

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ASSISTIVE TECHNOLOGY MEDICAL
EQUIPMENT SERVICES, INC.,

Plaintiff,

vs.

HOOD & SELANDER, CPAS, LLC,
DONNA C. CASH, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF DOROTHY A. CONNELLY, W.E.
APPLEGATE, III, AS PERSONAL
REPRESENTATIVE OF JAMES B.
CONNELLY, KIMBERLY CUCE,
PHILLIP DECLEMENTE,

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Civil Action No.: 2011-CP-10-8011

in

ORDER

2014 APR 30 PM 12:21
JULIE J. ARNSTRONG
CLERK OF COURT

FILED

RECEIVED

MAR 14 2018

SC Court of Appeals

THIS MATTER COMES before this Court for a hearing December 16, 2012 on (1) Defendant Donna C. Cash, as Personal Representative of the Estate of Dorothy A Connelly, Motion to Amend Answer to Add Counterclaim; (2) Defendant DeClemente's Motion to Extend Time pursuant to Rule 6 and Rule 60(b)(1) of the South Carolina Rules of Civil Procedure; (3) Defendant DeClemente's Motion for Default Judgment against Plaintiff; and (4) Plaintiff Motion for Damages Hearing for scheduling. At the outset of the hearing counsel for Plaintiff indicated Plaintiff's consent to the relief request in Defendant Cash's Motion to Amend Answer to Add Counterclaim. As such, Defendant Cash's Motion to Amend is GRANTED.

Based upon the pleadings, the Court record, memoranda of law, affidavits filed herein, and other such matters before the Court, Defendant DeClemente's Motion to Extend Time and Relief from Default is DENIED and Defendant DeClemente's Motion for Default Judgment against Plaintiff is DENIED. Plaintiff's Motion for Damages is CONTINUED. I make the following findings of fact, conclusions of law, and render judgment as hereinafter provided.

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COURT RECORD

1. On October 31, 2011, Plaintiff commenced this action by filing its Summons and Complaint.
2. On December 1, 2011, the Complaint was properly and duly served upon the Defendant Phillip DeClemente.
3. On March 30, 2012, Plaintiff filed an Affidavit of Default as to Defendant DeClemente more than 120 days after service.
4. Counsel for Plaintiff did not obtain an entry of default from the Clerk of Court or a default judgment from the Circuit Court.
5. On May 14, 2012, Counsel for DeClemente appeared by Letter of Representation filed with the Clerk of Court and asked to be informed of the date of the Plaintiff's motion for Default Judgment, though a motion for Default Judgment had not been scheduled before the Court.
6. On August 10, 2012, Defendant DeClemente filed a Motion to Extend Time pursuant to SCRCP 6 and 60(b)(1) to which at this hearing I granted Defendant DeClemente's request to include a request for relief from entry of default pursuant to SCRCP 55(c).
7. On August 10, 2012, Defendant DeClemente filed an Answer, Counterclaims and Cross Claims.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has personal jurisdiction over the parties and subject matter jurisdiction over this litigation. Venue is proper. The Court permitted Defendant DeClemente to amend his

Motion to Enlarge Time pursuant to SCRCP 6 and 60(b) to include Rule 55(c) for relief from default.

SCRCP Rule 55 permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is "good cause." See SCRCP 55(c). 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 Company Inc. v. Intedge Industries Inc., 383 S.C. 601, 681 S.E.2d 885 (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. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). The trial court need *not* make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. [Emphasis Added.] Dixon v. Besco Engineering, Inc., 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. Williams v. Stalnaker, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). See also, Sundown Operating Company Inc. v. Intedge Industries Inc., 383 S.C. 601, 681 S.E.2d 885 (2009).

Defendant DeClemente submitted a memorandum in support of his Motions which the Court has reviewed and considered along with argument of counsel at the hearing. DeClemente's counsel advised the Court that DeClemente was suffering from a psychiatric illness and was hospitalized approximately two weeks from February 2, 2012 through February 16, 2012. DeClemente advised the Court that he knew he had been served and was required to

answer the Complaint. Additionally, at the Court hearing DeClemente's counsel mentioned that DeClemente had other counsel assisting him in this matter prior to present counsel. At the hearing, the Court permitted the parties to submit supplemental affidavits addressing the issues raised at the hearing and relevant to the Rule 55(c) standard and the Court would take the matter under advisement.

After reviewing the supplemental affidavits and considering arguments of counsel and the Court record, I find that Defendant DeClemente was properly served with the Complaint on December 1, 2012. I find pursuant to supplemental affidavits and representations at the hearing, Defendant DeClemente knew he had to answer the Complaint and had the benefit of counsel in around the time he was served with the Complaint. However, I find that DeClemente demonstrated "good cause" pursuant to Rule 55(c) throughout his hospitalization, which was ongoing until sometime in May 2012. However, good cause did not exist from the time DeClemente obtained counsel in May 2012 to the time DeClemente filed the Defendant's Motion to Enlarge Time and Answer and Counterclaims on August 10, 2012. I find that the timing of motion for relief was not prompt.¹ Defendant DeClemente's Motion to Extend Time and/or Relief from Default pursuant to Rule 55(c) is DENIED.

Defendant DeClemente is in default for failure to timely file an Answer to the Complaint. DeClemente filed his Answer, Counterclaims and Cross Claims on August 10, 2012. At that time, Plaintiff had no obligation to respond to Defendant DeClemente's Counterclaims unless and until DeClemente was relieved from default and permitted to enter his Answer,

¹ "Although the presence of other factors, in the totality of the circumstances, may amount to a showing of "good cause," a defendant may not be relieved from the entry of default *solely* because it relied to its detriment on a negligent insurance agent." See, Sundown Operating Company Inc. v. Intedge Industries Inc., 383 S.C. 601, 681 S.E.2d 885 (2009).

Counterclaims and Cross Claims. I find that because Defendant DeClemente is not relieved from default, he cannot enter his Answer, Counterclaims and Cross Claims and cannot pursue default judgment against the Plaintiff for counterclaims that have never been permitted to be asserted. Defendant DeClemente's Motion for Default Judgment against Plaintiff is DENIED and Defendant's Answer and Counterclaims are STRICKEN.

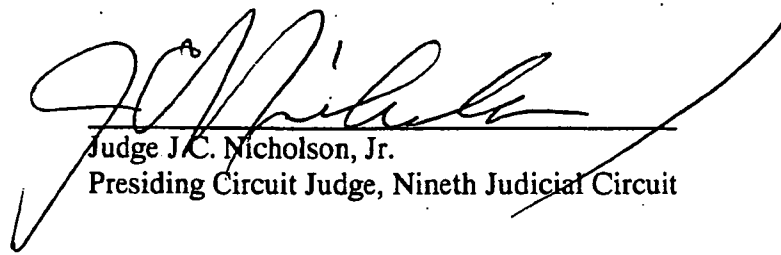
Default judgment is entered as to Defendant DeClemente and a hearing shall be scheduled on Plaintiff's Motion for Damages as to Defendant DeClemente.

NOW, THEREFORE, based upon the foregoing,

IT IS ORDERED, that Defendant Cash's Motion to Amend is GRANTED.

IT IS FURTHER ORDERED, that Defendant DeClemente's Motion to Extend Time and/or Relief from Default is DENIED and Defendant DeClemente's Motion for Default Judgment against Plaintiff is DENIED. Default judgment is entered as to Defendant DeClemente and Plaintiff's Motion for Damages is CONTINUED and a hearing to ascertain damages shall be set for the next term of this Court.

AND IT IS SO ORDERED.



Judge J.C. Nicholson, Jr.
Presiding Circuit Judge, Ninth Judicial Circuit

Columbia, South Carolina

4/24, 2014