IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

MALISSA BILLINGER,	)	
	)	
Plaintiff below/Appellant,	)	
v.	)	C.A. No. 2008-04-175
	)	
TROY DESHIELDS,	)	
	)	
Defendant below/Appellee.	)	

Submitted: October 14, 2008
Decided: October 22, 2008

Malissa Billinger, Pro Se Plaintiff.
Troy Deshields, Pro Se Defendant.

DECISION ON APPEAL FROM COMMISSIONER'S RECOMMENDATION

Defendant below/Appellee (hereinafter "Defendant") appeals the Commissioner's *sua sponte* recommendation denying Defendant's motion to vacate a default judgment. For the following reasons, the Court accepts the Commissioner's recommendation and enters judgment accordingly.

BACKGROUND

On December 28, 2007, Plaintiff filed a civil action in the Justice of the Peace Court against Defendant to recover $10,000.00 for breach of contract alleging that the work Defendant performed on her house was not done in a workmanlike manner. On January 25, 2008, Defendant filed an Answer. Trial was scheduled for March 4, 2008; however, Defendant failed to appear for trial and judgment by default was entered against him in the amount of $10,000.00, plus court costs of $40.00, and post-judgment interest at 8.5%.

On March 6, 2008, Defendant requested a motion hearing to set aside the default judgment indicating that he had temporarily changed addresses and did not receive notice of the original trial date. Defendant also maintained that the outcome would be different as he did not owe Plaintiff the amount of the judgment. On March 12, 2008, the Court, after reviewing Defendant's application for a motion hearing, found that Defendant's failure to appear was excusable neglect, set aside the default judgment, and scheduled a motion hearing for April 11, 2008. On April 14, 2008, judgment was entered by Justice of the Peace Court No. 17 in favor of Defendant and against Plaintiff as Plaintiff failed to prove by a preponderance of the evidence that the work performed by Defendant was not done in a workmanlike manner.

On April 25, 2008, Plaintiff filed with this Court a Notice of Appeal from the judgment of the Justice of the Peace Court entered on April 14, 2008. On the same date, Plaintiff filed her Praecipe, Summons on Appeal, and Complaint. On May 5, 2008, the Sheriff served a copy of the summons and complaint on Defendant by leaving a copy at Defendant's residence with Defendant's wife, Tia Deshields, who resided at the same residence. Defendant admits service of the complaint and summons, but Defendant did not file an answer or any other responsive pleading within the twenty (20) days prescribed by law and stipulated on the summons. Consequently, on June 20, 2008, this Court entered a default judgment against Defendant in the amount of $10,000.00, court costs of $100.00, and post-judgment interest at the legal rate.

On August 4, 2008, Defendant moved to vacate the default judgment indicating that he did not understand that he needed to make a written response to Plaintiff's appeal. A motion hearing was held on August 21, 2008. On August 22, 2008, the Commissioner

prepared a report that recommended denying Defendant's motion to vacate the default judgment as Defendant, who was properly served process, unreasonably failed to serve on the Plaintiff an answer within twenty days. Defendant timely appealed the Commissioner's recommendation.

STANDARD OF REVIEW

The denial of a motion to vacate a default judgment is a case dispositive determination. *Platinum Fin. Serv. Corp. v. Huffman*, 2001 WL 1555537, at *1 (Del. Com. Pl. Oct. 31, 2001). When reviewing a case dispositive matter, the Court reviews the decision *de novo* and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Commissioner. Ct. Com. Pl. Civ. R. 112(A)(4)(iv).

DISCUSSION

Court of Common Pleas Civil Rule 55(c) permits the Court, in its discretion, to set aside a default judgment in accordance with Rule 60(b). *See Battaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977) (a motion to vacate a default judgment is addressed to the sound discretion of the trial court). Rule 60(b)(1) provides for relief where the judgment was ordered as a consequence of "mistake, inadvertence, surprise, or excusable neglect." Ct. Com. Pl. Civ. R. 60(b)(1). Although Rule 60(b) should be construed liberally as policy favors the granting of such motions "upon almost any reasonable excuse," to "constitute excusable neglect, the conduct of the moving party must be the conduct of a reasonably prudent person." *Keith v. Melvin L. Joseph Const. Co.*, 451 A.2d 842, 846 (Del. Super. 1982). Upon a showing that such conduct was reasonable, the movant must show that the outcome would be different if the relief was granted and that substantial prejudice to the non-defaulting party will not result from

the granting of relief. *Id*. However, a mere showing of negligence or carelessness is not sufficient. *Cohen v. Brandywine Raceway, Ass'n.*, 238 A.2d 320, 325 (Del. Super. 1968).

Therefore, this Court must first determine whether Defendant's failure to answer Plaintiff's complaint was due to excusable neglect. This Court's analysis of the circumstances results in the conclusion that the conduct of Defendant was not that of a reasonably prudent person. The record reflects that Defendant was properly served process, and thus, had notice of Plaintiff's complaint. Nevertheless, Defendant failed to file an answer within twenty days. Defendant provides that he did not understand that he needed to make a written response to Plaintiff's appeal. However, the Court finds that Defendant's conduct did not constitute excusable neglect as, upon service of process, a reasonably prudent person would have consulted with an attorney to ascertain his or her legal rights and obligations, or, at the very least, inquired of the Court what to do. Additionally, the Defendant's explanation is not plausible as he understood that he needed to file an answer to Plaintiff's complaint after he was properly served process in the court below. This indicates that Defendant, who had just gone through the litigation process in the Justice of the Peace Court, either, did not pay the matter at hand the attention it deserved, or made a free and conscious choice to not file an answer.

Defendant's failure to pay attention to the matter at hand can be characterized as merely negligent or careless as the time within which to file an answer or responsive pleading was stipulated on the summons. However, after Defendant read the summons he did nothing to assure compliance with the procedural rules. As previously stated, he did not communicate with the court or speak with an attorney. In short, he did not follow through with the case. Such inaction on Defendant's part, without any justifying

circumstances, cannot be deemed to be a basis for a finding that the neglect shown here was excusable. As previously stated, a showing of mere negligence or carelessness is not sufficient to constitute excusable neglect. *Cohen*, 238 A.2d at 325.

On the other hand, it is possible to conclude that Defendant intentionally failed to file an answer as Defendant, by his own admission, received process, read it, and then did nothing. In fact, the record reflects that the fi. fa. was filed on June 27, 2008, issued on July 2, 2008, and the levy was returned by the Sheriff non est on July 18, 2008. However, it was not until August 4, 2008 that Defendant moved to vacate the default judgment. Thus, it is possible to conclude that Defendant simply ignored process until Plaintiff had the Sheriff attempt to levy on his goods and chattels. Case law provides that "[a] defendant who chooses to ignore a purported service of process does so at his own risk." *Melvin L. Joseph Const. Co.*, 451 A.2d at 847 (citing *Paramount Packaging Corp. v. H.B. Fuller Co. of New Jersey*, 190 F. Supp. 178 (E.D. Pa. 1960)). *See also Cummings v. Jimmy's Grille, Inc.*, 2000 WL 1211167, at *3 (Del. Super. Aug. 4, 2000) ("[a] defendant cannot have the judgment vacated where [he] has simply ignored the process").

In either scenario, the Court concludes, as the Commissioner did, that Defendant's failure to respond to Plaintiff's complaint was not the act of a reasonable person, especially when inaction and failure to assure compliance with procedural rules had previously resulted in the entry of a default judgment in the court below. 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. *See Apt. Cmtys. Corp. v. Martinelli*, 859 A.2d 67, 72 (Del. 2004) (stating that a 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").

CONCLUSION

After a *de novo* review of the law and facts, I find that the Commissioner's recommendation denying the motion to vacate default judgment was appropriate. Thus, the Commissioner's recommendation is **AFFIRMED**.

IT IS SO ORDERED, this _____ day of October, 2008.

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The Honorable Rosemary Betts Beauregard