

Superior Court  
of the  
State of Delaware

Jan R. Jurden  
*Judge*

3733

New Castle County Courthouse  
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Wilmington, Delaware 19801-

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Date Decided: January 7, 2008

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RE: Kathryn Lee v. Charter Communications VI, LLC et al.  
C.A. No. 05C-04-100-JRJ  
Upon Defendant's Motion for Relief from Default Judgment – DENIED.

Dear Counsel:

Before the Court is defendant Fox Communications Service, Inc.'s ("Fox") motion to vacate the default judgment entered on July 25, 2006. The issue is whether Fox, which failed to respond to Plaintiff's Amended Complaint or Motion for Default Judgment, is entitled to relief from the default judgment pursuant to Superior Court Civil Rule 60(b). Because the Court finds that Fox's failure to timely respond to the Amended Complaint and the Default Judgment Motion was not due to excusable neglect or extraordinary circumstances, Fox's motion is **DENIED**.

## BACKGROUND

Plaintiff seeks compensation for injuries she allegedly sustained in a trip and fall. Plaintiff filed her initial complaint on April 12, 2005. On August 31, 2005, Plaintiff filed an Amended Complaint adding Fox as a defendant. On February 15, 2006, Fox was properly served with the Amended Complaint. Fox did not respond to the Amended Complaint.<sup>1</sup> On June 21, 2006, Plaintiff filed a Motion for Default Judgment against Fox. Fox was properly served with a copy of the Motion. Fox failed to respond to the Motion. On July 26, 2006, the Court granted Plaintiff's Motion for Default Judgment against Fox. On November 16, 2007, Fox filed a Motion for Relief from Default Judgment. On December 5, 2007 and December 14, 2007, the Court held a hearing on Fox's Motion.

Fox blames its co-defendant, Charter Communications VI, LLC ("Charter"), for Fox's failure to respond to the Amended Complaint and Plaintiff's Motion for Default Judgment. According to Arthur Foxwell ("Foxwell"), the President of Fox, he contacted Charter after he was served with the Amended Complaint and was assured by a "male representative" that the lawsuit was "frivolous" and that he "need not worry about it."<sup>2</sup> Foxwell claims that he did not respond to the Amended Complaint because this conversation led him to believe that Charter was representing Fox in this matter.<sup>3</sup> Fox does not argue that its conduct in this regard constitutes excusable neglect. Instead, it

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<sup>1</sup> Fox's response was due on March 7, 2006.

<sup>2</sup> Affidavit of Arthur Foxwell ("Aff."), D.I. 60.

<sup>3</sup> Aff., D.I. 60.

argues that the default judgment must be vacated because Fox has a meritorious defense<sup>4</sup> and Plaintiff will suffer no prejudice if the motion is granted.

In opposition, Plaintiff argues that Fox's reliance on assurances obtained from an unnamed, unknown representative of Charter cannot be characterized as the conduct of a reasonably prudent person. Plaintiff maintains that Fox has failed to demonstrate excusable neglect or the existence of any extraordinary circumstances justifying its failure to respond to the Amended Complaint or Default Judgment Motion and thus is not entitled to relief pursuant to Superior Court Civil Rule 60(b).

### DISCUSSION

#### A. Rule 60(b)(1) – Excusable Neglect

A motion to vacate a default judgment pursuant to Superior Court Civil Rule 60(b)(1) “is addressed to the sound discretion of the Trial Court.”<sup>5</sup> Courts view such motions with favor because they promote Delaware's strong judicial policy of deciding cases on the merits.<sup>6</sup> Although Rule 60(b) should be construed liberally, a party moving to vacate a default judgment still must satisfy three elements before a motion under that rule will be granted: “(1) excusable neglect in the conduct that allowed the default judgment to be taken; (2) a meritorious defense to the action that would allow a different outcome to the litigation if the matter was heard on its merits; and (3) a showing that substantial prejudice will not be suffered by the plaintiff if the motion is granted.”<sup>7</sup> The Court should only consider the second two elements of the three pronged test “if a satisfactory explanation has been established for failing to answer the complaint, e.g.

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<sup>4</sup> According to Fox, it did not lay the temporary wire at the Middletown Trace Apartment Complex where Plaintiff fell.

<sup>5</sup> *HBattaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977)H.

<sup>6</sup> *HVerizon Delaware, Inc. v. Baldwin Line Constr. Co.*, 2004 WL 838610 (Del. Super.)

<sup>7</sup> *Verizon Del. Inc.*, 2004 WL 838610.

excusable neglect or inadvertence.”<sup>8</sup> “Excusable neglect” has been defined as “that neglect which might have been the act of a reasonably prudent person under the circumstances.”<sup>9</sup> “A Defendant cannot have the judgment vacated where it has simply ignored the process.”<sup>10</sup>

Fox has failed to establish the “threshold requirement” that its conduct was that of a reasonably prudent person. In *Apartment Communities Corp. v. Martinelli*, the defendant corporation blamed a “low-level” clerical employee for its failure to respond to a complaint.<sup>11</sup> The employee failed to alert the appropriate management personnel upon receipt of the complaint because she did not understand the importance of responding to a complaint.<sup>12</sup> The Delaware Supreme Court held:

it was the responsibility of the defendant, ... to ensure that all employees who are capable of accepting service of process know when and to whom the complaint should be forwarded. Where the sheriff has properly served process upon a defendant corporation, that corporation is thereby responsible for dealing with the complaint in a timely manner.<sup>13</sup>

Here, it was Fox’s responsibility to respond to the Amended Complaint and Motion for Default Judgment in a timely manner. Fox had notice of the Amended Complaint as of February 15, 2006. In addition, on June 21, 2006, more than three months after Fox’s response was due, Fox received notice of the default judgment motion. At this point, at a

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<sup>8</sup> *Hapt. Cmty. Corp. v. Martinelli*, 859 A.2d 67, 72 (Del. 2004)H.

<sup>9</sup> *HBattaglia*, 379 A.2d at 1135.

<sup>10</sup> See *HCummings v. Jimmy's Grille, Inc.*, 2000 WL 1211167, at \*3 (Del. Super.)H (denying defendant's motion to reargue the Court's order which had denied defendant's motion to open a default judgment because defendant “got involved too late”). See also *HVebery v. McCabe*, 100 A.2d 460, 461 (Del. Super.)H (“If the prayer of this petition were granted, this Court would be forced to open and vacate judgments upon any excuse a petitioner elected to advance, and the words ‘excusable neglect’ would cease to have meaning.”).

<sup>11</sup> *Apt. Cmty. Corp.*, 859 A.2d 67.

<sup>12</sup> *Id.*

<sup>13</sup> *H Id.* at 68, 71H (affirming the Trial Court's conclusion that the failure of an employee leasing agent to recognize the significance of a complaint and advise appropriate personnel of service did not establish excusable neglect).

minimum, Fox should have questioned whether its interests were being properly protected by Charter. At the very least, Fox should have contacted Charter's counsel to check the status of the matter.<sup>14</sup> Fox decided to simply ignore the Amended Complaint and a Motion for Default Judgment based solely on telephonic assurances of an unnamed, unknown representative of Charter. This is hardly the conduct of a reasonably prudent person. Therefore, Fox fails to satisfy the first element of the three-prong test under Rule 60(b)(1)<sup>15</sup> and the Court need not consider its alleged meritorious defenses or the prejudice to the Plaintiff.

B. Rule 60(b)(6) – Extraordinary Circumstances

Fox also fails to demonstrate the existence of any extraordinary circumstances that would justify Rule 60 relief. Relief under Rule 60(b)(6) is an extraordinary remedy which requires a showing of “extraordinary circumstances.”<sup>16</sup> In order to establish “extraordinary circumstances,” the defendant must show something beyond the neglect of a representative who fails to properly process a complaint.<sup>17</sup>

Fox's reliance on assurances obtained from an unnamed, unknown representative of Charter demonstrates neglect, not extraordinary circumstances justifying its failure to properly respond. It was Fox's responsibility to respond to the Amended Complaint and

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<sup>14</sup> In its motion, counsel for Fox states that in December 2006, Charter contacted Foxwell and requested that he testify on its behalf at an Arbitration hearing. Counsel for Fox claims that “sometime later” Foxwell contacted Charter for a status on the matter and a “female representative” informed him that the matter had settled. Furthermore, the Court specifically asked Fox's counsel at the December 5, 2007 hearing, “So, it's your position that Mr. Foxwell had a reasonable belief based on representations made to him by Charter's former counsel that Charter was representing his interests in defending this suit?” Counsel answered, “Yes.” The implication that Foxwell reasonably relied on the assurances of Charter's former attorney and unknown female representative of Charter is misleading. Default judgment had been entered against Fox four months prior to these conversations between Foxwell and Charter affiliates. Furthermore, the assertion made by Fox's counsel that Foxwell contacted Charter for a status on the matter is inaccurate. According to the affidavit submitted by Foxwell, Charter initiated the call.

<sup>15</sup> *HVerizon Delaware, Inc.*, 2004 WL 838610 at \*2H (Del. Super.).

<sup>16</sup> *Cooke v. Cobbs*, 2003 WL 22535080 at \*1 (Del. Super.); *HDixon v. Delaware Olds, Inc.*, 405 A.2d 117 (Del. 1979)H; *HJewell v. Division of Social Services*, 401 A.2d 88 (Del. 1979)H.

<sup>17</sup> *Id.*

the Motion for Default Judgment in a timely manner. Fox ignored both. Simply stated, Fox's conduct constitutes inexcusable neglect, not extraordinary circumstances.

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Fox's Motion for Relief from Default Judgment is **DENIED**.

**IT IS SO ORDERED.**

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Jan R. Jurden, Judge