THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002481

AEP2, LLC f/k/a 2AM Group, LLC.....Respondent

v.

BMW of North America, LLC.....Appellant

APPELLANT'S INITIAL BRIEF

M. Dawes Cooke, Jr., Esq.
S.C. Bar No. 1376
Anna L. Strandberg, Esq.
S.C. Bar No. 102432
288 Meeting Street, Ste 200
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708
Attorneys for Appellant

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I. Did the lower court abuse its discretion in failing to set aside the entry of default in light of uncontroverted evidence that the default was caused by a mistake of fact as to the date of service?

II. Did the lower court err in awarding prejudgment interest calculated from the date of first payment, even though both the contract purported to govern and the controlling law require notice?

STATEMENT OF THE CASE

This matter was commenced on February 8, 2017, when Respondent filed a Complaint claiming BMW NA is obligated to indemnify it for withdrawal liability Respondent incurred to the Western Conference of Teamsters Pension Trust in 2014. BMW NA removed the case to the federal district court and filed notice of removal with the circuit court on March 24, 2017; Appellant's default had been entered earlier that same day. Following remand, BMW NA moved for relief from the default entry. The matter was heard before the Honorable J.C. Nicholson, Jr. on June 13, 2017. The circuit court denied relief by Order filed July 21, 2017, and subsequently denied BMW NA's Rule 59(e) and Rule 60(b) motions for relief by Form 4 Order on October 4, 2017. A damages hearing was held on October 12, 2017. Following the hearing, the court entered two default judgments: the first, for a total amount of $647,309.06, was entered on November 2, 2017; a second judgment was entered on November 27, 2017, for $633,206.06. BMW NA served Respondent with Notice of Appeal on December 1, 2017.

STATEMENT OF FACTS

In 2011, Appellant and Defendant BMW of North America ("BMW NA") outsourced operations of its Ontario, California facility to 2AM Group, LLC, AEP2's predecessor in interest ("AEP2"). The transition resulted in BMW NA incurring $863,811.59 in withdrawal liability to the Western Conference of Teamsters Pension Trust. BMW NA paid this amount in full, fulfilling its obligation under the services contract. Years later, AEP2's sale of assets to another company resulted in its own $605,669.06 pension fund withdrawal obligation to the Teamsters. AEP2 filed two suits against attorneys involved in the transaction, alleging that they could and should have structured the asset purchase to avoid withdrawal liability. Almost three years after AEP2's obligation to the Teamsters arose, AEP2 filed yet a third lawsuit against BMW NA, claiming for the first time that the Services Agreement obligates BMW NA to pay the Teamsters a second time. But a mistake of fact led to BMW filing its response to AEP2's Complaint just out of time, and BMW NA now appeals from a default judgment in the amount of $633,206.06.[1]

The Services Contract

In late 2011, BMW NA entered into a services contract with AEP2's predecessor in interest, 2AM Group, LLC, for labor management, quality assurance, and general operations of BMW NA's facility in Ontario, California. See Ex. 1 to Compl.; Spitaleri 2d Aff. 1–2, June 12, 2017. All of the facility's employees were union members of the Teamsters Automotive, Industrial, and Allied Workers Local No. 495, and as part of the

[1] At the time of this appeal, two judgments have apparently been entered; the first, filed on November 2, 2017 in the amount of $647,309.06 was, upon information and belief, entered in error. BMW would respectfully request that this duplicate judgment be vacated.

agreement, BMW NA agreed to indemnify AEP2 from and against "any potential withdrawal liability *on the part of BMW NA* to the Western Conference of Teamsters Pension Fund" resulting from the termination of BMW NA's contribution obligation to the fund (emphasis added). See Order 2, July 21, 2017; Ex. 1 to Compl. ¶ 16b. BMW NA's withdrawal from the Teamsters' jointly-administered pension plan resulted in BMW NA incurring over eight hundred thousand dollars in liability. Spitaleri 2d Aff. 2. Per the services agreement, BMW NA duly paid this amount in full Id.

Several years later, in February of 2014, AEP2 entered into an agreement to sell substantially all of its assets to another company, Sustained Quality, LLC. Order 2. BMW NA was not a party to this transaction. As a result of the sale, and the resulting termination of AEP2's obligation to contribute to the Teamsters' pension, AEP2 purportedly incurred $605,669.06 in withdrawal liability. Ex. 2 to Compl. AEP2 reports that this amount has been paid to the Western Conference of Teamsters Pension Trust in full and in accordance with the Teamsters' notice and demand. Order Denying Mot. to Set Aside Entry of Default 2, July 21, 2017.

Subsequent Litigation

In 2016, AEP2 filed a professional negligence suit against the transactional attorney who assisted in negotiating and concluding the sale to Sustained Quality, LLC. Id. In connection with this litigation, the defendant's attorney, Bruce Wallace, Esq., served BMW NA with a subpoena *duces tecum* requesting documents related to the services agreement at the Ontario facility. Spitaleri 2d Aff. 2–3. BMW NA's response included an unsigned draft of a document captioned as an "Assignment, Assumption and Consent Agreement." Spitaleri 2d Aff. 1; Abel 2d Aff. 2, June 12, 2017. To date, a signed

copy of this document has not been located. Mr. Wallace also noticed the deposition of Courtney Anderson, formerly of BMW NA's legal department. Spitaleri 3d Aff. 1, Oct. 5, 2017.

AEP2 subsequently filed a second professional negligence suit for the same damages against its own in-house counsel in the Charleston County Court of Common Pleas on February 7, 2017.[2] Order Denying Mot. to Set Aside Entry of Default 3, July 21, 2017. The following day, the present suit, and AEP2's third arising out of the sale of assets, was filed in the same court. See Compl. BMW was served through its registered agent on February 10th of 2017, and its legal department coordinator forwarded the Summons and Complaint to in-house counsel, Richard Spitaleri, Esq., on February 13th. See Aff. of Service, Feb. 11, 2017; Spitaleri 3d Aff. 5.

In the course of managing the legal affairs of an international company, Mr. Spitaleri receives email correspondence from around the country. Spitaleri 2d Aff. 9. To organize these emails, he groups them using unique keywords—in this case, "AEP2"—to identify and sort related correspondence. Spitaleri 3d Aff. 21. The department coordinator's February 13th email with "AEP2, LLC" identified as the Plaintiff was associated with the similarly-captioned subpoenas served by Mr. Wallace in the professional negligence matter pending in the same South Carolina county, and electronically filed accordingly. Spitaleri 2d Aff. 8.

On February 21, 2017, Mr. Spitaleri contacted Mr. Wallace's office about the proposed deposition of BMW NA's agent, Courtney Anderson. Spitaleri 3d Aff. 1. The sum and substance of that conversation is in dispute. Following the conversation, Mr.

[2] Both professional negligence suits were subsequently stayed pending the outcome of this dispute.

Wallace forwarded a copy of the Summons and Petition by email that morning, and Mr. Spitaleri immediately undertook to identify outside litigation counsel and assign the matter with instructions to remove and defend the case. Spitaleri 3d Aff. 23; Abel Aff. 5, April 25, 2017. In light of the filing date of the pleading and his conversation with Mr. Wallace, Mr. Spitaleri made a good faith mistake as to the date of service, believing it to be the date of his receipt of the pleadings, or February 21, 2017. Spitaleri 3d Aff. 23. AEP2 filed the Proof of Service with the Clerk later that afternoon. See id. at 5; Aff. of Service.

Consistent with a service date of February 21, 2017, counsel for BMW NA electronically filed a Notice of Removal in the United States District Court for the District of South Carolina on March 23, 2017. See Notice of Def.'s Removal to Federal Ct., March 24, 2017. AEP2's Motion and Affidavit for Entry of Default were filed in the Charleston County Court of Common Pleas the following morning, March 24, and default was entered accordingly. Order of Entry of Default, March 24, 2017. Only a few hours later, the Clerk for Charleston County filed BMW NA's Notice of Removal. See Notice of Def.'s Removal.

After AEP2 filed a Motion to Remand in the district court citing the untimely removal, Mr. Spitaleri and counsel for BMW NA discovered the February 10th service date, informed opposing counsel of the good faith mistake as to the service date, and promptly consented to the motion. Abel Aff. 2–3, April 25, 2017. The district court's remand order was logged in Charleston County on April 20th, and BMW NA moved to set aside the March 24th entry of default. See Remand Order, April 20, 2017; Def.'s Mot. to Set Aside Entry of Default, May 1, 2017. In support of this Motion, BMW NA

submitted affidavits by Richard Spitaleri and Ashley Abel, setting forth the circumstances under which BMW came to rely on the incorrect date of service. See Abel Aff.; Spitaleri Aff. By Order filed July 21, 2017, the Honorable J.C. Nicholson, Jr. denied BMW NA's motion, holding that BMW NA had failed to establish good cause for the default. Order Denying Mot. to Set Aside Default 10. In particular and referring only to specific language in a single Affidavit, the lower court held that BMW NA's "lost-in-the-shuffle defense [was] inadequate." Id. at 4. Further, and contrary to the uncontroverted sworn statements of both Mr. Spitaleri and Mr. Abel, the Court premised its holding in part on a finding that the Complaint "was not assigned to outside counsel for a prompt response." Id. at 4–5.

BMW NA moved for reconsideration of the Order pursuant to Rules 59(e) and 60(b) of the South Carolina Rules of Civil Procedure. Def.'s Mot. for Recons., Aug. 8, 2017. Both Plaintiff's Motion for Damages Hearing and BMW NA's Motions for reconsideration or relief were set to be heard on October 12, 2017. However, prior to the hearing, the Court entered its October 4, 2017 Order denying all of BMW NA's Motions by Form 4 Order. Order, Oct. 4, 2017. After the Court's October 4 Order, but prior to the scheduled hearing date, both AEP2 and BMW NA filed additional supporting affidavits. See Spitaleri 3d. Aff. Neither affidavit addresses the amount of AEP2's damages; instead, both go to the circumstances surrounding the unsigned assignment agreement at issue and the series of events leading up to BMW NA's notice of removal. Id.

With BMW NA's Motions for relief from the default judgment disposed of, the October 12, 2017 hearing went forward solely on the issue of damages. Relying on the allegations of the Complaint, counsel for BMW NA argued that the provisions of the

contract identified as the source of indemnity liability and attached to AEP2's Complaint should control the measure of damages. See Damages Hr'g Tr. 27:3 – 31:24, Oct. 12, 2017. BMW NA noted two provisions in particular: first, a notice provision demanding that claims for damages "shall be made in writing to such other party within a reasonable time after the first observation of such injury or damage"; and second, a choice of law provision identifying New Jersey's state law as controlling. Id. 27:3-27:18. The Court ultimately agreed that New Jersey law controlled and applied New Jersey's statutory interest rate, but declined to enforce the notice provision, instead calculating prejudgment interest from the date the damages were purportedly incurred rather than the date BMW NA was first provided with notice of the alleged loss. See Order Denying Mot. to Set Aside Entry of Default 2.

By apparent clerical error, two default judgments have been entered in this matter. The first, in the total amount of $647,309.06, was filed on November 2, 2017. See Order of Default J., Nov. 2, 2017. This first Order of Default Judgment recites a total prejudgment interest amount of $41,640, calculated using the entire amount of withdrawal liability incurred ($605,669.06) from the date of Plaintiff's first payment. Id. at 2. The second judgment, filed on November 27, 2017, calculates the total amount of prejudgment interest $27,537, with interest calculated from the date of each payment, for a total amount of $633,206.06. Order of Default J. 2, Nov. 27, 2017. Both calculate prejudgment interest at a rate of 2.25%, per New Jersey law. See id.

BMW now appeals the lower court's default judgment and respectfully requests that this Court vacate the default and remand for further proceedings or, in the alternative, modify the default judgment to reflect the correct amount of prejudgment interest.

ARGUMENT

In defending this suit, BMW NA effected removal only days out of time and almost simultaneously with the entry of default. Nevertheless, the lower court refused to grant BMW NA the requested relief, resulting in a substantial default judgment premised solely on an interpretation of the Services Agreement that disregards the contract's plain language. AEP2 has thus unjustly received a windfall arising from a minor, good faith mistake of fact and a default order that applies certain provisions of the contract AEP2 relies on to establish liability, while ignoring others. This judgment should be vacated or modified because (I) the lower court abused its discretion in refusing to set aside the entry of default; and (II) the court erred in both its award and calculation of prejudgment interest.

I. The lower court abused its discretion in refusing to set aside the entry of default

A party seeking relief from an entry of default is first required 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., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 607–08, 681 S.E.2d 885, 888 – 89 (2009). Once the defaulting party has explained the default, the trial court must also consider (1) the timeliness of the motion for relief; (2) whether the defaulting defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief were granted. Id. The standard for relief under Rule 55(c) is mere "good cause," a less stringent requirement than that imposed by Rule 60(b) for relief from a default judgment. Id. The lower court's decision as to whether to set aside an entry of default will not be disturbed absent an abuse of discretion. Regions

Bank v. Owens, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013). An abuse of discretion occurs when either the court bases its order on a finding fact that is without evidentiary support, or when the judgment is controlled by an error of law. Id. In this case, the lower court's order denying relief from entry of default should be vacated because the order is premised on an erroneous factual finding as to the explanation or reason for BMW NA's default, and as a result the court misapplied Rule 55(c), SCRCP; additionally, the timeliness of the complaint, existence of a meritorious defense, and absence of any prejudice to Respondent all weigh in favor of relief.

A. The court's holding that BMW NA had not presented a satisfactory explanation for its default is premised on erroneous factual findings and misapplication of the law

The lower court mischaracterized BMW NA's explanation for the delay in its answer, and as a result, misapplied Rule 55(c), SCRCP, and the test articulated in Sundown. In denying BMW NA's motion for relief, the lower court's Order repeatedly asserts that BMW NA "lost" the pleadings, "ignore[d] the legal process," and "turned a blind eye," and that the matter "was not assigned to outside counsel for a prompt response." Based on these findings, the lower court held that BMW NA had not put forth a satisfactory explanation for the default. However, the only competent evidence of BMW NA's handling of the Summons and Complaint is the uncontroverted affidavits of Mr. Spitaleri and Mr. Abel. Their statements unequivocally evidence that the default was not the result of lost or ignored legal process, but rather a simple mistake of fact as to the date of service. Unlike mistakes of law, mistakes of fact are within the plain language and purview of the more stringent standard for relief applied under Rule 60(b). See Rule 60(b)(1), SCRCP; see also Hillman v. Pinion, 347 S.C. 253, 554 S.E.2d 427 (Ct. App.

2001) (noting that Rule 60(b) "is an appropriate remedy for good faith mistakes of fact," as opposed to mistakes of law or ignorance). Sundown clarified the varying standards applied to lift an entry and a judgment of default. Sundown, 383 S.C. at 607–08, 681 S.E.2d at 888–89. But it should not be read to upend decades of case law affirming that relief from an entry of default is to be liberally granted, or to carve out an exception from relief under Rule 55 that would be otherwise available under the more stringent test of Rule 60(b). Id. Under the plain language of the South Carolina rules and South Carolina law, BMW NA's mistake of fact as to the date of service and deadline for a defensive filing is a satisfactory explanation for the default.

1. The lower court erroneously found that BMW NA's default was the result of a "lost" or "ignored" pleading.

The Order denying relief from entry of default is predicated on a finding that the "explanation" for BMW NA's failure to answer within the time allotted was a "lost" or "misplaced" complaint. Because these factual conclusions are without evidentiary support, the lower court's order should be reversed. See Regions Bank v. Owens, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013) ("An abuse of discretion occurs . . . when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support."). While BMW NA admittedly initially misidentified and misfiled the Complaint, this oversight was neither the cause of nor the explanation for the default. Instead, the uncontroverted evidence establishes that the default was "caused" by a mistake of fact as to the correct date of service.

This explanation is clearly established by the affidavits of Attorneys Abel and Spitaleri. Mr. Abel acknowledged that he received the Complaint on February 21, 2017, and believed the date of service to be the same. Mr. Spitaleri likewise confirmed that he

received and took action on the Complaint, but made a good faith mistake of fact as to the correct date of service. Contrary to the lower court's holding, BMW NA had received, acknowledged, and recognized the Complaint, and forwarded it to outside litigation counsel no later than February 21st, nearly three weeks before a defensive response was due. Respondent does not and cannot dispute this. To the extent that any affidavits offered by the Respondent might purport to contradict this explanation, they are improperly considered because the affiants have no personal knowledge of the exchange between Mr. Spitaleri and Mr. Abel, nor do they claim to. See generally Rule 602, SCRE. Notwithstanding the lower court's colorful condemnation of Mr. Spitaleri's initial oversight, it erred when it attributed BMW NA's default to prior conduct that had been resolved well before the time to answer AEP2's complaint had expired. The court cannot find that no "good cause" exists based on a defendant's apparently careless conduct earlier in the proceedings, without regard to whether or not that conduct actually caused the default. No matter how egregious the court below may have found BMW NA's initial handling of the pleading, this misunderstanding was plainly not the cause of—or the explanation for—BMW NA's default, and the court's factual finding that it was is without evidentiary support.

The lower court held that BMW NA had failed to establish "good cause" to set aside the default entry under Rule 55(c), SCRCP, based on a finding that its explanation of a "lost" pleading was insufficient under South Carolina law. The lower court was correct in noting that a lost or ignored pleading is not good cause to set aside an entry of default. But that is not the case here. Rather, BMW NA made a good faith mistake regarding the date of service and inadvertently miscalculated the due date for a

responsive motion, ultimately filing the Notice of Removal with the district court on March 23, 2017, a day before default was entered. A mistake as to the date of service falls squarely within the plain language and case law of Rule 60(b), SCRCP, and is therefore encompassed by Rule 55's more lenient "good cause" standard. See Rule 55(c), SCRCP.

2. A mistake of fact with regard to the date of service is "good cause" for relief from entry of default, and the lower court abused its discretion in holding otherwise

South Carolina courts have recognized that a mistake of fact as to the date of service is adequate grounds for relief under the more rigorous standard applied under Rule 60(b)(1), SCRCP. In Columbia Pools, Inc. v. Galvin, this Court held that the court below had abused its discretion in refusing to vacate a default judgment after the defendant filed a late answer in reliance on the incorrect date of service. 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1985). The Columbia Pools defendant was served on March 3, 1982, but mistakenly informed his attorney that the date of service was March 4. Id. at 60, 339 S.E.2d at 524. Relying on this representation, and without verifying the correct date of service, the defendant's attorney filed and served an answer and counterclaim out of time. Id., 339 S.E.2d at 524–25. Applying Rule 60(b), the lower court refused to grant the defendant relief, but the appellate court reversed and vacated the default judgment, holding that "where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief." Id. at 61, 339 S.E.2d at 525.

The reasoning of Columbia Pools was reaffirmed by this Court in 2001, in Mictronics, Inc. v. S.C. Dep't of Rev., 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001).

There, petitioner Mictronics failed to appear at a hearing before the administrative law judge ("ALJ") due to a mistake as to the hearing date, even though the ALJ had issued an amended notice of hearing bearing the correct date and a member of the ALJ staff had spoken to Mictronics' president about the matter by phone. Id. at 508, 548 S.E.2d at 224. The ALJ treated Mictronics' failure to appear at the hearing as a default and dismissed the action. Id. Applying Rule 60(b), the ALJ held that Mictronics "had received adequate notice of the hearing and that its failure to attend could not be excused based on mistake, inadvertence, surprise, or excusable neglect." Id. at 509, 548 S.E.2d at 225. On appeal, the circuit court held that the ALJ had abused its discretion in applying the excusable neglect standard of Rule 60(b), rather than the "good cause" standard of Rule 55(c). Id. The appellate court reversed and held that Rule 60(b) applied, but that the ALJ had nevertheless abused its discretion in refusing to grant relief in light of Mictronics' "good faith error" with respect to the hearing date. Id. at 511, 548 S.E.2d at 226.

The holdings of Columbia Pools and Mictronics are controlled by the text of the South Carolina Rules of Civil Procedure.[3] The language of the Rules of Civil Procedure must be given its plain meaning. Whitehead v. State, 310 S.C. 532, 534, 426 S.E.2d 315, 316 (1992). By including "mistake" as grounds for relief from a default judgment, the legislature clearly intended to encompass situations where, as here, the final judgment is predicated on a party's good faith mistake of fact. By its plain language, a "mistake" is necessarily an undesirable error that could and should have been avoided or corrected. South Carolina courts have consistently held that a mistake of fact is grounds for relief from judgment, even when the party seeking relief "did not act in the most prudent or

[3] Columbia Pools relies on S.C. Code § 15-27-130, which was later repealed and replaced by Rule 60, SCRCP. See Sijon v. Green, 289 S.C. 126, 127, 345 S.E.2d 246, 247 (1986).

procedurally correct manner." Williams v. Watkins, 384 S.C. 319, 325, 681 S.E.2d 914, 917 (Ct. App. 2009) (holding that lower court abused its discretion by refusing to grant relief from judgment after defendant failed to appear for trial due to mistaken good faith belief that the case had been continued); see also Hillman v. Pinion, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct. App. 2001) (noting that "[Rule 60(b)(1), SCRCP] is an appropriate remedy for good faith mistakes of fact"). Limiting relief to only those situations where the defendant has prudently avoided the erroneous belief in the first place or successfully corrected it before judgment has been entered would effectively read "mistake" out of the Rule; such a rewriting of the statute is beyond the court's discretion.

The matter now before this Court parallels Columbia Pools and Mictronics, and BMW NA's good faith mistake as to the date of service falls within the plain language of Rule 60(b)(1), SCRCP. While the lower court made much of BMW NA's failure to ascertain the correct date of service and thereby correct its mistaken factual belief, the law imposes no such requirement. In both Columbia Pools and Mictronics, the defaulting defendants had ample opportunity to learn or verify the correct dates of required action prior to defaulting. In both cases, this Court nevertheless held that the lower court had abused its discretion in refusing to set aside the default judgments. Conduct amounting to mistake and excusable neglect under Rule 60(b)(1) cannot simultaneously fall short of the more forgiving "good cause" standard for relief under Rule 55(c). See Rule 55(c), SCRCP; Rule 60(b)(1), SCRCP; Sundown, 383 S.C. at 607–08, 681 S.E.2d at 888–89.

The authorities relied on by the lower court in finding no good cause are readily distinguishable from the present case. In White Oak Manor, Inc. v. Lexington Insurance

Co., 407 S.C. 1, 753 S.E.2d 587 (2014), the Supreme Court affirmed the lower court's refusal to grant relief, on the grounds that "the only excuse offered was that Lexington lost the pleadings." Likewise, in Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897 (1995), the Supreme Court affirmed that the lower court did not abuse its discretion in holding that the defendant had failed to establish good cause after accepting the summons and complaint and subsequently losing it, ultimately failing to make any appearance at all until after the default judgment had been entered. Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263 (2009) entails an insurance agent who received process and subsequent related correspondence from plaintiff's counsel but nevertheless failed to forward it for a reply, and in Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987), this Court vacated and remanded a default order after a defendant received suit papers but failed to notify either its attorney or its insurer.[4] Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. at 609, 681 S.E.2d at 889, likewise concerns a defendant who was served with suit papers on two occasions, but offered no explanation at all for its failure to respond to the first service and inexplicably failed to forward the summons and complaint to its insurer until after the deadline to answer the second had expired.

As distinguished from the above cases, BMW NA's failure to timely answer was not due solely to its misplacement or mishandling of the complaint, as in White Oak or Roche, nor did it receive and acknowledge the suit papers but fail to take any action at all, as in Richardson, Roberts, or Sundown. BMW NA did not default because it lost, neglected, or ignored the complaint. To the contrary, BMW NA filed to remove only

[4] The Order erroneously states that the Roberts court affirmed the lower court's order finding no "good cause"; presumably, the court intended to reference Richardson.

days out of time due to a miscalculation and mistake of fact as to the date of service. Columbia Pools and Mictronics control.

B. The remaining factors weigh in favor of granting relief

Once a defaulting defendant has offered a satisfactory explanation for the default, the court may weigh (i) the timeliness of the motion for relief; (ii) whether the defendant has a meritorious defense; and (iii) whether granting relief would prejudice the plaintiff. In this case, all three criteria weigh in favor of lifting the default. BMW NA sought relief from the entry of default within days after the state court's jurisdiction resumed following removal, its meritorious defense is evidenced by the very document relied on to establish liability, and AEP2 cannot have been prejudiced by the minimal delay. To the extent that the court below held otherwise, its findings were unsubstantiated by the evidence and controlled by an incorrect application of Rule 55(c).

1. BMW NA's motion for relief was timely.

While the lower court's written Order does not make an express finding as to the timeliness of BMW's motion for relief, the court made an oral ruling that it was timely. To the extent that this Court considers this element, BMW NA's motion for relief from default was promptly made.

BMW NA removed the action to the district court and filed the notice of removal in the state court within hours of the entry of default, thereby suspending the jurisdiction of the state court. See 28 U.S.C. § 1446(d) (filing notice of removal with the state court "shall effect the removal and the State court shall proceed no further unless and until the case is remanded"); Cades v. H & R Block, Inc., 43 F.3d 869 (1994) (noting that "an untimely removal is a defect in removal procedure" rather than jurisdiction). It was not

possible for BMW NA to seek relief from the entry of default before the federal district court's remand order was entered on April 20, 2017. BMW NA executed and mailed its Motion for Relief from Entry of Default to the Charleston County Clerk of Court a few days later. Because BMW NA promptly sought relief almost immediately after the remedy became available, the timeliness element is satisfied.

2. BMW NA has presented a meritorious defense

The lower court's Order also does not make an express finding as to the existence of a meritorious defense. However, to the extent that this Court considers this prong of the inquiry, it is plainly satisfied. AEP2's claim to indemnification arises out of the unexecuted assignment agreement attached to its Complaint. In addition to the various defenses and denials in BMW NA's proposed Answer, filed alongside the motion for relief, the language of the assignment agreement itself establishes a defense. In particular part, the indemnification clause relied on by AEP2 limits BMW NA's obligation to withdrawal liability incurred "on the part of BMW NA."

In denying the existence of a meritorious defense, Respondent pointed to the legal opinion of four attorneys: namely, Mr. Wallace and Fritz Jekel, who represent the defendants in the still-pending malpractice suits, and Respondent's own counsel. See Damages Hr'g Tr. 25:19–21, 26:1–5. That the attorneys currently engaged in this dispute have taken legal positions advantageous to their own clients cannot properly be considered as evidence of the absence of a meritorious defense.

3. AEP2 will not be prejudiced by the relief

The Respondent would suffer no undue prejudice if relief were granted. Prejudice does not result from a minor delay in the prosecution of the lawsuit or the plaintiff's loss

of quick victory. See Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 812 (4th Cir. 1988). Nor is a plaintiff prejudiced by having to litigate its case on the merits and prove the defendant's liability. Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc., 616 F.3d 413, 419 (4th Cir. 2010). The object of an entry of default is to expedite the proceedings, not to give the plaintiff an undue advantage.

Respondent argued that it would be prejudiced by a grant of relief because the payments it now seeks indemnification for arose in 2014, and that it would accrue costs in the course of discovery and litigation if the entry were lifted. Neither Respondent's own delay in bringing suit nor the ordinary cost and delay associated with filing a civil action constitutes prejudice under Rule 55(c), SCRCP. AEP2 is not prejudiced.

II. The court erred in its award and calculation of prejudgment interest

Even assuming that the lower court did not err in refusing to set aside the entry of default, this Court should modify the judgment and reduce or eliminate the award of prejudgment interest. While the lower court correctly held that New Jersey law applied under the assignment agreement's choice of law provision, it nevertheless committed legal error when it failed to acknowledge the agreement's notice of damages provision or apply the correct law when determining the date of accrual of prejudgment interest.

A. The court erred by partially enforcing the contract and disregarding the notice of damages requirement

The court below acknowledged that the assignment agreement, as the source of AEP2's claim for liability, controlled the application of prejudgment interest and applied New Jersey law in accordance with the choice of law provision. However, the court below disregarded and gave no effect to the provision requiring written notice of any claim for damages within a "reasonable time." Contract construction is reviewed de novo,

and no deference is afforded to the lower court's interpretation. See Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 474, 965 A.2d 203, 207 (App. Div. 2009).

As in South Carolina, New Jersey courts are obligated to enforce contractual terms as they are written, and cannot make or rewrite contracts for the parties. McMahon v. City of Newark, 195 N.J. 526, 545–46, 951 A.2d 185, 196–97 (2008). In doing so, "the court must discern and implement the common intention of the parties." Id. This general principle extends to contractual provisions requiring notice of damages. See Johnson & Dealaman, Inc. v. Wm. F. Hegarty, Inc., 93 N.J. Super. 14, 224 A.2d 510 (N.J. Super. 1966). Under New Jersey law, the court will consider any relevant evidence in determining the meaning of the contract, even when the express terms are unambiguous, in order to apply a rational meaning. See McMahon, 195 N.J. at 546, 951 A.2d at 197; Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 269, 901 A.2d 341, 346 (2006).

The agreement that Respondent has identified as the source of liability also contains a "Notice of Damages Provision" requiring that, in the event of injury or failure to comply with the agreement, "claim shall be made in writing to such other party within a reasonable time." It is undisputed that Respondent failed to give BMW NA notice of its purported claim for indemnification until the service of this suit, on February 10, 2017, years after the claim arose. Nevertheless, the court below disregarded this notice requirement in its entirety, holding that Respondent was not only entitled to all of the damages claimed, but that prejudgment interest began to accrue at the time of payment—notwithstanding Respondent's failure to adhere to the contract's notice of damages provision. While the provision does not set out the consequences of breach, it would be an irrational construction to hold that it was intended to have no effect at all. The most

reasonable interpretation of this provision, in light of the expressed general purpose of the agreement, would be to bar the Respondent's claim in its entirety. At a minimum, however, Respondent's failure to adhere to the contract terms should limit its right to damages and restrict its ability to collect prejudgment interest accrued during the years that passed between the alleged claim for damages and Respondent's first notice to BMW NA. The lower court erred in its piecemeal enforcement of the agreement, and this court should vacate or modify the default judgment below accordingly.

B. The lower court misapplied New Jersey law in determining the date that prejudgment interest began to accrue.

Even assuming that the lower court was correct in disregarding the notice of damages provision, it was nevertheless required to consider the accrual of prejudgment interest under New Jersey law. The award of prejudgment interest and calculation thereof are "within the sound discretion of the trial court." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 390, 982 A.2d 420, 430 (2009).

Prejudgment interest is not automatically awarded in contract actions. Performance Leasing Corp. v. Irwin Lincoln-Mercury, 262 N.J. Super. 23, 619 A.2d 1024 (App. Div. 1993). Instead, unless the contract expressly provides for prejudgment interest, it is awarded at the court's discretion after the application of equitable principles. DialAmerica v. KeySpan Energy, 374 N.J. Super. 502, 865 A.2d 728 (2005). Generally speaking, the primary consideration is to compensate a claimant for the value of the award during the time that the defendant had the use of the money. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 506 (1974). However, a defendant's good faith is also paramount; courts will reject efforts to calculate prejudgment interest from a

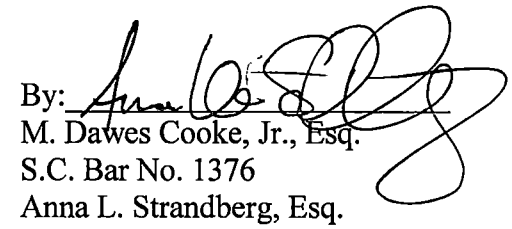
date prior to the plaintiff's first demand or notice. Derfuss v. N.J. Mfrs. Ins. Co., 285 N.J. Super. 125, 135–36, 666 A.2d 599, 604 (1995).

Here, Respondent did not claim or demand any right to indemnification until several years had passed. Notwithstanding a contractual provision expressly requiring written notice of claims, Respondent failed to provide BMW NA with even a hint of its alleged indemnification obligation before filing and serving the present suit. Instead, AEP2 slept on its alleged rights for years. BMW NA has not acted in bad faith or refused to negotiate. Respondent filed suit against two other defendants for the same damages and involved BMW NA in that litigation by subpoena without any suggestion that any money might be owed. To the extent that Respondent claims to have only recently become aware of the indemnification obligation, it is a party to the agreement it now relies on and cannot fairly claim ignorance of its existence, and in any event Respondent's delay in discovering the alleged liability cannot reasonably be attributed to BMW NA. Even if AEP2 is entitled to prejudgment interest under the contract terms, that interest cannot equitably begin to accrue until BMW NA's first notice of AEP2's claim, or February 21, 2017.

CONCLUSION

For the foregoing reasons, Appellant BMW of North America respectfully requests that this Court vacate the lower court's Order Denying Motion to Set Aside Entry of Default and remand for adjudication on the merits or, in the alternative, modify the default judgment to eliminate prejudgment interest from the total value, or recalculate prejudgment interest with the date of accrual as BMW NA's first notice of AEP2's claim to damages.

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 
M. Dawes Cooke, Jr., Esq.
S.C. Bar No. 1376
Anna L. Strandberg, Esq.
S.C. Bar No. 102432
288 Meeting Street, Ste 200
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708

Other Counsel of Record:

Ashley Bryan Abel, Esq.
Jackson Lewis P.C.
15 South Main Street, Ste. 700
Greenville, SC 29601
Attorney for Defendant/Appellant BMW of North America

Thomas H. Pope, III, Esq.
Pope & Hudgens, Attorneys, P.A.
P.O. Box 190
Newbery, SC 29108
Co-Counsel for Plaintiff/Respondent AEP2, LLC f/k/a 2AM Group, LLC

John P. Freeman, Esq.
200 W. Highland Dr. Unit 107
Seattle, WA 98119
Co-Counsel for Plaintiff/Respondent AEP2, LLC f/k/a 2AM Group, LLC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002481

AEP2, LLC f/k/a 2AM Group, LLC.....Respondent

v.

BMW of North America, LLC.....Appellant

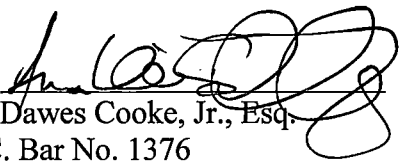
PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief on Appeal in the above-referenced Respondent by depositing a copy of it in the United States Mail, postage prepaid, on March 28, 2018, addressed to its attorneys of record:

Thomas H. Pope, III, Esq.
Pope & Hudgens, Attorneys, P.A.
P.O. Box 190
Newbery, SC 29108

John P. Freeman, Esq.
200 W. Highland Dr. Unit 107
Seattle, WA 98119

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 
M. Dawes Cooke, Jr., Esq.
S.C. Bar No. 1376
Anna L. Strandberg, Esq.
S.C. Bar No. 102432
S.C. Bar No. 69550
288 Meeting Street, Ste 200
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708

BARNWELL WHALEY
PATTERSON & HELMS LLC
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REPLY TO SOUTH CAROLINA OFFICE

M. Dawes Cooke, Jr.
mdc@barnwell-whaley.com

Anna L. Strandberg
astrandberg@barnwell-whaley.com

March 28, 2018

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: AEP2, LLC f/k/a 2AM Group, LLC v. BMW of North America, LLC
Appellate Case No.: 2017-002481
Our File No.: 5330.001

Dear Madame Clerk:

Enclosed for filing please find the original and one (1) copy of each of the following:

(1) Appellant BMW of North America's Appellant's Initial Brief;

(2) Appellant BMW of North America's Designation of Matter to be Included in the Record on Appeal; and,

(3) Proofs of Service.

We would appreciate if you would file the original documents and return the filed, stamped copies to us in the self-addressed, stamped envelope provided.

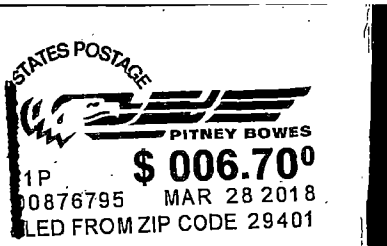
By copy of this letter, we are serving copies of the enclosures upon counsel of record.

Sincerely,

M. Dawes Cooke, Jr.
Anna L. Strandberg

MDCjr/ALS/jgc
Enclosures

cc: John P. Freeman, Esquire
Thomas H. Pope, III, Esquire
Ashley B. Abel, Esquire



BARNWELL WHALEY
PATTERSON & HELMS LLC
75 YEARS 1938-2013

P.O. Drawer H, Charleston, SC 29402-0197

5330.001

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201