EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF CHESTERFIELD

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CASE No.: 2017-CP-13-0804

2019 SEP -5 PM 4:20
Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

FIRST-CITIZENS BANK & TRUST COMPANY AND SADIE M. MURVIN,

Plaintiffs,

v.

MIRANDA LIBBY MURVIN, A/K/A MIRANDA LIBBY MURVIN ZIMMERMAN AND GREAT AMERICAN LIFE INSURANCE COMPANY,

Defendants.

ORDER DENYING DEFENDANT GREAT AMERICAN LIFE INSURANCE COMPANY'S SECOND MOTION FOR RELIEF FROM ENTRY OF DEFAULT AND DEFAULT JUDGMENT

This matter is before the undersigned Special Referee pursuant to an Order from the South Carolina Court of Appeals dated May 16, 2019. The Order granted Appellant Great American Life Insurance Company's ("Great American") motion for leave to file a supplemental motion pursuant to Rule 60(b) and ordered the pending appeal of this matter to be held in abeyance pending the Circuit Court's resolution of the motion. This matter had previously been referred to the undersigned as Special Referee by the March 22, 2018 order of the Honorable Paul M. Burch, which noted "jurisdiction of this entire matter shall be vested in the Special Referee...to determine any and all matters that might arise concerning this case thereafter, [including any] motion to set aside the default." Great American filed its supplemental Rule 60(b) Motion on March 1, 2019, before it received leave from the Court of Appeals to do so. As noted above, Great American was granted leave to file its supplemental Rule 60(b) Motion pursuant to the May 16, 2019 Order of the Court of Appeals, and the motion is thus properly before the undersigned Special Referee at this time.

WOG #1

Pursuant to the Court of Appeals' May 16, 2019 Order, the undersigned scheduled a hearing in Chesterfield, South Carolina for July 31, 2019. Counsel for Great American and counsel for First-Citizens Bank & Trust Company ("First Citizens") and Sadie M. Murvin (together, "Plaintiffs") appeared and presented oral argument. Prior to the hearing, Plaintiffs and Great American each also filed a Memorandum of Law with supporting documents, and Plaintiffs filed affidavits of Suzanne King (the "2019 King Affidavit") and of Kevin Barth, Esq. (the "Barth Affidavit."). Defendant Miranda Libby Murvin did not appear at the hearing and has not appeared in this case. After considering the motion, arguments of counsel, memoranda and supporting documents, and pleadings of record, the undersigned makes the following Findings of Fact and Conclusions of Law. The undersigned denies Great American's Second Motion for Relief from Entry of Default and Default Judgment for the reasons set forth herein.

FINDINGS OF FACT

1. Great American was served with a Summons and Amended Complaint in this action through the South Carolina Department of Insurance ("SCDOI") on January 25, 2018. SCDOI mailed a certified letter to Great American on the same date notifying it that service had been accepted on Great American's behalf.

2. Great American did not file a responsive pleading. On March 5, 2018, Plaintiffs filed a Motion for Entry of Default, which requested that judgment be entered in the sum certain amount of $136,000.00 based on the breach of contract action only. Plaintiffs also requested that an Order of Default be entered on the remaining causes of action and that a hearing be set before a duly appointed Special Referee.

3. The Clerk of Court entered and filed Entry of Default on March 5, 2018.

W08
#2

4. On March 7, 2018, First Citizens representative Suzanne King executed an affidavit in connection with Plaintiffs' Motion for Default Judgment (the "2018 King Affidavit"). The 2018 King Affidavit noted that "...a copy of the annuity terms was attached to the Amended Summons and Complaint filed in this action." Suzanne King made this statement upon information and good faith belief, as at the time she executed the 2018 King Affidavit, Plaintiffs had not yet discovered or been made aware of the mistaken contract number and policy printout in the Amended Complaint.

5. At the time she signed the 2018 King Affidavit, Suzanne King believed that the Amended Complaint included, as an attachment, a policy printout of the Great American single premium deferred annuity payable to the Estate of Lonnie Murvin. It was not until months later, in July 2018 and in connection with Great American's first Motion for Relief from Default Judgment under Rule 60(b)(1), that Suzanne King learned for the first time that counsel for First Citizens had unintentionally and mistakenly attached to the Amended Complaint a policy printout for an annuity issued by Midland National Life Insurance Company.

6. I find that Suzanne King did not make any statement in her affidavit intended to deceive, misrepresent, or to be anything other than completely truthful to the Court and the Parties.

7. All other information in the 2018 King Affidavit was and remains accurate, including that Great American sent a $136,000.00 check payable to the Estate of Lonnie Murvin to the defendant Miranda Murvin, who was not a duly appointed Personal Representative of the Estate of Lonnie Murvin.

8. On March 22, 2018, the Honorable Paul M. Burch found that Plaintiffs were entitled to a default judgment against Great American in the sum certain amount of $136,000.00

WOD #3

for breach of contract and that a hearing on damages on the remaining causes of action was needed. This order appointed the undersigned as Special Referee.

9. The judgment entered by the Court of $136,000.00 is equal to the amount of the policy proceeds that Great American owed to the Estate under the insurance policy that Suzanne King believed she was referencing in the 2018 King Affidavit. Thus, the unintended error in the 2018 King Affidavit did not result in the court ordering a judgment in an incorrect or unjustified amount. I therefore find that the mistaken statement in the affidavit amounts to harmless error only and does not affect the substantial rights of the parties.

10. Before a hearing to ascertain damages on the remaining causes of action was scheduled, Great American made its first appearance in the action on April 16, 2018 and filed a Motion to Vacate Default Judgment pursuant to Rule 60(b)(1) due to alleged mistake, inadvertence, surprise, or excusable neglect in failing to respond to the Amended Complaint.

11. In seeking to vacate the Motion for Default Judgment against it, Great American filed a proposed answer to the Amended Complaint. After reading the Amended Complaint and the 2018 King Affidavit of which it now claims is evidence of fraud, Great American admitted that it issued the annuity to Lonnie Murvin, that all premiums were paid, that Plaintiffs satisfied all conditions precedent to the full funding of the annuity, and the annuity was in full force and effect at the time of the death of Lonnie B. Murvin and had a value of approximately $136,000.00 payable to the Estate of Lonnie B. Murvin.

12. The undersigned held a hearing on July 12, 2018, during which Plaintiffs and Great American each presented oral argument and a memorandum of law in support of their positions regarding Great American's first Rule 60(b) motion (the "First Hearing"). Great American offered an affidavit of Keith Lindsay (the "Lindsay Affidavit") evidencing

WOD #4

communications between Great American and First Citizens. Great American did not offer any evidence tending to explain its failure to respond to the Amended Complaint.

13. Though not in the record as evidence, Great American's Memorandum of Law in Support of its Motion to Vacate Default Judgment noted that the Amended Complaint contained an annuity policy contract number that "is not a Great American Contract Number" and an attachment to the Amended Complaint that was "in fact a statement from Midland National Life Insurance Company" and not a Great American policy printout.

14. At the First Hearing, counsel for Great American argued that the wrong policy number in the Amended Complaint and the wrong policy printout attachment to the Amended Complaint justified its alleged mistake, inadvertence, surprise, or excusable neglect in failing to respond to the Amended Complaint, thereby supporting relief under Rule 60(b)(1) for those reasons. In connection with Great American's arguments at the First Hearing, the undersigned and counsel for both Plaintiffs and Great American openly discussed the fact that the contract number and policy printout attached to the Amended Complaint were incorrect at the First Hearing.

15. Since being made aware of the mistaken contract number and policy printout attachment, Plaintiffs have never taken the position that the Amended Complaint contained the correct Great American policy number and printout. Rather, Plaintiffs have acknowledged those mistakes, both in briefing and at the First Hearing before the undersigned. Indeed, the issue of the mistaken information on the complaint was addressed in the undersigned's order following the First Hearing, because those issues — the wrong policy number and the wrong policy printout attachment—formed the basis of Great American's first Motion to Vacate default judgment under Rule 60(b)(1).

wd
#5

16. After considering the oral arguments of counsel, memoranda submitted by Plaintiffs and Great American, the Lindsay Affidavit and other pleadings of record, the undersigned entered an order denying Great American's Motion to Vacate Default Judgment under Rule 60(b)(1). Great American appealed.

17. During the pendency of Great American's appeal, Great American sought leave and was permitted to file the instant Motion for Relief from Entry of Default and Default Judgment, this time pursuant to SCRCP Rules 60(b)(2) and (3), for alleged newly discovered evidence which by due diligence could not have been discovered, and for alleged fraud, misrepresentation, or other misconduct of an adverse party.

18. Great American claims that the newly discovered evidence that supports relief under Rule 60(b)(2) was a statement in Plaintiffs' brief to the South Carolina Court of Appeals that the Amended Complaint included an incorrect policy number and attached a policy from another insurance company. Great American claimed that the 2018 King Affidavit supports relief under Rule 60(b)(3) as evidence of fraud, misrepresentation, or other misconduct of an adverse party. Because the alleged new evidence, ostensibly connoting fraud, is simply a repetitive acknowledgement of harmless error previously addressed in the proceedings for Great American's first Rule 60(b) motion, I find that relief from judgment is not warranted under their second Rule 60(b) motion.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Special Referee concludes as follows:

Rule 60(b)(2)

1. "Pursuant to Rule 60(b)(2), a party may obtain relief from a final judgment, order, or proceeding based on newly discovered evidence which by due diligence could not have been

LWOP #6

discovered in time to move for a new trial ..." *Fasset v. Evans*, 364 S.C. 42, 50, 610 S.E.2d 841, 845 (S.C. App. 2005) (internal citations and quotations omitted). A party moving for relief under Rule 60(b)(2) must establish that the newly discovered evidence "(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching." *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (Ct. App. 2008) (citing test from *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005)).

2. First, accepting for the sake of argument that the alleged "admission" is newly discovered evidence, it does not change the result of the default judgment against Great American. To date, Great American has offered no evidence into the record of its reason or justification for knowingly failing to respond to the Amended Complaint. Without such record evidence, the "admission" would not change the result of the default judgment against Great American. Under Rule 61, SCRCP, harmless error should not change a judgment. In this case, the proposed new evidence proves only a harmless error in the complaint—an error that would not reasonably impact the default judgment. The amount of the judgment in question, and the pertinent facts supporting that judgment, remain the same regardless.

3. Second, accepting for the sake of argument that the alleged "admission," and not the facts underlying the admission, is the evidence at issue, the admission is not newly discovered. During the First Hearing, the undersigned and counsel for both Plaintiffs and Great American openly discussed the fact that the contract number and policy printout attached to the Amended Complaint were incorrect. Plaintiffs have never taken the position that the Amended Complaint contained the correct Great American policy number and printout. Rather, Plaintiffs

WOR #7

have acknowledged those mistakes, both in briefing and at the First Hearing before the undersigned.

4. Third, both the underlying facts (wrong policy number and wrong policy printout) and the admission of them not only could have been discovered prior to the First Hearing, they were discovered prior to the First Hearing. Moreover, Great American relied exclusively on these facts in its argument seeking relief in its first Motion for Relief from Default Judgment.

5. Fourth, a supposedly new admission as to the veracity of an undisputed fact (which has previously been acknowledged to be true) is not material to the issue of the Court's decision on whether to grant relief from default judgment.

6. Finally, such an admission is only cumulative, especially where the underling facts are undisputed, have been acknowledged by all parties to be true, and formed the basis of Great American's first request for relief from Default Judgment

7. Great American has failed to demonstrate that it is entitled to relief under Rule 60(b)(2).

Rule 60(b)(3)

8. Rule 60(b)(3) allows a court to relieve a party from final judgment when there is fraud, misrepresentation, or other misconduct of an adverse party.

9. A party may not prevail on a Rule 60(b)(3) motion on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct. *See Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004) (citations omitted).

wpd
#8

10. Similarly, where a party could have discovered "new" evidence prior to trial, the party is not entitled to relief under Rule 60(b)(2) or (3)." *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct.App.2004).

11. The statements in the Amended Complaint and the 2018 King Affidavit are not evidence of fraud, misrepresentation, or other misconduct of an adverse party. At the time she signed the 2018 King Affidavit, Suzanne King believed that the Amended Complaint included, as an attachment, a policy printout of the Great American single premium deferred annuity payable to the Estate of Lonnie Murvin. It was not until months later, in July 2018 and in connection with Great American's first Motion for Relief from Default Judgment under Rule 60(b)(1), that Suzanne King learned for the first time that counsel for First Citizens had unintentionally and mistakenly attached to the Amended Complaint a policy printout for an annuity issued by Midland National Life Insurance Company.

12. This honest mistake did not result in an unlawful or improper judgment. The Default Judgment sum certain amount of $136,000.00 is the correct value of the Great American annuity policy at issue and is the same amount that Great American mistakenly paid to Defendant Miranda Murvin. Thus, the mistaken attachment and number amounted to harmless error, which did not affect the substantial rights of the parties.

13. Great American cannot plausibly maintain that is was confused or misled. In seeking to vacate the Motion for Default Judgment against it, Great American filed a proposed answer to the Amended Complaint. After reading the Amended Complaint and the 2018 King Affidavit of which it now claims is evidence of fraud, Great American admitted that it issued the annuity to Lonnie Murvin, that all premiums were paid, that Plaintiffs satisfied all conditions precedent to the full funding of the annuity, and the annuity was in full force and effect at the

time of the death of Lonnie B. Murvin and had a value of approximately $136,000.00 payable to the Estate of Lonnie B. Murvin.

14. The very documents that Great American now proffers as fraud, misconduct, or misrepresentations were scrutinized by Great American when it first sought relief from default judgment, and Great American had no impediment to fully answering and responding to such allegations.

15. The Amended Complaint properly alleged that Lonnie B. Murvin had an annuity policy with Great American valued at approximately $136,000.00. The mistake in the Amended Complaint—including the wrong specific policy number and attaching the wrong policy printout—did not affect either Great American's or the Court's knowledge of this fundamental fact, nor did the corresponding honest mistake in the 2018 King Affidavit.

16. In sum, the Default Judgment was not procured by fraud, misconduct, or misrepresentations[1]. Instead, the judgment was procured because Great American failed to respond to a duly issued Summons and Amended Complaint and, by Great American's own admission, did so consciously and knowingly.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Great American's Motion for Relief from Entry of Default and Default Judgment under Rule 60(b)(2) and (3) is hereby **DENIED**.

AND IT IS SO ORDERED.

[1] Because Great American has failed to prove a basis for relief under any prong of Rule 60(b), it becomes unnecessary to address any additional factors. Great American has failed to show mistake, inadvertence, surprise, or excusable neglect under subsection (b)(1), newly discovery evidence under subsection (b)(2), or fraud, misrepresentation, or "other misconduct" under subsection (b)(3). Without a showing of one of these reasons, there is no requirement for further analysis. Moreover, the undersigned finds that the delay interposed in this case by bringing an additional Rule 60(b) motion regarding the same scrivener's errors addressed in the first Rule 60(b) motion in the midst of an appeal is prejudicial to the Plaintiffs.

#10

William O. Spencer, IV
Special Referee

Chesterfield, SC
September 5, 2019

#11