Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

New Castle County Courthouse
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Wilmington, Delaware 19801-3733
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Date Submitted: August 24, 2006
Date Decided: September 22, 2006
Date Corrected: April 20, 2009

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RE: Darrell F. Sanders v. Jay M. Cseh, Heritage Mechanical Services d/b/a Hutchinson Plumbing Heating Cooling LLC, Heritage Mechanical Services, and Hutchinson Plumbing Heating Cooling, LLC
C.A. No. 05C-07-011-JRJ
Upon Defendant's Motion to Vacate Entry of Default Judgment – ***DENIED***

Dear Counsel:

I have reviewed Mr. Lapinski's affidavit in support of Defendant's Motion to Vacate Default Judgment and plaintiff's response thereto. For the reasons set forth below, Mr. Lapinski's affidavit fails to establish "excusable neglect" under Superior Court Civil Rule 60(b).

The following facts are not disputed.

- Plaintiff advised Hanover Insurance Group ("Hanover") on May 10, 2004 he was represented by counsel in connection with the September 20, 2003 automobile collision.

- Plaintiff advised Hanover on December 21, 2004 that he sustained injuries in the September 20, 2003 collision caused by Hanover's insured.

- Plaintiff sent his medical records to Hanover on January 3, 2005. Plaintiff sent supplemental medical records to Hanover on February 11, 2005.

- Hanover sent a settlement offer to plaintiff which plaintiff rejected before filing suit on July 1, 2005.

- Proper service was completed on defendants on October 28, 2005.

- When plaintiff received no responsive pleading, he filed a Motion for Default Judgment on January 26, 2006. Plaintiff properly served this motion on all defendants.

- The defendants failed to oppose the motion or appear at the March 1, 2006 hearing on the motion.

- Plaintiff advised Hanover on March 23, 2006 that the Court granted default judgment against its insured and the Court had scheduled an inquisition hearing. Plaintiff also provided Hanover with all of plaintiff's medical records, bills, and a copy of the default judgment motion with proof of service.

- One week later, plaintiff sent the PIP payout log to Hanover and advised that the Court had rescheduled the inquisition hearing to May 17, 2006.

- On March 31, 2006, plaintiff contacted Hanover again about the default judgment.

- On May 17, 2006, the Court held the inquisition hearing. Hanover failed to attend. The Court considered the damages evidence and awarded $95,000 to the plaintiff. After the hearing, the Court awarded $2,341.59 in attorneys fees and costs. Plaintiff sent the Court's Order to Hanover on June 12, 2006.

- Hanover's counsel did not file the instant motion to vacate the default until August 9, 2006.

The record is clear that despite the notice provided on multiple occasions by plaintiff, Hanover took no legal action to oppose the motion for default judgment until August 9, 2006.

While Mr. Lapinski's affidavit explains why Hanover failed to take any legal action from January 2005 until August 2006, it does not establish "excusable neglect" under Superior Court Civil Rule 60(b). Mr. Lapinski states in his affidavit:

> With this understanding and the explanation provided in our motion to vacate, in the first week of April of 2006, this office was on our third of five paralegals in a calendar year for the reasons already explained. If this individual failed to identify the materials given to her in this matter were in fact new file materials and instead placed them in the existing Terry v. Heritage Mechanical, et al. file, as explained in the motion to vacate it would explain why actions was not immediately taken in this answer. In the alternative, if, upon opening the mail, the secretary receiving the new file materials failed to identify them as such and forward them to the paralegal, they could have been in Terry file, without being read by counsel as that matter was

> resolved and in the process of being closed as explained in the motion to vacate. [1]

Mr. Lapinski goes on to state:

> It is our position that given the safeguards…[our office instituted before this incident]…to guarding against human error from fatigue and employee turnover under these circumstances that the misfiling of these materials amounts to excusable neglect.[2]

The Court disagrees and notes that it recently rejected a very similar argument in *Mendiola v. State Farm Mut. Automobile Ins. Co.*[3] In *Mendiola*, the Court held that the defendant failed to provide a satisfactory explanation to establish its failure to file an Answer to the Complaint, e.g., excusable neglect or inadvertence.[4] Excusable neglect is "'neglect which might have been the act of a reasonably prudent person under the circumstances.'"[5] "Carelessness and negligence are not necessarily 'excusable neglect'…[a] mere showing of negligence or carelessness without a valid reason may be deemed insufficient."[6] Moreover, "negligence may be so gross as to amount to sheer indifference, to open and vacate judgment upon such excuse would cease to give meaning to the words

[1] Aff. of Neil R. Lapinski, D.I. 32, ¶ 10.
[2] Lapinski Aff., ¶ 11.
[3] 2006 WL 1173898 (Del. Super.).
[4] *Id.* at *4.
[5] *Apt. Cmtys. Corp. v. Martinelli*, 859 A.2d 67, 70 (Del. 2004) (*quoting Battaglia v. Wilmington Sav. Fund* Soc'y, 379 A.2d 1132, 1135 n.4 (Del. 1977)).
[6] *McDonald v. S & J Hotel Enters., L.L.C.*, 2002 WL 1978933, at *2 (Del. Super.) (*citing Cohen v. Brandywine Raceway Ass'n*, 238 A.2d 320, 325 (Del. Super. 1968)).

'excusable neglect.'"[7] In *Mendiola*, this Court specifically found that the defendant had failed to establish its threshold requirement that the conduct of its regional office employees was that of reasonable prudent persons.[8] "[F]ailure to respond to the properly served Complaint resulted from its employees' failure to recognize the Complaint as the beginning of a new lawsuit and their mistaken assumption it related to the plaintiff's previously filed personal injury action."[9]

Here, Hanover did nothing to respond to the Complaint which was served in October, 2005. There is no showing that Hanover failed to respond to the Complaint based on excusable neglect. Hanover has not demonstrated that its failure to: (1) respond to the Complaint, (2) respond to the Motion for Default Judgment, (3) respond to plaintiff's counsel's letters regarding the entry of a default judgment and scheduling of an inquisition hearing, and (4) attend the inquisition hearing constitute *excusable* neglect.

In *Mendiola*, the defendants' conduct in confusing the complaint against the underlying tortfeasor and plaintiff's complaint against State Farm did not amount to excusable neglect. The same is true here. Hanover's argument that it confused plaintiff's case with another personal injury case does not amount to excusable neglect. The two complaints at issue have different civil actions numbers, involve completely different plaintiffs, and involve different counsel. The conduct of the

[7] *Id.* (*citing Vechery v. McCabe*, 100 A.2d 460 (Del. Super. 1953)).
[8] 2006 WL 1173898, at *3 (*citing Meyer v. Am. Reliance Ins. Co.*, 1991 WL 89820, at *2 (Del. Super.)).
[9] *Id.*

defendants, defendants' insurance company and defense counsel's employees is not the conduct of reasonably prudent persons and does not constitute excusable neglect.

Nor does the Court find "extraordinary circumstances" pursuant to Rule 60(b)(6).[10] Superior Court Civil Rule 60(b)(6) is an extraordinary remedy. As the Court held in *Mendiola*, an inadvertent mix up of two cases shows neglect and not extraordinary circumstances explaining the failure to properly process a complaint. The Court noted in *Mendiola* that it is not extraordinary for an automobile accident to spawn two lawsuits involving the same plaintiff and auto insurance company. It is not extraordinary for an automobile accident involving two occupants to spawn two lawsuits involving both occupants and the tortfeasor. Because the defendants fail to establish excusable neglect or extraordinary circumstances under Rule 60(B)(1) or (6), the defendants' motion is **DENIED.**

IT IS SO ORDERED.

Jan R. Jurden, Judge

[10] Although the defendants did not indicate which portion of Rule 60(b) they are moving under, plaintiff has addressed herein excusable neglect raised in the Defendant's motion pursuant to Rule 60(b)(1) as well as Rule 60(b)(6).