



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

OPENING BRIEF OF APPELLANT, DEFENDANT BELOW,
CHRISTIANA MALL, LLC

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NATURE OF PROCEEDINGS

This case is an appeal from a decision of the Superior Court of the State of Delaware in and for New Castle County dated September 24, 2013 denying Defendant Below-Appellant, Christiana Mall, LLC's motion to vacate a default judgment.

The Complaint on which the default judgment was entered was filed on October 17, 2012. By way of its Complaint, Emory Hill and Company sought to impose a mechanic's lien on a portion of the Christiana Mall to recover for labor and materials allegedly supplied to construct a self service frozen yogurt stand for the tenant leasing Mall rental suite 1135. Emory Hill and Company also alleged in its Complaint that Christiana Mall, LLC was liable for the labor and materials allegedly supplied under *quantum meruit*, *quantum valebant*, and unjust enrichment theories.

Christiana Mall, LLC was properly served, but due to what the Superior Court deemed to be excusable neglect, it failed to file a timely answer to the Complaint. The default judgment was directed by Emory Hill and Company on January 30, 2013 pursuant to Super. Ct. Civ. R.

55(b). On April 26, 2013, Christiana Mall, LLC filed its motion to vacate the default judgment under Super. Ct. Civ. R. 60 (b) (1) on the grounds that the judgment was entered as a result of excusable neglect, and under Rule 60 (b) (4) on the grounds that the judgment was void as a matter of law. Following briefing and oral argument, on September 24, 2013 the Superior Court entered an Order denying the motion to vacate the default judgment. On October 11, 2013, Christiana Mall, LLC filed in this Court a Notice of Appeal of the Superior Court's Order. This is Christiana Mall, LLC's Opening Brief in support of its appeal.

SUMMARY OF ARGUMENT

1. The Superior Court abused its discretion when it denied Christiana Mall, LLC's motion for relief from the default judgment because granting relief would not result in substantial prejudice to Emory Hill and Company.

2. The Superior Court's finding of substantial prejudice is premised on the misinterpretation of Super. Ct. Civ. R. 12 (a), and 25 *Del.C.*

§ 2716, in that the Court incorrectly concluded that a timely answer to the Complaint and affidavit of defense would have identified the defects in its mechanic's lien filing so that Emory Hill and Company could have amended its filing to correct the defects before the deadline to amend had passed.

STATEMENT OF FACTS¹

Defendant Below-Appellant, Christiana Mall, LLC (“Christiana”) owns and operates a portion of the Christiana Mall located in Newark, Delaware (“Mall”). Plaintiff Below-Appellee/Cross Appellant, Emory Hill and Company (“Emory Hill”) is a building contractor.

On October 17, 2012, Emory Hill filed a Complaint and Statement of Mechanic’s Lien (“Complaint”) in the Superior Court of the State of Delaware in and for New Castle County. By way of the Complaint, Emory Hill sought, among other things, to impose a mechanic’s lien on the Mall to recover for labor and materials allegedly furnished to Christiana’s co-defendant below MRFRUZ, LLC (“Fruz”) for the construction of a self service frozen yogurt stand in Mall rental suite 1135. [A1-A8] [A9]

Emory Hill alleged in the Complaint that it supplied the labor and materials pursuant to a written agreement between April 16, 2012 and August 8, 2012. Emory Hill further alleged that final payment for the labor and materials allegedly supplied was due from Fruz on September

¹ References to “[A _]” are to the Appendix to Opening Brief of Appellant, Defendant Below Christiana Mall, LLC.

30, 2012. Thus, the deadline for Emory Hill's mechanic's lien filing pursuant to 25 Del. C. §2711 (b) was 120 days after September 30, 2012, or January 28, 2013.

Christiana was served with the Complaint through its registered agent in Delaware on November 7, 2012. On November 8, 2012, Christiana received a copy of the Complaint from its registered agent in Delaware at Christiana's offices at 110 Wacker Drive, Chicago, Illinois. [A10] The complaint was immediately sent to Christiana's managing agent's office also on Wacker Drive in Chicago.

On November 9, 2012, Christiana's agent sent a copy of the Complaint to Christiana's tenant at Mall rental suite 1135, MRF Atlantic, LLC ("MRF")² along with a demand that MRF defend and indemnify Christiana and the Mall in the action in accordance with the requirements of the written lease covering rental suite 1135. [A11-A12]

On November 14, 2012, MRF accepted defense of the matter by signing and returning to Christiana's agent the November 9 notice and demand letter. [A11-A12]

² Fruz was not Christiana's tenant at Mall rental suite 1135. The tenant at Mall rental suite 1135 was MRF Atlantic, LLC. MRF Atlantic, LLC was not made a party to the action below. [A13-A16]

On November 16, 2012, Christiana's agent was copied on an e-mail exchange between Emory Hill's counsel and David Shafkowitz, Esquire, Pennsylvania counsel for Fruze, indicating that the parties were actively discussing a settlement of the matter. At the conclusion of the November 16th e-mail, Mr. Shafkowitz stated:

"In the meantime, I want to confirm that you agreed to provide the appropriate extension of time to respond to the filing in this case and confirm your representation that all documents that have been filed in this matter have been provided to my office. If for some reason my understanding is incorrect in any way, please advise immediately." [A17]

On November 27, 2012, Christiana's agent contacted Mr. Shafkowitz by e-mail inquiring about the status of the matter. In response, Mr. Shafkowitz advised Christiana's agent as follows:

"Looks like they are reviewing our settlement proposal. He granted the necessary extensions of time to answer. If we do not have it resolved shortly I expect to have it removed for arbitration. I will keep you posted." [A18]

On December 11, 2012, Christiana's agent again e-mailed Mr. Shafkowitz requesting an update on the matter. Mr. Shafkowitz did not respond to this e-mail. [A17] Unknown to Christiana, also on December 11, 2012, Emory Hill's counsel informed Mr. Shafkowitz by

e-mail that he considered Fruz's settlement position to be "untenable and not in good faith". Fruz and Christiana were given until December 31, 2012 to serve and file an answer to the Complaint. As to Christiana, counsel advised Mr. Shafkowitz as follows:

"Please advise through your client that the owner is required to answer the complaint, otherwise, default judgment will be taken against the owner."

Christiana was not informed by Mr. Shafkowitz or anyone else that settlement negotiations had broken down or that Emory Hill had demanded that Christiana file an answer to the Complaint by December 31. [A19]

Christiana did not file an answer to the Complaint by the December 31 deadline. On January 30, 2013, Emory Hill filed a Direction for Entry of Default Judgment pursuant to Super. Ct. Civ. R. 55 (b) against Christiana and Fruz in the total amount of \$204,287.15.

[A20-A22] Christiana first learned of the default judgment on or about February 13, 2013, at which time Christiana's agent sent an e-mail to Mr. Shafkowitz demanding that the default judgment be "dismissed immediately." [A23] The undersigned entered an appearance in the

Superior Court on behalf of Christiana on February 14, 2013.

On April 26, 2013, Christiana filed a motion to vacate the default judgment under Super. Ct. Civ. R. 60 (b) (1) on the grounds that the judgment was entered as a result of excusable neglect, and under Super. Ct. Civ. R. 60 (b) (4) on the grounds that the judgment was void as a matter of law. The motion to vacate was briefed, and counsel presented oral argument to the Superior Court on May 15, 2013 and August 21, 2013. On September 24, 2013, the Superior Court entered an Order denying the motion to vacate the default judgment. The September 24 Order is the subject of the instant appeal.

As to Christiana's request for relief under Rule 60 (b) (1), the Superior Court held that while Christiana had shown excusable neglect, and meritorious defenses to Emory Hills claims, granting relief from the judgment would be substantially prejudicial to Emory Hill. As to Christiana's request for relief under Rule 60 (b) (4) the Superior Court held that Emory Hill had complied with the requirements of Super. Ct. Civ. R. 4 (f) (4) and that Christiana lacked standing to move to vacate the default judgment under Rule 4 (f) (4).

ARGUMENT

I. CHRISTIANA’S FAILURE TO FILE A TIMELY ANSWER TO THE COMPLAINT DID NOT RESULT IN SUBSTANTIAL PREJUDICE TO EMORY HILL SO AS TO JUSTIFY DENYING CHRISTIANA’S MOTION FOR RELIEF FROM THE DEFAULT JUDGMENT UNDER SUPERIOR COURT CIVIL RULE 60 (b) (1).

1. Question Presented

Whether the Superior Court abused its discretion when it held that Emory Hill would be substantially prejudiced if Christiana were granted relief from the default judgment because Christiana’s failure to file a timely answer to the Complaint deprived Emory Hill of the opportunity to discover and correct the defects in its mechanic’s lien filing before the deadline to do so had passed. This question was preserved below by way of *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). Trials on the merits are favored....and a glaring abuse of discretion is not required for reversal of a trial court's refusal to relieve a party of the harsh sanction of dismissal. *Invst Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 397-398 (6th Cir. 1987). Where the trial court in reaching its conclusion overrides or misapprehends the law, or the judgment exercised is manifestly unreasonable, an appellant court will not hesitate to reverse. *Pitts v White*, 109 A.2d 786, 788 (Del. 1954).

3. Merits of the Argument

The Court may set aside a judgment by default in accordance with Rule 60 (b). *Super. Ct. Civ. R. 55 (c)*. *Super. Ct. Civ. R. 60(b)(1)* provides, in pertinent part, as follows:

“On motion and upon such terms as are just, the Court may relieve a party...from a final judgment...for the following reasons: (1) ... excusable neglect...”

In deciding applications for relief from judgments under Super. Ct. Civ. R. 60 (b) (1), the Delaware Courts have consistently held that the grounds for relief should be liberally construed because of Delaware's strong public policy favoring deciding cases on their merits. *Tsipouras v. Tsipouras*, 677 A.2d 493, 496 (Del. 1996); *Keener v. Isken*, 58 A.3d 407, 410 (Del. 2013) A party moving to vacate a default judgment on the grounds of excusable neglect must show: (1) culpable conduct leading to the default and if so was that conduct excusable; (2) a meritorious defense to the action; and (3) whether the plaintiff will be prejudiced if the motion is granted. *Apartment Communities Corporation v. Martinelli*, 859 A.2d 67, 70 (Del. 2004). Decisions of the Federal Courts construing this three part test are persuasive. *Id.* citing *Hoffman v. Cohen*, 538 A.2d 1096, 1098 (Del. 1988); *Canaday v. Superior Court*, 119 A.2d 347, 352 (Del. 1956).

In this case, the Superior Court held that Christiana had shown excusable neglect, and meritorious defenses to Emory Hill's action. The Court denied Christiana's motion to vacate the default judgment on the grounds that granting relief would substantially prejudice Emory Hill.

The Court held:

“Emory Hill filed its mechanic's lien claim well before the statutory period for filing had run. If Christiana had responded to the Complaint in a timely manner, Emory Hill would have had approximately two full months left to amend the Complaint before the statutory filing period had run. The loss of the opportunity to amend technical defects in the strict, statutorily regulated mechanic's lien proceeding, due to the neglect of the opposing party, is substantial prejudice to Emory Hill”. *Emory Hill and Company v. MRFRUZ and Christiana Mall, LLC*, 2013 WL 5347519 (Del. Super.) at.p.17

Christiana's failure to file a timely answer was not the reason that Emory Hill's filing was deficient, nor was it the reason Emory Hill failed to discover and correct the defects before the deadline to do so had passed. Thus, the Superior's Court's holding that Christiana's failure was sufficiently prejudicial to Emory Hill so as to justify allowing the default to stand was a misapprehension of the law amounting to an abuse of discretion. *Pitts v. White, supra*.

In *Ravine v. Ravine*, 894 A.2d 407, 2006 WL 453213 (Del. Supr.) this Court held that substantial prejudice can be shown to exist where the passage of time has impaired the nonmoving party's ability to present the merits of his or her claims. *Id. citing Justice v. McGinn*, 1998 WL 229436 (Del. Ch.).

In *Justice v. McGinn*, 1998 WL 229436 (Del. Ch.) the Court of Chancery, after noting that no Delaware case had explicitly defined "substantial prejudice", held that substantial prejudice exists in the context of a motion under Super. Ct. Civ. R. 60 (b) (1) when circumstances have changed since the entry of the judgment such that the plaintiff's ability to litigate its claim is now impaired in some material way or if relevant evidence has become lost or unavailable. *Id.* at p.4. *citing Accu-Weather, Inc. v. Reuters, LTD.*, 779 F. Supp. 801, 802 (M.D. Pa. 1991).

In *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V.*, 2002 WL 31439767 (Del. Ch.) the Court of Chancery, noting again that substantial prejudice had not been explicitly defined in the Delaware cases, and following *Accu-Weather, Inc. supra*, found

substantial prejudice where opening up the default would greatly increase plaintiff's expenses, and deplete the E&O coverage available to pay any damage award entered against the defendant. *Id.* at p.9.

Other courts are in accord. In *Emcasco Insurance Company v. Sambrick*, 834 F.2d 71 (3d. Cir 1987), the Court held that substantial prejudice sufficient to deny a motion to set aside a default requires a showing that the plaintiff's ability to pursue its claim has been hindered or that relevant evidence has been lost. In *Scarborough v. Eubanks*, 747 F. 2d 871 (3d Cir. 1984) the Court identified "irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or the excessive and possibly irremediable burdens or costs imposed on the opposing party" as examples of substantial prejudice under Rule 60 (b) *Id.* at p. 876. In *Feliciano v. Reliant Tooling Co., LTD*, 691 F. 2d 653 (3d Cir. 1982) the Court held that an increased potential for fraud, or substantial reliance upon the judgment could support a finding of prejudice. *Id.* at 657. Other specific examples of prejudice include corporate defendants having ceased operations, and the inability to locate individual defendants or witnesses resulting in difficulty

reconstructing documentary evidence. See *Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 132 (4th Cir. 1992). The lack of intervening equities or special harm other than mere delay has also been a consideration in determining prejudice under Rule 60 (b). *Tozer v. Charles A. Krauss Milling Co.*, 189 F.2d 242, 246 (3d Cir.1951).

The common thread running through these cases is that substantial prejudice requires a clear showing that the plaintiff's ability to fully litigate its case moving forward will be significantly impaired or prevented by virtue of the defendant's default. Emory Hill made no such showing below.

First, the Superior Court found that the prejudice suffered by Emory Hill was that it lost its opportunity to amend its lien filing by virtue of Christiana's failure to file a timely answer. Emory Hill was not in any way impaired or prevented from amending its lien filing by reason of Christiana's failure to file its answer between December 31, 2012, (when Emory Hill withdrew the ongoing extension and demanded that Fruz and "the owner" file answers) and the January 28, 2013 deadline to amend its mechanic's lien filing. In fact, Emory Hill was free to amend

its lien filing as a matter of course under Super. Ct. Civ. R. 15 (a) at anytime between October 17, 2012 and January 28, 2013. Emory Hill made no effort to do so. Also, as earlier indicated, the Complaint included claims against Christiana under *quantum meruit*, *quantum valebant* and unjust enrichment theories. Those claims would not have been affected in any way by the January 28, 2013 deadline if Christiana's motion to vacate had been granted.

The only thing which significantly impaired Emory Hill's effort to litigate the mechanic's lien portion of its case was that its mechanic's lien filing was legally defective, and it was apparently unaware of this situation until after the deadline to amend had lapsed. The defects however were present from the time the case was filed. There was no effort by Christiana to conceal the defects, and neither the default, the passage of time, nor anything Christiana had done or failed to do caused any of the defects, or prevented Emory Hill from timely discovering and correcting the defects.

Indeed, contrary to the Superior Court's holding, avoiding substantial prejudice did not require that Christiana point out the problems with Emory Hill's filing in time for Emory Hill to use that information to eliminate Christiana's ability to defend itself in that portion of the case. The goal is to avoid substantial prejudice to the non-defaulting party. It is not to guaranty the non-defaulting party success on the merits.

Moreover, the Superior Court failed to give due consideration to the prejudice that would befall Christiana if the Court denied relief. *Justice v. McGinn, supra*. It bears mention that the Superior Court held that Christiana had met the threshold requirement of showing excusable neglect, *Apartment Communities Corporation v. Martinelli*, 859 A.2d 67, 70 (Del. 2004) and that it had meritorious defenses to Emory Hill's claims. If the default is permitted to stand, Christiana will be saddled with a substantial mechanic's lien judgment against its property without having had a reasonable opportunity to defend itself against the claim on the merits.

For the reason's set forth above, the Superior Court's denial of Christiana's motion to vacate the default judgment exceeded the bounds of reason in light of the circumstances and it ignores rules of law and practice in a manner that created injustice. *Schultz v. Ginsburg*, 695 A.2d 661 (Del. 2009) The decision of the Superior Court should therefore be reversed.

II. CHRISTIANA WAS NOT REQUIRED TO FULLY DISCLOSE IN ITS ANSWER ITS TECHNICAL LEGAL DEFENSES TO EMORY HILL'S STATEMENT OF CLAIM FOR MECHANIC'S LIEN SUCH THAT EMORY HILL WOULD HAVE BEEN ABLE TO CORRECT THE DEFECTS BEFORE THE DEADLINE TO DO SO HAD PASSED.

1. Question Presented

Whether the Superior Court properly held that Emory Hill was substantially prejudiced by the default because a timely answer under Super. Ct. Civ. R. 12 (a) and a proper affidavit of defense under 25 Del. C. §2716 would have disclosed Christiana's technical defenses to Emory Hill's mechanic's lien filing in time for Emory Hill to amend its filing to correct the defects. This question was preserved below by way of *Christiana Mall, LLC's Reply to Plaintiff's Supplemental Response to Christiana Mall LLC's Motion to Vacate*. [A24-A36]

2. Scope of Review

This Court's review of the trial Court's application of a rule of court is a question of law that is reviewed *de novo*. *State v. Kelly*, 947 A.2d 1123 (Table), 2008 WL 187945 (Del.) This Court's review of the trial Court's application of a statute is a question of law that is reviewed

de novo. *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926, 929 (Del. 2013).

3. **Merits of the Argument**

As earlier indicated, the Superior Court's holding that Emory Hill would be substantially prejudiced if relief from the default judgment were granted was grounded on the finding that had a timely answer and affidavit of defense been filed, Emory Hill would have been able to use those filings to discover and correct the defects in its mechanic's lien filing before the amendment deadline had passed. However, this holding by the Superior Court was based on a misinterpretation of Super. Ct. Civ. R. 12 (a) and 25 Del. C. §2716 sufficient to justify reversal of the Court's denial of Christiana's motion for relief from the default judgment.

Super. Ct. Civ. R. 12 (a) requires that Christiana serve its answer and affidavit of defense in conformity with 25 Del. C. §2716 within 20 days after service of the summons on Christiana. 25 Del. C. §2716 provides as follows:

“Judgment by default may be entered for the plaintiff at such time and in the manner prescribed in the rules of the Superior Court, unless the defendant has previously filed in the cause an affidavit that the defendant verily believes there is a legal defense to the whole or part of such cause of action and setting forth the nature and character of the defense.”

The purpose for the affidavit of defense under §2716 is to ensure speedy determination of litigation by permitting trials only in such cases where the defendant is willing to swear that he has a valid defense. The affidavit of defense is intended to eliminate time consumption with respect to cases having no meritorious defenses. *Miller v. Master Home Builders, Inc.*, 239 A.2d 696, 698 (Del. Super. 1968) citing *Woolley On Delaware Practice*, Vol. I §244.

In a proper affidavit of defense, the party affiant is required to state that he believes that there is a legal defense to the claim and to state the nature and character of his defenses so as to show on the face of the affidavit, a condition of *facts*, which if true, would constitute a legal defense in such action. *Id. See also (Woolley Vol. I §278(f))*. (emphasis supplied.) There is nothing in the text of 25 *Del.C.* §2716 nor are there any cases, or other authority which hold that a proper affidavit of

defense to a mechanic's lien filing must disclose defendant's counsel's legal analysis of plaintiff's pleading. The affidavit of defense requirement is not intended to be a back stop for the lien claimant.

Thus, Christiana was not required to lay out the defects in Emory Hill's mechanic's lien filing in a timely answer under Rule 12 (a) or in a proper affidavit of defense under §2716 in a manner that would flag these defects for Emory Hill and cause Emory Hill to amend its lien filing. Christiana could have filed an answer and affidavit of defense which did not expose the defects, and argue for dismissal of the lien claim on a motion for summary judgment filed after the time to amend the lien claim had expired.

Therefore, because the Superior Court's Order denying Christiana's motion for relief from the default judgment was based on a misapplication of Super. Ct. Civ. R. 12 (a) and 25 Del. C. §2716 the Court's Order should be reversed.

CONCLUSION

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

Respectfully submitted.

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