

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

**RICHARD F. STOKES**  
*JUDGE*

**SUSSEX COUNTY COURTHOUSE**  
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GEORGETOWN, DE 19947  
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June 19, 2015

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RE: **Sens Mechanical, Inc, Plaintiff, v. Dewey Beach Enterprises, Inc.  
ET AL., Defendants**  
C.A. No.: S13L-12-027 RFS

Dear Counsel:

Presently before the Court is Plaintiff's, Sens Mechanical, Inc, ("Sens"), Motion to Vacate this Court's Order dated April 16, 2015.<sup>1</sup> Pursuant to Superior Court Civil Rule 60(b)(1), Sens seeks an order from this Court vacating a prior order for sanctions based on excusable neglect.<sup>2</sup> Sens avers reliance on its former counsel, whose actions and omissions allegedly constitute gross negligence,

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<sup>1</sup> See generally, Pl.'s Mot. for Relief.

<sup>2</sup> *Id.* at ¶ 21-22.

amount to excusable neglect.<sup>3</sup> In the alternative, Sens seeks remedial action based on mistake by its former counsel pursuant to Superior Court Civil Rule (b)(6).<sup>4</sup> The only reason Sens proffers to support this contention is Sen's former counsel was transitioning between law firms.<sup>5</sup> Excusable neglect and mistake of counsel may be reasons to vacate an order, but reliance on counsel and counsel's transition between law firms does not amount to excusable neglect. Therefore, the reasons proffered are insufficient justifications to warrant vacating an order. For the reasons set forth herein, Sens' Motion to Vacate is **DENIED**.

### **FACTS AND PROCEDURAL POSTURE**

Sens initiated this action on December 18, 2013.<sup>6</sup> On June 13, 2014, the Court entered its Pretrial Scheduling Order establishing a discovery cut-off date of January 26, 2015.<sup>7</sup> During the course of litigation one of the defendants, Day Star Sills, Inc ("Day Star") sought discovery requests.<sup>8</sup>

By the cut-off date, January 26, 2015, Sens had not filed a response to Day Star's discovery requests.<sup>9</sup> At that time, Defendants initiated a Motion to Compel.

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 24.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.* at ¶ 1.

<sup>7</sup> Defs.' Resp. at ¶ 2.

<sup>8</sup> Day Star presents a common defense with the other named defendants. In various filings, the plural reference to defendants appears but Day Star has the lead.

<sup>9</sup> *Id.*

The motion was scheduled for argument on February 20, 2015, but, was later rescheduled for February 26, 2015. Notice of the Motion to Compel and re-scheduling was sent to Sens. The Court granted Defendants' Motion to Compel and entered an order compelling Sens to respond to the discovery requests.<sup>10</sup>

Belatedly Sens contacted its former counsel to discuss whether the deadlines would be met.<sup>11</sup> Its former counsel at that time received some documents and answers responsive to the discovery requests from employees of Sens.<sup>12</sup> Unfortunately, Sens' former counsel did not comply with the Court's order, nor did its former counsel inform Sens that no further work was being done.<sup>13</sup> Similarly, the Court was not informed of any exigency or scheduling difficulties. Sens did not comply with the Court's order.<sup>14</sup> Thereafter, an order was entered granting sanctions on April 16, 2015.<sup>15</sup>

On May 15, 2015, Sens filed a Motion to Vacate this Court's order granting sanctions.<sup>16</sup> Defendants responded on June 5, 2015.<sup>17</sup>

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<sup>10</sup> *See generally*, Order Granting Defs.' Mot. to Compel.

<sup>11</sup> Pl.'s Mot. for Relief. ¶ 11–15.

<sup>12</sup> *Id.*

<sup>13</sup> Defs.' Resp. at ¶ 2.

<sup>14</sup> *Id.*

<sup>15</sup> *See generally*, Order Granting Defs.' Mot. for Sanctions.

<sup>16</sup> *See generally*, Pl.'s Mot. for Relief.

<sup>17</sup> *See generally*, Defs.' Resp.

## STANDARD OF REVIEW

“A motion to open a default judgment pursuant to Superior Court Civil Rule 60 (b) is addressed to the sound discretion of the Court.”<sup>18</sup> There is, however, a strong public policy in Delaware for courts to decide cases on the merits.<sup>19</sup> As such, any doubt as to whether a case should be reopened, a default judgment set aside, will be resolved in favor of the Movant when determining whether the requirements necessary to grant relief are satisfied.<sup>20</sup> Though “the rule will be given a liberal construction because of this underlying policy, the burden is upon [the Movant] to establish the basis for relief.”<sup>21</sup>

## DISCUSSION

### Relief from Judgment

According to Superior Court Civil Rule 60 (b), “[o]n motion and upon such terms as are just, the Court may relieve a party . . . from a final judgment . . . for the following reasons: (1) Mistake, inadvertence, surprise, or *excusable neglect*; . .

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<sup>18</sup> *Phillips v. Siano*, 1999 WL 1225245, \*2 (Del. Super. Oct. 29, 1999) (citing *Battaglia v. Wilm. Sav. Fund Soc’y*, 379 A.2d 1132, 1135 (Del. 1977); *Model Fin. Co. v. Barton*, 188 A.2d 233 (Del. Super. 1963); *Kaiser-Frazer Corp. v. Eaton*, 101 A.2d 345 (Del. Super. 1953)).

<sup>19</sup> *See Keener v. Isken*, 58 A.3d 407, 409 (Del. 2013); *Green Tree Servicing LLC v. Hawkins*, 2013 WL 5314996, \*1 (Del. Super. Sept. 6, 2013) (quoting *McMartin v. Quinn*, 2004 WL 249576 at \*1 (Del. Super. Feb. 3, 2004); *Phillips*, 1999 WL 1225245 at \*2 (citing *Weeks v. Wilson*, 577 A.2d 755 (Table) (Del. 1990)).

<sup>20</sup> *Green Tree Servicing LLC*, 2013 WL 5314996, \*1 (quoting *McMartin*, 2004 WL 249576, \*1); *Phillips*, 1999 WL 1225245 at \*2 (citing *Keystone Fuel Oil Co. v. Del-Way Petroleum, Inc.*, 364 A.2d 826, 828 (Del. Super. 1976); *Cohen v. Brandywine Raceway*, 238 A.2d 320 (1968)).

<sup>21</sup> *Phillips*, 1999 WL 1225245 at \*2 (citing *Weeks*, 577 A.2d 755).

. or (6) any other reason justifying relief from the operation of the judgment (emphasis added).”<sup>22</sup> Under Rule 60 (b) (1), the Court may set aside a judgment for excusable neglect. Carelessness and negligence do not automatically qualify as “excusable neglect,”<sup>23</sup> since such showings, without a legitimate reason, may be deemed insufficient to justify relief.<sup>24</sup> This is because “negligence may be so gross as to amount to sheer indifference, and to open and vacate a judgment upon such excuse would cease to give meaning to the words ‘excusable neglect.’”<sup>25</sup> When determining whether excusable neglect has been demonstrated, the Court may look at all surrounding circumstances.<sup>26</sup>

“Excusable neglect has been described as that neglect which might have been the act of a reasonably prudent person under the circumstances.”<sup>27</sup> According to *Phillips v. Siano*:

[a] party seeking to vacate a default judgment pursuant to Rule 60 (b) (1) must establish the presence of four essential elements: 1) that his conduct was that of a reasonably prudent person; 2) that the motion was not brought after an unreasonable delay; 3) the presence of a

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<sup>22</sup> Super. Ct. Civ. R. 60 (b).

<sup>23</sup> *City of Dover v. Hunter*, 880 A.2d 239, 244 (Del. Super. 2004) (citing *Cohen*, 238 A.2d at 325 (citations omitted)).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (citing *Vechery v. McCabe*, 100 A.2d 460 (Del. Super. 1953)).

<sup>26</sup> *Keener*, 58 A.3d at 410 (Del. 2013) (citing *Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011)); *Schremp v. Marvel*, 405 A.2d 119, 121 (Del. 1979); *Hunter*, 880 A.2d at 244 (citing *Cohen*, 238 A.2d at 325).

<sup>27</sup> *Hunter*, 880 A.2d at 244 (citing *Cohen*, 238 A.2d at 325).

meritorious defense; and 4) the lack of substantial prejudice to the non-moving party.<sup>28</sup>

In the alternative, if a party is unable to satisfy the above stated elements of excusable neglect, he may obtain relief under Rule 60 (b) (6). The Court may set aside a judgment under that rule for “any other reason justifying relief from the operation of the judgment.”<sup>29</sup> Rule 60 (b) (6) is an independent ground for relief with a completely distinct standard from 60 (b) (1).<sup>30</sup> Because 60 (b) (6) is a residual source for unspecified reasons to set aside a judgment, it is a special if not an unique remedy. When necessary, the Court may invoke this judicial power to accomplish justice.<sup>31</sup> However, the exercise of discretion is not unrestrained. Rather, the standard to obtain relief under Rule 60 (b) (6) is the extraordinary circumstances test.<sup>32</sup> “Extraordinary circumstances do not exist where the conduct of the moving party has been intentional or willful. A Rule 60 (b) (6) motion, although designed to shield against injustice, cannot become a sword ‘to relieve a party from the duty to take legal steps to protect his interests’”<sup>33</sup>

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<sup>28</sup> *Phillips*, 1999 WL 1225245 at \*3 (citing *Concors Supply Co., Inc. v. Berger*, 1988 WL 130437 (Del. Super. Nov. 9, 1988)).

<sup>29</sup> Super. Ct. Civ. R. 60 (b).

<sup>30</sup> *Phillips*, 1999 WL 1225245 at\*4 (citing *Keith v. Melvin Joseph Constr. Co.*, 451 A.2d 842, 847 (Del. Super. 1982)).

<sup>31</sup> *See Hunter*, 880 A.2d at 244.

<sup>32</sup> *Phillips*, 1999 WL 1225245 at\*4 (citing *Jewell v. Division of Soc. Serv.*, 401 A.2d 88 (Del. 1979); *Keith*, 451 A.2d 842).

<sup>33</sup> *Id.* (quoting *Opher v. Opher*, 531 A.2d 1228 (Del. Fam. 1987) (citations omitted)).

## Analysis

Sens is not entitled to relief from judgment under either Rule 60 (b) (1) or (6). Sens is incapable of satisfying the first essential element necessary to obtain 60 (b) (1) relief because Sens' conduct falls below that of an ordinary, reasonable prudent person.<sup>34</sup> Defendants assert Plaintiff did not act reasonably because Sens "should have made some effort to ensure compliance"<sup>35</sup> Sens failed to make any effort to determine the status of the litigation for one year.<sup>36</sup>

Moreover, Sens was aware, through third-party defendant, Stephen Pope, who is employed at Sens as a Vice President, that certain discovery deadlines were missed.<sup>37</sup> Plaintiff, in response, did not protect itself or respond to the outstanding discovery requests, or take any measures with its former counsel. Plaintiff did not comply with the stipulated discovery deadline following the order granting Defendant's Motion to Compel. In fact, it is accurate that "other than responding to the Defendant's Petition to Discharge the Mechanic's Lien and Defendant's Counter claim, the docket reflects absolutely no activity by Plaintiff until the Substitution of Counsel was filed."<sup>38</sup>

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<sup>34</sup> See e.g. *Model Fin. Co.*, 188 A.2d at 235 (holding unreasonableness when relying on counsel or mistake by counsel, even when there is an admission by counsel about carelessness, does not equate to a finding of excusable neglect).

<sup>35</sup> Def.'s Resp. at ¶ 9.

<sup>36</sup> *Id.* at ¶ 2.

<sup>37</sup> Pl.'s Mot. for Relief. ¶ 11–15.

<sup>38</sup> Def.'s Resp. at ¶ 1.

A reasonable prudent person facing sanctions for discovery requests that may cause the loss of the ability to introduce contradictory evidence at trial and a significant loss of damages would have taken protective steps. Accordingly, a reasonable prudent person knowing the pendency of discovery violations, would have been proactive.<sup>39</sup> Sens is a corporate entity that engages in substantial construction projects with the inherent risks of litigation. Indeed, Sens is a party to companion litigation at the project.<sup>40</sup> In the *Critical Systems LLC* case, the Superior Court docket reflects Sens was properly served and default judgment was entered against Sens on April 7, 2014 in the amount of \$171,332.92 before the critical lapses here.<sup>41</sup> Plaintiff cannot establish its actions were in line with that of a reasonably prudent person. Failure to meet this threshold is dispositive on this ground alone.<sup>42</sup>

Even assuming its actions conformed to those of a reasonably prudent person, Sens is not entitled to relief. Rule 60 (b) (1) requires no undue delay when filing a motion for relief.<sup>43</sup> Defendants acknowledge Sens sought a replacement counsel, but also assert a delay of over a month following the entry of an order

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<sup>39</sup> See e.g., *Delmarva Power & Light Co. v. First S, Util Const., Inc.*, 2007 WL 3105110, at \*2 (Del. Super. Oct. 17, 2007) (denying relief and acknowledging in the event of an emergency the Court is accessible by e-mail).

<sup>40</sup> See e.g., *Day Star Sill, Inc. v Sens Mech., Inc.* C.A. No. S14C-03-023 RFS (Del. Super. March 21, 2014).

<sup>41</sup> See generally, *Critical Sys. LLC v. Dewey Beach Enter.*, C.A. No. S14L-02-034 (Del. Super. April 7, 2014).

<sup>42</sup> *Phillips*, 1999 WL 1225245 at \*3.

<sup>43</sup> *Id.*

granting sanctions is unreasonable.<sup>44</sup> Rule 60 (b) (1) does not mandate a filing deadline for a relief from judgment motion; the standard is instead that the aggrieved party must file it without unreasonable delay.<sup>45</sup> It is helpful to look at filing deadlines for motions for reargument, motions for new trial, and appeals when evaluating whether a movant has filed his motion to vacate default judgment without unreasonable delay.<sup>46</sup>

Looking at the filing deadlines for a motion for new trial, which is ten days, a motion for reargument, which is five days, and the filing deadline for appeals to the Delaware Supreme Court, which is thirty days, Plaintiff has failed them. With this background, Sens was unreasonably late in filing its motion. Thus, Sens has not satisfied this element.<sup>47</sup>

Next, whether a meritorious defense has been raised will be construed by the Court to mean whether Sens has alleged a meritorious Complaint. While Sens' claims may have merit, they are unable to meet the other three elements. Furthermore, Sens' ability to have a meritorious claim is limited based on the current sanctions in place. Sens may not enter any evidence that has not been offered prior to April 16, 2015; oppose the counterclaim; is precluded from

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<sup>44</sup> Def.'s Resp. at ¶ 9–14.

<sup>45</sup> *Id.* at \*4.

<sup>46</sup> *See Schremp*, 405 A.2d at 121.

<sup>47</sup> *See e.g., Hard v. Harvell* 2006 WL 3095947 at \*1 (Del. Super. Oct. 27, 2006) aff'd, 930 A.2d 928 (Del. 2007) (acknowledging a near-month delay is unreasonable when denying relief under Rule 60(b)).

opposing defenses that Sens' sworn release bars Sens' change order claims that predate the release, or that Sens' change order claims were untimely.<sup>48</sup> As such, Plaintiff will not likely be able to satisfy the third element for Rule 60 (b) (1). Even if the sanctions were lifted and Sens presented a meritorious claim, Sens is not entitled to relief under Rule 60 because Sens cannot satisfy all four elements.

Lastly, the Court finds the relief requested by Sens would substantially prejudice Defendants. At this juncture, any additional changes modifying the Scheduling Order would unduly prejudice the Defendants because the pretrial stipulation is due on September 2, 2015.<sup>49</sup> Given the scheduled trial date of October 5, 2015, there is not enough time to re-open discovery or for Defendants to file a Motion for Summary Judgment.<sup>50</sup> Upending the case now would significantly prejudice Defendants and unjustifiably delay resolution of this dispute. This is especially true given the posture of this case and the substantial delay created by the party who initiated the litigation.

Likewise, Plaintiff is not entitled to relief under Rule 60 (b) (6) since extraordinary circumstances have not been shown. As indicated above, relying solely on the advice of counsel under these particular circumstances was unreasonable. The case, initiated by Sens in the first instance, remained idle on the

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<sup>48</sup> *See generally*, Order Granting Defs.' Mot. for Sanctions.

<sup>49</sup> Def.'s Resp. at ¶¶ 10–12.

<sup>50</sup> *Id.*

docket for over a year. Following notice of the Motion to Compel, Sens contacted its former attorney on April 13, 2015.<sup>51</sup> A default judgment had been previously entered against Sens in a companion case.<sup>52</sup> Since Sens was also on notice from Pope,<sup>53</sup> its failure to respond to any of Defendants' notices, letters about these violations, or to comply with court ordered discovery requests, becomes willful.<sup>54</sup> Plaintiff's inaction not to take steps to protect its legal interests disqualifies it from receiving the extraordinary relief available under Rule 60 (b) (6).

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<sup>51</sup> Pl.'s Mot. for Relief. ¶ 11–15.

<sup>52</sup> See, *Critical Sys. LLC v. Dewey Beach Enter.*, C.A. No. S14L-02-034 (Del. Super. April 7, 2014).

<sup>53</sup> Pl.'s Mot. for Relief. ¶ 11–15.

<sup>54</sup> *Phillips*, 1999 WL 1225245 at\*4 (citing *Jewell v. Division of Soc. Serv.*, 401 A.2d 88 (Del. 1979)).

**CONCLUSION**

Considering the foregoing, Plaintiff's Motion to Vacate is **DENIED**.

**IT IS SO ORDERED**

Very Truly Yours,

*/s/ Richard F. Stokes*

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Richard F. Stokes, Judge

cc: Prothonotary