Rule 55(c) is "mere good cause." 'This standard requires a party seeking relief from an entry of default under rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.' Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).
> 'Once a party has put forth a 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.' Id. at 607-08, 681 S.E.2d at 888. (emphasis added).

In the White Oak case, the circuit court found and concluded that the defendant had provided no reasonable explanation for why it failed to respond to the initial complaint and noted that the only excuse offered was that Defendant Lexington had "lost the pleadings." The circuit court concluded that ground was insufficient and denied the motion.

On appeal to the Court of Appeals, the decision was reversed. Our Supreme Court reversed the Court of Appeals opinion and affirmed the circuit court's order denying the motion to set aside the default. In that case, Defendant Lexington had taken the position that it had replied promptly after discovering the default, that it had presented evidence of meritorious defense and alleged that the Plaintiff would not suffer prejudice if the relief was granted. The Supreme Court nonetheless affirmed the lower court order, finding that there was no error in the lower court's holding that losing the complaint was not good cause and that the circuit court acted within its discretion in concluding that losing a complaint was not a satisfactory explanation for failing to timely respond.

BMW finds itself in a dilemma created by its own in-house counsel's failure to make any one of three inquiries that would have led him to know that service was on February 10. BMW filed notice of removal 43 days after service. As the moving party seeking relief from default, BMW has the burden of providing an explanation for the default.[4] It has not discharged that burden.

As explained by the Supreme Court of South Carolina in White Oak Manor, id., a determination of "good cause" under Rule 55, SCRCP, requires first that the defaulting party must

[4] The June 12, 2007, affidavit of Mr. Spitaleri claims that he was "confused" by the fact that the Complaint in this case was similar to the deposition subpoena which Bruce Wallace had served on BMW in the Buxton case. Spitaleri's affidavit says he is responsible for "managing litigation brought against BMW" (paragraph 1). He clearly should know the difference between a subpoena in AEP2, LLC v. Buxton (Case No. 2016-CO-10-02014) and a Complaint in AEP2 vs. BMW North America (Case No. 2017-CP-10-00644). Among other things, the defendants and case numbers are totally different. I find and conclude that there was no basis upon which BMW's general counsel could have been confused. There is no support in this record for BMW's contention that there is good cause under Rule 55.

provide a justifiable explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. In the instant case, BMW has failed to show good cause under Rule 55 and this Court so finds and concludes.

The White Oak case is the culmination of many appellate decisions in South Carolina where our appellate courts have steadfastly applied Rule 55, SCRCP, to reject motions to set aside default where the defaulting party has not been diligent in responding timely to lawsuits. In an earlier case, Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897 (1995), the Supreme Court ruled that "losing a summons and complaint within the corporation" was not a ground to set side default. Id. at 212, 456 S.E.2d at 900. In that case, the Supreme Court reinstated the entry of default and remanded the case for a damages hearing. The ruling of Roche makes it clear that our Supreme Court has already established that the excuse that a complaint was "lost within a corporation" is not good cause under Rule 55.

Being careless in handling suit papers does not equal good cause for relief from default. In Richardson v. PV, Inc., 383 S.C. 610, 682 S.E.2d 263 (2009), the Supreme Court held that the insurance company's negligence in failing to timely answer was imputed to the insured and was not "good cause." The courts in this state have consistently held that "the negligence of an attorney or an insurance company is imputable to a defaulting litigant." Richardson, 682 S.E.2d at 267, citing Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct.App. 1987). In Roberts, a motion to set aside was filed two months after entry of default; the lower court order finding no "good cause" and denying the motion was affirmed.

In Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), the defendant forwarded the complaint to its insurance agent two weeks after notifying the agent

of the suit. The lower court denied the motion to set aside default. The Court of Appeals affirmed, and the Supreme Court affirmed on the ground that the defaulting defendant failed to show good cause. It specifically ruled as follows:

> "... we do not believe that petitioner meets even the most minimal showing of good cause and is therefore not entitled to relief from the entry of default." Id. at 607, 681 S.E.2d 888 (emphasis added).

It is clear from the four decisions of our Supreme Court cited above, covering 1995 through 2014, that BMW's motion is based on facts (intra-corporate negligence) that do not constitute good cause. BMW has not presented to this Court a single reported case supporting relief from default where the defaulting party contended the papers were "lost in the proverbial shuffle."

Our appellate courts have consistently held that if the trial court determines that the defaulting party has failed to establish a satisfactory explanation for the default, its decision will not be reversed for failing to make a specific finding of fact on the record for each of the three factors identified in Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009),[5] if there is sufficient evidentiary support on the record for the finding of the lack of good cause. Id. at 608.

The affidavit of Bruce Wallace, submitted by Plaintiff, is most telling. He had a 30-minute telephone call with BMW's in-house counsel more than two weeks before BMW's Answer was due in which he fully explained to BMW counsel why he believed it was liable to indemnify Plaintiff and how he expected to depose BMW's in-house lawyer on that issue. In the instant case, the good cause requirement has not been met; BMW has established no satisfactory explanation for the default. BMW's neglect was inexcusable.

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[5] In that case, the Supreme Court provided that once a party puts forth a satisfactory explanation for the default, the next step for the trial court is to also consider: "(1) the timeliness 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 888.

The Plaintiff's motion for a damages hearing is granted. This Court will set a hearing in the next sixty (60) days after conferring with counsel for the parties.

THEREFORE, IT IS ORDERED as follows:

(a) Good cause to set aside the default has not been shown and BMW's motion to set aside the entry of default is therefore denied;

(b) Plaintiff's motion to set a damages hearing is granted.

AND IT IS SO ORDERED.

The Honorable J. C. Nicholson, Jr.
Ninth Judicial Circuit

Charleston, S.C.
July 20, 2017