STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: July 11, 2014)

BARBARA PEREZ and	**:**	
BARBARA PEREZ as parent and	**:**	
next friend of RAMYA Y. PEREZ	**:**	
	:	
v.	**:**	**C.A. No. PC 2012-5495**
	:	
GAIL DION and	**:**	
FITZPATRICK'S PUB, INC. and	**:**	
2012 SPORTS BAR & LOUNGE, INC. and	**:**	
JOHN DOE I and	**:**	
JOHN DOE II	**:**	

DECISION

LANPHEAR, J. Before this Court is a dispute between Barbara Perez and Barbara Perez on behalf of her minor child, Ramya Y. Perez (collectively, Plaintiffs), 2012 Sports Bar & Lounge, Inc. (Defendant), Gail Dion (Co-Defendant), and Fitzpatrick's Pub, Inc. (Co-Defendant), regarding Defendant and Co-Defendants' liability for injuries incurred by Ms. Perez as a result of an automobile accident. In particular, Plaintiffs' Complaint alleges that a drunk driver, Ms. Dion, consumed drinks at Defendant and Co-Defendant's places of business and consequently they are jointly liable to Plaintiffs for the resultant injuries. The instant matter is Defendant's Motion to Vacate Entry of Default entered against it. Jurisdiction is pursuant to Super. R. Civ. P. 55(c).

I

Facts and Travel

Ms. Perez alleges that on June 29, 2012, Ms. Dion consumed alcoholic beverages at two establishments in Cranston, Rhode Island; namely, Fitzpatrick's Pub and 2012 Sports Bar. Ms.

Perez further alleges that when Ms. Dion left these establishments, she drove her car while she was under the influence of alcohol. Ms. Dion traveled in the northbound lanes of Route 10 in Cranston, although her vehicle was driving southbound (opposite to the flow of traffic). Ms. Perez was a passenger in a vehicle driving southbound in the southbound lanes. The two vehicles struck head-on.

Ms. Perez sustained serious and permanent injuries. She claims damages for lost wages, medical expenses and compensation for pain and suffering. She also claims that her daughter, Ramya Y. Perez, lost the society and companionship of her mother during this period.

Although service of process was effectuated upon the agent for service of process on November 5, 2012—see summons in file—2012 Sports Bar failed to answer or otherwise respond. Defendant was defaulted as a result of its inaction on January 16, 2013. The Plaintiffs then moved for judgment against Defendant and scheduled a hearing to prove their damages through testimony and other evidence, an oral proof of claim. At the hearing on July 11, 2013, the Court awarded damages of $700,000 to Ms. Perez and $200,000 to Ramya Y. Perez. See Order dated August 28, 2013.

On August 8, 2013, 2012 Sports Bar moved to vacate the default. It claimed it had no knowledge of the suit, or the claim, and never received process. The Court conducted hearings on the motion to vacate in the fall of 2013. This matter is now before the Court for decision.

II

Findings of Fact

On October 9, 2012, counsel for Plaintiffs issued a letter to 2012 Sports Bar threatening litigation and urging the Defendant to contact counsel. There were three attempts to deliver the letter by certified mail, but the letter was never claimed. A copy of the letter was mailed by

regular mail, but the envelope to 2012 Sports Bar contained a letter addressed to Fitzpatrick's Pub, a Co-Defendant. The letter was received by Richard J. DeAndrade, Vice President and Treasurer of 2012 Sports Bar. Despite receiving the letter, Defendant took no action, and suit was initiated.

Defendant is a small business which operates only in the evening. In establishing the business, the corporation consulted with Norman Lecours. Mr. Lecours has done bookkeeping and tax preparation work for various clients for over fifty years and testified at length at the motion hearing. Mr. Lecours occasionally incorporated businesses for clients, listing himself as the agent for service of process, as he did for Defendant. Mr. Lecours also testified that when he is served with process for any of the corporations, he accepts service, photocopies the documents, provides the documents to the client, and retains a copy.

When Mr. Lecours initially completed the tax filings for Defendant, Richard J. DeAndrade, the Treasurer of 2012 Sports Bar, would visit Mr. Lecours' office monthly to exchange financial reports. However, soon after the corporation formed, Defendant elected to proceed without Mr. Lecours, completing its own tax returns starting in February 2013. The agent for service was never changed. On October 29, 2012, Mr. Lecours gave the service documents to Richard J. DeAndrade with instructions to forward them to Raymond DeAndrade, President of 2012 Sports Bar.[1]

Mr. Lecours was an accountant with many years of experience. He was cooperative when he testified and appeared to have cooperated with defense counsel before he testified. Although subpoenaed, he seemed to bear no ill will and had minimal understanding of the

[1] Mr. Lecours testified that it was his practice to deliver a copy to the officers. Raymond DeAndrade testified that he had moved residences in August 2012 and never informed the post office or forwarded his mail.

significance of the suit or the pending motion. Instead, he spoke of his relations with 2012 Sports Bar in cooperative terms, discussed each item in the file, and responded appropriately to both attorneys.

The DeAndrades testified that Mr. Lecours never gave them the service of process documents, but acknowledged that Mr. Lecours was regularly provided paperwork to do the accounting work during the same period. They suggested that they would have contacted counsel if they were aware of the suit, but they also acknowledged doing nothing after receiving the initial letter threatening litigation. Richard J. and Raymond DeAndrade testified that they thought the letter was addressed to the wrong bar, but Richard J. DeAndrade was clearly aware of the motor vehicle collision at the time that he received the letter. He succinctly recalled the "hefty" women, the time they were in, the number of drinks they had, and the men who accompanied them. He even testified that they went to Fitzpatrick's Pub after they left. One would think that all of this would trigger a stronger reaction to the letter threatening litigation. This, and his informal approach to the questions posed, leaves the Court to question his credibility and to find Mr. Lecours more credible.

III

Standard of Review

The threshold issue to be determined by this Court is the standard of review applicable to the instant matter. Specifically, the Court must decide whether the Order entered by this Court, which is the subject of this review, is a default or a default judgment. Defendant's motion is an attempt to vacate a default, not a default judgment.[2]

[2] A defendant could not come much closer to a judgment being entered against it. On November 5, 2012, Defendant was served with a Complaint. It failed to respond. On January 16, 2013, Defendant was defaulted. A hearing to prove the Plaintiffs' claims was then scheduled. On July

This Court is hard pressed to find that a default judgment was entered in this case.[3] In particular, the parties do not dispute that the Order and Judgment prepared by Plaintiffs was not signed by this Court or the Court's clerk. See Pls.' Ex. I. Another document was prepared by this Court, entitled "Order," and entered on August 28, 2013. The Order entered on August 28, 2013 cannot be considered a final judgment of this Court because it is entitled as an Order, states that the matter is continued for status, and does not satisfy Super. R. Civ. P. 58(a)(2)'s requirement that every judgment be set forth on a separate document.[4] See Reyes v. Providence Place Grp., 853 A.2d 1242, 1247 (R.I. 2004) (finding that an order that merely directed that "judgment may enter . . . failed to fulfill the requirements of Rule 58(a)"). In addition, the civil docket sheet for the instant matter does not contain an entry of judgment in accordance with Rule 79(a) of the Superior Court Rules of Civil Procedure.[5] See Super. R. Civ. P. 79(a); see also

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11, 2013, this Court heard an oral proof claim with live testimony and medical affidavits submitted by Ms. Perez. The Court granted a partial judgment for $900,000. At that point, the Plaintiffs only needed to submit a judgment form to the Court. In all likelihood, it would have been executed promptly. Through the good graces of Plaintiffs' counsel, another demand letter was sent to Defendant with the purpose of apprising Defendant of the danger it faced. Then, and only then, did Defendant obtain counsel and respond to the litigation.

[3] "The entry of a default judgment is a two-step process; the court or the clerk of the court first enters a default; there then follows a default judgment that must be entered in accordance with Rule 55." Val-Gioia Props., LLC v. Blamires, 18 A.3d 545, 548 (R.I. 2011) (citing Medeiros v. Hilton Homes, Inc., 122 R.I. 406, 409, 408 A.2d 598, 599 (1979) ("A full reading of Rule 55 shows that it embraces two steps: the entry of a default, which is then to be followed by the entry of a default judgment.").

[4] Additionally, this Court notes that it has provided partial awards to only two out of three Co-Defendants in the instant matter. In pertinent part, Super. R. Civ. P. 54(b) states that

> "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

[5] Super. R. Civ. P. 79 reads, in relevant part, that

Norwest Mortg., Inc. v. Masse, 799 A.2d 259, 261 (R.I. 2002) (inferring that no judgment was entered in case, in part because the docket sheet did not show that judgment entered, but instead that, "Judgment shall enter"). Accordingly, this Court finds that the appropriate standard of review is controlled by Rule 55(c) of the Superior Court Rules of Civil Procedure (generally, Rule 55).

In reference to Rule 55 of the Rhode Island Rules of Civil Procedure governing defaults, our Supreme Court has noted that "[j]udgment by default is a drastic remedy which should only be employed in extreme situations." McKinney & Nazareth, P.C. v. Jarmoszko, 774 A.2d 33, 36 (R.I. 2001) (internal quotation omitted). Rule 55(a) provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Id. at 37. After default is entered, judgment by default may be entered pursuant

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> "[t]he clerk shall keep the civil docket and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action."

to Super. R. Civ. P. 55(b). To vacate an entry of default before a default judgment is entered, a party must show "good cause" under Super. R. Civ. P. 55(c). Reyes, 853 A.2d at 1246.

Our Supreme Court has explained that '"the only showing required for removing [a] default [is] 'good cause' and not the 'mistake, inadvertence, surprise, or excusable neglect' showing which would [be] demanded under [Rule] 60(b), had the default been followed by the subsequent entry of a final judgment."' Id. at 1247 (quoting Berberian v. Petit, 118 R.I. 448, 452, 374 A.2d 791, 793 (1977)). Moreover, the First Circuit Court of Appeals has opined that the "good cause" threshold for relief from default is less stringent and more easily achieved than the standard attendant to relief from a final judgment. Coon v. Grenier, 867 F.2d 73, 76 (1st Cir. 1989). Additionally, "where there are no intervening equities, any doubt [about the existence of good cause,] should as a general proposition, be resolved in favor of the movant so that the issue can be decided on the merits." Reyes, 853 A.2d at 1247 (internal quotation marks omitted). Therefore, a motion to vacate a default "'may be granted whenever the court finds that the default was not the result of gross neglect, that the nondefaulting party will not be substantially prejudiced by the reopening, and the party in default has a meritorious defense."' Sec. Pac. Credit (Hong Kong) Ltd. v. Lau King Jan, 517 A.2d 1035, 1036 (R.I. 1986) (quoting 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2696 at 518-19 (1983) ("Relief from a default entry has been granted when the default was due to . . . clerical mistake, confusion . . . or defendant's failure to receive service"); see also 1 Kent, Rhode Island Civil Practice, § 55.5 (1969). Importantly, "[t]he burden of demonstrating good cause lies with the party seeking to set aside the default." Indigo America, Inc. v. Big Impressions, LLC, 597 F.3d 1, 3 (1st Cir. 2010). When these three prongs are satisfied, the "good cause" standard is met. Reyes, 853 A.2d at 1247.

IV

Analysis

In support of its Motion to Vacate Entry of Default, Defendant asserts that "good cause" exists to vacate the entry of default. Specifically, Defendant contends that it was not grossly negligent, that the non-defaulting party will not be prejudiced, that it possesses a meritorious defense, that the large sum of money involved in the instant matter warrants a decision on the merits, and that there is no indication that it or any of its officers acted in bad faith.

In response, Plaintiffs argue that Defendant was, in fact, grossly negligent in failing to answer the case, that Plaintiffs will be substantially prejudiced by reopening the matter, that Defendant has failed to present a meritorious defense, and the equities fall in Plaintiffs' favor.

Our Supreme Court has consistently applied a "liberal interpretation" to Super. R. Civ. P. 55(c). See Berberian, 118 R.I. at 452, 374 A.2d at 793. The "liberal interpretation of Rule 55(c) is in accord with the interpretation given to its federal counterpart Fed. R. Civ. P. 55(c)." See Sec. Pac. Credit, 517 A.2d at 1036; see also Coon, 867 F.2d at 76 ("a liberal approach is least likely to cause unfair prejudice to the nonmovant"). "There is no mechanical formula for determining whether good cause exists and courts may consider a host of relevant factors." Indigo Am., Inc., 597 F.3d at 3 (citing KPS & Assocs. v. Designs by FMC, Inc., 318 F.3d 1, 12 (1st Cir. 2003)). Courts usually consider: "(1) whether the default was willful; (2) whether setting it aside would prejudice the adversary; and (3) whether a meritorious defense is presented." Id. Additional factors to be considered are as follows: "(4) the nature of the defendant's explanation for the default; (5) the good faith of the parties; (6) the amount of money involved; and (7) the timing of the motion." Id. (quoting KPS, 318 F.3d at 12).

For example, with respect to good cause, in Coon, 867 F.2d at 74, the defendant moved to set aside an entry of default in a personal injury action involving an automobile collision. The First Circuit Court of Appeals found that there was no indication that defendant, who failed to answer plaintiff's complaint, "consciously sought to evade process." Id. at 76. Consequently, the First Circuit remanded the case with instructions to vacate the default. Id. at 79.

In this case, this Court finds that there is good cause to grant the Defendant's Motion to Vacate Entry of Default. The Defendant's failure to file an answer was not the result of gross neglect. See Coon, 867 F.2d at 76 (finding no willfulness and only mere negligence where defaulting defendant did not try to conceal his whereabouts or evade service, but simply moved and neglected to provide an address change). Soon after Defendant's corporation was formed, Mr. Lecours stopped preparing tax returns and acting as Defendant's accountant. Despite Mr. Lecours' lack of involvement with Defendant's business, he remained the agent of service for Defendant. As previously stated, this Court finds Mr. Lecours' testimony credible, that on October 29, 2012, Mr. Lecours gave the service documents to Richard J. DeAndrade with instructions to forward them to Raymond DeAndrade, President of 2012 Sports Bar. This Court has expressed reservations regarding the reliability of Raymond DeAndrade's testimony and has concerns regarding the formality of the corporate business. However, this Court finds the testimony that Raymond DeAndrade moved residences in August 2012, failed to inform the post office of this change and also neglected to provide the post office with a forwarding address to be credible.

This Court would be less than candid if it did not state that Plaintiffs present persuasive arguments in favor of denying Defendant's Motion to Vacate Entry of Default. The Plaintiffs adhered to the Superior Court Rules of Civil Procedure by serving the Defendant through its

agent for service. However, given the liberal interpretation of Super. R. Civ. P. 55(c) and the general policy of resolving doubts about the existence of good cause in favor of the movant, this Court finds that the Defendant's actions were not the result of gross neglect. See Indigo Am., Inc., 597 F.3d at 6; Sec. Pac. Credit, 517 A.2d at 1036; Berberian, 118 R.I. at 452, 374 A.2d at 793.

Furthermore, Plaintiffs will not be substantially prejudiced by reopening this case. The Complaint was filed on October 24, 2012, and Defendant's agent for service was served on November 5, 2012. After Plaintiffs received no response from Defendant, they filed for an Entry of Default, and the Entry of Default was granted on January 16, 2013. Subsequently, Defendant filed a Motion to Vacate Entry of Default on August 8, 2013, nearly seven months after the Entry of Default. This Court refuses to infer prejudice from the passage of this time alone. See Lolatchy v. Arthur Murray, Inc., 816 F.2d 951, 954 (4th Cir. 1987) (allowing case to be heard on merits although moving party delayed ten months before filing its motion to set aside default); but see Seanor v. Bair Transp. Co. of Del., 54 F.R.D. 35, 36 (E.D. Pa. 1971) (denying defendant's motion to vacate entry of default because defendant waited thirteen months after entry of default to file its motion and because Defendant's motion came "virtually on the eve of trial"). Plaintiffs have provided this Court with no evidence that witnesses are unavailable, that evidence has been lost, or that discovery will somehow be obstructed or curtailed. See Keegel v. Key W. & Caribbean Trading Co., Inc., 627 F.2d 372, 374 (D.C. Cir. 1980) ("[t]hat setting aside the default would delay satisfaction of plaintiffs' claim" is insufficient to show prejudice); United States v. One Parcel of Real Prop., 763 F.2d 181, 183 (5th Cir. 1985) (merely requiring a party to litigate a suit does not amount to prejudice).

As to the final requirement, this Court finds that the Defendant has presented a meritorious defense. A meritorious defense must "plausibly suggest the existence of facts which, if proven at trial, would constitute a cognizable defense." Coon, 867 F.2d at 77. The movant does not need to demonstrate a likelihood of success. Id. Here, the Defendant has asserted that Ms. Dion may not have been intoxicated at the time she was patronizing Defendant's establishment. In addition, Defendant has argued that Ms. Dion became intoxicated at Fitzpatrick's Pub, which was visited by Ms. Dion after leaving 2012 Sports Bar. This Court finds these defenses to be plausible. See id. at 77; Reyes, 853 A.2d at 1247.

Finally, this Court notes that Plaintiffs' attorney has represented that damages in the instant case have the potential of exceeding $5,000,000, another factor that weighs in favor of removing the default. See Reyes, 853 A.2d at 1247 ("resolving doubts in favor of removing default in actions where large sums of money are involved in the suit") (internal quotation omitted). For all of these reasons and in consideration of the policy of removing defaults and litigating cases on the merits, this Court finds that all of the requirements necessary to vacate this default have been satisfied.

V

Conclusion

Upon review of the entire record, this Court concludes that the Defendant's failure to answer the Complaint was not the result of gross neglect; the Plaintiffs will not be substantially prejudiced by the reopening of this case; and the Defendant presents meritorious defenses. Thus, Defendant's Motion to Vacate Entry of Default is granted. If Plaintiffs seek attorneys' fees, they shall submit a demand within twenty days of the date of this Decision. A copy shall be presented to the Court and the Court will then schedule a hearing on the request.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Barbara Perez v. Gail Dion, et al.**
CASE NO:	**PC 2012-5495**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**July 11, 2014**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
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