

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )  
 )  
 Christopher and Ann Marie May, )  
 )  
 Plaintiffs, )  
 vs. )  
 )  
 Ferrara Buist, LLC, John Does 1-50, and )  
 Jane Does 1-50, )  
 )  
 Defendants. )  
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 )  
 Ferrara Buist, LLC, )  
 )  
 Third-Party Plaintiff, )  
 )  
 v. )  
 )  
 MDJ Construction, Inc., )  
 )  
 Third-Party Defendants. )  
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IN THE COURT OF COMMON PLEAS  
 SIXTEENTH JUDICIAL CIRCUIT  
 CASE NO: 2017-CP-46-3722

**ORDER DENYING DEFENDANT  
 FERRARA BUIST, LLC'S MOTION TO  
 VACATE DEFAULT**

**RECEIVED**  
 JUN 03 2019  
 SC Court of Appeals

The parties came before me in my capacity as the Special Referee in this matter on Defendant Ferrara Buist, LLC's (hereinafter "Defendant") Motion to Vacate the Order of Default Against Ferrara Buist, LLC on December 14, 2018.

This case arises out of Defendant's defective construction of Plaintiffs' home in 2015. Defendant's faulty and defective work at the subject residence has caused damage to the home and has caused Plaintiffs to suffer hardship as a result.

The relevant procedural background in this matter is as follows:

- Plaintiffs filed the action on December 15, 2017.
- Defendant was served on December 21, 2017.
- Plaintiffs granted Defendant a 30-day extension to answer the pleadings on January 15, 2018, requiring that Defendant answer by February 14, 2018.

- Defendant mailed a Motion to Stay to the Court on February 14, 2018, which the Court filed on February 26, 2018.
- Defendant entered default on February 14, 2018.
- Plaintiffs electronically filed an Affidavit of Default on April 16, 2018.
- Defendant thereafter electronically filed its Answer and Counterclaim to the Court on April 16, 2018.
- Judge Hall signed the Order of Default and Referral to Special Referee on April 17, 2018.

Plaintiffs allowed Defendant an additional 30 days to answer the pleadings, which made Defendant's responsive pleading due by February 14, 2018. Defendant did not answer the pleadings or file any responsive pleading by that date. Defendant filed a Motion to Stay the case pursuant to the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (hereinafter "the Act") on February 14, 2018. S.C. Code Ann. §40-59-810-860. The Act allows for a contractor to move to stay a case to allow parties to comply with the Act and provide a fair opportunity for the contractor to inspect the damage and offer to make repairs, which the homeowner can choose to accept or deny.

A motion to stay is not a responsive pleading under the South Carolina Rules of Civil Procedure. Rule 12(a) of SCRPC requires a defendant to serve his answer within 30 days after the service of the complaint upon him. Rule 12(b) allows a defendant to make by motion any of the eight defenses contained therein as a responsive pleading, and Rule 12(e) allows a defendant to file a motion for a more definite statement. A motion to stay the case pursuant to the Notice and Opportunity to Cure Act is not a responsive pleading. Defendant failed to comply with SCRPC when it neither answered the pleadings nor filed a Rule 12 motion by February 14, 2018. Accordingly, Defendant has been in default since February 14, 2018.

Defendant argues that because Judge Kimball granted Defendant a 90-day stay to comply with the Notice and Opportunity to Cure Act on May 21, 2018, it did not need to file a

responsive pleading until the end of the 90 days. The Notice and Opportunity to Cure Act<sup>1</sup> does not address responsive pleadings, and is designed to allow defendants a fair opportunity to inspect and offer to repair damage or defective work. On May 21, 2018, Judge Kimball granted Defendant's Motion to Stay to ensure compliance of these requirements of the Act, but did not grant the Defendant additional time to answer the pleadings, as this issue was not before him.

The standard for granting relief from an entry of default is "good cause" under Rule 55(c) SCRC. This standard requires a party seeking relief from an entry of default to provide an explanation for the default and give reasons why vacating it would serve the interests of justice. 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. *Sundown Operating Co. v. Intedge Indus., Inc.*, 681 S.E.2d 885, 888 (S.C. 2009) (citing *Wham v. Shearson Lehman Bros., Inc.*, 381 S.E.2d 499, 501-02 (S.C. 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. *Id.* (citing *Dixon v. Besco Engineering, Inc.*, 463 S.E.2d 636, 639 (S.C. Ct. App 1995)). The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. *Id.* (citing *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 633 S.E.2d 497, 499 (S.C. 2006)).

Defendant failed to show good cause or provide any valid reason why the entry of default should not be entered, or why the Default Judgment and Motion to Ascertain Damages should not proceed. In Defendant's Notice of Motion and Motion to Vacate the Order of Default

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<sup>1</sup> A stay under the Act is not automatic, as the defendant must move for the stay. Additionally, the stay is also not retroactive and pauses the case from the date the motion to stay is granted. The Act requires that a claimant serve written notice of the claim on the contractor no later than 90 days before filing the action. From the date of service, the contractor has 30 days to inspect, offer to remedy, offer to settle, or deny the claim regarding the defects, and must do so in writing.

Against Ferrara-Buist, LLC, Defendant states that while York County was participating in the pilot program for electronic filing, documents could be mailed and filed with the clock-stamp or electronically filed. Defendant misrepresents in its Motion that it mailed its Answer on April 13, 2018, and that the "Answer and Plaintiff's Affidavit of Default simply crossed in the mail as a result of the electronic filing pilot program." Defendant electronically filed its Answer on April 16, 2018 after Plaintiffs electronically filed their Affidavit of Default earlier that same day. Regardless, Defendant had been in default since February 14, 2018 even though Plaintiffs filed their Affidavit of Default and Defendant filed its Answer on April 16, 2018.

The Defendant has not showed any good cause or provided a valid explanation of why the Entry of Default should not be entered, its Motion to Vacate Default is accordingly denied.



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Carl E. Pierce, II, Esquire  
Special Referee

March 29, 2019  
Charleston, South Carolina