

STATE OF SOUTH CAROLINA )  
 COUNTY OF CHESTERFIELD )  
 )  
 Griffin Chrysler Dodge Jeep, Inc )  
 Plaintiff, )  
 vs. )  
 )  
 Tonny Edward Sipe, )  
 Defendant. )  
 )  
 \_\_\_\_\_ )  
 Tony Edward Sipe, )  
 Third Party Plaintiff, )  
 )  
 vs. )  
 )  
 Jason S. King, )  
 Third Party Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT

Case No. 2016-CP-13-681

**ORDER DENYING MOTION  
TO SET ASIDE DEFAULT JUDGMENT**

**RECEIVED**  
APR 19 2019  
SC Court of Appeals

This Motion for Relief From Default Judgement, filed by Third Party Defendant Jason S. King, came before me for a hearing on October 29, 2018. A representative of the Plaintiff appeared at this hearing with their attorney of record, Kevin M. Barth, Esquire. Defendant Tony Sipe also appeared at the hearing with his attorney of record, M.W. Cockrell III., Esquire. Third Party Defendant Jason S. King appeared with his attorney, Robert T. King, Esquire.

**BACKGROUND**

This is a debt collection action by the Plaintiff Griffin Chrysler Jeep Dodge, Inc. (hereinafter "Griffin") against Sipe, as the result of allegations that Sipe failed to turn over title to a 2011 Ford F150 that Sipe traded in to Griffin in a transaction wherein Sipe purchased a Ram Laramie Longhorn Vehicle from Griffin. Griffin alleges damages based on their inability to recoup funds from this trade in by selling the Ford F150 vehicle without the title. The action was initiated by Griffin on September 12, 2016 by filing a Summons and Complaint, which was later served on Sipe on September 27, 2016 via personal service. Sipe filed a timely Answer and Third

Party Complaint on October 28, 2017, naming Jason S. King as Third-Party Defendant. The Answer and Third Party Complaint was personally served on King November 2, 2016.

More than 30 days passed from the service of the Answer and Third Party Complaint on King without receiving any sort of responsive pleading or appearance. On January 17, 2017, Sipe filed a Motion for Entry of Default and Order of Reference. The matter was referred to Larry W. Knox, Esquire as Special Referee. A hearing was set before Mr. Knox on January 30, 2017, after proper service on Griffin and King. King did not appear at the hearing and an Order of Judgement was entered in the amount of \$135,000.00. The Order of Judgement was filed on February 2, 2017 and served on King February 14, 2017.

On August 21, 2017, more than six months after service of the Order of Judgement on King, King filed and served his Third-Party Defendant's Notice of Motion and Motion for Relief from Default Judgement. No affidavit about the facts of the case from King or any witness, or any other factually based material that might have anything to do with the allegations of the complaint was served with the motion. The motion simply asserts the default judgement entered against King is inequitable and void based on alleged violations of Rule 14(a), *SCRCP* and other case law cited. The motion offers no explanation for why King did not contact an attorney about the Summons and Complaint or why he did not respond to the Summons on Third-Party Complaint, Answer, and Third-Party Complaint in any way until more than nine months after service of until the time for an Answer had expired.

King has still failed to file an Answer to Sipe's Summons on Third-Party Complaint, Answer, and Third-Party Complaint, and has only filed his Motion for Relief from Default Judgement and a Notice of Motion and Motion to Dismiss Third-Party Complaint, which was not

served until January 3, 2018, well over a year after personal service of Sipe's Third-Party Summons, Answer, and Third Party Complaint. These motions fail to acknowledge the lack of effort, i.e. the lack of any excuse for not taking steps to address the matter in either motion or any correspondence to Counsel for Sipe.

King brings his motion for Relief from Default Judgement pursuant to Rule 60(b)(1), *SCRCP*.

### ANALYSIS

Rule 60(b)(1), *SCRCP* provides that "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]" Rule 60(b)(1), *SCRCP* provides that "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (4) the judgment is void[.]"

Relief from judgment or order under Rule 60, *SCRCP*, rests within the sound discretion of the trial court. *Thompson v. Hammond*, 299 S.C. 116, 382 S.E.2d 900 (1989). Rule 60(b)(4), *SCRCP*, allows relief from an order to be granted on the grounds that the order is void. A void order is one rendered in the absence of proper due process or jurisdiction. *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central*

*Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950). Such notice must give the parties a reasonable time to make their appearance and “[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Id.*

King asserts that the judgement is void based on Rule 14(a), *SCRCP* in that Sipe lacks a claim under derivative liability and so the judgement is void based on Sipe’s failure to state a claim upon which relief can be granted. King makes no argument pursuant to Rule 60(b)(1), *SCRCP*, as to why the judgement should be set aside.

The Courts have long defined a void judgment as “one so affected by a fundamental infirmity that the infirmity may be raised even after the judgement becomes final. Rather, it must be “premised . . . on a certain type of jurisdictional error. Further, a motion under Rule 60(b)(4) is not a substitute for a timely appeal.” *United Student Aid Funds, Inc.*, 559 U.S. 260 (2010). The Court then noted that “. . . courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an ‘arguable basis’ for jurisdiction.” *Id.*

Here, King brings as grounds for his motion, that pursuant to Rule 60(b)(4), *SCRCP*, the judgement against him is void based upon the requirement in Rule 14(a), *SCRCP*, that Sipe does not have a substantive claim arising under derivative liability against King and so, in turn, Sipe has failed to state a claim against King under which relief may be granted, or, that the Court lacks subject matter jurisdiction over King, and so the judgment must be void and the judgement must be set aside pursuant to Rule 60(b)(4), *SCRCP*.

King's motion asserts that he has a meritorious defense pursuant to Rule 14(a), *SCRCP*, in that he claims Sipe has no substantive claim against him founded upon derivative liability and so in turn, the third-party complaint failed to state a proper claim against King and should be dismissed. That counsel for King *believes* King has a meritorious defense is not relevant to the issue before the Court, nor can that belief substitute for a presentation of facts that would show a meritorious defense. *See Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433 (2003).

Relief under Rule 60(b)(4), *SCRCP* premised on lack of subject-matter jurisdiction is only appropriate where there was not even an arguable basis for jurisdiction. Here, King argues that upon a presentation to the trial court, the trial court may have found that Sipe lacked a substantive claim against King founded upon derivative liability and so King is an improper party to this action. However, this is where King misses the mark. The South Carolina Court of Appeals found in *Williams v. Working Benevolent State Grand Lodge of S.C.* 109 S.C. 233, (1918), that defect of parties is waived unless raised by answer or demurrer. Thus, King's default waves any objection to any pleading defect that could be made because of his failure to file an answer or otherwise plead within the time frame allowed. Based on the foregoing, King's motion to set aside the default judgement should be denied because not only has he waived an assertion as to being named an improper party, but he also failed to raise his argument under Rule 14(a), *SCRCP* in a timely manner and his failure to do so does not automatically render the judgement void. *See, Id.* Even if the argument were valid, it follows that subject matter jurisdiction cannot be the basis of a 60(b)(4), motion solely because King could have argued it in an answer or other filing had it been presented within the time allotted by the *South Carolina Rules of Civil Procedure*. *See Id.*

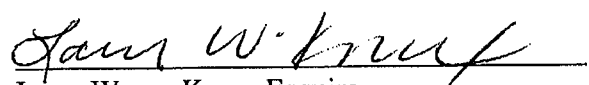
**CONCLUSION**

Defendant claims that this judgment should be set aside due to excusable neglect and misrepresentations by counsel. Defendant has failed provide any credible evidence as to this excusable neglect or misrepresentation. Accordingly, Defendant has failed to make a *prima facie* showing of a meritorious defense. As such, this Court is not moved to set aside the Defendant's default judgment.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Defendant's Motion to Set Aside the Default Judgment is **DENIED**.

IT IS FURTHER ORDERED that Third Party Defendant King is adjudged to be in default in the amount of \$135,000.00, as previously adjudicated by the Court.

**AND IT IS SO ORDERED!**

  
Larry Wayne Knox, Esquire  
Special Referee of Chesterfield County

*April 11, 2019*  
Chesterfield, South Carolina