IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

State Farm Fire & Casualty Insurance Company (a/s/o Cruz Hernandez),	)	
Plaintiff,	)	
v.	)	C.A. No. 07C-12-156-JRJ
Laborers Eastern Organization Fund and John Blyden,	)	
Defendants.	)	

OPINION

Date Submitted: October 22, 2008
Date Decided: January 13, 2009
Date Corrected: April 20, 2009

Upon Defendant Laborers Eastern Organization Fund's Motion to Vacate the Default Judgment: **DENIED.**

Amanda L.H. Brinton, Esquire, 521 N. West Street, Wilmington, Delaware, 19801, attorney for plaintiff.

Sandra F. Clark, Esquire, 1105 Market Street, 5th Floor, Wilmington, Delaware, 19801, attorney for defendants.

Jurden, J.

Before the Court is Defendant Laborers Eastern Organization Fund's ("LEOF") Motion to Vacate the Default Judgment and Plaintiff State Farm Fire & Casualty Insurance Company's ("State Farm") opposition thereto.

I. BACKGROUND

The Complaint initiating this lawsuit was filed on December 19, 2007. The Complaint stems from an automobile accident which occurred on December 22, 2005. On February 18, 2008, a writ was lodged with the Prothonotary reflecting that the Secretary of State was served with a copy of the Complaint and Process ("Process") in accordance with 10 *Del. C.* §§ 3104, 3312.[1] On February 29, 2008, State Farm filed its Amendment to the Complaint pursuant to Superior Court Civil Rule 4(h), reflecting that State Farm mailed a copy of the Process to LEOF by registered mail, return receipt requested, on February 14, 2008.[2] State Farm attached a copy of the postal service receipt (evidencing mailing of those documents by registered mail) to its Rule 4(h) Amendment.[3] State Farm also attached a copy of LEOF's return receipt, received on February 19, 2008, which evidences receipt of the documents by LEOF.[4] On July 21, 2008, a judgment pursuant to Superior Court Civil Rule 55(b)(1) was entered against LEOF for

[1] Pl. Resp. in Opp. to Def.'s Mot. to Vacate the Default J., Docket Item ("D.I.") 9.
[2] *Id.*
[3] *Id.*
[4] D.I. 5.

having made a default in appearance in this action.[5] It was not until October 7, 2008, that LEOF filed a Motion to Vacate Default Judgment, claiming excusable neglect.[6] On October 15, 2008, State Farm filed its opposition to LEOF's Motion to Vacate Default Judgment. On October 22, 2008, the Court held a hearing on LEOF's Motion. During that hearing, the Court advised LEOF that its Motion was insufficient to establish excusable neglect and gave LEOF ten days to supplement its Motion. The Court also gave State Farm leave to file supplemental opposition. This matter is now ripe for decision.

II. DISCUSSION

The basis for LEOF's excusable neglect is as follows. According to Defendant John Blyden ("Blyden"), in February, 2008, after LEOF received the lawsuit papers, Blyden was told by Erika Montgomery, the Assistant to the Director of LEOF, to call the number listed on the vehicle insurance card.[7] Blyden contacted the insurance broker/sales agent that was listed on the card.[8] According to David Johnson, the Director of LEOF, LEOF purchased an insurance policy from Crum & Forster through the brokerage firm of Conover Beyer which was in effect from May 2005 until 2006 or 2007. LEOF purchased another insurance

[5] D.I. 18.
[6] D.I. 8.
[7] Blyden Aff., Ex. 1 to Def.'s Supplemental Br. to Mot. to Vacate Default J., D.I. 14.
[8] *Id*.

policy from Netherlands through Conner Strong, which was in effect in 2006 or 2007 until the present.

Mr. Johnson avers that Blyden erroneously contacted Conover Beyer about the accident, and that neither Blyden nor Conover Beyer realized that there had been a change in insurance brokers and providers.[9] Conover Beyer did not advise LEOF that it was not covering the accident.[10] It was not until August 20, 2008 that the error was discovered and Crum & Foster contacted counsel.

In opposition, State Farm argues that in March 2008, after LEOF failed to timely answer the Complaint, State Farm called LEOF's general counsel, Patrick, Byrne, and advised him that LEOF was in default.[11] LEOF still did not respond to the Complaint. State Farm called Mr. Byrne a second time, before the default was entered, to advise him again of LEOF's default.[12] State Farm points out that even after State Farm advised LEOF on July 22, 2008 that a default judgment had been entered against it, LEOF failed to respond or take any action in a timely manner. It was not until September 7, 2008, that counsel for LEOF entered an appearance in this case. And, as noted above, a Motion to Vacate was not filed until one month later – October 7, 2008.[13]

[9] Johnson Aff. ¶ 5, Ex. 1 to Def.'s Mot. to Vacate the Default J., D.I. 8.
[10] *Id*.
[11] Crawford Aff. ¶ 2, D.I. 9; *see supra* note 1.
[12] *Id*.
[13] *See supra* note 6.

LEOF offers no explanation as to why, after learning that it was in default on two separate occasions, it failed to timely respond to the Complaint. LEOF fails to establish why its failure to notify the correct insurance carrier is *excusable* neglect as opposed to mere neglect. LEOF also fails to establish why its failure to follow up with the insurance carrier after initially reporting the accident is excusable neglect as opposed to mere neglect.

Rule 60(b)(1) provides:

> *Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect.[14]

A motion to set aside a default judgment is addressed to the sound discretion of the Court.[15] Rule 60(b)(1) is to be liberally construed, and any doubts raised by the motion should be resolved in favor of the moving party.[16] To prevail on a Rule 60(b) motion, the movant must establish:

1. excusable neglect in the conduct that allowed the default judgment to be taken;

[14] Del. Super. Ct. Civ. R. 60(b)(1).
[15] *Mendiola v. State Farm Mut. Auto. Ins. Co.*, 2006 WL 1173898, at *2 (Del. Super. April 27, 2006); *Cohen v. Brandywine Raceway Ass'n.*, 238 A.2d 320, 325 (Del. Super. 1968).
[16] *Mendiola*, 2006 WL 1173898, at *2 (citing *Verizon Delaware, Inc. v. Baldwin Line Const. Co., Inc.*, 2004 WL 838610, at *1 (Del. Super. April 13, 2004)).

2. a meritorious defense to the action that would allow different outcome to the litigation if the matter was heard on the merits; and

3. that substantial prejudice will not be suffered by the plaintiff if the motion is granted.[17]

The Court will consider the possibility of a meritorious defense or possible prejudice to the plaintiff only if the movant has a satisfactory explanation for its failure to answer the complaint, e.g. excusable neglect.[18]

"Excusable neglect" is "neglect which might have been the act of a reasonably prudent person under the circumstances. Carelessness and negligence are not necessarily 'excusable neglect.'"[19]

The Court finds that LEOF has failed to establish its threshold requirement that its conduct was that of a reasonably prudent person. When LEOF received the Process, Blyden sent the suit papers to the wrong insurer. Although Conover Beyer never advised LEOF it was not the correct insurer, no one from LEOF followed up with Conover Beyer about the Process. Had someone from LEOF done so, they would have discovered that Conover Beyer was not the correct insurer. And, compounding the neglect is the fact that no one from LEOF followed up when State Farm advised LEOF on two separate occasions that it was in default. Given all of the circumstances, LEOF's conduct is not that of a

[17] *Mendiola*, 2006 WL 1173898, at *2.
[18] *Id*.
[19] *Id*. (quotations omitted).

reasonably prudent person and therefore does not constitute excusable neglect.[20] Wherefore, LEOF's Motion to Vacate the Default Judgment is **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

[20] *Sanders v. Jay M. CSEH*, 2006 WL 2742337, at *2-3 (Del. Super. Sept. 22, 2006); *Mendiola.*, 2006 WL 1173898, at *2-3; *Cohen*, 238 A.2d at 325.