

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOHN A. PARKINS, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
TELEPHONE: (302) 255-2584

September 10, 2008

Andrew G. Ahern III, Esquire
Joseph W. Benson, P.A.
1701 North Market Street
P.O. Box 428
Wilmington, DE 19899

Kester Cross, Esquire
Williams and Crosse
1214 King Street, Suite 300
Wilmington, DE 19801

Re: Melissa Begatto as Next Friend of Kyler Begatto
v.
Jeanette P. Sutton
C. A. No. 06C-03-240 JAP

Dear Counsel:

Defendant has moved to vacate a default judgment against her in the amount of \$10,677.71. For the following reasons that motion is **DENIED**.

In 2004 Kyler Begatto was bitten by a dog owned by defendant. Kyler's mother brought suit against defendant in 2006 and an alias summons, complaint and other routine documents were served upon the defendant's adult daughter at defendant's residence. Defendant failed to respond to the complaint, and the Court eventually entered a default judgment against her. Thereafter plaintiff was awarded \$10,677.71 at an inquisition hearing. Defendant took no action to defend this matter until nearly two years later when she filed a pro se motion to vacate the default judgment. According to

defendant, "I did not realize there was a complaint against me until a constable came to access my personal belongings." Shortly after defendant filed her motion, counsel entered an appearance on her behalf. Counsel filed an answer but did not supplement the pro se motion to vacate the default judgment.

The record shows that plaintiff made repeated efforts to inform defendant of the pendency and developments in this case. The process server executed an affidavit attesting to the fact that he served the complaint and alias summons on 55 year old Stacey Williams, defendant's daughter, at defendant's home. Shortly before the answer was due, plaintiff's counsel received a telephone call from Ms. Williams in which she told counsel that she had located the suit papers and was forwarding them to her mother's homeowner's insurer. Plaintiff's counsel agreed not to seek a default until July 17, 2006.

By July 18, plaintiff had heard nothing, so plaintiff's counsel called Ms. Williams at a phone number given to him by Ms. Williams; this is the same telephone listed in the motion to vacate as belonging to defendant. Plaintiff received no response to that call. Two weeks later plaintiff still had heard nothing further from the defendant and had heard nothing at all from defendant's homeowner's insurance carrier, so plaintiff filed her motion for a default judgment. Plaintiff sent copies of the motion by both regular and certified mail. The copy sent by regular mail was not returned and the certified mailing receipt was signed by Keshondra Sutton. After the

inquisition plaintiff mailed a copy of the judgment by both regular and certified mail. Again the regular mailing was not returned to plaintiff and the certified mailing receipt was signed by Keshondra Sutton.

In her motion to vacate the default, defendant acknowledged that her daughter “accepted the notice.” She further asserts that her daughter did not tell her about it because the daughter knew that the defendant was not well. Mrs. Sutton also contends that an SPCA agent told her that the child was not harmed by Mrs. Sutton’s dog. This Court entered an order requiring defendant, now represented by counsel, to submit an affidavit from the SPCA official alleged to have made the statement that the child was not harmed. This deadline for this submission has passed and no affidavit has been filed by the defendant.

A motion to vacate a default judgment is addressed to this Court’s discretion. As a threshold matter, the Court must consider whether culpable conduct of the defendant led to the default and, if so, whether that conduct is excusable. If the defendant can make such a showing, then this Court will consider (1) whether the defendant has a meritorious defense and (2) any prejudice to the plaintiff.¹

There is virtually no evidence to support defendant’s claim of excusable neglect. The plaintiff went to extraordinary lengths to ensure that the defendant was aware of the pendency of the matter and her obligation to respond to the complaint. Indeed, plaintiff went so far as to speak to the

¹Apartment Community Corp. V. Martinelli, 859 A.2d 67, 69-70 (Del.2004)

defendant's daughter and delayed seeking a default so that the defendant's daughter could forward the suit to defendant's homeowner's insurance carrier. On the other hand defendant claims that she is elderly and was ill at the time the suit was instituted. According to defendant, her daughters withheld information about the suit from her in order to avoid upsetting her. There is, however, a nearly complete absence of evidence to support defendant's contentions. Defendant has not provided any evidence to the Court concerning the nature of her illness and her mental state at the time she was served with the suit. Equally importantly, defendant has failed to provide any evidence to the Court substantiating her claim that her daughters withheld information about the suit from defendant in an effort to protect defendant. In the absence of such evidence, this Court will not find excusable neglect by the defendant.²

The Court is mindful that there is a strong policy favoring resolution of cases on the merits and that motions to vacate default judgments should be liberally construed.³ This rule of liberal construction, however, does not relieve the defendant from her obligation to provide evidence upon which the Court can bare a finding of excusable neglect.

Even assuming, however, that defendant had satisfied her threshold obligation of showing excusable neglect, the Court must still deny the motion

²Apartment Communities, *supra* at 72 ("Given the mere speculation on the part of counsel and the lack of any sworn affidavits to support ACC's motion to vacate the default judgment, the Superior Court properly concluded that ACC did not establish ... excusable neglect").

³Old Guard Ins. Co. V. Jimmy's Grille, Inc. 2004 Del .LEXIS 417 *7 (Del. Sept. 21, 2004)

to vacate the default because there has been no showing of a meritorious defense. Defendant argues in her motion to vacate the default that “the SPCA officer that told me of the incident with my dog said that the child was not hurt.” Indeed, the Court gave the defendant an opportunity to provide an affidavit from this SPCA officer. As noted previously, she has not done so. Defendant’s inability to obtain such an affidavit is likely explained by indisputable evidence the child was, in fact, injured. Emergency Room records show that the child was treated for a dog bite on her right cheek and received one rabies shot before defendant’s dog was located and tested. Defendant’s contention that the child was not harmed is therefore without merit. To the extent that this Court needs to consider the prejudice which would result to plaintiff if this case were to be reopened, that prejudice seems obvious. This incident took place more than four years ago when the child was four years old. The child and his mother are entitled to put this matter to rest. In sum, defendant has failed to provide evidence that persuades this Court to exercise its discretion in vacating the default judgment entered against her.

SO ORDERED.

Very truly yours,

John A. Parkins, Jr.