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

YOUNG CONWAY STARGATT & TAYLOR, LLP, Plaintiff, v. ASTHMA DISEASE MANAGEMENT INC., A.J. HENLEY, PAUL A. DANDRIDGE, JAMES O'CONNOR, RICHARD ANDERSON, and RAYMOND H. MILELY, III Defendants.	)	C.A. No. 2001-08-693 ARBITRATION CASE

Submitted: February 4, 2005
Decided: March 24, 2005

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ON DEFENDANTS' MOTION TO OPEN DEFAULT JUDGMENT ENTERED FOR PLAINTIFF

This matter is before the Court on Asthma Disease Management, Inc., et al. (hereinafter referred to as "ADMI") motion to open a default judgment entered for Young Conaway Stargatt & Taylor, hereinafter referred to as ("YCST") on the date of trial after ADMI failed to appear. Trial was scheduled for December 2, 2004, and this Court entered a default judgment for YCST in the amount of $45,624.50 because ADMI failed to appear. Defendants now seek relief from that judgment under Court of Common Pleas

Civil Rule 60(b) and 59(a). Rule 60(b) permits relief from a default judgment where there is excusable neglect, and Rule 59(a) permits the Court to grant a new trial. This is the Court's decision following written submissions and arguments.

FACTS

ADMI is a healthcare assistant company which contacted YCST to act as Delaware counsel in Delaware Court of Chancery proceedings (hereinafter referred to as "the Chancery Action"). The parties never executed a retention written agreement, but ADMI assured YCST that its terms of representation were acceptable. The facts which lead ADMI to seek YCST representation commenced on November 1, 2000, when Joseph Schoell, defense counsel in the Chancery action, notified ADMI's counsel, the Schnader firm, that he intended to move to disqualify it from the Chancery action because it viewed the Schnader firm's representation as a conflict. In a letter dated November 22, 2000, the Schnader firm informed Schoell although they did not concede their representation constituted an impermissible client conflict, it would withdraw as counsel for ADMI. This letter also indicated that discussions were proceeding with YCST for them to assume representation of ADMI.

On November 20, 2000, William D. Johnston, Esquire, a partner with YCST wrote to ADMI outlining the terms of representation upon the Schnader firm's withdrawal, and requested a $25,000 retainer. In December 2000, defendants requested as an accommodation, the retainer be reduced to $15,000. YCST agreed and Mr. Johnston submitted billing statements to ADMI pursuant to this revised agreement.

The parties never executed a written agreement; however, defendant A.J. Henley assured YCST that signed copies of the second retention letter would be forthcoming and that YCST's retainer and subsequent bills would be paid. Defendants never paid any of the amounts billed by YCST.

On August 29, 2001, YCST brought those proceedings to collect the amounts due. YCST seeks recovery on the basis of breach of contract and quantum meruit. On October 9, 2001, Denise S. Kraft, Esquire (hereinafter referred to as "Kraft") an associate with Klehr Harrison, filed an answer for ADMI. The case was referred to arbitration on May 27, 2003. At the hearing held on October 9, 2003, Kraft appeared on behalf of ADMI, the arbitrator found for YCST, and awarded judgment in the amount of $45,624.50. Defendants filed a demand for trial de novo pursuant to Court of Common Pleas Civil Rule 16.1(k)(11)(d) on November 2, 2003.

A pretrial conference was scheduled for March 12, 2004, but at plaintiff's request, was rescheduled to April 20, 2004, and subsequently rescheduled to May 14, 2004 at ADMI's request. At the May 14, 2004 pretrial conference, Kraft represented ADMI. Following the pretrial conference, trial was scheduled for December 2, 2004. On June 3, 2004, notice was sent to John J. Paschetto for YCST and Kraft for ADMI. ADMI on December 2, 2004 failed to appear at trial, did not request a rescheduling, and did not communicate with the Court, a basis for its failure to appear. On YCST's motion, the Court entered judgment on the basis of quantum meruit.

DISCUSSION

Defendants now move in these proceedings to vacate the Court's judgment on the basis of excusable neglect. The defendant relies upon Court of Common Pleas Civil Rule 60(b) which provides in relevant part as follows:

> The Court may relieve a party or a party's legal representative from final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect;"

When considering a motion under this rule, to open a default judgment, the Court must analyze three factors: first, whether conduct of the defendant which led to the default is excusable; second, whether the defendant has a meritorious defense; and third, whether the plaintiff will be prejudiced if the motion is granted. *Apartment Communities Corp. v. Martinelli*, Del. Supr., 859 A.2d 67, 69 (2004). Excusable neglect has been defined as "that neglect which might have been the act of a reasonably prudent person under the circumstances," where carelessness and negligence may be deemed insufficient as excusable neglect unless there is a valid reason why the neglect occurred. *Battaglia v. Wilmington Sav. Fund Soc'y*., Del. Supr., 379 A.2d 1132, 1135 fn.4 (1977). Excusable neglect is not to be characterized as mere carelessness or negligence, but "that neglect which might have been the act of a reasonably prudent person under the circumstances." *Mullins v. Dover Downs, Inc.*, 1998 WL 278402, (Del. Super.), at fn.2, citing *Cohen v. Brandywine Raceway Ass'n*, Del. Super., 238 A.2d 320, 325 (1968). The Court must examine the considerations of each case in order to determine whether the conduct of the moving party was the conduct of a reasonably prudent person. *Givens v. State of Delaware Harness Racing Comm'n*, 1998 WL 960765, (Del. Super.) Any relief to be granted must be based upon the consideration of each case and any doubt should be

resolved in favor of the petitioner because of public policy of resolving disputes on the merits. Id. at 2.

Delaware courts have found excusable neglect where the review of the facts and circumstances indicates that the party seeking relief has made active efforts to comply with the rules of the court. See *Wilson v. King*, 1998 WL 110117, (Del. Super.) (excusable neglect found to vacate a Rule 41(e) dismissal where pro se litigant sought a 30-day grace period to seek legal counsel and the Court was unable to consider the merits of the request prior to dismissing the claim); *Dolan v. Williams*, Del. Super., 707 A.2d 34, 37 (1997). (Plaintiff's failure to timely serve defendant with process constitutes excusable neglect where the plaintiff's attorney directed service of complaint in a timely manner, was involved in settlement negotiations with defendant's insurer, and agreed not to seek default judgment at insurer's request, at all times believing that service was completed.) Additionally, the Court has found excusable neglect where the party relied upon the advice of the court staff. *Bailey v. McClough*, Del. Super., 660 A.2d 393 (1995). However, the court has declined to find excusable neglect where a review of the facts and circumstances indicates that the affected party did not make reasonable efforts to comply with the applicable rule. See, e.g., *Wright v. Quorum Litig. Svc*., 1997 WL 524061, (Del. Super.)

Kraft left the firm of Klehr Harrison on or about June 8, 2004. Her files were to be returned to the various originating partners for reassignment, which defendants claim is standard firm practice when an attorney leaves the firm. However, the originating partner in this case, Francis M. Corell, Jr., Esquire (hereinafter referred to as "Corell"), is not a Delaware attorney, but practices in Klehr Harrison's Philadelphia office.

Defendants claim that the file was "inadvertently left in the Wilmington office" and was never returned to Corell for reassignment. According to Corell's affidavit, he had general familiarity with the case, but had not heard anything about trial scheduling, so he called the Court on December 8, 2004 to make an inquiry and learned about the default judgment.

ADMI alleges this conduct is excusable under the rule and the Court should grant its motion to open the default. Defendants cite no case law where a Court has found excusable neglect where an attorney or law firm is given proper notice and fails to appear at trial. Defendants merely offer policy arguments to support its Rule 60(b) motion to open default judgment. Further, defendants argue and I agree that *Battaglia v. Wilmington Savings Fund Society*, Del. Supr., 379 A.2d 1132, 1135 (1977) and *Keystone Fuel Oil Co. v. Del-Way Petroleum, Inc.*, Del. Supr., 364 A.2d 826, 828 (1976), respectively, indicates that any analysis of Rule 60(b) should be "accorded liberal construction, because of the underlying policy reasons which favors trial on the merits as opposed to judgment by default." However, setting aside a default judgment where the moving party is represented, has been given proper notice of the trial date, and fails to appear without a notice to the Court is simply unprecedented.

On June 3, 2004, notice was served to both parties, including Kraft on behalf of defendants. Nonetheless, Klehr Harrison claims that their neglect in failing to appear at trial is excusable since "confusion [was] caused by departure of trial counsel" from the firm of Klehr Harrison, and the file "was inadvertently left in the Wilmington office, rather than returned to Corell." However, these proposed justifications do not amount to excusable neglect because Kraft or an agent at Klehr Harrison was properly served with

notice of the December 2, 2004 trial date. It appears too that a reasonable attorney, when they leave an office, would put the firm on notice of pending proceedings in every outstanding case. Further, if such attorney did not prepare such notice, it is only reasonable for the firm to take steps to determine the status of outstanding litigation. The attorney in question left the firm June 8, 2004. The trial was not scheduled until December 2, 2004, which is about six months later. I do not find that a six (6) month delay to determine the status of a case reasonable.

Further, regardless of whether the supervising attorney at Klehr Harrison received notice of the December 2, 2004 trial date, a reasonably prudent person leaving a firm should have at least communicated receipt of notice to their appropriate supervisor or principal. Additionally, a reasonably prudent person in Correll's circumstances would not wait six months to inquire about a trial date after the attorney he assigned a case, left the firm. Klehr Harrison's lack of minimal procedural safeguards to prevent files from being misplaced when one of its attorneys leaves the practice fails to come within what has been defined as excusable neglect under the rule.

Since I do not find excusable neglect for failing to appear at trial, I do not have to address either the possibility of a meritorious defense or possible prejudice to defendants. *Apartment Communities Corp. v. Martinelli*, 859 A.2d 67, 72 (Del. 2004). Additionally, since I find there is no basis for excusable neglect, the motion for a new trial under Civil Rule 59(a) is DENIED and the motion under Civil Rule 60(b) is DENIED.

SO ORDERED this 24th day of March, 2005

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Alex J. Smalls
Chief Judge

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