# IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

DAN HALL	)
Appellant/Defendant-below,	) C.A. No. CPU6-12-000781
	)
v.	)
	)
SUSSEX PINES COUNTRY CLUB, IN	C.)
Appellee/Plaintiff-below	)

Submitted February 14, 2013 Decided March 7, 2013

Dean A. Campbell, Esquire, Attorney for Appellant/Defendant-below Richard E. Berl, Jr., Esquire, Attorney for Appellee/Plaintiff-below

# DECISION ON APPEAL FROM COMMISSIONER'S RECOMMENDATIONS

Appellant, Dan Hall has appealed the Commissioner's Report recommending that Appellant's Motion for Default Judgment be denied in this appeal *de novo* matter. After review of the record and submissions by the parties, the Court affirms the Commissioner's recommendation for the reasons set forth herein.

# **FACTUAL BACKGROUND**

This is a breach of contract action filed by Appellee, Sussex Pines Country Club, Inc., against Appellant, Dan Hall. On June 6, 2012, judgment was entered in favor of the Appellee in the Justice of the Peace Court ("JP Court"). Both parties were represented by counsel of record below. On June 20, 2012, Appellant filed in this Court a timely *de novo* appeal of the JP Court's decision.

However, Appellant failed to file a Notice of Appeal to stay the record with the JP Court. Appellee, in turn, failed to file the original Complaint on Appeal with this Court. On August 21, 2012, Appellant filed a Motion for Default Judgment. After a hearing held on November 15, 2012, the Commissioner issued his Report recommending that the motion be denied. Defendant has appealed that recommendation.

# STANDARD OF REVIEW

A default judgment is a case-dispositive determination. The Court reviews *de novo* the Commissioner's decision on a case-dispositive determination, and may accept, reject, or modify in whole or in part the findings or recommendations made by the Commissioner.<sup>1</sup>

# **ANALYSIS**

Appellant contends that he is entitled to default judgment because Appellee failed to comply with this Court's Civil Rule 72.3(b). Default judgment is appropriate when "a party against whom a judgment for affirmative relief is sought, has failed to appear, plead or otherwise defend as provided by [the] Rules." Under such circumstances, the Court may enter default judgment upon application of the party.<sup>3</sup>

Any party appealing a JP Court civil action decision to this Court must file a Notice of Appeal both with this Court and the JP court.<sup>4</sup> When, as here, the

<sup>3</sup> Ct. Com. Pl. Civ. R. 55(b).

<sup>&</sup>lt;sup>1</sup> Ct. Com. Pl. Civ. R. 112(A)(4)(iv).

<sup>&</sup>lt;sup>2</sup> Ct. Com. Pl. Civ. R. 55(a).

<sup>&</sup>lt;sup>4</sup> Ct. Com. Pl. Civ. R. 72.3 (b), (e).

Appellee is the plaintiff below, the Appellee "shall serve a copy of [the Complaint] within 20 days after service of the process on appeal . . .." However, "[w]hen an appellee having the duty of serving the complaint . . . fails to do so as required by Rule 72.3(b), judgment shall be entered against appellee for failure to plead."

In this case, Appellant filed his Notice of Appeal with this Court on June 15, 2012. However, counsel for Appellant failed to file the Notice of Appeal with the Justice of the Peace Court. Had he done so, that Court's Rules would have required electronic service of the Notice of Appeal on Appellee's attorney of record. Nevertheless, the Notice of Appeal was served on Appellee by serving its General Manager on June 28, 2012. Appellee had to file its Complaint on Appeal within 20 days of that service.<sup>7</sup> To date, Appellee has not filed its Complaint with this Court.

At the November 15, 2012 motion hearing, Appellee argued that its failure to file the Complaint in accordance with Rule 72.3(b) was the result of excusable neglect. Court of Common Pleas Civil Rule 60(b)(1) provides that the Court may relieve a party from a final judgment for "[m]istake, inadvertence, surprise, or excusable neglect..." Similarly, Civil Rule 6(b) provides, in pertinent part, that "the Court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done where

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<sup>&</sup>lt;sup>5</sup> Ct. Com. Pl. Civ. R. 72.3 (b).

<sup>&</sup>lt;sup>6</sup> Ct. Com. Pl. Civ. R. 55(bb2).

<sup>&</sup>lt;sup>7</sup> Ct. Com. Pl. Civ. R. 72.3(b).

<sup>8 &</sup>lt;u>Id</u>.

the failure to act was the result of excusable neglect." A motion for such relief is within the discretion of the trial court.9 In exercising this discretion, the Court liberally construes its rules in favor of its long-standing preference, and this State's public policy, that cases be determined on their merits.<sup>10</sup>

Although the present motion is one for entry of default judgment and not a motion for relief from default judgment, it raises the same issue of excusable neglect, and the Court will apply the Rule 60(b) standards in determining it. A party seeking relief under Rule 60(b) must establish three (3) elements: "(1) excusable neglect in the conduct that allowed the default judgment to be taken; (2) a meritorious defense to the action that would allow a different outcome to the litigation if the matter was heard on the merits; and (3) a showing that substantial prejudice will not be suffered by the plaintiff if the motion is granted."11 "'[E]xcusable neglect' exists if the moving party has valid reasons for the neglect - reasons showing that the neglect may have been the act of a reasonably prudent person under the circumstances."12 To determine whether a moving party's neglect is "excusable", the Court may consider all surrounding circumstances.<sup>13</sup> As the Delaware Supreme Court further explains:

Excusable neglect has been described as that neglect which might have been the act of a reasonably prudent person under the circumstances. Carelessness and negligence do not

<sup>&</sup>lt;sup>9</sup> See Perry v. Wilson, 2009 WL 1964787 (Del. Super. July 8, 2009) (wherein, the Superior Court applied a rule identical to Ct. Com. Pl. Civ. R. 60).

<sup>10</sup> See Keener v. Isken, 58 A.3d 407 (Del. 2013); Keystone Fuel Oil Co. v. Del-Way Petroleum, Inc., 364 A.2d 826, 828 (Del. Super. 1976).

<sup>&</sup>lt;sup>11</sup> Perry, 2009 WL 1964787, at \*1.

<sup>&</sup>lt;sup>12</sup> *DiSabatino v. DiSabatino*, 922 A.2d 414 (Del. 2007).

<sup>&</sup>lt;sup>13</sup> <u>Id</u>.

necessarily rise to the level of "excusable neglect". A mere showing of negligence or carelessness without a valid reason may be deemed insufficient. Moreover, because negligence may be so gross as to amount to sheer indifference, to open and vacate [the] judgment upon such excuse would cease to give meaning to the words "excusable neglect". 14

The Court finds that Appellee's failure to timely file its Complaint with this Court constitutes excusable neglect, occasioned at least in part by the inactions of Appellant. The Court is satisfied that Appellee's manager, upon receiving service of process of the appeal, reasonably and excusably assumed that Appellee's attorney of record would also receive notice of the appeal; as he would have if Appellant had properly filed it with the JP Court. The Court also takes notice of the custom and practice of the members of the Bar of this State, when, as here, both parties are represented by counsel, to forward a courtesy copy of the notice of appeal to opposing counsel. Although not required by the Rules of this Court, such professionalism is certainly anticipated by both the Court and its practitioners. Counsel for Appellant did not meet that expectation in this case for whatever reason.

As to the remaining Rule 60 (b) factors, inasmuch as Appellee prevailed on the merits below, it obviously has a meritorious claim. Moreover, denial of granting a default judgment on appeal will not substantially prejudice Appellant; no significant litigation has yet occurred in this Court, and Appellant remains fully able to appeal and defend against the judgment below on its merits. Any

prejudice to Appellant is outweighed by the "basic underlying policy which

prefers that a [party] have [its] day in court."15

The Commissioner's January 3, 2013 findings and recommendations are

well-reasoned and supported by the law and the evidence. Therefore, the

Commissioner's Recommendation is AFFIRMED; Appellant's Motion for Default

Judgment is **DENIED**. Appellee shall file its Complaint on Appeal with this

Court within twenty (20) days; and Appellant shall comply with Rule 72.3 (e)

within ten (10) days.

IT IS SO ORDERED.

Kenneth S. Clark, Jr.

<sup>15</sup> *Keystone*, 364 A.2d at 828.