STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	
	)	C/A No. 2019-CP-38-00053
Kacey Green and Charinrath Green,	)	
	)	
Plaintiffs,	)	
	)	
versus	)	
	)	
Mervin Lee Johnson,	)	
	)	
Defendant.	)	

ORDER

THIS MATTER CAME BEFORE THIS COURT on October 21, 2019 as to a Motion filed on June 17, 2019 by the Defendant entitled "Defendant's Notice of Motion and Motion to Dismiss, or, in the Alternative, to Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead." Present at the hearing were: A. Walker Barnes for the Defendant, David R. Williams for the Plaintiffs, and E. Mason West for the Plaintiffs.

BACKGROUND

Plaintiff filed this lawsuit on or about January 11, 2019, alleging negligence, recklessness, carelessness, willfulness, wantonness, and gross negligence. Defendant Mervin Lee Johnson was served this lawsuit by personal service, pursuant to S.C. Code Ann. Section 15-9-350, at 348 High Street, Orangeburg, SC 29115, on January 26, 2019. The court agreed service was proper and entered an order of default on or about March 8, 2019. Defendant was properly notified of the damages hearing, but did not make an appearance. A damages hearing was held May 22, 2019. This court's order of damages was filed June 5, 2019. On or about June 17, 2019, Defendant finally made an appearance, through counsel, by filing a motion to dismiss, or alternatively to set aside entry of default to allow Defendant to Answer. On October 17, 2019, Defendant filed two affidavits, one from insurance adjuster and one from a trucking company representative who appears to be an internal adjuster possibly because some self insured amount is in play. Defendant himself did not file an affidavit and has yet to offer any testimony or other forthcoming position in this case. Further, Defendant has offered no affidavits, or other evidence, to refute or contradict

that Plaintiff effected proper service of the Summons and Complaint and Notice of the Damages Hearing.

STANDARD

The standard for setting aside an entry of default is found in Rule 55(c) of the South Carolina Rules of Civil Procedure – there must be "good cause" to set it aside. Rule 55 SCRCP. The rule squarely puts the burden of showing good cause on the moving party, in this case the Defendant Johnson. If the Defendant fails to show good cause why he was unable to answer the Complaint, the court's refusal to set aside an entry of default will be upheld as supported by the evidence. Williams v. Vanvolkenburg, 312 S.C. 373, 440 S.E.2d 408 (Ct. App.1994); Wham v. Shearson Lehman Brox., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App.1989). The trial judge has discretion to make this determination and abuse of that discretion occurs "when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Sundown Operating Co v. Intedge Indus., 383 S.C. 601, 606, 681, S.E.2d 885, 888 (2009). Further explained, "a party seeking relief from an entry of default [must] provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Id. If there is a satisfactory explanation for default, the court then considers "(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." *Id*. (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (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.*, 320 S.C. 174, 179, 463 S.E. 2d 636, 639 (Ct. App. 1995)).

In addition to good cause, Rule 55 goes on to read that "if a judgment by default has been entered, [it] may likewise [be] set aside in accordance with Rule 60(b)." Rule 55 SCRCP. Rule 60(b) allows relief from a final judgment or order for five reasons:

> **(1)** mistake, inadvertence, surprise, or excusable neglect;
>
> **(2)** newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> **(3)** fraud, misrepresentation, or other misconduct of an adverse party;
>
> **(4)** the judgment is void;
>
> **(5)** the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b) SCRCP. There are additional factors to consider under Rule 60(b)(1): "(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party." Rouvet v. Rouvet, 388 S.C. 301, 309 (Ct. App. 2010).

ANALYSIS

Defendant's motion is denied because Defendant failed to establish good cause, satisfactory explanation for the default as required by Rule 55 SCRCP and the progeny case law.

As noted *supra*, Defendant produced two affidavits. One from insurance adjuster that offer an explanation as to why Defendant did not timely answer. Nikole Shields, Senior Claims Consultation for Claims Direct Access in Utah, states the following, specifically to Defendant Johnson's involvement: "in or around November 2018, after being diagnosed with a heart condition, Defendant underwent open heart surgery, which required an extensive recovery; Defendant has not worked since the November 2018 open heart surgery; and in June 2019, Defendant was diagnosed with diabetes, for which he has been hospitalized on multiple occasions." Aff. Nikole Shields (Oct. 17, 2019). The other, Breeann Richardson, a claims administrator for CDS Transport Inc. in Utah, makes the same affirmations as to Defendant Johnson. Aff. Breeann Richardson (Oct. 17, 2019). Indeed, it is the exact same language.

These reasons are not good cause. First, the lawsuit was filed in January of 2019 – two months after Defendant Johnson's alleged surgery. The lawsuit was served at Defendant

Johnson's home on January 26, 2019 – again two plus months after his alleged surgery in November of 2018. Second, if we presume Richardson and Shields are correct – and to do so would be to ignore the hearsay embedded in their affidavits – Defendant Johnson was not working (i.e. he was not driving up and down the highway) and in "extensive recovery." Plaintiff did not attempt to serve Defendant Johnson at work, or anywhere else, but rather at his home. The diabetes diagnosis, again assuming Shields and Richardson's hearsay should even be considered, was not until after the damages hearing in May 2019. While the court is sympathetic to the ailments Defendant Johnson proposedly endured, they are insufficient and unsatisfactory reasons to set aside judgment.

The remaining justifications proposed in these two affidavits are coming from insurance adjusters and administrators. As clearly defined in *McClurt v. Deaton*, if an insurance company is not a party to the case, then it does not have standing to make arguments to set aside a judgment. The affidavits speak nothing of Defendant Johnson's perspective on why the wreck happened as it did. The affidavits speak nothing of any conversations Plaintiff's counsel had with Defendant Johnson or any alleged exchange of information or assurances between Plaintiff's counsel and Defendant Johnson. The affidavits make summarily, conclusive assumptions by insurance adjusters of the impact as "minor" – an impact they did not witness nor, apparently, did not even discuss with Defendant Johnson.

While the court's analysis at this point is determinative of the issue, it is important to note that but for his failure to establish good cause, Defendant Johnson still cannot satisfy the other requirements under Rule 60 to set aside the default and the damages order. Specifically, Defendant Johnson has not set forth a meritorious defense. Defendant Johnson puts forth no explanation as to how the wreck occurred. There is nothing before the court to dispute that Defendant Johnson rear-ended Plaintiff multiple times while driving at a high rate of speed down I-26. Indeed, the *McClurg* court defines meritorious defense in terms of any evidence "to suggest that the accident was the result of anything other than Deaton's negligence." McClurg 380 S.C.

at 575. This accident, as presented before this court, has only one cause – Defendant Johnson's conduct. Defendant Johnson's argument of meritorious defense thus boils down to only a dispute of the amount of damages awarded. Per *McClurg*, that is not a meritorious defense.

Finally, setting aside the judgment at this point is unduly prejudicial to Plaintiffs. Plaintiffs have now moved to Virginia. Further litigation in Orangeburg, South Carolina, would be particularly burdensome to Plaintiffs, prejudicing their ability to prosecute their claims as they would have when living in South Carolina.

CONCLUSION

Defendant Johnson's motions are hereby denied. This court's damages order stands.

AND IT IS SO ORDERED.

_____
Judge James B. Jackson, Jr.
Master in Equity

Dated: October _____, 2019

Orangeburg Common Pleas

Case Caption: Kacey D Green , plaintiff, et al VS Mervin Lee Johnson

Case Number: 2019CP3800053

Type: Order/Damages

So Ordered

James B. Jackson, Jr. 3077 Master in Equity