

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**LARRY LOVINS, D/B/A
APPALACHIAN HOME CENTER,
A Kentucky Business and TRI-STATE
HOTELS, LLC, a Kentucky Limited Liability
Company,**

Plaintiffs,

v.

**CIVIL ACTION NO. 13-C-1796
Judge Charles E. King**

**JAI SAI, LLC, a West Virginia
Limited Liability Company; NATIONAL
REPUBLIC BANK OF CHICAGO; RIVER
CITIES GLASS & CONSTRUCTION, LLC,
a Kentucky Limited Liability Company,**

Defendants.

**JAI SAI, LLC'S MOTION FOR RELIEF FROM JUDGMENT
PURSUANT TO RULE 60(B)**

COMES NOW Defendant Jai Sai, LLC ("Jai Sai"), by counsel, pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, and respectfully moves for relief from the Order granting summary judgment to Plaintiffs and dismissing Jai Sai's counter-claim entered on April 30, 2014. In support of its Motion, Jai Sai states:

Facts

Plaintiffs filed suit against Jai Sai and others in the Circuit Court of Kanawha County, West Virginia, alleging that Jai Sai contracted to have work completed on its property located in Cross Lanes, West Virginia, but did not pay all amounts owed to Plaintiffs. (Complaint, ¶ 6). Jeff C. Woods (WVSB # 4124) ("Mr. Woods"), of The Law Office of Jeff C. Woods, represented Jai Sai in this matter. In the Complaint, Appalachian Home Center claims Jai Sai owes it \$23,177.00 for materials supplied and/or work performed. Tri-State Hotels, LLC claims \$630,000.00 in unpaid work and materials. *Id.* ¶¶ 7-8.

Plaintiffs allegedly served their First Set of Interrogatories, Requests for Production, and Requests for Admission ("Discovery Requests") to Jai Sai on December 11, 2013. Mr. Woods advised Jai Sai's current counsel that he never received the Discovery Requests.

Plaintiffs moved for summary judgment on February 28, 2014. Plaintiffs' motion was based on a lack of response from Jai Sai to Plaintiffs Requests for Admission under the default provision of W.Va. R. Civ. P. 36. A hearing was held on the Motion for Summary Judgment on April 7, 2014. Mr. Woods advised new counsel for Jai Sai that he was undergoing medical testing at the time of the hearing, and therefore, did not know of the hearing. Jai Sai, having hired Mr. Woods to represent it in this matter, was not aware of the hearing because all notices and other documents were sent to Mr. Woods' office. Because Mr. Woods did not know of the hearing and because Jai Sai was not aware of the hearing, Mr. Woods made no appearance at the hearing.

Due, in part, to Mr. Woods' lack of appearance at the hearing on Plaintiffs' Motion for Summary Judgment and the default admissions relied on by Plaintiffs', the Court Ordered that the Plaintiffs' respective liens were valid; that the Plaintiffs were both entitled to pre and post judgment interest, attorneys fees, and costs; and that Jai Sai's Counter-Claim was dismissed with prejudice. Jai Sai, through no fault of its own, was unaware (1) that the discovery and requests for admission had been served; (2) that a Motion for Summary Judgment was pending; (3) that a hearing had been set on the Motion; (4) that a hearing was held on the Motion; or (5) that the Motion had been granted until May 27, 2014. It is from this Order that Jai Sai is requesting relief.

Standard of Review

Rule 60(b) of the West Virginia Rules of Civil Procedure states that “the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause . . . or (6) any other reason justifying relief from the operation of the judgment.” The Supreme Court of Appeals of West Virginia has stated that W.Va. R. Civ. P. 60(b) is to be construed liberally to accomplish justice and to facilitate the deciding of cases based on their merits. Syl. Pt. 6, *Toler v. Shelton*, 204 S.E.2d 85, 157 W.Va. 778 (1974); *Hamilton Watch Co. v. Atlas Container, Inc.*, 156 W.Va. 52, 59, 190 S.E.2d 779, 783 (1972) (“The recent cases applying Rule 60(b) have uniformly held that it must be given a liberal construction. *** Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments.” (citation omitted)).

The first determination a court must make in a Rule 60(b) motion based on grounds (1), (2), (3), or (6) is to determine if the motion was filed within one year of the judgment entered, and then determine if, under all the circumstances, if it was filed within a reasonable time. Syl. Pt. 3, *Delapp v. Delapp*, 213 W.Va. 757, 584 S.E.2d 899 (2003). Once the court has determined the motion was timely filed, the court should also consider the following four factors to determine whether a default judgment should be vacated under Rule 60(b): “(1) [t]he degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the

degree of intransigence on the part of the defaulting party.” Syl. Pt. 3, *Parsons v. Consolidated Gas Supply Corporation*, 163 W.Va. 464, 256 S.E.2d 758 (1979); Syl. Pt. 1, *Black’s Auto Repair and Towing, Inc. v. Monongalia County Magistrate Court*, 211 W.Va. 661, 567 S.E.2d 671 (2002).

For the purposes of Rule 60(b), the determination of “excusable neglect” “is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Delapp v. Delapp*, 213 W.Va. 757, 762, 584 S.E.2d 899, 904 (2003) (citing *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498, 123 L.Ed.2d 74, 89 (1993)). The Court in *Pioneer* offered four factors to aid in the determination of whether something is excusable neglect: “[(1)] the danger of prejudice [to the other party], [(2)] the length of the delay and its potential impact on judicial proceedings, [(3)] the reason for the delay, including whether it was within the reasonable control of the movant, and [(4)] whether the movant acted in good faith.” *Id.* at 763, 584 S.E.2d at 905.

Argument

There are three tests which must be met to obtain relief under Rule 60(b). Jai Sai can satisfy all three tests: (1) Jai Sai timely filed its motion, well within one year of the judgment from which relief is requested; (2) Jai Sai can meet the four requirements necessary for determining whether a default judgment should be vacated; and (3) Jai Sai can show that the conduct that lead to the default judgment meets the four elements required to show excusable neglect.

1. Jai Sai's Rule 60(b) Motion Was Timely Filed

Jai Sai hired new counsel on May 27, 2014. It was not until then that it learned of the April 30, 2014, entry of the Order granting Plaintiffs' Motion for Summary Judgment. Jai Sai's new counsel filed a Motion to Stay Enforcement of Plaintiffs Summary Judgment Order Pending Rule 60(b) West Virginia Rules of Civil Procedure Hearing within thirty days of the entry of the April 30th Order and within one day of being retained. Therefore, Jai Sai's Motion is well within the one year limit required for filing a Rule 60(b) motion.

2. Default Judgment Against Jai Sai Should Be Vacated Because Jai Sai Can Meet Each Requirement For Vacating A Judgment Based on Rule 60(b)

As will be explained more fully below, Jai Sai has met all requirements necessary to prove that the conduct that lead to the entry of a default judgment was due to excusable neglect on the part of Mr. Woods. Because excusable neglect is present, and because Jai Sai can also meet the four requirements set out by the court in *Parsons*, and explained in detail below, Jai Sai's Rule 60(b) motion should be granted.

A. Prejudice Suffered by Plaintiff from Delay

Plaintiffs did not suffer any prejudice due to the delay in answering the Motion for Summary Judgment. While there is no clear definition of "prejudice" outlined by the court, other courts have defined prejudice as involving surprise to one party¹, long periods of delay in the proceedings², or that the actions of the court were fundamentally unfair³. Prejudice is anything that can cause "damage or detriment to one's legal rights or claims." *Black's Law Dictionary* (9th ed. 2009).

¹ *McDougal v. McCammon*, 193 W.Va. 229, 238, 455 S.E.2d 788, 797 (1995).

² Fn. 3, *Love v. Georgia Pacific Corp.*, 214 W.Va. 484, 590 S.E.2d 677 (2003).

³ *State v. LaRock*, 196 W.Va. 294, 315, 470 S.E.2d 613, 634 (1996).

There is no prejudice suffered by Plaintiffs. The facts of this case remain the same as they were stated in Jai Sai's Answer to the Complaint and Counter-Claim against Plaintiffs. Plaintiffs would not be surprised by any facts or circumstances raised by Jai Sai if this action were to continue on its merits. There is also no delay present in this case. Jai Sai immediately began efforts to correct Mr. Woods' errors once it learned of Mr. Woods' failure to respond to discovery or the Motion for Summary Judgment by hiring new counsel and filing the current Motion. Because there would be no surprise or delay caused by granting Jai Sai's Motion for Relief, it would not be fundamentally unfair to require Plaintiffs to continue with this action based on the merits of the parties' allegations. All parties will remain in the same position they were in prior to the entry of the Order granting Summary Judgment. The parties would simply be allowed to proceed with this case on its merits.

B. Presence of Meritorious Defenses

When examining the presence of a meritorious defense, the court must determine whether a different result than the one obtained would have resulted from a full trial. *Groves v. Roy G. Hildreth and Son, Inc.*, 222 W.Va. 309, 316, 664 S.E.2d 531, 538 (2008). A meritorious defense is present in this case because Jai Sai has set forth allegations that Plaintiff Tri-State Hotels had little, if any, involvement in the property. In fact, the entire amount awarded to Plaintiff Tri-State may be invalid. Discovery is necessary to make this determination. Jai Sai believes it can prove that Tri-State in fact had little, if any, involvement in the property, and is owed far less than \$630,000 – if it is owed anything at all.

It is the policy of the West Virginia Supreme Court of Appeals that cases such as this one should be decided on its merits. The Rules of Civil Procedure “should be liberally construed in order to provide the relief from onerous consequences of default judgments.” *Parsons*, 163 W.Va

at 471, 256 S.E.2d at 762. Any doubt involved in deciding whether to allow a remedy under Rule 60(b) should be resolved in favor of setting the default judgment aside to allow for a fair analysis of the facts of the case and the defenses of Jai Sai. *Cook v. Channel One, Inc.*, 209 W.Va. 432, 437, 549 S.E.2d 306, 311 (2001) (*citing Graley v. Graley*, 174 W.Va. 396, 398, 327 S.E.2d 158, 160 (1985)).

C. Significance of the Interests At Stake

The interests at stake in this situation are severe. Should the current judgment stand, Jai Sai will face a judgment of over \$650,000 that was awarded due to the excusable neglect of Mr. Woods. The sheer amount of damages at stake in this situation satisfies this requirement.

D. Degree of Intransigence on Defaulting Party

Jai Sai is not responsible for the failure to address discovery or the summary judgment motion. Jai Sai relied upon Mr. Woods, its attorney, to handle those matters. Unfortunately, Mr. Woods was, according to his statement to counsel, unable to do so because of his medical testing and lack of receipt of the discovery requests and Motion for Summary Judgment. But one thing is clear – Jai Sai as a party was not intransigent. Jai Sai simply relied upon its attorney and it should not suffer such a significant judgment due to Mr. Woods' failure or inability to address the discovery or Motion for Summary Judgment.

When a party is not responsible for the actions of its attorney, dismissal should only be used in extreme circumstances such as a clear record of delay. *Foster v. Good Shepherd Interfaith Volunteer Caregivers, Inc.*, 202 W.Va. 81, 83, 502 S.E.2d 178, 180 (1998).

Jai Sai relied upon Mr. Woods to handle the litigation. Jai Sai did not know that Mr. Woods did not answer Plaintiffs' Requests for Admissions or that Mr. Woods failed to appear at the hearing for Plaintiffs' Motion for Summary Judgment. Mr. Woods acted on his own accord

and was not under the direction of Jai Sai regarding the legal obligations that are involved with representing clients such as when to respond to discovery or making appearances at hearings. Therefore, Jai Sai was not intransigent and, in fact, was unaware that the Motion had even been filed or any discovery served.

Because Jai Sai can show that it can satisfy all four of the factors set out by *Parsons*, the Order granting summary judgment should be set aside and vacated, and this Court should decide the case on its merits.

3. The Order Granting Summary Judgment Against Jai Sai Should Be Vacated Because Any Failure to Appear or Respond to the Requests for Admissions is Due to Excusable Neglect by Mr. Woods

The failure to appear at the hearing for Plaintiffs' Motion for Summary Judgment and respond to Plaintiffs' Requests for Admissions was caused by excusable neglect from Mr. Woods. Jai Sai meets each of the four factors set out by *Pioneer*, and required for finding excusable neglect. Because these factors are met, Jai Sai satisfies the requirement of Rule 60(b)(1) that some form of excusable neglect or other excuse be present.

A. Danger of Prejudice to the Other Party

As previously stated, Plaintiffs did not suffer any prejudice due to the delay in answering the Motion for Summary Judgment. The facts of this case remain the same as they were prior to the entry of a default judgment and all parties will remain in the same position they were in prior to the entry of the Order granting Summary Judgment.

B. Length of Delay and Its Impact

The delay involved in this situation is minimal. The Order granting Plaintiffs Motion for Summary Judgment was entered on April 30, 2014. Jai Sai retained new counsel and began actions to remedy the situation created by Mr. Woods within thirty days of the entry of that

Order. Plaintiffs had not begun any proceedings to collect on its judgment, or even held the meeting required by the Court in its Order to determine the priority of the liens on the property. Vacating the Court's previous order at this point will permit a fair adjudication of the merits of this case. It will not prejudice the Plaintiffs in any way.

C. Reason For the Delay

The delay in this case was caused by Mr. Woods' failure to respond to Plaintiffs' Requests for Admissions and to address the Motion for Summary Judgment. Absent Mr. Woods' failure to respond, Plaintiffs would not have had an argument for summary judgment and this case would have proceeded on its merits. It is no fault of Jai Sai's that Mr. Woods failed to respond to Plaintiffs' Requests for Admissions or address the Motion for Summary Judgment.

D. Acted in Good Faith

Despite Mr. Woods' errors in representing Jai Sai, he did not represent Jai Sai in bad faith. "A party that obstructs or delays the interactive process or fails to communicate, by way of initiation or response, is acting in bad faith." *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 68, 479 S.E.2d 561, 578 (1996). Mr. Woods has advised Jai Sai's current counsel that he was unaware of certain deadlines and hearings that prevented him from addressing the Requests for Admissions or Motion for Summary Judgment.

This factual scenario is similar to that in *Delapp v. Delapp*. In that case, the Court held that while generally, attorney negligence will not set aside a default judgment for excusable neglect, when a Rule 60(b) motion is presented, "excusable neglect is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 762, 584 S.E.2d at 904. Additionally, when the Court considered the four factors set out by *Pioneer*, it held that a failure to meet a deadline was excusable because the inaction committed

was only an omission caused by carelessness; there was no indication that there was an intentional disregard of the filing deadline, and therefore, there was no bad faith on the part of the attorneys. Additionally, the Court found that there was no prejudice to the appellee, and minimal delay in the proceedings. Therefore, the neglect of appellant's attorneys was excusable.

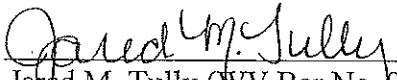
Here, Jai Sai faces a similar situation. Mr. Woods failed to meet filing deadlines and failed to appear for a hearing. Mr. Woods advised Jai Sai's current counsel that he did not receive Plaintiffs' Requests for Admissions. Additionally, Mr. Woods advised that he was undergoing medical testing at the time of the filing and hearing on the summary judgment motion. As such, he was unable to appear and defend Jai Sai in that hearing and was unaware that a Motion for Summary Judgment had been filed. Mr. Woods was also unaware of the discovery filed and is justified in not attending to the summary judgment motion due to medical testing. He did not intentionally try to delay proceedings or gain an unfair advantage by failing to respond or appear. As a result, Mr. Woods did not act in bad faith and only caused minimal delay in the proceedings.

Conclusion

The Order entered against Jai Sai was entered due to Mr. Woods' excusable neglect and unavoidable causes because of lack of notification of documents and Mr. Woods' medical testing. Because Mr. Woods did not have knowledge of certain documents Jai Sai was unable to remedy the situation at the time of the mistake. Even if the Court does not find excusable neglect by Mr. Woods, Jai Sai should not be punished due to the mistake, inadvertence, or negligence of Mr. Woods. The result of Mr. Woods' failure to respond to the Requests for Admission and Motion for Summary Judgment was no fault of Jai Sai and Jai Sai should not suffer a judgment of over \$650,000.

WHEREFORE, Jai Sai respectfully requests that this Court vacate the April 30, 2014, Order Granting Plaintiffs' Motion for Summary Judgment as well as the dismissal of Jai Sai's counter-claims.

Respectfully submitted,

 ^{FAM}
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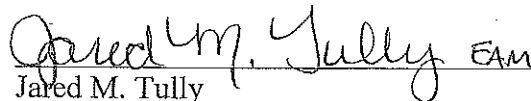
CERTIFICATE OF SERVICE

I, Jared M. Tully, do hereby certify that the foregoing *Jai Sai, LLC's Motion for Relief from Judgment Pursuant to Rule 60(b)* has been served upon the following counsel of record via U.S. Mail, postage pre-paid on this 16th day of June, 2014:

J. Phillip Fraley
Orndorff Hatfield & Fraley
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Jared M. Tully