IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PARKWAY GRAVEL, INC., :

a Delaware corporation, : C.A. No. N13C-11-269 CEB

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Plaintiff, :

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V.

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US LUBES, LLC, a foreign

corporation,

:

Defendant. :

Submitted: April 10, 2014 Decided: April 15, 2014

ORDER

Upon Defendant's Motion to Vacate Default Judgment.

Denied.

Jeffrey M. Weiner, Esquire, Wilmington, Delaware; attorney for Plaintiff.

Daniel A. Griffith, Esquire of Whiteford Taylor & Preston, LLC, Wilmington, Delaware; attorney for Defendant.

WITHAM, R.J.

The issue before the Court is whether it should grant Defendant's Motion to Vacate Default Judgment on the grounds of excusable neglect.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Parkway Gravel, Inc. (hereinafter "Plaintiff") seeks to recover damages for breach of a commercial lease agreement between Plaintiff and Defendant US Lubes, LLC (hereinafter "Defendant"). Plaintiff is a Delaware corporation, and Defendant is a foreign corporation with its principal place of business at 725 Skippack Pike, Suite 140 in Blue Bell, Pennsylvania. Under the commercial lease agreement, Plaintiff leased Defendant space at 410 Churchman's Road in New Castle, Delaware for a term of ten years commencing on April 1, 2011 and terminating on September 30, 2021.

On November 25, 2013, Plaintiff filed a complaint alleging that Defendant breached the lease by defaulting on several rent payments, and by completely failing to make any rent payments as of July 1, 2013. Service was effected upon Defendant on or about December 11, 2013 by mailing the notice, summons and complaint to Defendant's Pennsylvania address via certified mail. A "P.George" signed the return receipt card at Defendant's Pennsylvania address. Plaintiff subsequently amended the complaint on December 11 to include an affidavit of service.

Defendant failed to answer Plaintiff's complaint within 20 days after service of process was accomplished.¹ On January 7, 2014, Plaintiff directed the Court to enter default judgment against Defendant. One week later, on January 14, 2014,

¹ See Del. Super. Ct. Civ. R. 12(a) ("defendant shall serve an answer within 20 days of after service of process, complaint and affidavit. . . ."

counsel for Defendant contacted Plaintiff's counsel requesting that the default judgment be vacated. Plaintiff's counsel ultimately denied the request, and Defendant subsequently filed the instant Motion to Vacate pursuant to Superior Court Civil Rule 60(b).

Defendant argues that there is excusable neglect under Civil Rule 60(b) sufficient to justify vacating the default judgment. Defendant contends that its principal, William Packer, Jr. (hereinafter "Packer") was on vacation in the Galapagos from December 20, 2013 through December 30, 2013 for the holidays. Defendant argues that Packer was unaware of Plaintiff's complaint because the complaint was actually addressed to Scott Surrell (hereinafter "Surrell") rather than Packer. Surrell was Defendant's former president, who had left the company in April of 2013. Defendant contends that excusable neglect exists because the 20-day window to respond was during the holidays, and because process was directed to Surrell who was no longer with Defendant. Defendant also points out that Defendant's counsel promptly contacted Plaintiff's counsel seven days after default judgment was entered, approximately 35 days after service of process was accomplished.

Plaintiff argues that Defendant's actions constitute mere neglect, rather than excusable neglect sufficient to vacate the default judgment. Plaintiff contends that Defendant is incorrect that the original complaint was addressed to Surrell, and argues that even if Packer was away from December 20 through December 30, there was still sufficient time from the service of process on or about December 11 for Packer to learn of the complaint. Plaintiff further argues that because Defendant is a foreign corporation that failed to properly qualify under 8 *Del. C.* § 371, Defendant

is barred from defending this action until it has properly qualified to do business in Delaware. Plaintiff purports to rely on *Verizon Delaware, Inc. v. Baldwin Line Construction Co.*² for this argument.

LEGAL STANDARD

A motion to vacate a default judgment is addressed to the "sound discretion" of the Court.³ Civil Rule 60(b) sets forth different grounds for vacating a judgment, including *inter alia* "[m]istake, inadvertence, surprise, or excusable neglect." Any doubts in a Rule 60(b) motion should be resolved in favor of the moving party in order to further Delaware's "strong judicial policy of deciding cases on the merits and giving parties to litigation their day in court." The moving party bears the burden to prove excusable neglect. Specifically, in order for the Court to grant relief on the basis of excusable neglect, the moving party must meet three prongs: (1) excusable neglect in the moving party's conduct that allowed default judgment to be taken; (2) a meritorious defense to the action that would allow a different outcome if the case was heard on the merits; and (3) that substantial prejudice will not result to the non-

² 2004 WL 838610 (Del. Super. Apr. 13, 2004).

³ *Perry v. Wilson*, 2009 WL 1964797, at *1 (Del. Super. July 8, 2009) (citing *Battaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977)).

⁴ Del. Super. Ct. Civ. R. 60(b)(1).

⁵ Watson v. Simmons, 2009 WL 1231145, at *2 (Del. Super. Apr. 30, 2009) (citations omitted).

⁶ Perry, 2009 WL 1964797, at *2.

moving party if the motion is granted.⁷ The moving party must first establish excusable neglect in order for the Court to consider the second and third prongs.⁸ Excusable neglect is defined as "that neglect which might have been the act of a reasonably prudent under the circumstances." "A mere showing of negligence or carelessness without a valid reason may be deemed insufficient." ¹⁰

DISCUSSION

Plaintiff's unqualified foreign corporation argument

Before undertaking the excusable neglect analysis, the Court shall first address Plaintiff's opposition, yet not argued before the Court, that because Defendant is an unqualified foreign corporation, Defendant is barred from defending this action until it properly qualifies to do business in Delaware.

Plaintiff is correct that 8 *Del. C.* § 371 sets forth various requirements a foreign (*i.e.*, non-Delaware) corporation must meet in order to qualify to do business in Delaware. However, 8 *Del. C.* § 383(b) specifically provides:

[t]he failure of a foreign corporation to obtain authority to do business in this state shall not impair the validity of any contract

⁷ Emory Hill and Co. v. Mrfruz LLC, 2013 WL 5347519, at *3 (Del. Super. Sept. 24, 2013) (citing Verizon Delaware, 2004 WL 838610, at *1).

⁸ *Id.* (citing *Lee v. Charter Commc'ns VI, LLC*, 2008 WL 73720, at *1 (Del. Super. Jan. 7, 2008)).

⁹ Watson, 2009 WL 1231145, at *2 (citing Battaglia, 379 A.2d at 1135).

¹⁰ Id. (citing Cohen v. Brandywine Raceway Assoc., 238 A.2d 320, 325 (Del. Super. 1968)).

¹¹ 8 *Del. C.* § 371(b)(1)-(2).

or act of the foreign corporation or the right of any other party to the contract to maintain any action or special proceeding thereon, and *shall not prevent the foreign corporation from defending any* action or special proceeding in this State. 12

Based on this statutory language, it is ultimately irrelevant to Defendant's ability to defend this action whether or not Defendant has properly qualified to do business in Delaware. Defendant may still defend this action despite its failure to properly qualify. Plaintiff's argument is wholly without merit.

Plaintiff relies on the Superior Court's decision in *Verizon Delaware* in support of this argument. This case is not helpful. In *Verizon Delaware*, the plaintiff attempted to effect service upon the defendant by serving the defendant's registered agent, who happened to be a Maryland attorney.¹³ The registered agent also happened to have passed away nearly two years prior to the plaintiff's attempt to effect service, and the defendant's president did not have notice of the complaint until over a year after the complaint was filed.¹⁴ The Superior Court found that the defendant's failure to appoint a new registered agent after its original registered agent had passed away "cannot be deemed excusable under the circumstances" and denied defendant's motion to vacate.¹⁵ The Court found that the plaintiff had acted reasonably because the deceased attorney was the registered agent of record at the time the complaint was

¹² 8 *Del. C.* § 383(b) (emphasis added).

¹³ 2004 WL 838610, at *1.

¹⁴ *Id*.

¹⁵ *Id.* at *2.

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Verizon Delaware concerns the excusable neglect inquiry in the context of a foreign corporation with an invalid registered agent of record. The Court fails to see how this case is in any way relevant to or supportive of Plaintiff's argument that Defendant is barred from defending this action due to its failure to properly qualify under § 371. While on the subject, the Court notes that Verizon Delaware is inapposite based on the facts of this case. Plaintiff served Defendant via certified mail to Defendant's principal place of business in Pennsylvania-not by attempting to serve a deceased registered agent in another state. Defendant is not arguing that the signer for the complaint, "P.George," was somehow incompetent to be served. Defendant contends that the original complaint was addressed to its former president, Scott Surrell, and thus Packer had no knowledge of it. This is not accurate—the complaint was never addressed to Surrell; notice of service was addressed to Defendant by its corporate name at its Pennsylvania address. What Defendant may be referring to is the demand notice attached to the original complaint dated October 30, 2013 which is addressed to Surrell. However, this notice does not affect whether service of the complaint itself was effective; it also precedes the amended complaint that accounts for service.

As Defendant's argument regarding Surrell is inaccurate, and the facts of this case are otherwise distinct, *Verizon Delaware* does not apply to this case. This argument must be rejected.

¹⁶ *Id*.

Excusable neglect

Turning now to the relevant inquiry under Rule 60(b)(1), there is no need to address the meritorious defense and substantial prejudice prongs because Defendant cannot establish excusable neglect. Setting aside Defendant's inaccurate argument regarding Surrell, Defendant's basis for excusable neglect appears to simply consist of: (1) that Plaintiff served the complaint during the holidays; (2) Packer was on vacation in the Galapagos when the complaint was served; and (3) the delay was not particularly egregious. The fact that it was the holiday season when Plaintiff served the complaint is irrelevant; the complaint was not actually served on a holiday. That the delay was not particularly egregious is also not relevant to the excusable neglect inquiry. The brunt of Defendant's argument rests on its contention that Packer was on vacation when the complaint was served.

Resolving any doubts in favor of the moving party, this Court shall assume that Packer had no knowledge of the complaint while he was away in the Galapagos. However, it is not accurate to state that Packer was away when the complaint was served. Service of process was effected on or about December 11, 2013; Packer was not on vacation until *December 20*. Defendant has provided no explanation as to why or how Packer was not aware of the complaint during this time span between service of process and his departure for the Galapagos. Further, Defendant has also failed to explain why, even if Packer was away during the 20-day window to file an answer, that someone else at Defendant could not have contacted Packer or otherwise consulted with an attorney. This Court has found that a defendant's failure to seek legal representation upon service of the complaint does not amount to excusable

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Defendant's argument assumes without explaining that Packer's knowledge

and review of the complaint was somehow necessary before Defendant could take any

steps to answer the complaint. Even if Packer's review of the complaint was

necessary before an answer could have been filed, Defendant has not established that

Packer's failure to take any action in the time between receiving the complaint and

Packer's departure for vacation was the result of excusable neglect. All that

Defendant can show is that it was close to the holidays when Plaintiff filed the

complaint and Defendant's principal chose to go on vacation during this time, days

after service of process was already accomplished. This is not a valid reason for any

delay-the mere neglect alleged here by Defendant does not amount to excusable

neglect.

CONCLUSION

Defendant has failed to establish excusable neglect. Accordingly, Defendant's

Motion to Vacate Default Judgment is **DENIED.**

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Kent County Resident Judge

WLW/dmh

¹⁷ Murzyn v. Locke, 2006 WL 1195628, at *2 (Del. Super. Mar. 16, 2006).

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