

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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**Re: Richard Thompson v. Colonial Court Apartments, LLC
C.A. No. 05C-09-126 RRC**

Submitted: October 10, 2006

Decided: November 1, 2006

Upon Defendant's Motion to Vacate Default Judgment.

DENIED.

Dear Counsel:

Before the Court is a motion filed by Defendant Colonial Court Apartments, LLC ("Defendant") to vacate the default judgment that this Court entered in favor of Plaintiff on January 24, 2006. The issue is whether Defendant, who failed to respond to Plaintiff's complaint after being

properly served by personal service on a representative of Defendant's registered agent, is entitled to reopen the default judgment pursuant to Superior Court Civil Rule 60(b)(1). Because the Court finds that Defendant's failure to timely respond to the complaint was not due to excusable neglect, Defendant's motion is **DENIED**.

I. FACTS AND PROCEDURAL HISTORY

On September 15, 2005, Plaintiff filed a complaint in this Court seeking damages stemming from a slip and fall that occurred in Defendant's parking lot on February 4, 2004. Service of process was made by personal service on a representative of Defendant's registered agent, Corporation Maintenance & Service Co., on September 27, 2005. The record does not indicate what the registered agent did with that notice.

Defendant's insurance carrier, Nationwide Insurance Company ("Nationwide"), had been negotiating with Plaintiff's attorney throughout 2004 and 2005. However, Nationwide asserts that it had no actual knowledge of service of process of the lawsuit until April 11, 2006.

Defendant did not file an answer to the complaint and subsequently this Court granted Plaintiff's motion for a default judgment pursuant to Superior Court Civil Rule 55(b)(2) on January 24, 2006. Plaintiff sent Defendant notice of the default judgment hearing by a certified letter addressed to Defendant's business address of 1401 Maryland Avenue, Wilmington, Delaware. Following the entry of default judgment, this Court copied Defendant on a letter to Plaintiff's counsel with notice of the date and time for the inquisition hearing. The Court's letter was also sent to the Defendant at the 1401 Maryland Avenue address. No one appeared at the inquisition hearing on behalf of Defendant and the Court entered an inquisition award of \$35,000 in favor of Plaintiff.

The record does not reveal how Defendant learned of the lawsuit, but Defendant filed this motion to vacate default judgment on May 26, 2006. Subsequently, Defendant supplemented its motion with an affidavit of Namik Marke. The affidavit states in pertinent part:

1. I was the owner of Colonial Court Apartments, LLC from 2001 through October 1, 2004.
2. Colonial Court Apartments, LLC was formed in conjunction with the purchase of Colonial Court Apartments. The Physical [sic] location of Colonial Court Apartments is located at 1401 Maryland Avenue, Wilmington, Delaware.

3. In or about October 1, 2004, the property located at 1401 Maryland Avenue was sold to Mr. Winton Feigum, at which time Colonial Court Apartments, LLC's ownership interest in a property known as Colonial Court Apartments ceased to exist. Prior to the property's sale in October 2004, Colonial Court Apartments, LLC maintained two employees, Lindsay Richardson, and a maintenance supervisor. After the sale of the property, no employees of Colonial Court Apartments, LLC continued to work at the 1401 Maryland Avenue address.

4. Neither I, nor any employees of Colonial Court Apartments, LLC have had notice of the instant suit filed by Richard Thompson until after being notified that a Default Judgment had been taken against Colonial Court Apartments, LLC in this matter.

Defendant made no request for further discovery on this motion despite the Court's invitation to do so.

II. PARTIES' CONTENTIONS

Defendant claims that it had no notice of the default judgment until after the inquisition hearing. According to the affidavit Defendant submitted, Defendant sold its ownership interest in the property where Plaintiff fell, known as Colonial Court Apartments, in October 2004, after Plaintiff fell but before the complaint was filed. Moreover, Defendant asserts that it ceased to do business at the time of the sale. However, Defendant concedes that in the winding up of its affairs, it neglected to terminate the authority of its registered agent. Despite this oversight, Defendant argues that its failure to respond to the complaint was due to excusable neglect.

In response, Plaintiff contends that service of process was properly made on a representative of Defendant's registered agent and that Defendant, either itself or through its agents or employees, "simply ignored proper notification." Additionally, Plaintiff argues that he will be "substantially prejudiced" if the Court were to grant the present motion. Therefore, Plaintiff claims that Defendant cannot obtain relief at this point.

III. DISCUSSION

A motion to vacate a default judgment pursuant to Superior Court Civil Rule 60(b)(1) "is addressed to the sound discretion of the Trial

Court.”¹ Courts view such motions favorably because they promote Delaware’s strong judicial policy of deciding cases on the merits.² Although Rule 60(b) should be construed liberally, a party moving to vacate a default judgment still must satisfy three elements before a motion under that rule will be granted: “(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 its merits; and (3) a showing that substantial prejudice will not be suffered by the plaintiff if the motion is granted.”³

The Court should only consider the second two elements of the three pronged test “if a satisfactory explanation has been established for failing to answer the complaint, e.g. excusable neglect or inadvertence.”⁴ “Excusable neglect” has been defined as “that neglect which might have been the act of a reasonably prudent person under the circumstances.”⁵ Therefore, this Court must first determine whether Defendant’s failure to answer Plaintiff’s complaint, after Plaintiff properly served Defendant’s registered agent, was due to excusable neglect.

Every Delaware limited liability company must maintain a registered agent in the state under the Delaware Limited Liability Company Act.⁶ In addition, the process to change a registered agent is clearly prescribed.⁷ Here, Plaintiff served the complaint on a representative of Defendant’s registered agent on September 27, 2005. Although Defendant may have been in the process of winding up its business, Defendant concedes that it did not revoke the authority of its registered agent and that Plaintiff properly served the registered agent. The Court does not consider Defendant’s admitted neglect in terminating the authority of the registered agent “the act of a reasonably prudent person under the circumstances.”⁸

Plaintiff also served Defendant at its 1401 Maryland Avenue address by certified mail, return receipt requested, with notice of the motion for

¹ *Battaglia v. Wilmington Sav. Fund Soc’y*, 379 A.2d 1132, 1135 (Del. 1977).

² *Verizon Delaware, Inc. v. Baldwin Line Constr. Co.*, 2004 WL 838610 (Del. Super.).

³ *Id.*

⁴ *Apt. Cmty. Corp. v. Martinelli*, 859 A.2d 67, 72 (Del. 2004).

⁵ *Battaglia*, 379 A.2d at 1135 n. 4.

⁶ 6 *Del. C.* § 18-104.

⁷ *Id.*

⁸ *See Verizon Delaware, Inc.*, 2004 WL 838610, at *2 (denying the defendant’s motion to vacate a default judgment because its “failure to satisfy its obligation to maintain a valid registered agent cannot be deemed excusable under the circumstances”).

default judgment. In addition, this Court copied Defendant at the same address on a letter to Plaintiff's counsel with notice of the March 22, 2006 inquisition hearing. Nevertheless, it was not until six months after the default judgment was entered and three months after the inquisition hearing that Defendant attempted to vacate the judgment.⁹ The record on which this motion is decided is not as complete as it could be; however, Defendant declined the Court's offer to undertake further discovery if it wished. The one affidavit Defendant did provide does not establish that Defendant's neglect was excusable. Defendant, therefore, has not met its burden.¹⁰ Because Defendant cannot satisfy the first of the three pronged burden under Rule 60(b)(1), the Court need not consider the second two prongs.

IV. CONCLUSION

For the above reasons, Defendant's motion to vacate default judgment is **DENIED**.

IT IS SO ORDERED.

oc: Prothonotary

⁹ See *Cummings v. Jimmy's Grille, Inc.*, 2000 WL 1211167, at *3 (Del. Super.) (denying defendant's motion to reargue the Court's order which had denied defendant's motion to open a default judgment because defendant "got involved too late").

¹⁰ See *Martinelli*, 859 A.2d at 72 (stating that the defendant did not produce enough evidence in support of its motion to vacate default judgment to meet its burden of proving excusable neglect).