

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

SANDRA SANTOS, ON BEHALF OF THE
WRONGFUL DEATH BENEFICIARIES OF
JOSE ESCUDERO, DECEASED, AND THE
ESTATE OF JOSE ESCUDERO, DECEASED

PLAINTIFF

VS.

CAUSE NO. 2018-0070 CICI

K.K. HENDERSON KENT

DEFENDANT

ORDER

THIS CAUSE came before the Court on the Defendant's Motion to Set Aside or Reconsider Default Judgment. After due consideration of said motion, opposing party's response, and oral arguments, this Court has made the following determinations.

On December 14, 2018, the complaint was filed in this case. According to the complaint, on September 20, 2018, Jose Escudero died as a result of injuries he sustained when the vehicle he was driving struck a donkey, veered off the road, and hit a tree. The Plaintiff claims the donkey was owned by the Defendant, K.K. Henderson Kent.

On January 9, 2019, the Proof of Service was filed indicating that the Defendant was served with process by Cody Vanlandingham of the Leflore County Sheriff's Department on December 14, 2018. On January 17, 2019, a "Docket Entry of Default" was filed by the Circuit Clerk of Leflore County after the Defendant failed to timely answer, appear, or otherwise defend as to the Plaintiff's complaint. On July 29, 2019, the Court enter an order granting the Plaintiff's Motion for Entry of Default Judgment and entered a judgment against the Defendant in the amount of \$2,008,980.00.

The Defendant is now before the Court seeking to have the Court's July 29, 2019 Order and Judgment set aside. The Defendant claims that she was never served with process and that she has a colorable defense in this case. The Defendant claims that she was not served on December 14, 2018 and that the first notice she received regarding this lawsuit was on August 12, 2019.

Motion to Set Aside Default Judgment

Rule 55 governs default judgments. According to Rule 55 (c), “[f]or “good cause” shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).”

Rule 60(b) states in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) fraud, misrepresentation, or other misconduct of an adverse party;
- (2) accident or mistake;
- (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
- (6) any other reason justifying relief from the judgment.

According to the Mississippi Supreme Court, there is a three-prong balancing test for trial courts to consider in determining whether to set aside a default judgment pursuant to Rule 60(b). *BB Buggies v. Leon*, 150 so.3d 90 (¶23) (Miss. 2014) (citing *American States Ins. Co. v. Rogillio*, 10 So.3d 463, 468 (¶10) (Miss. 2009)). Under this test the trial court must consider: (1) the nature and legitimacy of the defendant's reasons for default; (2) whether the defendant has a colorable defense to the merits of the claim; and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the judgment is set aside. *Id.* The Mississippi Supreme Court has interpreted the three prong balancing test of *Rogillio* to consist of (1) a “good cause” prong; (2) a “colorable defense” prong, and (3) a “prejudice” prong. *Flagstar Bank, FSB v. Danos*, 46 So.3d 298, 307 (¶29) (Miss. 2010) (citing *Rogillio*, 10 So.3d at 468).

Good Cause

In considering the first prong of the balancing test, the Court must determine if the defendant had “good cause” for the default. The “good cause” prong does not pertain to whether there is “good cause” to set aside the default, but refers to whether the defendant can show “good cause” for his default. *Rogillio*, 10 So.3d at 468.

The Defendant argues that since she was never served with process there is “good cause” for her default. During the hearing on this matter the Defendant and several witnesses testified. According to the testimony, on December 14, 2018, the Defendant was at the deli she owned. The deli closed at 1:00 in order for the Defendant to help prepare for her niece’s wedding and rehearsal dinner. The Defendant testified that she was not served on that day and all of her witnesses testified that they did not see a Sheriff’s deputy serve the Defendant. The Sheriff’s deputy was not called to testify, but did sign an affidavit stating that the Defendant was served at her place of business on December 14, 2018.

The Court found the Defendant’s testimony not credible in this case and to contain numerous inconsistencies. Two examples of these inconsistencies are as follows: (1) the defendant claimed that she did not own a donkey on September 20, 2018, she later admitted to having a rescue donkey on her property on that date and (2) she claimed that the donkey did not appear to have been involved in the accident that killed Jose Escudero and it was not injured, she later testified that the donkey had a bloody nose.

Each of the Defendant’s witnesses testified that they did not see the Defendant being served on December 14, 2018. The Court finds that each of the witnesses were busy either working or preparing for a wedding while at the deli on December 14, 2018 and could have easily failed to notice a deputy serving process on the Defendant. However, since the only evidence offered at the hearing shows that the Defendant was not served, the Court accepts the Defendant’s claim that she was not properly served in this case and finds that the Defendant has shown “good cause” for setting aside the default. Accordingly, the Court finds that this prong weighs in the Defendant’s favor.

Colorable Defense

The second prong of the balancing test is whether the defendant has a “colorable defense.” In deciding a motion to set aside a default judgment, the trial court must consider whether the defaulting defendant has a “colorable defense” to the merits of the plaintiff’s claims. *Id.* at 469. When speaking about the “colorable-defense” prong, the Mississippi Supreme Court has stated “[i]f any one of the three factors in the balancing test outweighs the other in importance, this is the one.” *Id.* The

Mississippi Supreme Court has “encouraged trial courts to vacate a default judgment where ‘the defendant has shown that he a meritorious defense.’” *Id.* at 470 (quoting *Allstate Ins. Co. v. Green*, 794 So.2d 170, 174 (Miss. 2001)).

According to the Mississippi Supreme Court, “[w]hile this Court does not view the default as a defendant’s general admission of facts, a defendant, upon default, is held to admit a plaintiff’s well-pleaded allegations of fact[,] and [the] defendant is barred from contesting such facts on appeal.” *Olive v. Malouf*, 94 So.3d 1254, 1258 (¶14) (Miss. Ct. App. 2012) (quoting *Leach*, 909 So.2d at 1287-1288 (¶14)). “Mere conclusions, unsubstantiated allegations, and general denials are not sufficient to set aside a default judgment.” *Id.* A more rigorous standard of proof than that of a general denial is required to set aside a default judgment. *Leach*, 909 So. 2d at 1288 (¶17). A defendant is required to “set, forth[,] in affidavit form[,] the nature and substance of [his] defense.” *Olive*, 94 So.3d at 1258 (quoting *H & W Transfer & Cartage Serv.*, 511 So.2d at 899).

The Defendant claims that she has meritorious and colorable defenses in this case. These defenses including that Mr. Escudero’s accident and death were not caused by a donkey or if they were caused by a donkey, they were not caused by her donkey. The Court finds that Defendant has colorable defenses to the plaintiff’s claims in this case and that second prong of the balancing test weighs in her favor.

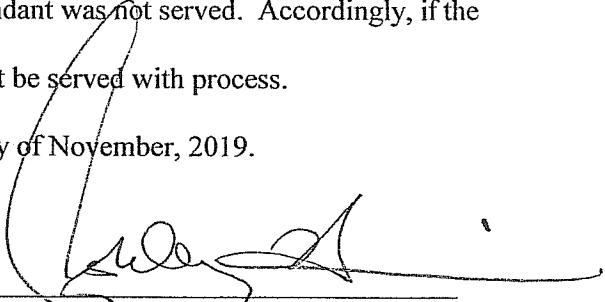
Prejudice

The final prong of the balancing test requires consideration of the extent of prejudice, if any, that the plaintiff would suffer if the default judgment was set aside. *BB Buggies, Inc.*, 150 So.3d at 103 (¶31). According to the Mississippi Supreme Court, “[t]he mere fact [that] the plaintiff may have to try and prove his case does not stay the judicial hand. That is not the sort of prejudice the rule contemplates.” *Id.* (quoting *Rush v. North American Van Lines*, 608 So.2d 1205, 1211 (Miss.1992)). The Court finds that the Plaintiff will not be prejudiced if the default is set aside and that this prong weighs in favor of the Defendant.

Having found all three-prong balancing test used by trial courts in considering whether to set aside a default judgment weigh in favor of the Defendant, the Court finds the Defendant's motion is well taken shall be granted.

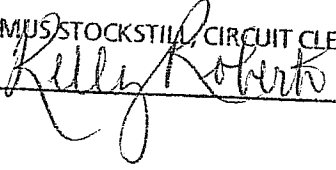
IT IS, THEREFORE, ORDERED AND ADJUDGED that the Defendant's Motion to set Aside or Reconsider Default Judgment shall be and is hereby GRANTED and the Docket Entry of Default entered on January 17, 2019, the Order granting the Plaintiff's Motion for Entry of Default Judgment signed on July 29, 2019 and the Final Judgment signed on July 29, 2019, shall be and are hereby set aside. The Court has made a ruling that the Defendant was not served. Accordingly, if the Plaintiff desires to proceed with the case, the Defendant must be served with process.

SO ORDERED AND ADJUDGED this the 19 day of November, 2019.


CIRCUIT JUDGE

FILED

NOV 20 2019

ELMUS STOCKSTILL, CIRCUIT CLERK
BY:  D.C.