February 5, 2008

Ms. Simmone Y. Berry
2421 N. Tatnall Street
Wilmington, DE 19802

Edward F. Kafader, Esquire
McCullough, McKenty & Kafader, P.A.
824 Market Street Mall, Suite 412
P.O. Box 397
Wilmington, DE 19899-039

Re: ***State Farm Fire & Casualty Co. a/s/o William Fountain v. Simmone Y. Berry***
C.A. No.: 2001-06-121

Date Submitted: February 1, 2008
Date Decided: February 5, 2008

Letter Opinion on Defendant's Motion to Vacate Judgment

Dear Ms. Berry and Mr. Kafader:

A hearing was held on Friday, February 1, 2008 to consider Defendant Simmone Yvette Berry's (the "Defendant") Motion to Vacate Judgment (the "Motion"). Plaintiff also filed a written response on January 22, 2008 to Defendant's Motion. For the reasons set forth below, the Court DENIES Defendant's Motion.

THE FACTS

(i.) Defendant's Motion.

Defendant alleges in her Motion that on June 6, 2000 a Complaint and Praecipe was filed against her alleging that on June 30, 1999 she operated and/owned a Buick LeSabre that was involved in an accident with the plaintiff. The partial temporary tag was "XA11218". Defendant alleges that the car in question hit plaintiff's car and plaintiff's brother's car "causing $866.00 worth of damage". (¶ 1).

Defendant also asserts in her Motion that the "motor vehicle did not belong to me;" nor was she the driver. According to the defendant the tag number provided in the Police Report does not belong to her and the Police Report indicated that the tag on the care in question was a partial temporary tag. (¶ 2).

According to the Defendant's Motion, the Police Report also indicated there were three (3) juveniles operating the motor vehicles and she was eight months pregnant when the incident occurred. Defendant claims she did not receive knowledge "of the situation" because she did not reside at the address listed on the "Court documents". Defendant also claims she was never arrested for the incident; nor was there an arrest concerning the matter. According to the defendant, she now seeks her driver's license and moves that the instant case be opened and the judgment vacated. (¶ 3)

(ii) Plaintiff's Response

In Plaintiff's Response to Defendant's Motion State Farm Fire & Casualty Company as subrogee of William A. Fountain ("Plaintiffs") aver that service of the Complaint attached to their Answer was initially attempted on defendant at 810 Anchorage Street, Wilmington, DE 19805, but defendant no longer resided at that address. Plaintiffs aver that they then conducted an investigation as to defendant's correct address. As outlined in paragraph two (2) are Plaintiff's response to Defendant's Motion and attached as an exhibit thereto is a copy of a Report dated July 30, 2001 that indicated the defendant actually resided at 2231 N. Pine Street, Wilmington, DE. According to plaintiff, defendant's address and telephone number was then verified as correct.

Appended to Plaintiff's Response was Exhibit "C" which was a copy of an Affidavit of Special Process Server indicating that defendant was served at 2231 N. Pine Street, Wilmington, DE by serving the defendant's sister Keisha Waters.

Next, plaintiff avers through the attached Exhibit "D" to their Answer a Direction for Entry of Default Judgment was filed with this Court on October 10, 2001 and sent to the Defendant at 2231 N. Pine Street, Wilmington, DE.

Appended to the Answer to the Complaint was Exhibit "E", a Notice of Withdrawal of Motor Vehicle Privileges sent to the defendant at her record address listed above on August 23, 2002 which was previously verified as defendant's last known record address.

Finally, plaintiffs aver that Defendant's Motion to Vacate is dated January 7, 2008; almost six years passed since the defendant received notice of the Direction for Entry of Default Judgment; and five years after defendant received notice that her driving privileges were suspended as a result of a the entry of the default judgment in this matter.

THE LAW

C.C.P. Civ. R. 60(b) provides for relief from a judgment or order and *inter alia*, provides a "defendant may be entitled to relief from a judgment upon showing a mistake, inadvertence, surprise or excusable neglect". *See Schremp v. Marvel*, 405 A.2d 119 (Del. Supr. 1979). Case law also provides that a party moving for relief under C.C.P. Civ. R. 60(b) is required to act "without unreasonable delay after discovering the entry of an adverse judgment". In *Schremp* the moving party, as the plaintiff avers at paragraph 8 of his answer did not file a Motion for Relief from Judgment for more than two (2) months after discovering that judgment had been entered and the Court found this time delay constituted "unreasonable delay" by the Superior Court.

The threshold requirement in deciding whether to vacate a default judgment under Civil Rule 60(b)(1) is to establish that a moving party's conduct or neglect is that of reasonably prudent person under the circumstances. *McMartin v. Quinn,* 2004 Del. Super. LEXIS 28, 2004 WL 249576. at *2 (Del. Super. Feb. 3, 2004). The Court must examine each case to determine if the movant acted as a reasonably prudent person. *Keith v. Melvin L. Joseph Construction Co.*, 451 A.2d 842. 846 (Del.

Super. 1982). The moving party also must establish the possibility of a meritorious defense and no substantial prejudice to the non-moving party. *Id.*

As stated in Joseph H. Pinkett, Steven L. Brittingham and Carla Brittingham, his wife, v. Valley Forge Insurance Company, 1989 Del. Super. LEXIS 425 (October 4, 1989):

> II. Motions to vacate default judgment are governed by Superior Court Rule 60(b)(1):
>
> Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, ect. 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 reason: (1) Mistake, inadvertence, surprise, or excusable usable neglect; . . .
>
> The Supreme Court has defined the standards applicable to motions to vacate.
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> A motion to open a default judgment pursuant to Rule 60 (b) (1) . . . is addressed to the sound discretion of the Trial Court. *Model Finance Company v. Barton,* Del.Super., 188 A.2d 233 (1963); 7 Moore's *Federal Practice* (2d ed.) para. 60.19. In determining whether there was an abuse of discretion, we consider two questions. *First, did the defaulting party make some showing that, if relief is granted, the outcome of the action may be different from what it will be if the default judgment is permitted to stand?* Wright & Miller, *Federal Practice and Procedure:* Civil § 2697. This test has been expressed as a requirement that the defaulting party demonstrate a meritorious defense to the underlying action. *Id.* at § 2697; *Medunic v. Lederer,* 3 Cir., 533 F. 2d 891, 893 (1976). *Second, will substantial prejudice be caused the non-defaulting party by granting the motion?* Wright & Miller, supra, at § 2699; *Medunic v. Lederer,* supra. And when reviewing an order granting a motion to open a default judgment, we recognize that *Rule 60(b) has been accorded a liberal construction because of the underlying policy which favors a trial on the merits to a judgment based on a default. Robins v. Garvine,* Del.Supr., 37 Del.Ch. 44, 136 A.2d 549, 552 (1975); *Medunic v. Lederer,* supra. [Emphasis added.]
>
> *Battaglia v. Wilmington Savings Fund Society,* Del.Supr., 379 A.2d 1132, 1135 (1977).
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> With the view that Rule 60(b) is to be accorded liberal construction because of the favoritism of trials on the merits three questions must be addressed in order: (1) was there excusable neglect by this defendant, (2) did this defendant make some showing that the outcome of the action *may* be different from it will be if the default judgment is allowed to stand, and (3) will substantial prejudice be caused to plaintiffs if the motion is granted.

A) Where there is a claim of excusable neglect, the issue is whether the movant acted with "neglect which may have been the act of a reasonably prudent person." *Cohen v. Brandywine Raceway Association,* Del.Super., 238 A.2d 320, 325 (1968); *accord Model Finance Company v. Barton,* Del.Super., 188 A.2d 233 (1963).

OPINION AND ORDER

The Court finds based upon the record that defendant did not take action after the Default Judgment for more than six (6) years; nor did she outline any facts in her Motion that would constitute mistake, inadvertence, surprise or excusable neglect. In addition, the defendant did not provide any affidavits or documents to support her summary allegation that she did not receive notice of the judgment. Mr. Kafader's affidavit attached to this Direction for Entry of Default Judgment correctly states the defendant was served through her sister Keisha Waters and has "not appeared, filed an answer or otherwise pleaded…" Because of the unreasonable delay and lack of evidence to constitute excusable neglect that would indicate defendant is entitled to relief from judgment, the Court DENIES the Defendant's Motion to Vacate. The Court also incorporates by reference the uncontradicted documents appended to Mr. Kafader's Answer that clearly convince this Court that defendant had, in fact, notice of the judgment and did not, in any way act as a reasonably prudent person in taking appropriate action to move to vacate this judgment. Finally, plaintiffs will suffer prejudice if the judgment is vacated because of defendant's lack of due diligence.

IT IS SO ORDERED this 5th day of February, 2008

John K. Welch
Judge

/jb

cc: Karen Gallagher, Chief Civil Clerk of the Court