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'S REPLY TO PLAINTIFFS' RESPONSE TO JAI SAI'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 hereby Replies to *Plaintiffs' Response to Jai Sai's Motion for Relief from Judgment Pursuant to Rule 60(b).*

Plaintiffs argue that "Jai Sai cannot meet the requirements necessary to warrant vacating the judgment and Jai Sai's actions go well beyond excusable neglect." (Plaintiffs' Response to Jai Sai's Motion for Relief from Judgment Pursuant to Rule 60(b) at p. 1-2). Jai Sai can show that Plaintiffs have not been prejudiced by the delay in the case, that Jai Sai's allegations and defenses are both meritorious and directed at the appropriate party, and that Jai Sai did everything it could to make contact with its previous counsel and make sure that he was keeping track of Jai Sai's legal issues.

A. Plaintiffs' Potential Delay Is Not Sufficient Prejudice to Prevent Justice Being Served

Prejudice is confined to the issue of evidence. *Ryan v. Rickman*, 213 W.Va. 646, 649, 584 S.E.2d 502, 505 (2003). The question to be asked is whether the length of the delay has "caused critical or dispositive evidence to be lost, destroyed, or otherwise made unavailable?" *Id.* (citing *Banker v. Banker,* 196 W.Va. 535, 547, 474 S.E.2d 465, 477 (1996)) The Fourth Circuit has also held that the mere passage of time, without an allegation of a specific way they have been prejudiced such as the loss of important evidence, is not sufficient to show that prejudice has occurred. *Aikens v. Ingram*, 524 Fed.Appx. 873, 883 (4th Cir. 2013). Prejudice can also be shown when a party is disadvantaged in asserting or establishing a claimed right or other harm that is caused. *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (internal citations omitted).

Plaintiffs argue that they would be prejudiced by "most likely hav[ing] to wait approximately another year to get paid for work that was completed approximately 18-months ago." (Plaintiffs' Response at A.1.). There is no specific allegation concerning how Plaintiffs' have been prejudiced other than the delay in receiving payment. All of the evidence that was initially present when the suit was filed is still present and available. In fact, by allowing this case to proceed on its merits, it is likely that additional relevant evidence will be discovered and will aid the Court in making a more accurate determination of the merits of this case.

Furthermore, Plaintiffs did not serve Jai Sai with the instant suit until November 2013[1] – 11 months into the alleged 18-months since completion. Had Jeff C. Woods ("Mr. Woods"), Jai Sai's previous counsel, responded to Plaintiffs' discovery responses and Motion for Summary Judgment, this case would still be ongoing and Plaintiffs' would still be waiting on payment. It is unjust to uphold a judgment against Jai Sai based on a technicality when the merits of the case

[1] *Id.*

have not been addressed, especially when it would not change the status of the case timeline had discovery responses been timely made.

B. Jai Sai's Defenses Are Meritorious and Directed at the Correct Party

Plaintiffs assert that Jai Sai's meritorious defenses are directed at Dolatrai Patel, not Tri-State Hotels. (Plaintiffs' Response at p. 3). It is clear from Jai Sai's motion that its allegations are against Tri-State Hotels. Jai Sai's belief that Tri-State Hotels had little involvement in the property is based upon the amount of work that the company itself completed, or coordinated to have completed, through its principal and agent, Dolatrai Patel. Therefore, the allegations asserted against Tri-State Hotels or Dolatrai Patel are proper because Dolatrai Patel's actions taken in furtherance of Tri-State's business can be attributed to Tri-State Hotels. *See Travis v. Alcon Laboratories, Inc.*, 202 W.Va. 369, 381, 504 S.E.2d 419, 431 (1998).

Jai Sai made several allegations of factual disputes in its Counterclaim against Plaintiffs, filed simultaneously with Jai Sai's Answer, which are meritorious. Plaintiffs claimed that this action is for enforcement of their respective liens. (Compl. ¶ 11). However, Tri-State has not supplied documentation of its lien sufficient to show when and how money was spent in the construction of the subject property, what work was actually completed, and whether Jai Sai's payments to Tri-State were properly credited to Jai Sai's account. (Jai Sai's Counterclaim, ¶¶ 5, 7-8). Moreover, Jai Sai has retained Arnett Foster Toothman PLLC to review the documents upon which Tri-State bases its claim. Although a full review is not complete at this time, a preliminary review appears to show that the claimed amount is, in whole or in part, unsupported. These allegations and defenses against Tri-State are sufficient factual disputes and meritorious

C. Jai Sai Could Not Have Done More to Prevent the Intransigence of Its Previous Counsel

Plaintiff's counsel states that parties are responsible for monitoring its case. *Dimon v. Mansy*, 198 W.Va. 40, 45, 479 S.E.2d 339, 344 (1996). However, that Court also stated that "a court's authority to issue dismissals as a sanction must be limited by the circumstances and necessity giving rise to its exercise." *Id.* Because dismissal with prejudice is so harsh, it should only be used in "flagrant cases". *Id.* In fact, the Court recognized that a dismissal based on procedure alone "is a severe sanction which runs counter to the general objective of disposing cases on the merit." *Id* at 45-46, 479 S.E.2d at 344-45.

Dimon is distinguishable from the instant case because *Dimon* involved a case being dismissed for failure of a plaintiff to move its case toward trial. However, even if that general rule is applied here, Jai Sai should still be permitted to continue with the case on its merits. During the time between when Plaintiffs filed suit against Jai Sai and the time when Jai Sai obtained its current counsel, Jai Sai contacted Mr. Woods 11 times by email and approximately 40 times by phone. Please see call and email log attached hereto as Exhibit A. Jai Sai made every effort it could to make sure counsel was doing what was required of him to ensure the case progressed smoothly and according to the Rules of Civil Procedure. However, as Plaintiff's counsel points out, Jai Sai is required to speak through its counsel and was therefore limited with what it could do beyond its numerous phone calls and emails to Mr. Woods. Dismissing this case due to Mr. Woods' failure to respond to discovery requests and requests for admission would be a severe action not justified by the circumstances present in this case. Jai Sai should be permitted to continue this case on its merits because it is apparent that Jai Sai made every attempt it could to make sure Mr. Woods was doing what was necessary to proceed with this

case. It is not reasonable to permit summary judgment under these circumstances when there is no reason why the case should not proceed on its merits.

D. Excusable Neglect is Present

Plaintiffs' counsel points to *White v. Berryman*, 187 W.Va. 323, 332, 419 S.E.2d 917, 926 (1992) as a more analogous case supporting its contention that an attorney's negligence is not sufficient for setting aside a default judgment based on excusable neglect. The case Jai Sai previously cited to support its position, *Delapp v. Delapp*, 213 W.Va. 757, 584 S.E.2d 899 (2003), distinguishes *White* on that specific point. The Court in *Delapp* held that although the statement in *White* is the general holding, the United States Supreme Court had since found that, for Rule 60(b) purposes, "'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Delapp* at 762, 419 S.E.2d at 904 (*citing Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 394, 113 S.Ct. 1489, 1497, 123 L.Ed.2d 74, 89 (1993)).

The *Delapp* court also analogized to a case where the *Pioneer* test[2], which Jai Sai outlined and argued more fully in its original Motion, was used to find that noncommunication between associate and lead counsel for a party which led to a default judgment against their client amounted to an "omission[] caused by carelessness." *Delapp* at 763, 584 S.E.2d at 905 (internal citations omitted). Because the failure to comply with the filing deadline was due to negligence and not a deliberate disregard for the rules, and because there was no allegation that the omission was intended to delay the trial or seek an unfair advantage, the court held that it was an "innocent oversight" and no bad faith was found. *Id.* (*citing Cheney v. Anchor Glass*

[2] The four factors of the *Pioneer* test are: (1) danger of prejudice to the other party, (2) length of delay and its potential impact on the proceedings, (3) the reason for the delay, and (4) whether the movant acted in good faith. *Pioneer* at 395, 113 S.Ct. at 1498, 123 L.Ed.2d at 89-90.

Container Corp., 71 F.3d 848 (11th Cir. 1996)). Therefore, because all other elements of the *Pioneer* test had been met, the Court found the conduct to be excusable neglect.

Here, like in *Delapp* and *Cheney*, Mr. Woods' neglect was due to an omission caused by carelessness. This is confirmed by his Affidavit attached hereto as Exhibit B. Even if Mr. Woods did receive notice of the discovery requests and the hearing for the Motion for Summary Judgment, his failure to respond is an omission caused by carelessness, and can be considered excusable neglect. Additionally, Plaintiffs have not alleged that Mr. Woods' neglect or omission was intended to delay the case or seek an unfair advantage. Because Mr. Woods' conduct was due to excusable neglect, Plaintiffs have not alleged any bad faith from Mr. Woods which led to the carelessness, and because Jai Sai is also able to meet all other requirements set forth in *Pioneer*, Jai Sai should be granted relief from the Order granting summary judgment pursuant to Rule 60(b).

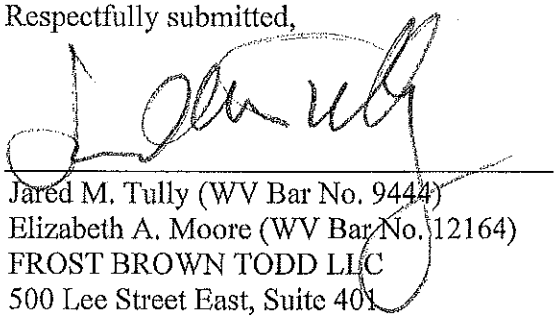
Conclusion

Plaintiffs' allegations and contentions that Jai Sai's motion is faulty or incorrect fail. Jai Sai has shown that its allegations against Plaintiff Tri-State are meritorious and directed against the appropriate party, that Plaintiffs would not be prejudiced by the time elapsed between the entry of the default judgment and now, that Jai Sai did everything possible to keep its counsel on track with this case, and that Jai Sai's previous counsel's actions were in fact excusable neglect according to the United States Supreme Court.

WHEREFORE, for the foregoing reasons, Jai Sai respectfully requests that this Court vacate the April 30, 2014, Order Granting Plaintiffs' Motion for Summary Judgment as well as

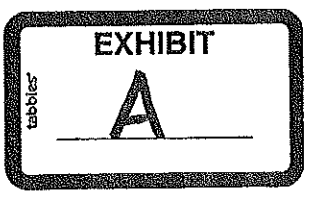
the dismissal of Jai Sai's counter-claims, and deny Plaintiffs' requests for relief in their Response to Jai Sai LLC's Motion for Relief From Judgment Pursuant to Rule 60(b).

Respectfully submitted,



Jared M. Tully (WV Bar No. 9444)
Elizabeth A. Moore (WV Bar No. 12164)
FROST BROWN TODD LLC
500 Lee Street East, Suite 401
Charleston, WV 25301-3207
(304) 345-0111 / (304) 345-0115 (fax)
Counsel for Jai Sai, LLC

Date	Emails/Faxes
5/1/2013	Email
5/7/2013	Email
5/13/2013	Email
5/16/2013	Email
6/4/2013	Email
6/6/2013	Email
6/10/2013	Email
6/11/2013	Email
6/20/2013	Email
6/21/2013	Email
6/22/2013	Email
7/3/2013	Fax sent
7/3/2013	Email
7/8/2013	Email
7/9/2013	Email
7/10/2013	Emails
7/22/2013	Email
8/2/2013	Email
8/5/2013	Email
8/6/2013	Email
8/16/2013	Email
8/17/2013	Email
8/18/2013	Email
8/19/2013	Email
9/17/2013	Email
10/11/2013	Email
10/29/2013	Email
11/1/2013	Email
11/3/2013	Email
11/3/2013	Email
11/7/2013	Email
11/8/2013	Email
11/25/2013	Email
12/13/2013	Email
12/17/2013	Email
12/20/2013	Email
1/25/2014	Email
3/6/2014	Email
3/10/2014	Email
4/7/2014	Email
4/8/2014	Email
4/15/2014	Email
5/8/2014	Email
5/15/2014	Email
5/19/2014	Email



Phone Calls	
Date	# of Minutes
4/1/2013	3
4/1/2013	26
4/1/2013	5
4/2/2013	2
4/2/2013	5
4/5/2013	10
4/12/2013	12
4/15/2013	1
4/15/2013	1
4/15/2013	5
4/25/2013	1
4/30/2013	1
4/30/2013	7
5/7/2013	1
5/7/2013	8
5/7/2013	3
5/7/2013	1
5/8/2013	1
5/8/2013	5
5/8/2013	1
5/9/2013	6
5/17/2013	4
5/22/2013	11
6/4/2013	1
6/4/2013	2
6/5/2013	1
6/5/2013	1
6/5/2013	1
6/5/2013	2
6/5/2013	1
6/6/2013	1
6/7/2013	1
6/7/2013	2
6/7/2013	2
6/17/2013	1
6/17/2013	2
6/19/2013	19
6/27/2013	9
6/28/2013	2

7/1/2013	1
7/1/2013	23
7/1/2013	1
7/1/2013	1
7/1/2013	1
7/1/2013	8
7/2/2013	3
7/3/2013	3
7/3/2013	1
7/8/2013	3
7/8/2013	2
7/8/2013	1
7/8/2013	10
7/8/2013	11
7/10/2013	6
7/10/2013	1
7/10/2013	4
7/11/2013	29
7/11/2013	4
7/16/2013	5
7/18/2013	2
7/26/2013	15
7/29/2013	5
7/29/2013	29
8/5/2013	9
8/29/2013	8
9/17/2013	3
9/18/2013	8
11/1/2013	9
11/2/2013	2
11/11/2013	1
11/11/2013	1
11/12/2013	7
11/13/2013	6
12/13/2013	2
12/13/2013	14
12/13/2013	9

2/5/2014	1
2/5/2014	5
2/5/2014	2
2/12/2014	8
2/14/2014	1
2/14/2014	1
2/14/2014	4
2/18/2014	1
2/18/2014	14
2/19/2014	3
2/20/2014	1
2/20/2014	2
2/20/2014	2
3/7/2014	7
3/7/2014	2
3/12/2014	3
3/31/2014	1
3/31/2014	2
4/1/2014	1
4/3/2014	1
4/4/2014	3
4/10/2014	1
4/10/2014	1
4/14/2014	1
4/14/2014	2
4/16/2014	3
5/7/2014	4
5/12/2014	1
5/12/2014	6
5/19/2014	1
5/20/2014	1
5/21/2014	40
5/27/2014	2
5/28/2014	1
5/28/2014	7

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.

AFFIDAVIT OF JEFF C. WOODS

1. I am Jeff C. Woods, previous counsel to Jai Sai, LLC, a defendant in the above captioned lawsuit.

2. I did not receive Plaintiffs First Set of Interrogatories, Requests for Production, and Requests for Admission to Jai Sai ("Discovery Requests").

3. I did not receive a good faith letter from Plaintiffs counsel attempting to elicit a response to the Discovery Requests.

4. I was unable to attend the hearing on Plaintiffs Motion for Summary Judgment because I was undergoing medical testing at the time and was unaware that a hearing had been set.

5. I did not inform Jai Sai, LLC of my medical testing, Plaintiffs' Motion for Summary Judgment, or of any other documents allegedly sent to my office.

FURTHER the Affiant sayeth naught.

August 5, 2014
Date

Jeff C. Woods

EXHIBIT
tabbies
B

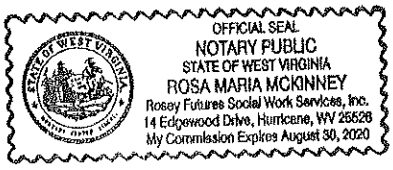
STATE OF West Virginia,

COUNTY OF Putnam

The foregoing instrument was acknowledged before me this 5th day of August, 2014, by Jeff C. Woods.

Rosa Maria McKinney

Notary Public



My Commission expires: August 30, 2020

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.

CERTIFICATE OF SERVICE

I, Jared M. Tully, do hereby certify that the foregoing ***Jai Sai's Reply to Plaintiffs' Response to Jai Sai'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 12th day of August, 2014:

J. Phillip Fraley
Orndorff Hatfield & Fraley
Village Professionals Building
99 Cracker Barrel Drive, Suite 100
Barboursville, WV 25504

River Cities Glass & Construction, LLC
c/o William E. Cox
4778 Winchester Avenue
Ashland, KY 41101

Jared M. Tully