

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.	)	C/A No. 2015-CP-40-01394
	)	
<i>Plaintiff,</i>	)	<b>ORDER DENYING DEFENDANT'S</b>
	)	<b>MOTION FOR SUMMARY JUDGMENT</b>
TW Telecom Holdings, Inc., a Delaware Corporation; and DOES 1-10, inclusive,	)	
	)	
<i>Defendants.</i>	)	

2019 OCT -5 AM 8:52  
 CHRISTIE H. ROBERTS  
 CLERK OF COURT  
 S.C. P. & G.S.

This matter is before the Court pursuant to Defendant TW Telecom Holdings, Inc.'s (hereinafter "Defendant") Motion for Summary Judgment. For the reasons set forth below, this Court Denies Defendant's Motion for Summary Judgment.

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**FACTS AND PROCEDURAL HISTORY**

Plaintiff PTA-FLA, Inc. (hereinafter "Plaintiff") filed its Summons and Complaint on March 3, 2015, and served TW Telecom on March 16, 2015 via certified mail to CT Corporation System in Columbia, SC. On May 6, 2015, upon motion of Plaintiff, the clerk filed an entry of default against Defendant. Defendant filed a Motion to Set Aside Entry of Default, an Affidavit from Ryan McManis, and an Answer to Plaintiff's Complaint. By order dated July 16, 2015 this Court denied Defendant's Motion to Set Aside Entry of Default and by order dated August 25, 2015, this Court denied Defendant's Motion to Reconsider. Defendant is in default.

In early March 2016, the parties were notified that the case was placed on the Richland County jury trial roster for the damages hearing. There was a roster meeting scheduled for April 4, 2016. On April 1, 2016, counsel for the parties entered into a stipulation striking the case from

the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure (hereinafter the "Stipulation"). The Stipulation states:

The Plaintiff wishes to strike this case from the trial docket pursuant to Rule 40(j), SCRCP, and the Defendant consents to the Plaintiff's request. Now, therefore, the parties stipulate to the following:

1. This matter shall be, and the same hereby is, stricken from the trial docket.
2. The Plaintiff or Defendant shall have the right to move to restore this case to the trial docket at any time within one calendar year of the date of the filing of this stipulation.

(Def.'s Mot. Summ. J., Ex. 1).

The Stipulation was dated and filed with the Court on April 1, 2016. That same day, counsel for the Plaintiff emailed the Honorable Alison Renee Lee's law clerk, Chadwick Devlin, advising of the filing of the 40(j) stipulation and seeking confirmation that counsel's presence would not be required at the roster meeting on April 4, 2016. (Def.'s Mot. Summ. J., Ex. 2). Counsel for the parties also emailed Ms. Anne R. Henley, the Civil Non-Jury Court Scheduler for Richland County, to advise that a Rule 40(j) stipulation was entered. (Def.'s Mot. Summ. J., Ex. 3). Ms. Henley responded by saying "thank you." *Id.* On April 4, 2016, Mr. Devlin responded to Plaintiff's counsel's prior email stating that "if this matter was 40(j)'d, there will be no need to attend the roster meeting." (Def.'s Mot. Summ. J., Ex. 2). Further, Mr. Devlin responded again on April 4, 2016 advising counsel that the case did not appear on the trial roster. (Def.'s Mot. Summ. J., Ex. 4). On April 4, 2016, the Honorable Alison Renee Lee executed a Form 4 Order simply stating: "Consent Stipulation of dismissal attached pursuant to 40 J." (Def.'s Mot. Summ. J., Ex. 5). The Form 4 Order was filed on April 7, 2016. *Id.* Plaintiff filed its Motion to Restore on April 6, 2017. On or about April 12, 2017, Defendant simultaneously filed an Opposition to

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Plaintiff's Motion to Restore and a Motion for Summary Judgment. Plaintiff subsequently filed an Opposition to Defendant's Motion for Summary Judgment and Defendant filed a brief Reply.

### **SUMMARY JUDGMENT STANDARD**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), S.C.R.C.P. The moving party has the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537 (1991). However, the moving party may demonstrate this "with or without supporting affidavits," and may point out that there is a lack of evidence to support the nonmoving party's case. Rule 56(b), S.C.R.C.P. "In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." *Id.*

### **DISCUSSION**

#### **I. Defendant Does Not have Standing to File a Motion for Summary Judgment.**

"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." *Roche v. Young Bros.*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (internal citations omitted). "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." *Id.* at 82, 504 S.E.2d at 314. Additionally, a defaulting party may file a motion to set aside the entry of default. *See Limehouse v. Hulsey*, 404 S.C. 93, 111, 744 S.E.2d



566, 576 (2013). There is no further South Carolina authority on additional rights a party in default could possibly have, and Defendant was unable to provide any support for the notion that a defaulted party should be able to subsequently file a motion for summary judgment. This dearth of authority is because it is axiomatic that a defaulted party has forfeited its rights to participate in the case. Defendant filed a motion to set aside the entry of default and that was denied. Its subsequent motion for reconsideration was denied. Defendant has no other legal rights as a party in default. It does not have the right to file a motion for summary judgment and therefore has no standing to file this motion. As such, Defendant's Motion for Summary Judgment is DENIED.

**II. Plaintiff's Motion to Restore was Filed within One Year of the Date it Was Stricken.**

**(j) Case Stricken From Docket by Agreement.** A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made **within 1 year of the date stricken**, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

Rule 40(j), S.C.R.C.P. (emphasis added).

The Stipulation was filed April 1, 2016. On April 4, 2016, the Honorable Alison Renee Lee executed a Form 4 Order simply stating: "Consent Stipulation of dismissal attached pursuant to 40 J." However, the Form 4 Order was not filed until April 7, 2016. Plaintiff filed its Motion to Restore April 6, 2017 within one year of the filing of the Form 4 Order, the date that complaint was stricken pursuant to 40(j).

The Stipulation states:



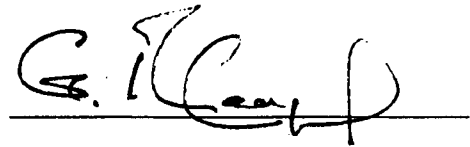
1. The Plaintiff or Defendant shall have the right to move to restore this case to the trial docket at any time within one calendar year of the date of the filing of this stipulation.

However, the Stipulation also states that “[t]he Plaintiff wishes to strike this case from the trial docket pursuant to Rule 40(j), SCRPC, and the Defendant consents to the Plaintiff’s request.” There becomes an ambiguity as to whether the Stipulation meant to give Plaintiff a year from the date the case was stricken or a year from the date of the filing of this stipulation. Resolving the issue of material fact in the light most favorable to the non-moving party, the Stipulation allowed the Plaintiff to file its Motion to Restore within one year of the date the case was stricken from the docket by Order filed April 7, 2016. Plaintiff filed its Motion to Restore on April 6, 2017, within the one-year time frame.

#### CONCLUSION

For the reasons set forth above, Defendant’s Motion for Summary Judgment is DENIED. Defendant does not have standing to bring such a motion as a defaulted party, Plaintiff timely filed its Motion to Restore pursuant to 40(j) SCRPC, and Plaintiff’s claims are not barred by statute of limitations. Plaintiff is instructed to set a damages hearing with the Richland County Clerk of Court.

**IT IS SO ORDERED.**



Judge G. Thomas Cooper, Jr.

October 4, 2017

Richland County, South Carolina