

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

NATIONWIDE MUTUAL INSURANCE)
COMPANY a/s/o/ MICHAEL FISHER)
and SALLIE LITTLETON,)
)
Plaintiff,)
)
v.)
)
ADRIAN GALINDO and JOEL ROBLES)
ZUNIGA,)
)
Defendants.)

C.A. No. 2002-01-056

Submitted: August 18, 2006
Decided: September 7, 2006

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**ORDER ON DEFENDANT JOEL ROBLES ZUNIGA'S
MOTION TO VACATE DEFAULT JUDGMENT**

In these proceedings, Joel Robles Zuniga (hereinafter "Zuniga") moved to vacate a default judgment entered against him on February 25, 2005. Zuniga alleged he was not properly served as required by Court of Common Pleas Civil Rule 4(f)(I). The facts alleged by Nationwide Mutual Insurance Company, subrogee, of Michael Fisher and Sallie Littleton (hereinafter "Nationwide"), indicate Michael Fisher was operating a 1992 Pontiac with Sallie Littleton as a passenger on December 12, 2000 on Route 26 near

Gumboro, Delaware in Sussex County. A vehicle owned by Zuniga (hereinafter “Zuniga”) and driven by Adrian Galindo (hereinafter “Galindo”) struck the Fisher vehicle resulting in personal injury and property damage. On January 4, 2002, Nationwide brought an action in this Court alleging Galindo’s negligence and Zuniga’s negligent entrustment, and sought damages in the amount of \$16,270.53 plus costs, pre- and post-judgment interest.

On February 7, 2002, Special Process Server Stephen M. Grelock (hereinafter “Grelock”) filed a Return of Service Affidavit in this Court, which indicates service was perfected upon Zuniga at his residence (RD #2, Box 325, Lot 2, Georgetown, Delaware 19947) by leaving a copy of the Summons and Complaint with a woman named Sylvia Saldivai on February 5, 2002. Court of Common Pleas Civil Rule 12(a) requires a defendant to serve an answer within twenty (20) days after service of process. On February 25, 2002, Nationwide moved pursuant to Court of Common Pleas Civil Rule 55, for entry of judgment against Zuniga in the amount of \$16,370.53 plus costs, on the basis Zuniga failed to appear, plead or otherwise defend. On February 26, 2002, this Court granted Nationwide’s motion transferring the judgment to Superior Court.

On June 1, 2006, Zuniga filed this motion to vacate alleging he was never served as required by the rule. He further alleges the woman identified in the Sheriff’s Return as Sylvia Saldivai was never a member of his household or authorized to accept service of process, and did not advise him of any such service. In support of his argument, Zuniga attaches an affidavit where he avers he did not own the automobile involved in the accident, and did not know nor loan a car to Defendant, Adrian Galindo. Furthermore, Zuniga avers only becoming aware of this matter in May, 2006 when his realtor, Manuel

Alvarez, advised him to seek legal counsel upon discovering the default judgment. The affidavit also indicates Sylvia Saldivai was never a member of his household and was never authorized to accept service for him.

On June 23, 2006, Nationwide filed a response to Zuniga's motion alleging service upon Sylvia Saldivai was proper pursuant to Court of Common Pleas Civil Rule 4(f)(I) regardless of whether or not she was ever expressly authorized by Zuniga to accept service on his behalf. Plaintiff argues over "4.33 years" have passed since this Court originally entered default against Zuniga and that Zuniga's delay in filing his motion to vacate amounts to that type of neglect which is not excusable under Court of Common Pleas Civil Rule 60(b).

A hearing was held on the motion August 16, 2006 where the Court heard testimony regarding service. Nationwide's first witness, Stephen Grelock, who has served legal papers for over thirty years, testified he recalls preparing the return of service affidavit, and is accurate as filed. Grelock testified when he arrived at Zuniga's residence on February 5, 2002, he recalled a woman answering the door. Grelock asked for Zuniga, and the woman indicated Zuniga was at work. Grelock stated he asked the woman if she lived there, to which she answered "yes." Grelock handed the Summons and Complaint to her, which she accepted, and asked for her name. Grelock testified he asked her for identification, and she handed him either a driver's license or a state identification card. Grelock copied down her name and wrote it on the return as "Sylvia Saldivai."

The defendant Zuniga called as his witness Silvia Saldivar,¹ (hereinafter “Saldivar”) who testified she does not recall being served. She further denies living at Zuniga’s residence, but indicates she was Zuniga’s wife’s cousin, and that she occasionally visits their household, but that she has never lived with them. On cross-examination, plaintiff’s counsel inquired about her previous addresses. In particular, plaintiff’s counsel asked if she had ever lived in Selbyville, Delaware. Saldivar stated she lived there with her ex-husband at one point, but could not recall the exact address.

Zuniga testified that Saldivar has never lived with him, but that he has known Saldivar since he was twelve years old, and that their families meet three to four times a year. He further testified that Saldivar has never resided with him even on a temporary basis, as there is not enough room in his house for Saldivar. Zuniga further testified he recalls being out of the state on February 5, 2002.

Analysis

A motion to vacate a default judgment pursuant to Rule 60(b)(6) is addressed to the discretion of the Court. However, the defaulting party must demonstrate excusable neglect; a meritorious defense, that is if the motion is granted, the outcome of the action may be different; and there is no substantial prejudice to the plaintiff by granting the motion. *Battaglia v. Wilmington Savings Fund Society*, Del. Supr., 379 A.2d, 1132 (1977).

Rule 4(f)(I) of the Civil Rules governing the Court of Common Pleas provides:

¹ Defendant’s Exhibit No.: 1 is a photocopy of a Delaware Driver License, issued on December 16, 2004 to Silvia Patricia Saldivar, 223 Clark Drive, B-14 Holiday Acres, Dagsboro, DE 19939.

“(f) *Service of process; how made.* (1) Summons. Service of summons shall be made as follows:

(I) Upon an individual other than an infant or incompetent person by delivering a copy of the summons, complaint and affidavit, if any, to that individual personally or by leaving copies thereof at that individual’s dwelling house or usual place of abode with some person of suitable age and discretion ***then residing therein***, or by delivering copies thereof to an agent authorized by appointment or by law to receive service of process.” (Emphasis added).

Zuniga argues that the default should be vacated because he was not properly served in that it has not been shown that the person to whom service was made “resides” at his dwelling house. The testimony of the process server indicates he served Silvia Saldivar at the defendant’s residence and asked if she lived there, to which she responded “yes.” Additionally, he testified he requested identification and she produced a driver’s license or state identification card. However, he did not record the address from the identification produced. Additionally, the name on the returned file with the Court differs slightly from the identification produced by Saldivai at the hearing.

Merriam-Webster’s Dictionary defines “reside” as an intransitive verb meaning, “to dwell permanently or continuously: occupy a place as one’s legal domicile.”² For due process purposes, notice is deemed to be sufficient where the method of service of process is reasonably calculated to inform interested parties of the proceeding before them and give the parties the opportunity to object. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Here, the record before the Court reflects that although service was made upon an individual by the name of Sylvia Saldivai, Nationwide has failed to show, by a *preponderance of the evidence*, that service was ever made upon anyone at Zuniga’s residence “then residing

² <http://www.m-w.com/dictionary/reside>

therein” as required by Rule 4(f)(I), therefore I am unable to conclude service was effective.

The language of Rule 60(b) provides the Court may relieve the movant from judgment upon terms that are just. In this instance, the time period between the judgment and this motion, a period of some four (4) years has lapsed. Counsel for Nationwide has expended numerous hours on the default motion, transfer of judgment, and these proceedings. Therefore, I conclude plaintiff’s counsel is entitled to reasonable legal fees and costs.

For the reasons stated herein, and pursuant to Rule 4(f)(I) and 60(b), the Default Judgment is hereby VACATED. Defendant shall pay plaintiff’s counsel fees in the amount of \$1,100.00 and costs in the amount of \$55.00. Defendant shall file an answer within 20 days of this order.

SO ORDERED this 7th day of September, 2006

Alex J. Smalls
Chief Judge