



IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTIANA MALL, LLC :
 :
 : No. 552, 2013
 :
 Appellant, :
 Defendant Below, : APPEAL FROM THE OPINION AND
 : ORDER OF THE SUPERIOR COURT
 : OF THE STATE OF DELAWARE IN
 v. : AND FOR NEW CASTLE COUNTY
 : DATED SEPTEMBER 24, 2013
 : DENYING DEFENDANT CHRISTIANA
 EMORY HILL AND COMPANY, : MALL, LLC'S MOTION TO VACATE
 : DEFAULT JUDGMENT IN CIVIL
 : ACTION NO.: N12L-10-021 JRJ
 Appellee, :
 Plaintiff Below. :
 :

**CHRISTIANA MALL, LLC'S REPLY BRIEF AS APPELLANT AND
ANSWERING BRIEF AS CROSS APPELLEE**

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SUMMARY OF ARGUMENT ON THE CROSS APPEAL

1. Denied. The Superior Court did not abuse its discretion when it held that Christiana's failure to file a timely answer to the Complaint was the result of excusable neglect.

2. Denied. The Superior Court did not abuse its discretion when it held that Christiana had shown that it had meritorious defenses to Emory Hill's *quantum meruit* claim.

3. Denied. The Superior Court did not commit legal error when it held that Christiana's failure to file a timely answer to the Complaint was the result of excusable neglect.

STATEMENT OF FACTS

Christiana will rely on the Statement of Facts section of its *Opening Brief of Appellant, Defendant Below, Christiana Mall, LLC*.

ARGUMENT

I. **CHRISTIANA'S FAILURE TO FILE A TIMELY ANSWER TO THE COMPLAINT DID NOT IMPAIR EMORY HILL'S ABILITY TO FULLY LITIGATE ITS MECHANIC'S LIEN CLAIM.**

Emory Hill relies on *Hritz v. Woma Corp.*, 732 F.2d 1178 (3d Cir. 1984) and *Williams v. Delcollo Electric, Inc.*, 576 A.2d 683 (Del. Super. 1989) to support the Superior Court's holding that by failing to file a timely answer to the complaint, Christiana deprived Emory Hill of the ability to litigate the merits of its mechanic's lien claim. Neither *Hritz* nor *Williams* support this holding by the Superior Court.

In *Hritz* the U.S. District Court refused to vacate a default judgment entered against the distributor of mining equipment that malfunctioned and caused damage to the plaintiffs. The plaintiffs' counsel attempted to identify the manufacturer of the equipment by writing to the distributor and informing it about plaintiffs' injuries more than fifteen (15) months before the expiration of the statute of limitations. The distributor could have identified the manufacturer from its files covering the sale of the equipment. However, the distributor failed to respond to plaintiffs' counsel.

One day before the statute of limitations expired, plaintiffs sued the distributor for the damages sustained by the malfunctioning equipment. The distributor did not respond to the complaint, nor did it respond to a petition for

entry of a default judgment, or to a notice that a default judgment had been entered and that a damages hearing would be held. Following the damages hearing, the District Court entered a money judgment against the distributor for the damages proved by plaintiffs as being proximately caused by the faulty equipment.

More than four (4) months after the default judgment was entered, the distributor filed a motion to vacate the default. The plaintiffs learned from the motion the identity of the manufacturer of the equipment who was also the distributor's parent company. The manufacturer had not been joined in the action, and by then it could not be joined because the limitations period had expired.

In its discussion of the prejudice factor of the Rule 60 (b) test, the Court of Appeals held that the distributor's persistent failure to disclose its role in the sale of the equipment created a time bar to plaintiffs proceeding against the manufacturer. This failure was "part of a pattern that threatens plaintiffs with the gravest prejudice: having their claim barred completely by the statute of limitations." *Id.* at 1182.

The situation in *Williams* is analytically the same as that in *Hritz*. In *Williams*, the plaintiff was prevented from identifying and joining all potentially liable parties as defendants in her personal injury action before the limitations period expired due to the defendant's default. Like in *Hritz* the key to the Court's holding in *Williams* was that the defaulting defendant's failure to participate in the

matter prevented the plaintiff from identifying and joining an otherwise unknowable party before the statute of limitations on plaintiff's claims against that party expired.

Unlike the situation in *Hritz* and *Williams*, Christiana's failure to file a timely answer to the complaint did not prevent Emory Hill from identifying any party, or learning any facts, that were critical to perfecting its lien claim before the deadline to amend had expired. Emory Hill was always fully capable of protecting its lien claim by following the requirements of the mechanic's lien statute as interpreted by the controlling case law. It is well settled in Delaware that the right to maintain a mechanic's lien is in derogation of the common law, and therefore the mechanic's lien statute must be strictly construed. *Builders' Choice, Inc. v. Venzon*, 1995 WL 264593 (Del. Super.) *aff'd* 672 A.2d 1 (Del. 1995). Emory Hill stood to lose its lien rights if the default were vacated because its filing failed to meet the legal requirements necessary to implement a lien. Christiana was in no way responsible for this failure, nor did Christiana do anything to prevent Emory Hill from identifying and correcting the defects in its filing before the time to amend had expired. Thus, the Superior Court's finding that Christiana's failure to timely answer the complaint deprived Emory Hill of the ability to protect its interest so as to justify denying Christiana's application for relief from the default judgment was a misapprehension of the law. The Court's Order denying

Christiana's motion to vacate the default judgment should therefore be reversed.

Pitts v White, 109 A.2d 786, 788 (Del. 1954).

II. ALL OF CHRISTIANA'S DEFENSES TO EMORY HILL'S STATEMENT OF CLAIM FOR MECHANIC'S LIEN WERE LEGAL DEFENSES THAT WERE NOT REQUIRED TO BE DETAILED IN A TIMELY ANSWER OR IN AN AFFIDAVIT OF DEFENSE.

The meritorious defenses to Emory Hill's mechanic's lien cited by Christiana in support of the motion to vacate were: failure to state a commencement date for the furnishing of labor and materials as required by 25 *Del.C.* § 2712 (b)(5); failure to identify the owner of the structure as required by 25 *Del.C.* § 2712 (b)(2); failure to properly identify the location of the structure to be liened as required by 25 *Del.C.* § 2712 (b)(7); failure to supply a proper affidavit as required by 25 *Del.C.* § 2712 (c); failure to state with whom Emory Hill contracted to furnish the labor and materials which were the subject of the lien as required by 25 *Del.C.* § 2712 (b)(3); and failure to satisfy the requirements of 25 *Del.C.* § 2725 (a).

These are all legal defenses. The Superior Court Rules of Civil Procedure nowhere provide that any of these defenses are waived unless included in an answer or other responsive pleading. As was argued in its Opening Brief, Christiana could have raised any of these defenses for the first time in a motion for summary judgment filed after the deadline for Emory Hill to amend its lien filing had passed. Likewise there is no statute, rule or other authority which states that *all* of the defendant's legal defenses to a mechanic's lien claim must be set forth in detail in the affidavit of defense required by 25 *Del.C.* § 2716.

The purpose of the affidavit of defense is to make a *prima facie* showing that the defendant has some meritorious defense to the plaintiff's claims so that the Court can avoid spending time on matters where no legitimate defense can be shown. *See Miller v. Master Home Builders, Inc.*, 239 A.2d 696, 698 (Del. Super. 1968) citing *Woolley On Delaware Practice*, Vol. I § 244. There is no requirement that Christiana list in detail in its affidavit of defense all of the legal defenses that may later prove fatal to Emory Hill's lien claim in order to avoid entry of a default judgment under 25 *Del.C.* § 2716. A *prima facie* showing that there is a legitimate dispute between the parties is all that is required.

The Superior Court's holding that opening the default judgment against Christiana would result in substantial prejudice to Emory Hill was based on a misapplication of *Super. Ct. Civ. R. 12 (a)* and 25 *Del.C.* § 2716. The Court's Order denying Christiana's motion to vacate the default judgment should therefore be reversed.

III. THE SUPERIOR COURT'S FINDING OF EXCUSABLE NEGLIGENCE WAS NOT AN ABUSE OF DISCRETION.

1. Question Presented

Whether the Superior Court abused its discretion when it held that Christiana's failure to file a timely answer to the complaint was excusable neglect under Super. Ct. Civ. R. 60 (b). This question was preserved below by way of *Defendant Christiana Mall, LLC's Motion to Vacate Default Judgment [B151-B247]*¹ and *Christiana Mall, LLC's Reply to Plaintiff's Supplemental Response to Christiana Mall LLC's Motion to Vacate. [A24-A36]*

2. Scope of Review

Motions to open a default judgment and allow a defendant to appear and defend are addressed to the sound discretion of the trial court. *See Kaiser-Frazier Corp. v. Eaton*, 101 A.2d 345 (Del. 1953). When asked to review a discretionary ruling of the trial court, this Court's scope of review is to determine whether the trial court committed an abuse of discretion. *See Berger v. Pubco Corporation*, 976 A.2d 132, 139 (Del. 2009). When an act of judicial discretion is under review, the reviewing court may not substitute its own notions of what is right for those of the trial judge, if her judgment was based upon conscience and reason, as opposed to capriciousness and arbitrariness. *Mahani v. Edix Media Group, Inc.*, 935 A.2d

¹ Reference to [B__] are to the Appendix to Appellee's Answering Brief on Appeal and Cross Appellant's Opening Brief on Cross Appeal of Emory Hill and Company.

242, 245 (Del. 2007). A trial court abuses its discretion when it exceeds the bounds of reason in light of the circumstances or when it ignores rules of law or practice in a manner that creates injustice. *Schultz v. Ginsburg*, 965 A.2d 661, 666-67 (Del. 2009).

3. **Merits of the Argument**

Emory Hill argues that the Superior Court abused its discretion when it found excusable neglect because the Court failed to analyze whether it was reasonable for Christiana to rely on Mr. Shafkowitz to protect its interest in the mechanic's lien action. Emory Hill is incorrect. By any fair measure, the Superior Court conducted a thorough analysis of Christiana's reliance on Mr. Shafkowitz, and correctly concluded that Christiana's default was the result of excusable neglect.

Christiana's argument below on the excusable neglect factor of the Rule 60 (b) (1) test was that its tenant had agreed in writing to honor a contractual indemnity and Mr. Shafkowitz, the tenant's counsel, made representations to Christiana that caused it to believe that the matter was being properly addressed. The facts and legal issues surrounding these arguments were fully covered in two rounds of briefing and two rounds of oral argument. The interplay between Christiana, the tenant, and Mr. Shafkowitz was fully set out in two affidavits prepared by the only representative of Christiana that dealt directly with the tenant

and Mr. Shafkowitz about the Superior Court action. The second of these affidavits was ordered by the Superior Court to specifically address events surrounding Mr. Shafkowitz's failure to respond to an e-mail from Christiana dated December 11, 2012 requesting an update on the matter. The Court's analysis is plainly reflected in the September 24 Order denying Christiana's motion to vacate the default judgment.

In the September 24th Order the Court held:

“Christiana did not engage or consult with its own counsel upon receipt of the Complaint because it relied on Mrfruz's obligation to defend and indemnify Christiana. Francone believed, based on that obligation and Shafkowitz's November 27, 2012 email that Mrfruz was engaged in good faith negotiations with Emory Hill and that both Christiana and Mrfruz had an extension of time to answer. The question becomes, then, was it reasonable for Francone to rely on Shafkowitz's assurances, especially after Shafkowitz failed to respond to Francone's December 11, 2012 email?” (p. 10)

The Court went on to also consider: (i) that Christiana did not engage its own counsel after Mr. Shafkowitz failed to respond to the December 11 request for an update; (ii) that Christiana's representative went on vacation without knowing the length of the extension of the answer, and without knowing whether Emory Hill was aware that Mr. Shafkowitz was representing Christiana's interest; and (iii) that for 2 ½ months after Christiana was required to answer the complaint it was only minimally involved in resolving the dispute.

The Superior Court also directly considered Emory Hill's argument that the Court does not look favorably on parties that do not engage legal counsel when served with a complaint, or on parties that fail to follow up to be sure that their legal rights are being protected.

In the end, and following the rule that doubts about excusable neglect are resolved in favor of the movant, the Court found that Christiana's default was the result of excusable neglect. The Court held:

"Here, Christiana's failures were ultimately based upon Mrfruz's agreement to defend and Shafkowitz's representations...the Court finds that Christiana's neglect was excusable." (p. 12)

The Superior Court's finding that the default judgment was entered against Christiana as a result of excusable neglect was based upon conscience and reason, as opposed to capriciousness and arbitrariness and should not be disturbed.

IV. THE SUPERIOR COURT’S FINDING THAT CHRISTIANA HAD MERITORIOUS DEFENSES TO EMORY HILL’S *QUANTUM MERUIT* CLAIM WAS NOT AN ABUSE OF DISCRETION.

1. **Question Presented**

Whether the Superior Court abused its discretion when it held that Christiana had shown that it had a meritorious defense to Emory Hill’s *quantum meruit* claim under Super. Ct. Civ. R. 60 (b). This question was preserved below by way of *Defendant Christiana Mall, LLC’s Motion to Vacate Default Judgment [B151-B247]* and *Christiana Mall, LLC’s Reply to Plaintiff’s Supplemental Response to Christiana Mall LLC’s Motion to Vacate. [A24-A36]*

2. **Scope of Review**

The applicable scope of review is the same as that set forth in Argument III above.

3. **Merits of the Argument**

Emory Hill argues that the Superior Court abused its discretion by considering Christiana’s argument that Emory Hill had not shown a reasonable expectation that Christiana would pay for the fit out work performed for Fruz. According to Emory Hill, the expectation of payment argument was waived by Christiana because it was first raised in *Christiana Mall LLC’s Reply to Plaintiff’s Supplemental Response to Christiana Mall LLC’s Motion to Vacate* (“Reply”)

[B364-B376]. Emory Hill complains that it was “sand bagged” by Christiana because it claims it was unable to respond to the arguments made in the Reply.

Christiana did not “sand bag” Emory Hill on its presentation of its *quantum meruit* defenses. The Reply was the first and only filing made after the Court requested supplementation of Christiana’s *quantum meruit* defenses argument. In the motion to vacate, Christiana offered defenses on the unjust enrichment claim only on the theory that *quantum meruit* is founded on a claim of unjust enrichment and the defenses to both claims are the same. The Superior Court was not satisfied with that approach and ordered supplementation. [B318-B323]

In the Reply, Christiana offered a more thorough analysis of its defenses to Emory Hill’s *quantum meruit* claim. Among the defenses offered was that Emory Hill could not show a reasonable expectation that Christiana would pay it for the fit out work performed for Fruz. Also, Christiana needed to address the reasonable expectation of payment requirement in the Reply because Emory Hill identified this as an element of a *quantum meruit* claim in its *Response to Motion to Vacate Default Judgment* (“Response”) at p. 11, paragraph 23. [B262]

In addition, contrary to its claim in the *Questions Presented* section of Argument IV, page 40 of Emory Hill’s Answering Brief, the sand bag issue was not raised below. Emory Hill cites the Response [B261-B264] as the place on the record wherein the sand bag issue was preserved. However, later in its

Answering Brief Emory Hill complains that it was sand bagged because Christiana first raised the reasonable expectation of payment argument in the Reply which was filed over six weeks after Emory Hill's Response. [Answering Brief p. 40-42]

Moreover, Emory Hill had an opportunity to notify the Superior Court if it felt it had been sand bagged at anytime between June 28 when the Reply was filed, and September 24 when the Court issued its Order, including, in particular, at the oral argument held on August 21, 2013. [B378-B404] Emory Hill failed to do so.

The Superior Court's holding that Christiana had shown meritorious defenses to Emory Hill's *quantum meruit* claim so as to satisfy the requirements of Rule 60 (b) was based upon conscience and reason, as opposed to capriciousness and arbitrariness and should not be disturbed.

V. THE SUPERIOR COURT DID NOT COMMIT LEGAL ERROR IN ITS EXCUSABLE NEGLIGENCE ANALYSIS.

1. **Question Presented**

Whether the Superior Court committed legal error when it decided that Christiana's default was the result of excusable neglect. This question was preserved below by way of *Defendant Christiana Mall, LLC's Motion to Vacate Default Judgment* [B151-B247] and the Reply. [A24-A36]

2. **Scope of Review**

Christiana agrees that this Court conducts a *de novo* review of questions of law. *State v. Kelly*, 947 A.2d 1123 (Table), 2008 WL 187945 (Del.). Christiana disagrees however that the argument as framed by Emory Hill in section V of its Answering Brief presents a question of law. Motions to open a default judgment and allow a defendant to appear and defend are addressed to the sound discretion of the trial court. *See Kaiser-Frazier Corp. v. Eaton*, 101 A.2d 345 (Del. 1953). When asked to review a discretionary ruling of the trial court, this Court's scope of review is to determine whether the trial court committed an abuse of discretion. *See Berger v. Pubco Corporation*, 976 A.2d 132, 139 (Del. 2009).

3. Merits of the Argument

Emory Hill argues that the Superior Court committed legal error because it found excusable neglect without considering the “fact” that Fruz made no effort to defend Christiana below.

This argument is a remake of Emory Hill’s earlier argument that the Superior Court abused its discretion when it found that Christiana’s reliance on Mr. Shafkowitz was excusable neglect. Fruz engaged Mr. Shafkowitz pursuant to the indemnity. Mr. Shafkowitz represented to Christiana that he had negotiated an extension of the answer due date for Christiana while he worked on resolving the matter with Emory Hill and that he would keep Christiana posted going forward.

As it turned out, Christiana should not have relied on Mr. Shafkowitz but that did not become apparent until after the default was entered. Once Christiana realized that Mr. Shafkowitz was unreliable, it immediately engaged counsel to represent it in the matter. The Superior Court held that Christiana should not have relied solely on Mr. Shafkowitz but its neglect was excusable under all of the surrounding circumstance. That decision was not an abuse of discretion by the Superior Court, nor was it an error of law.

Emory Hill relies on *Watson v. Simmons*, 2009 WL 1231145 (Del. Super.) and *A Child’s Dream, Inc., v. Mills*, 765 A.2d 950 (Del. 2000). Neither case supports Emory Hill’s argument. In *Watson*, key facts were that there was no

ongoing extension of time to answer, and that the defaulting defendant's insurance representative did not contact counsel or send the complaint to counsel until after the default had been entered. The Court refused to find that the insurer's neglect was excusable under the circumstances. Here Fruz contacted counsel who immediately obtained copies of all of the filings in the action. As the Superior Court correctly held, Christiana's neglect was believing Mr. Shafkowitz's representations that Christiana had an extension of time to answer and he would keep Christiana posted if anything changed.

A Child's Dream is also distinguishable on its facts. In *A Child's Dream*, this Court held that trial court can consider the conduct of the defaulting defendant's insurance company when ruling on a Rule 60 (b) motion. This Court noted that the trial court asked to hear evidence of what the insurer had done after receiving the complaint, but the defendant presented nothing. *Id.* at 950. There is nothing in *A Child's Dream* however which suggests that failure to look at the indemnitor's conduct in ruling on a Rule 60 (b) motion is either an abuse of discretion or an error of law. As was argued earlier, the Superior Court in this case carefully analyzed the interplay between Christiana's representatives, Fruz and Mr. Shafkowitz and decided that Christiana's default was the result of excusable neglect.

The Superior Court's finding that the default judgment was entered against Christiana as a result of excusable neglect was correct as a matter of law and was based upon conscience and reason, as opposed to capriciousness and arbitrariness and should not be disturbed.

CONCLUSION

For the foregoing reasons, the Superior Court's denial of Christiana Mall, LLC's Motion to Vacate Default Judgment should be reversed.

Respectfully submitted,

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