

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

) CASE NO.: 2018-CP-23-01639

5Star Life Insurance Company,

) ORDER FOR ENTRY OF DEFAULT
) AND DEFAULT JUDGMENT
) ON THE COUNTERCLAIM

Plaintiffs,

v.

Peek Performance, Inc., a South Carolina
corporation

Defendants.

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NOV 28 2018

SC Court of Appeals

This action comes before the Court on the Motion of Peek Performance, Inc. ("PPI") for Entry of Default and Entry of Default Judgment on the Counterclaim. The Court heard oral argument on August 28, 2018. James G. Carpenter represented PPI, and William S. Brown and Amanda M. Scott represented 5Star Life Insurance Company ("5Star").

STATEMENT OF THE CASE

This case arises out of a contractual relationship between 5Star, a national insurance company, and PPI, an insurance marketing organization. 5Star alleges that it mistakenly overpaid commissions to PPI. After several months of efforts to resolve matters between the parties, 5Star terminated PPI's contract, and on March 19, 2018, 5Star filed suit against PPI electronically.

On March 29, 2018, PPI Answered and Counterclaimed. On March 29, the Court notified 5Star's counsel of the filing of the "Answer/Answer & Counterclaim."

5Star failed to file or serve a timely Reply to the Counterclaim.

On May 10, 2018, PPI filed a Notice of Default and Motion for Entry of Default Judgment on the Counterclaim. On May 10, 2018, the Court notified 5Star's counsel of the filing of the Notice of Default, an "Affidavit/Default," and a "Motion /Entry of Default."

On May 17, 2018, 5Star filed a two page Reply, a general denial. 5Star also purported to “reserve[] the right to allege additional defenses upon discovery and/or notice of facts sufficient to support said defenses.” However, 5Star issued no discovery requests to learn “facts sufficient to support said defenses.”

On May 10, 2018, PPI served Interrogatories and Requests for Production on 5Star. 5Star failed to respond to the Interrogatories or the Requests for Production.

On May 17, 2018, PPI moved to consolidate this action with a related action arising out of the same facts, Case No. 2017-CP-23-03269. 5Star failed to respond to the Motion to Consolidate.

On June 27, 2018, the Court held a hearing on the Motion to Consolidate. 5Star failed to appear at the hearing. On June 28, 2018, the Court ordered the two cases consolidated.

On August 7, 2018, PPI wrote 5Star’s counsel a follow up letter concerning the lack of response to PPI’s discovery requests. 5Star failed to respond to the letter and failed to produce responses to the Interrogatories and Requests for Production.

On August 17, 2018, 5Star filed its Opposition to Motion for Entry of Default and an affidavit of 5Star’s attorney. 5Star styles its Memorandum an “Opposition to Motion for Entry of Default.” 5Star also opposes PPI’s request for entry of default judgment.

LEGAL DISCUSSION

“The plaintiff **shall** serve his reply to a counterclaim in the answer within 30 days after service of the answer.” Rule 12(a) (emphasis added).

“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk **shall** enter his default upon the calendar (file book).” SCRCP 55(a) (emphasis added). “Entry of default is a ministerial act which a clerk is required to perform once default is

made to appear by the affidavit of the moving party.” *Stark Truss Co., Inc. v. Superior Constr. Corp.*, 360 S.C. 503, 509, 602 S.E.2d 99, 102 (2004). The *Stark Truss* Court continued, “A plain reading of Rule 55(a) allows entry of default when a pleading or defense is asserted in a manner noncompliant with the Rules of Civil Procedure. To hold otherwise would render the requirements in Rule 12(a), SCRPC, meaningless.” *Id.*

When a case does not involve liquidated damages, “the party entitled to a judgment by default shall apply to the court therefor.” SCRPC 55 (b)(2). Thereafter,

If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper.

SCRPC 55 (b)(2).

When faced with a similar situation, the Supreme Court reported that a Circuit Court “granted a default judgment against Petitioner, and following a damages hearing, the master-in-equity awarded damages to Respondents.” *Sundown Operating Company Inc. v. Intedge Industries Inc.* 383 S.C. 601, 604, 681 S.E.2d 885, 886 (2009).

In accord with these authorities, PPI asks this Court to make an entry of default and to enter default judgment as to liability, reserving the right to require necessary discovery processes and a subsequent hearing on damages on the counterclaim.

For the reasons stated herein, the Court grants PPI’s Motion for entry of default and entry of default judgment.

I. 5STAR FAILED TO SHOW GOOD CAUSE FOR RELIEF FROM DEFAULT.

5Star contends that it has “good cause” for being excused from default under SCRPC 55(c).

Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) 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 mere “good cause.” Rule 55(c), SCRCP. 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, 607, 681 S.E.2d 885, 888 (2009). 5Star contends its “good cause” consists of 5Star’s attorney’s failure to notice the Court’s Notice of Filing of the Answer and Counterclaim, and her lack of familiarity with electronic filing.

In her affidavit, 5Star’s attorney admits that she received the electronic notice of filing of the Answer and Counterclaim. She states that she “did not see an E-File notice alerting [her] to Defendant’s answer. [She] did not know that Defendant had filed an answer or claimed to have filed a counterclaim until [she] saw its Motion for Entry of Default [sic].” Scott Affidavit, par. 6. Scott further testified, “I did not know a defendant could serve a counterclaim by E-Filing.” Scott Affidavit, par. 7. Finally, she testifies, “I was very surprised when I saw the Motion for Entry of Default [sic].” Scott Affidavit, par. 8. The attorney’s alleged surprise at receiving a timely Answer, and the failure to observe the “notice of electronic filing” of the Answer and Counterclaims, simply does not constitute “good cause” for the failure to file a timely Reply to the Counterclaim.

She further explains that she is “an associate attorney with the Alabama-based debt collection firm Parnell & Parnell, PA. [Her] practice is devoted entirely to debt collection . . . [and her] cases are frequently uncontested and do not typically involve counterclaims.” Scott Affidavit, par. 1-2. 5Star’s attorney appears to have a statewide practice, but she explains that her “practice is focused in the Midlands. Richland County courts did not begin to use the E-File system until March 8, 2018.” Scott Affidavit, par. 3. This explanation, while understandable, underlines the

fact that 5Star's attorney testifies that she failed to demonstrate the required professional skill and attention in this case.

The Court finds that 5Star has failed to show "good cause" either to be granted relief from the entry of default, or to oppose the entry of default judgment. An attorney's failure is "imputable to the client." *Sundown Operating Company Inc. v. Intedg Industries Inc.* 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009). A showing of an attorney's negligence does not meet "even the most minimal showing of good cause, and [5Star] is therefore not entitled to relief from the entry of default." *Id.* 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

In *Simon v. Flowers*,

The affidavit of appellant's counsel, upon which the motion was based, shows that the **default was the result of forgetfulness** on his part which in turn was due to pressure of his business in the trial of cases and in attendance at hearings before the Industrial Commission. It is not suggested that either appellant or his counsel was misled by any statement or act of the respondent or of respondent's counsel. In the crowded routine of a busy lawyer's life **a mistake such as the record here discloses is understandable; but it entails the penalty of default** under strict enforcement of the rule of procedure, and the trial court's refusal to forgive it affords no basis for reversal.

Id., 231 S.C. 545, 550-51, 99 S.E.2d 391, 394 (1957) (emphasis added).

In *Simon*, the Court cited and relied on the rule and explanation from another case:

The only accident or mistake relied upon for vacating the decree and judgment of foreclosure **is the neglect of the petitioner's counsel** in that suit to file an answer setting up the defense of partial failure of consideration in the mortgage debt. Whether the failure to do this occasioned any injustice to the petitioner it is unnecessary to determine, because **the neglect of the attorney must be regarded at the neglect of the petitioner himself. * * * When a party selects an attorney of the court to conduct his cause** in his stead and place, he confers upon the attorney authority to take such action in its prosecution or defense as he may decide to be legal, proper and necessary in the management of the cause; **his acts are, in the absence of fraud, the acts of his client**; and the rule that a party cannot in equity find relief from the consequences of his own negligence is equally applicable where the neglect is that of his attorney employed in the management of the case.'

Id., 231 S.C. 545, 551-52, 99 S.E.2d 391, 394 (1957), quoting *Butler v. Morse*, 66 N.H. 429, 23 A. 90 (emphasis added).

Similarly, the South Carolina Court of Appeals ruled, “Where an attorney is merely neglectful, the general rule applies and relief from judgment is unavailable.” *Stearns Bank National Association v. Glenwood Falls, LP*, 373 S.C. 331, 342, 644 S.E.2d 793, 799 (2007).

The Supreme Court ruled that a party’s losing the pleadings is not “good cause” under Rule 55(c). *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014).

PPI did not act with excessive haste in filing its Notice of Default and Motion for Entry of Default Judgment. PPI waited well after the deadline for filing the Reply, before PPI filed its Notice of Default and a Motion for Entry of Default Judgment. Accordingly, 5Star has failed to demonstrate “good cause” for its failure to file a timely Reply.

II. PPI PLED A COUNTERCLAIM, NOT AN AFFIRMATIVE DEFENSE.

5Star contends that PPI’s Answer asserted only affirmative defenses and not a Counterclaim. The Court disagrees. The pleading is captioned “Answer and Counterclaim.” The Counterclaim extends from paragraph 9 through paragraph 68, from page 1 through page 11. The allegations are clearly denominated a Counterclaim, and the Counterclaim alleges, in significant detail, claims for breach of contract and defamation, not merely affirmative defenses. The Prayer for Relief on the Counterclaim clearly requests damages and affirmative relief on the Counterclaim against 5Star.

III. PPI HAS SUFFERED PREJUDICE FROM 5STAR’S CONDUCT.

5Star contends that PPI has suffered and will suffer no prejudice if 5Star is relieved from default. The Court disagrees. In the companion litigation, now joined to this one, PPI has requested extensive documents, necessary prosecute its case. The other parties contend they do

not have the extensive documentation, but rather that the extensive documentation is solely in the possession of 5Star. PPI has suffered prejudice by the failure of 5Star to Reply, by its failure to participate in this litigation, and by 5Star's failure to respond to Interrogatories and Requests for Production of Documents. Accordingly, PPI has suffered prejudice by the conduct and failure of 5Star.

IV. AFTER SUFFICIENT OPPORTUNITY FOR DISCOVERY, THE COURT WILL SET A HEARING FOR DAMAGES.

PPI requests the Court to allow sufficient opportunity for discovery, to compel 5Star to respond fully to its discovery requests, and thereafter to set a hearing to determine the amount of damages.

It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability. *Howard v. Holiday Inns Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978); *Schenk v. National Health Care, Inc.*, 322 S.C. 316, 471 S.E.2d 736 (Ct.App.1996); *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 334 S.E.2d 528 (Ct.App.1985). Though a defaulting party may be entitled to notice of the damages hearing, that party is limited to cross-examining witnesses and objecting to evidence. *Howard*, 271 S.C. 238, 246 S.E.2d 880; *Ammons v. Hood*, 288 S.C. 278, 341 S.E.2d 816 (Ct.App.1986). Moreover, once a party defaults, the trial court "may conduct such hearings or order such references as it deems necessary and proper" to enter the default judgment. Rule 55(b)(1), SCRPC.

Roche v. Young Bros., Inc. of Florence, 332 S.C. 75, 81-82, 504 S.E.2d 311 (1998).

Similarly, the Court of Appeals quoted 46 AmJur2d *Judgments* § 298 (2006): "In the context of a default judgment, unliquidated damages normally are not awarded without an evidentiary hearing. Where damages claimed are not readily ascertainable from the pleadings and record, a hearing is appropriate to determine the amount of damages." *Wells Fargo Bank NA v. Marion Amphitheater LLC*, 408 S.C. 87, 92, 757 S.E.2d 557, 560 (Ct. App. 2014). The Court concurs with this analysis, and, after discovery, will set a hearing to determine the amount of damages.

CONCLUSION

For the reasons stated herein, the Court **ORDERS** that an Entry of Default be entered against 5Star, and that Default Judgment be entered against 5Star as to liability on the counterclaim.

The Court also **ORDERS** 5Star to respond promptly and fully to PPI's discovery requests.

Finally, after adequate opportunity for discovery, the Court will schedule a damages hearing.

SO ORDERED, this _____ day of _____, 2018.

G. Thomas Cooper;
Circuit Judge presiding



Greenville Common Pleas

Case Caption: 5 Star Life Insurance Company vs. Peek Performance Inc

Case Number: 2018CP2301639

Type: Order/Default

So Ordered

s/ Honorable G. Thomas Cooper, Jr. Circuit
Judge 2126