

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DEXTA FEDERAL
CREDIT UNION

Plaintiff,

v.

HOLLY OAK TOWING &
SERVICE CENTER, INC.

Defendant.

C.A. NO.: 2007-09-046

NON-ARBITRATION

Christopher J. Sipe, Esquire
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**ORDER DENYING DEFENDANT'S
MOTION TO VACATE JUDGMENT AND REOPEN CASE**

On or about September 5, 2007, a complaint was filed in the instant matter on behalf of plaintiff Dexta Federal Credit Union (hereinafter "Dexta"). The Court finds as it appears from the documents in the record that the complaint was properly served on defendant Holly Oak Towing and Service Center's registered (hereinafter "Holly Oak"), on or about September 14, 2007. The trial record also indicates that service on the registered agent was also properly recorded by Return of Service Affidavit provided by the special process server on September 14, 2007.

Holly Oak contends that it did not receive the summons or complaint from its registered agent. On or about October 5, 2007, approximately five months prior to the instant motion, this Court entered a Default Judgment against defendant Holly

Oak for its failure to answer or respond to the Dexta Complaint within the time specified by court Rules. Counsel for the plaintiff filed on October 5, 2007 a Motion for Direction to Enter Default Judgment pursuant to *Court of Common Pleas Civil Rule 55* because Holly Oak “having failed to appear, having failed to plead, and/or having otherwise failed to defend the above-captioned action...” Mr. Sipe also supplied a detailed affidavit with the Motion with the Criminal Clerk.

On or about October 9, 2007, Dexta transferred the judgment to the Superior Court for purposes of execution, and defendant failed to respond to this action. On or about November 14, 2007, Dexta began execution proceedings in connection to the judgment in the Superior Court, and still received no response from Holly Oak. Thereafter, on January 22, 2008, approximately four months after Dexta served the complaint on Holly Oak, the New Castle County Sheriff appeared at Holly Oak’s place of business for purposes of executing the levy on the chattels in question. On or about February 8, 2008, defendant Holly Oak then filed a Motion to Vacate Judgment and Reopen Case (hereinafter “the Motion”) pursuant to Rule 60(b) in the above-captioned matter. No affidavits were appended to Holly Oak’s Motion to Substantiate the pending allegation contained in its Motion. Thereafter, on or about March 4, 2008, plaintiff Dexta filed a written response to defendant’s motion. On Friday, March 7, 2008 the Court heard oral argument on the Motion. This is the Court’s decision on defendant’s Motion.

I. The Facts

The instant case involves a 2006 Nissan Altima (hereinafter “the vehicle”), for which Dexta is the judgment creditor. At some time in September, 2006, the vehicle was reportedly stolen while the original debtor was incarcerated. Thereafter, in October, 2006, the vehicle was allegedly involved in an automobile collision. The original debtor never recovered the vehicle and, according to counsel, was subsequently deported for reasons unrelated to this case. Immediately after the automobile collision, the Delaware State Police contacted Holly Oak to tow the vehicle from the scene of the motor vehicle accident. Holly Oak did in fact tow the vehicle, which has been in its possession since the date of the automobile accident.

Because the original debtor failed to satisfy the existing loan on the vehicle with Dexta before his deportation, the loan remains outstanding. Therefore, Dexta, as lien holder of the vehicle, has sought to recover the vehicle, costs and fees associated with this action from Holly Oak. On or about September 5, 2007, Dexta filed the instant action in this Court. On October 5, 2007, the Court entered a Default Judgment against Holly Oak for failure to answer Dexta’s Complaint. On or about January 22, 2008, the Sheriff of New Castle County attempted to levy the vehicle. At this time Holly Oak indicated the attempted levy of the goods by the sheriff was the first notice it was given of Dexta’s action and judgment against it. Thereafter, Holly Oak filed the above-referenced motion with this Court.

II. Discussion

In the instant Motion, Holly Oak is seeking relief from the previous entry of Default Judgment against it, claiming surprise and excusable neglect under *Court of Common Pleas Civil Rule 60(b)*. Holly Oak argues it had no notice of the action against it because its registered agent failed to provide the initial complaint or default judgment. Holly Oak further argues that this Court has a preference for deciding cases on the merits, and asserts that it will suffer prejudice if the case is not reopened because of its outstanding storage fees. Holly Oak has failed to release the vehicle to Dexta until its outstanding storage fees are paid.

In response to Holly Oak's motion, Dexta first argues that there is no factual basis for plaintiff to argue for relief under the excusable neglect theory under *Court of Common Pleas Civil Rule 60(b)*. Dexta contends that Holly Oak has only provided an affidavit stating that the Complaint was not received or supplied, it cannot provide conclusive evidence that the registered agent failed to submit the Complaint served by plaintiff, and plaintiff claims to have in its possession a service affidavit signed by defendant's registered agent. Dexta also argues it will suffer substantial prejudice if the Default Judgment is vacated and the case is reopened. Dexta states it has been in full compliance with the Court's Rules with regards to service of the initial complaint and default judgment order entered against Holly Oak. Dexta also asserts that execution proceedings have already been instituted to recover the vehicle; the judgment has been transferred to the Superior Court; and counsel for plaintiff has already incurred significant attorney's fees, costs and expenses in connection with this

matter. Dexta also asserts that the resources currently invested in this matter would be greatly compromised if this Court were to reverse the current order.

Dexta further argues Holly Oak cannot overcome the requirement that it prove it would have a likelihood of success on the merits if the case were to be reopened. Some of the reasons presented by Dexta include defendant's failure to notify lien holder Dexta of its possession of the vehicle; the "baseless argument" that plaintiff should not be permitted to recover the vehicle because it is not the record owner; and finally the purportedly baseless argument that plaintiff Dexta should be required to pay \$20,000 in storage fees before the vehicle will be released to Dexta as record lien holder of the vehicle.

III. The Law

Resolution of this motion involves analysis of both the Court Rules and case law regarding service and relief from a default judgment. *Court of Common Pleas Civil Rule 4(f)(1)* indicates that service of process can efficiently be made by delivering copies of the summons "to an agent authorized by appointment or by law to receive service of process." Rule 60(b) of the Civil Rules governing the states that "the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for. . .mistake, inadvertence, surprise, or excusable neglect;. . .[or] any other reason justifying relief from the operation of the judgment."

A Motion to Vacate a Default Judgment pursuant to this Rule is addressed to the sound discretion of the Trial Court. *Battaglia v. Wilmington Sav. Fund Soc'y, Del.Supr., 379 A.2d 1132, 1135 (1977)*. Courts view such motions favorably because

they promote Delaware's strong judicial policy of deciding cases on the merits. *Thompson v. Colonial Court Apartments*, 2006 WL 3174767 (Del.Super.). Under this rule, the moving party attempting to obtain the default has the burden of establishing the basis for relief. *Nanticoke Mem. Hospital v. Scharf*, 2003 WL 430486, *1 (Del.Com.Pl.). To meet that burden under the theory of excusable neglect, the movant must prove three factors. First, that his or her conduct was that of a reasonably prudent person. *Nanticoke* at *2. Second, there will be a lack of substantial prejudice to the non-moving party. . *Id.* Third, that the moving party has a meritorious defense. *Id.* Nevertheless, the Court should only consider the second two elements of the test “if a satisfactory explanation has been established for failing to answer the complaint, e.g. excusable neglect or inadvertence.” *Thompson* at *2.

IV. Opinion and Order

Regarding Holly Oak’s Motion to Vacate Judgment and Reopen Case, in deciding whether defendant has, in fact, is entitled to relief from judgment, this Court must determine that defendant met its burden of establishing each of the three factors under the theory of excusable neglect. Holly Oak has indicated that it did not receive a copy of the summons and complaint because its mailing address changed at some point in 2006, but failed to update its address with the registered agent. The registered agent subsequently sent the documents to the wrong address. Clearly Dexta bears no responsibility for the inadvertence or neglect by Holly Oak to timely keep its business records current. Although it is clear to the court from the record that Dexta reasonably complied with the Court Rules regarding service of the

complaint and the judgment on Holly Oak's registered agent, there still remains the question of whether Holly Oak acted as a reasonably prudent person with respect to receipt of those documents. Holly Oak has not offered any evidence other than summary allegation not substantiated by affidavits that it acted with excusable neglect. Nevertheless, assuming Holly Oak's assertions during the motion hearing that it failed to update its address with the registered agent are true, the Court cannot find that Holly Oak acted as a reasonably prudent person. Holly Oak was obligated to notify its agent of address changes so that it could receive any legal documents properly served upon the corporation. Its failure to notify the registered agent of the change and its further failure to answer a properly served complaint cannot be characterized as excusable neglect based upon this record.

In order for Holly Oak to overcome the second factor, the Court must find that, in granting the instant motion, Dexta would not suffer substantial prejudice. The facts on the record illustrate the significant financial and legal resources have been invested to date by the plaintiff, the New Castle County Sheriff's Office and the Courts in attempting to resolve this matter. Significant time has passed since this Court entered the default against defendant Holly Oak, who has failed to participate in any proceedings since its registered agent first received notice of this action almost six months ago. It is evident from the record that plaintiff could not have done anything more to perfect service over the defendant, and defendant had multiple opportunities to respond to this action. The Court finds that there would be substantial prejudice to Dexta if the Default Judgment were to be reopened. In the

analysis above, the Court determined that Holly Oak's reasons for its failure to respond to or participate in this action cannot be characterized as the actions of a reasonable prudent person. Because of defendant's deficient participation, the Court is not prepared to grant the instant motion and thereby authorize the prejudice that would ultimately inure to plaintiff and all other parties who have made an investment in the resolution of this action.

Holly Oak is further required to prove that it has a likelihood of success on the merits if the Default Judgment is vacated and the case is reopened. "If there is some showing that if relief is granted the outcome of the suit may be different than if the default judgment is allowed to stand, the requirement is met." *Q by the C, LLC v. Artistic Fabrication*, 2002 WL 32073790, *2 (Del.Com.Pl.). In this matter, in order for the outcome to be different, Holly Oak would be required to prove by a preponderance of the evidence that Dexta is not entitled to recover the chattels in question. Holly Oak's primary argument has been that Dexta is not the record owner, and therefore should not be permitted to claim the vehicle. Nevertheless, based on the deportation of the record owner, and Dexta's position as primary lien holder/judgment creditor, the Court finds that Holly Oak's argument is not likely to succeed if this matter were to proceed on the merits at trial. Because Holly Oak cannot satisfy its three-pronged burden for establishing relief under *Court of Common Pleas Civil Rule 60(b)*, its Motion to Vacate Judgment and Reopen case must be DENIED.

Although this Court's general policy is to decide cases on the merits, based on Holly Oak's failure to overcome the above-referenced three factors and effectively prove entitlement to relief under *Court of Common Pleas Civil Rule 60(b)*, in the interest of justice, the instant motion must be DENIED.

The Court further notes that defendant Holly Oak has filed a Motion for Permission to Amend a Pleading. The motion expresses defendant's request to attach to its original Motion to Vacate Default and Reopen case, an affidavit verifying that it never received plaintiff's initial complaint. This supplementary motion was submitted to the Court after the original motions were filed and after the completion of oral argument. Because of defendant's untimeliness in submitting the Motion, the Court hereby DENIES the Motion for Permission to Amend a Pleading as untimely and after the record in this matter for already has been closed.

OPINION AND ORDER

The Court hereby DENIES Holly Oak's Motion to Vacate Judgment and Reopen Case pursuant to Rule 60.

IT IS SO ORDERED this 31st Day of March 2008.

JOHN K. WELCH
Judge

cc: Karen Gallagher, Chief Clerk
CCP, Civil Division