STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED – DECEMBER 30, 2011)

VALERIE BREMER	:	
	:	
vs.	:	**C.A. NO. KC 2010-0896**
	:	
WILLIAM G. BREMER; JAMES I. GOLDMAN, CPA; CEDAR TREE AND LANDSCAPING SERVICES, INC.; and T & L FARMS, LLC	:	

DECISION

K. RODGERS, J. This matter is before the Court on Defendant William G. Bremer's (Mr. Bremer) Motion to Vacate the Entry of Final Default Judgment and to Stay Proceedings. Plaintiff, Valerie Bremer (Mrs. Bremer), filed suit in this Court against Mr. Bremer for, *inter alia*, breach of fiduciary duties arising from Mr. Bremer's conduct regarding alleged jointly-held businesses. Mr. Bremer failed to respond to numerous motions and orders seeking information in discovery. For the reasons set forth below, Mr. Bremer's Motion to Vacate and Motion to Stay are granted.

I

Facts and Travel

The Bremers were married in September 1996; on August 14, 2007, Mrs. Bremer filed for divorce in Kent County Family Court. After a trial, the Kent County Family Court justice issued a bench decision assigning the marital assets on May 30, 2008. A Decision Pending Entry of Final Judgment was issued by the Family Court trial justice on November 25, 2008. The decision reflects that the parties were each awarded fifty

percent of the martial assets. However, two business entities organized under the laws of the State Rhode Island which were jointly held by Mr. and Mrs. Bremer – Cedar Tree & Landscaping Services, Inc. ("Cedar Tree") and T & L Farms, LLC ("T & L"), the corporate defendants named herein – were not addressed in the Decision as having been subject to the fifty-fifty division of marital assets. On November 28, 2008, Mr. Bremer's counsel filed a Motion to Amend Judgment in Kent County Family Court, specifically seeking to address the assignment of Cedar Tree and T & L. A careful review of the Family Court file, Valerie Bremer v. William Bremer, KC 07-0481, reveals that the November 28, 2008 Motion has not been adjudicated to date.

Mrs. Bremer filed the Complaint in this case on June 9, 2010, alleging that she is a fifty percent shareholder in Cedar Tree and a member of T & L. With regard to Cedar Tree, Mrs. Bremer contends, *inter alia*, that Mr. Bremer illegally and fraudulently removed her as an officer, misappropriated her fifty percent share of the stock in Cedar Tree, and deprived her of past and present earning capacity and of dividends to which she was and is entitled. She further alleges that due to Mr. Bremer's actions, the real property owned by T & L now has a cloud on its title, rendering it unmarketable.

Mr. Bremer filed an Answer on June 25, 2010, through his attorney, Alberto Aponte Cardono (Cardono). The parties then engaged in discovery. Suffice to say that Mr. Bremer, through counsel, failed to respond to discovery requests as mandated by the Superior Court Rules of Civil Procedure. On June 29, 2010, Mrs. Bremer served Plaintiff's Request for Production of Documents to Mr. Bremer's counsel. No response having been provided, Mrs. Bremer filed a Motion to Compel Production of Documents which was granted by rule of court, and the documents were required to be produced by

September 24, 2010. Again, Mr. Bremer failed to produce the requested documents, and Mrs. Bremer then moved for a Conditional Order of Default against Mr. Bremer. By agreement of Mr. Bremer and Mrs. Bremer, and pursuant to a Consent Order entered on November 18, 2010, Mr. Bremer was ordered to respond to the Request for Production of Documents by November 19, 2010, or risk the entry of final default.

When the discovery remained outstanding after November 19, 2010, Mrs. Bremer did indeed file a Motion for Entry of Default which was scheduled to be heard on January 11, 2011; the file reflects that the matter was passed and not adjudicated.

On February 22, 2011, Mrs. Bremer appeared to abandon efforts at that time to default Mr. Bremer for failing to comply with discovery. Rather, on that date, Mrs. Bremer filed a Motion to Compel A More Responsive Response to Plaintiff's Request for Production of Documents in accordance with her original June 29, 2010 Request for Production. In that February 22, 2011 filing, Plaintiff states that Mr. Bremer "failed to produce documents with respect to Requests numbered two through eleven" and thereafter lists twelve categories of documents, all of which can be characterized as falling within the general request No. 1 as previously propounded in the June 29, 2010 Request, which sought "[t]rue copies of all financial records including but not limited to bank statements, check ledgers, both sides of all cancelled checks and all other bank records" of the two corporations from 2006 to the present. That Motion to Compel a More Responsive Response to Request for Production was scheduled for hearing on March 28, 2011. No objection having been filed, and presumably no documents having been produced, the Motion to Compel was granted by rule of court and all the categories

of documents set forth in the February 22, 2011 Motion to Compel were required to be produced by Mr. Bremer by April 25, 2011.

Having failed to receive Mr. Bremer's response by the April 25, 2011 deadline on said Motion to Compel, Mrs. Bremer again moved for a conditional order of default against Mr. Bremer. That motion was filed on May 5, 2011, and was scheduled to be heard on May 23, 2011. The docket sheet reveals that that Motion was passed and not adjudicated on May 23, 2011.

Plaintiff thereafter filed and served a new discovery request and related motions incorporating some of the categories of documents previously requested but not as yet produced. On May 25, 2011, Mrs. Bremer filed Plaintiff's Second Request for Production of Documents which requested all bank statements and general ledgers of the two corporations for the years 2010 and 2011; internal documents of both entities, including minutes of meetings, corporate votes, officer resignations, shareholder sales and purchases, stock ledgers, stock certificates, and amendments to articles of incorporation; and records evidencing change of ownership of the two corporations. Notably, these requests were previously set forth in the originally filed June 29, 2010 Request for Production of Documents and the rule-of-court Order granting Plaintiff's Motion to Compel a More Responsive Response to Request for Production, neither of which Mr. Bremer had complied with in accordance with the various Court orders through that date. Plaintiff's Second Request for Production of Documents also sought certain categories of documents related to tax returns for 2010, Secretary of State filings for 2010 and 2011, W-2's and 1099's for payments to Mr. Bremer from either corporate entity for 2010 and 2011, and documents provided to the corporation's accountant to

prepare 2010 tax returns. Pursuant to Rule 34 of the Superior Court Rules of Civil Procedure, all those documents were due on July 5, 2011.

One day after filing Plaintiff's Second Request for Production of Documents, Plaintiff filed a Motion for Conditional Order of Default asserting that Mr. Bremer failed to comply with the Order granting Plaintiff's Motion to Compel More Responsive Response to Request for Production by rule of Court, which required compliance by April 25, 2011. That Motion for Conditional Order of Default was scheduled for hearing on June 27, 2011. Mr. Bremer failed to comply with the Order granting the Motion to Compel and failed to object or otherwise appear before the Court on June 27, 2011. Accordingly, the Court entered an Order requiring compliance with the Motion to Compel More Responsive Response to Request of Production by July 18, 2011, or otherwise be subject to having said default made final. Once again, Mr. Bremer failed to comply with that conditional order and Mrs. Bremer moved for final default against Mr. Bremer. That matter was scheduled for hearing on August 8, 2011, a State Holiday. The hearing was conducted on August 9, 2011, in accordance with Superior Court Rule of Practice 2.5. As no objection was filed and no one appeared on Mr. Bremer's behalf at the August 9, 2011 hearing, the Court granted Plaintiff's Motion for Entry of Final Default against Mr. Bremer. That Order was entered by the Court on September 6, 2011.

Eight days after the Court hearing on Mrs. Bremer's Motion for Entry of Final Default, on August 17, 2011, Mr. Bremer filed a Motion for Denial of Entry of Final Default and scheduled that Motion for hearing on September 12, 2011. No one appeared to press the Motion on September 12, 2011, and the matter passed. By Stipulation dated September 12, 2011, Cardono withdrew his appearance and Evan M. Kirshenbaum

entered his appearance as attorney for Mr. Bremer. New counsel thereafter filed the within Motion to Vacate the Default Judgment and a Motion to Stay the proceedings. This Court held a hearing on the Motion on November 14, 2011.

II

Standard of Review

Rule 60(b) of the Superior Court Rules of Civil Procedure provides that,

> "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment." Super. R. Civ. P. 60(b).

An individual seeking relief from a default judgment for mistake, inadvertence, surprise, or excusable neglect must: (1) "convince the trial justice of the adequacy of the reason given for his failure to respond to the court's process"; and (2) "state a defense which is prima facie meritorious." Holdgate v. Acton, 764 A.2d 187, 187 (R.I. 2000) (quoting David-Hodosh Co. v. Santopadre, 112 R.I. 567, 569, 313 A.2d 378, 379 (1974)).

"Excusable neglect" is a more rigorous standard than "good cause," and it requires a party to show "that the neglect . . . was occasioned by some extenuating circumstances of sufficient significance to render it excusable." Daniel v. Cross, 749 A.2d 6, 9 (R.I. 2000) (quoting Fields v. S. & M. Foods, Inc., 105 R.I. 161, 162, 249 A.2d 892, 893 (1969)). Excusable neglect that would qualify a party for relief "is generally that course of conduct that a reasonably prudent person would take under similar circumstances." Id. (quoting Astors' Beechwood v. People Coal Co., 659 A.2d 1109, 1115 (R.I. 1995)). "It is well settled that motions to vacate a judgment are left to the sound discretion of the motion justice and will not be disturbed on appeal unless an abuse

of discretion or error of law is shown." Labossiere v. Berstein, 810 A.2d 210, 213 (R.I. 2002). Furthermore, "[t]he burden of proof is on the moving party." Iddings v. McBurney, 657 A.2d 550, 553 (R.I. 1995).

III

Analysis

A

Failure to Respond to Discovery and Court Orders

It is abundantly clear to this Court that Mr. Bremer and Cardono blatantly violated the Superior Court Rules of Civil Procedure and numerous Orders of this Court. The record is replete with motions and orders with which Mr. Bremer failed to comply or ignored. Although discovery disputes are not uncommon, Mr. Bremer had no less than seven opportunities to produce various categories of documents and to avoid the default judgment in this case – and he failed to avail himself of each of them. He failed to provide the requested documents despite multiple requests, two orders to compel, an extension agreed to by Plaintiff, and two conditional orders of default. "[R]ather than take advantage of the offered opportunities to answer without penalt[y]," Mr. Bremer chose to be noncompliant. Providence Gas Co. v. Biltmore Hotel Operating Co., 119 R.I. 108, 114, 376 A.2d 334, 337 (1977). The Court would expect "a reasonably prudent person . . . under similar circumstances[]" to have been more diligent in complying with the directives of this Court. Daniel, 749 A.2d at 9.

When pressed at oral argument on November 14, 2011, why Mr. Bremer failed to comply with the Rules of Civil Procedure and the multitude of Orders from this Court, Mr. Bremer's new counsel was without explanation. Similarly, there was no explanation

why Mr. Bremer's prior counsel only now sought a Motion to Stay proceedings, when the basis for such Motion to Stay existed at the moment this civil action was filed in June 2010.

This Court cannot countenance such outright disregard of Court Orders and discovery violations. There was no excusable neglect demonstrated, and indeed there was no excuse provided at all. Mr. Bremer is not entitled to relief from the Entry of Default pursuant to Rule 60(b)(1). See Mumford v. Lewiss, 681 A.2d 914, 916 (R.I. 1996) (holding that failure to comply with discovery orders warranted dismissal of plaintiff's case).

B

Jurisdictional Basis Justifying Relief from Entry of Default

While Mr. Bremer has wholly failed to demonstrate excusable neglect for failing to comply with discovery Orders, relief from default judgment may be granted for other reasons "justifying relief from the operation of the judgment." Super. R. Civ. P. 60(b)(6). Mr. Bremer argues that it would be unjust to allow Mrs. Bremer to recover against Mr. Bremer in Superior Court for the Family Court's non-assignment of Cedar Tree and T & L. Although he cites no legal authority, Mr. Bremer contends that the Family Court should retain exclusive jurisdiction over the dispute regarding the alleged jointly-held property because there are motions that remain pending in the Family Court even after the parties' divorce was made final.

"The Superior Court of Rhode Island is a trial court of general jurisdiction. It is granted subject-matter jurisdiction over all cases unless that jurisdiction has been conferred by statute upon another tribunal." Chase v. Bouchard, 671 A.2d 794, 796 (R.I.

1996). "[U]nless the Legislature confers upon a tribunal exclusive original jurisdiction over matters that had been within the authority of another tribunal, the authority so conferred is concurrent with that of the original tribunal." Barone v. O'Connell, 785 A.2d 534, 535 (R.I. 2001) (internal citations and quotations omitted). "General Laws 1956 § 8-10-3 . . . broadened the Family Court's jurisdiction in matters of real and personal property in divorce proceedings by authorizing it to act in areas previously under the exclusive jurisdiction of the Superior Court." Id. "[W]here the two courts' jurisdictions overlap, principles of comity shall control and the court whose jurisdiction is first invoked should resolve the issues presented to it." Halliwell v. Lippitt Realty Co., 121 R.I. 927, 927, 394 A.2d 708, 709 (1978) (emphasis added).

In this case, the Kent County Family Court continues to have original and exclusive jurisdiction over the present controversy. Mr. Bremer's Family Court counsel filed a Motion to Amend Judgment on November 28, 2008, which has yet to be adjudicated by the Family Court and which specifically requested the Family Court to address the assignment of Cedar Tree and T & L. This motion was clearly filed prior to Plaintiff filing the within civil action on June 9, 2010. Therefore, with regard to the instant controversy, the Family Court's jurisdiction was "first invoked" and principals of comity, as well as precedent, require that the Family Court resolve the dispute presented by Mrs. Bremer's Complaint. Halliwell, 121 R.I. at 927, 394 A.2d at 709. This jurisdictional issue justifies relief from the default judgment previously entered against Mr. Bremer. Super. R. Civ. P. 60(b)(6).

For this reason, the default judgment as against Mr. Bremer is vacated pursuant to Rule 60(b)(6) and the proceedings are stayed pending resolution of the November 28, 2008 Motion to Amend Judgment in the Family Court.

C

Sanctions for Discovery Violations

Rule 37 of the Superior Court Rules of Civil Procedure permits the Court to impose sanctions for a party's failure to comply with discovery and Orders of the Court. Default is permitted if a defendant fails to comply with a Court order. Super. R. Civ. P. 37(b)(2)(C). While the Court properly imposed the sanction of default judgment by Order entered on September 6, 2011, following the August 9, 2011 hearing thereon, for the reasons discussed in Section III(B) supra, default judgment is vacated. However, sanctions are still entirely warranted. In lieu of or in addition to a default judgment, this Court may require the disobedient party or the attorney advising the disobedient party to pay reasonable expenses, including attorneys' fees, caused by the failure. Super. R. Civ. P. 37(b)(2). To date, this Court is not satisfied that the failure to comply with discovery Orders was substantially justified or that other circumstances make an award of expenses unjust, either of which would prevent this Court from imposing a sanction of attorneys' fees. Id. Upon the appropriate motion filed by Plaintiff and notwithstanding the Motion to Vacate Entry of Default Judgment and Motion to Stay being granted, this Court will entertain a Motion for Award of Attorneys' Fees for Mr. Bremer's outright failure to respond to discovery requests and Orders of this Court.

IV

Conclusion

Based upon the foregoing, Mr. Bremer's Motion to Vacate pursuant to Rule 60(b)(6) and Motion to Stay proceedings are granted, with the exception noted below. The Court also orders sanctions against Mr. Bremer for his outright failure to comply with discovery requests and Orders of this Court in the form of an award of attorneys' fees for reasonable fees incurred by Plaintiff in preparing and attending to hearings on the various Motions identified in Section I, supra. Said fees shall be ruled upon by the Court upon Plaintiff's filing of a Motion for Award of Attorneys' Fees with an appropriate affidavit(s) attached thereto. This Motion shall explicitly be permitted as an exception to the Motion to Stay proceedings.

Counsel shall submit an Order consistent with this Decision.