IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

Q BY THE C, LLC,	:	C.A.#02-06-075
Plaintiff below/Appellant	:	
v.	:	
ARTISTIC FABRICATION, a/k/a H. DAVID MAHAN	:	
Defendants below/Appellees	:	

COMMISSIONER'S ORDER

Submitted December 9, 2002
Filed December 30, 2002

Susan Huesman Mitchell of Smith,O'Donnell, Procino & Berl LLP, Georgetown, for Appellant Q BY THE C, LLC.

H. Cubbage Brown , Jr. of Brown, Shiels, Beauregard & Chasanov, Dover, for Appellee H. David Mahan

MAYBEE, Commissioner

Before the undersigned is the non case-dispositive motion of Defendant below, Appellee (Mahan) to vacate a default judgment in the amount of $17,430.00, plus interest. Mahan had entered into contracts with Plaintiff below, Appellant (Q BY THE C) to fabricate and install "artistically embellished" stair cases. The foregoing were to be installed in residential dwelling units constructed by Q BY THE C, which claims damages for failure to deliver the items pursuant to the terms of the contracts. The record reflects that judgment on the claim was entered in Justice of the Peace Court No.17 in favor of the Defendant below, Mahan and against Q BY THE C. Furthermore, Mahan counterclaimed for sums due and unpaid under the contracts, and judgment was entered

below on the counterclaim in favor of Mahan and against Q BY THE C in the amount of $11,860.00, plus interest. The latter filed a timely notice of appeal, which was served on Mahan, together with the summons and Complaint, on July 8, 2002. Mahan failed to answer and a default judgment was entered against him on August 8th upon the written direction of Q BY THE C. The motion for relief from the judgment was filed on October 17, 2002.

Motions to open default judgments and allow a defendant to appear and defend are addressed to the sound discretion of the Court. In the exercise of that discretion, real doubts are usually resolved in favor of the application to open the default judgment. *Kaiser-Frazer Corp. v. Eaton,* 101 A.2d 345, 353 (Del. 1953). "Any doubt should be resolved in favor of the petitioner because of the sound public policy favoring determination of actions on the merits." *Tozer v. Charles A. Krause Milling Co*., 3 Cir., 189 F.2d 242, 245 (1951).

Mahan seeks to set aside the default judgment in accordance with CCP Civ. Rule 60(b)(1). He contends that his default should be excused because of mistake, inadvertence, surprise or excusable neglect. At the hearing on his motion, Mahan acknowledged service of the summons on appeal. Although the foregoing contains language concerning the consequences of failure to file an answer, Mahan established that his ability to read and comprehend the information on the summons was limited. Furthermore, he established that he sought the advice of the sheriff upon service of the Complaint and Notice of Appeal and was not aware that he was required to file an answer before the date of the trial. When he did not receive notice of the trial date, he dispatched an agent to the clerk's office, only to learn that a default judgment had been entered against him. He then promptly retained counsel to file this application for relief from the judgment.

The standards for vacating a default judgment are set forth in *Keith v. Melvin L. Joseph Constar. Co.,* Del. Super., 451 A.2d 842, 846 (1982). With reference to the *Rule* 60(b)(1) requirement of "excusable neglect", the Court must first determine whether the conduct of the moving party was the conduct of a reasonably prudent person, citing *Cohen v. Brandywine Raceway Association,* Del. Super., 238 A.2d 320 (1968). "Only where the conduct can be so characterized, and the moving party also establishes 1) the

possibility of a meritorious defense, and 2) no substantial prejudice to the non-moving party, will the Court grant the motion to vacate pursuant to Rule 60(b)(1). *Battaglia v. Wilmington Sav. Fund Soc.,* Del. Spur., 379 A.2d 1132 (1977)."

Given Mahan's limited reading skill, I find that his reliance on the Sheriff was reasonable and that his conduct was that of a reasonably prudent person. Turning to the issue of the possibility that Mahan has a meritorious defense to this Complaint, the following is submitted. It is not necessary to determine the merits of a defense to the claim or counterclaim at this stage of the proceedings. If there is some showing that if relief is granted the outcome of the suit may be different than if the default judgment is allowed to stand, the requirement is met. 10A *Wright, Miller & Kane, Federal Practice and Procedure: Civil 3rd*: § 2697. If Mahan can establish that modification of the contracts implied delay in his performance or that Plaintiff failed to demand in writing adequate assurances of his future performance, the outcome would be different.

Finally, the record in this proceeding will not support a finding that plaintiff would incur substantial prejudice if it would have to try this case on the merits. The fact that reopening the judgment would delay plaintiff's possible recovery is not, in itself, a bar to relief. 10A *Wright, Miller & Kane, Federal Practice and Procedure: Civil 3rd*: § 2699. Because I find that 1) defendant's conduct meets the Rule 60(b)(1) standard of "excusable neglect"; 2) that defendant has also made a sufficient showing of the possibility of a meritorious defense against plaintiff; and 3) that the latter would not incur substantial prejudice if this case were tried on the merits, I conclude that the "interests of justice would best be served by granting defendant's motion to open the judgment." *Model Finance Company v. Barton*, Del. Super, 188 A.2d 233,236 (1963, Stiftel, J.).

SO ORDERED this 30th day of December, A.D. 2001

/s/

JOSEPH WHITMORE MAYBEE
Commissioner