IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Emory Hill and Company,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N12L-10-021 JRJ
	)	
MRFRUZ LLC and Christiana Mall, LLC,	)	
	)	
Defendants.	)	

Date Submitted: August 21, 2013
Date Decided: September 24, 2013

OPINION

Upon Defendant Christiana Mall, LLC's Motion to Vacate Default Judgment – **DENIED**

Scott T. Earle, Esquire, Cohen, Seglias, Pallas, Greenhall & Furman, PC, Nemours Building, 1007 North Orange Street, Suite 1130, Wilmington, Delaware, 19801. Attorney for Plaintiff.

Thomas C. Marconi, Esquire, Losco & Marconi, P.A., 1813 North Franklin Street, P.O. Box 1677, Wilmington, Delaware, 19899. Attorney for Christiana Mall, LLC.

Jurden, J.

Before the Court is a Motion to Vacate Default Judgment filed by Christiana Mall, LLC ("Christiana" or "Mall"). Pursuant to Superior Court Civil Rule 60(b), Christiana moves the Court to vacate on grounds of excusable neglect and because the judgment is void.

FACTS

Plaintiff Emory Hill and Company ("Emory Hill"), filed a Complaint and Statement of Mechanics' Lien ("Complaint") against Defendants on October 17, 2012, alleging that Mrfruz, LLC ("Mrfruz") failed to pay for construction materials and services provided by Emory Hill in connection with a "fit-out" of Mrfruz's yogurt stand at the Christiana Mall.[1] Emory Hill seeks to impose a mechanics' lien on the lands and premises which comprise a portion of Christiana Mall, and seeks to recover directly from Christiana based on *quantum meruit*, *quantum valebant*, and unjust enrichment.[2]

Christiana's registered agent was served in Delaware with the summons and Complaint on November 7, 2012.[3] On November 8, 2012, the registered agent forwarded a copy of the Complaint to Christiana's offices in Chicago, Illinois.[4] The Complaint was immediately sent to Christiana's managing agent, General

[1] Compl. ¶¶ 1, 7-8; Mot. to Vacate Default J. ("Mot.") ¶ 2.
[2] Compl. ¶¶ 6-14, 24-30.
[3] Mot. ¶ 2.
[4] *Id*.

Growth Properties, Inc. ("GGP").[5] On November 9, 2012, Frank Francone of GGP's legal department sent a copy of the Complaint to Christiana's tenant, MRF Atlantic, LLC, also known as Mrfruz, along with a demand that Mrfruz defend and indemnify Christiana in accordance with the terms of the lease between Christiana and Mrfruz.[6] Mrfruz accepted its responsibility to defend and indemnify Christiana by signing and returning Francone's demand letter.[7]

On November 16, 2012, Mrfruz's counsel, David M. Shafkowitz, Esquire, copied Francone on an email sent to Emory Hill's counsel, Scott Earle, Esquire.[8] In that email, Shafkowitz took issue with some of the expenses Emory Hill claimed, and stated: "… I want to confirm that you agreed to provide the appropriate extension of time to respond to the filing in this case…."[9]

On November 21, 2012, Earle responded to Shafkowitz's November 16, 2012 email stating, in pertinent part:

> This email confirms that Mr. Fruzz [*sic*] has an extension to answer the complaint and no default judgment will be taken against Mr. Fruzz [*sic*].[10]

Francone was not copied on this email, and Shafkowitz did not forward it to him. Shafkowitz did, however, respond to a November 27, 2012 email from Francone requesting an update, stating:

[5] Mot. ¶ 2; Resp. to Mot. to Vacate Default J. ¶ 7 ("Resp.").
[6] Mot. ¶ 3.
[7] *Id.* at Ex. B.
[8] Mot. at Ex. C.
[9] *Id.*
[10] Resp. at Ex. G.

> Looks like they are reviewing our settlement proposal. He granted the necessary extensions of time to answer. If we do not have it resolved shortly I expect to have it removed for an arbitration. I will keep you posted.[11]

On December 11, 2012, Francone sent Shafkowitz another email requesting another update.[12] Shafkowitz did not respond to this request.[13] In his supplemental affidavit, Francone states that he has no recollection (or documentation) of taking any action after Shafkowitz failed to respond to his December 11th email.[14] Francone was not concerned, however, because he believed: (1) Christiana's interests were adequately protected based on Mrfruz's defense and indemnification agreement, (2) Shafkowitz's assurances that Mrfruz was engaged in settlement discussions, and (3) Shafkowitz's representations that Earle had granted the necessary extensions of time to answer the Complaint.[15]

Mrfruz was served with process on December 10, 2012.[16] Coincidentally, on December 11, 2012, the same day Francone emailed his second status request, Earle emailed Shafkowitz, informing him that Emory Hill believed Mrfruz was not acting in good faith and had until December 31, 2012 to answer the Complaint.[17] Earle stated in that same email:

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[11] Mot. ¶ 5, Ex. C.
[12] Mot. ¶ 6, Ex. C.
[13] *Id*.
[14] Suppl. Aff. of Frank Francone ("Suppl. Aff.") ¶ 5.
[15] *Id.* ¶ 3.
[16] Resp. ¶ 10.
[17] *Id.* at Ex. H.

> The Christiana Mall LLC, the owner, has been served and has not yet answered the Complaint and Statement of Mechanics Lien and the time period for the owner to answer is now past due. The owner has never requested an extension of time to answer. Please advise through your client that the owner is required to answer the complaint, otherwise, default judgment will be taken against the owner.[18]

Francone was not copied on this email and there is no evidence to suggest that Shafkowitz forwarded it to him.[19]

There is no evidence of communication between Francone and Shafkowitz, or Francone and Earle, between December 10, 2012 and February 12, 2013. According to Francone, he was "heavily engaged in other work throughout the month of December" and then took a vacation during the holidays.[20] Francone returned to work on January 10, 2013, and called Shafkowitz sometime during that week to check on the case's status.[21] Shafkowitz assured Francone that "the status of the matter was unchanged" and he "expected a resolution in the near future."[22]

On January 30, 2013, both Defendants having failed to answer the Complaint, Emory Hill filed a Direction for Entry of Default Judgment against Mrfruz and Christiana.[23] Christiana was notified of the default on February 13,

[18] Resp. at Ex. H.
[19] Def.'s Reply to Pl.'s Suppl. Resp. ("Christiana's Reply") 2.
[20] Suppl. Aff. ¶ 5.
[21] *Id.* ¶ 6.
[22] *Id.*
[23] Trans. ID 49206468.

2013.[24] Francone immediately engaged counsel and e-mailed Shafkowitz, demanding that the default judgment be dismissed. [25] Christiana's counsel entered an appearance the next day and filed the instant motion on April 26, 2013.[26] Notably, on March 4, 2013, Plaintiff's counsel filed a Suggestion of Bankruptcy as to Mrfruz.[27]

The Court heard oral argument on May 15, 2013, and granted Christiana leave to supplement Francone's affidavit in order to clarify what actions Francone took after his December 11, 2012 email went unanswered. The Court granted further supplemental briefing and held a second oral argument on August 21, 2013.

PARTIES' CONTENTIONS

Christiana argues the default judgment should be lifted and the case pursued on its merits based on Christiana's excusable neglect pursuant to Superior Court Civil Rule 60(b)(1). Christiana asserts its neglect is excusable because it acted promptly by tendering the Complaint to its tenant, Mrfruz, who accepted the obligation to defend and indemnify Christiana.[28] Christiana also claims excusable

[24] Mot. ¶ 6.
[25] *Id.*
[26] The explanation for the gap between the entry of appearance and the filing of the motion to vacate is as follows: Christiana's counsel initially attempted to negotiate an arrangement with Emory Hill's counsel whereby Emory Hill would vacate the default voluntarily on the grounds that the default had been entered as a result of excusable neglect. That attempt proved unsuccessful. On February 27, 2013, Emory Hill served on Christiana interrogatories and a request for production directed to the events leading up to the entry of the default judgment in anticipation of the instant motion. Counsel agreed to notice the hearing on the instant motion for a time after the due date of the discovery responses.
[27] Trans. ID 49893234.
[28] Mot. ¶ 11.

neglect based on Christiana's reliance on Shafkowitz's assurances.[29] Additionally, Christiana argues it can overcome Plaintiff's claims on the merits because the mechanic's lien is "fatally defective,"[30] Christiana did not receive a benefit from Plaintiff's work,[31] and vacating the judgment will not prejudice Plaintiff.[32] As a fallback, Christiana argues that the default judgment is void under Superior Court Civil Rule 60(b)(4) because Plaintiff failed to comply with Superior Court Civil Rule 4(f)(4).[33]

Plaintiff counters by arguing that Christiana's reliance on Shafkowitz was "foolish," and "[a]lthough it had Delaware counsel, the Mall failed to properly answer…the Complaint, did not have its Delaware counsel enter its appearance, took no effort to confirm an extension with Plaintiff's counsel, and did not require verification" that the Mall had an extension of time to answer.[34] Moreover, Plaintiff argues that the improvements made on Mall premises, including HVAC, electrical, and plumbing work, inure to Christiana and Christiana will be unjustly enriched if the judgment is vacated.[35] Because the improvements were approved by Christiana and made in accord with the Christiana –Mrfruz lease, Plaintiff claims it will be inequitable for Christiana to maintain the benefits without compensating

[29] Mot. ¶ 13.
[30] Mot. ¶ 14-19.
[31] Mot. ¶ 20.
[32] Mot. ¶¶ 14-21.
[33] Mot. ¶ 22.
[34] Resp. ¶¶ 1, 20.
[35] Resp. ¶ 27.

Emory Hill.[36] Plaintiff also argues it will be substantially prejudiced because any amendment to the mechanic's lien (to overcome Christiana's "numerous 'hyper-technical' arguments alleging [lien] defect") will be time-barred.[37] Lastly, Plaintiff argues that Christiana's Rule 4(f)(4) argument misconstrues the law and this case's facts.[38]

DISCUSSION

Standard

Pursuant to Superior Court Civil Rule 60(b), the Court may relieve a defendant of a default judgment if the defendant can show either excusable neglect or that the judgment is void.[39] Delaware courts look favorably on motions to vacate default judgments "because they promote Delaware's strong judicial policy of deciding cases on the merits."[40] Accordingly, Rule 60(b) should be construed liberally to give effect to that underlying policy. [41] For this Court to grant relief from a default judgment because of excusable neglect, the defendant must show: "(1) excusable neglect in the conduct that allowed the default judgment to be taken; (2) a meritorious defense to the action that would allow a different outcome to the litigation if the matter was heard on its merits; and (3) [] that substantial

[36] Resp. ¶ 31.
[37] Resp. ¶¶ 34-36.
[38] Resp. ¶¶ 37-38.
[39] Superior Court Civil Rule 60(b) provides, in pertinent part: "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; . . . (4) the judgment is void."
[40] *Verizon Delaware, Inc. v. Baldwin Line Constr. Co.*, 2004 WL 838610, at *1 (Del. Super. Feb. 27, 2004) (Slights, J.).
[41] *Battaglia v. Wilm. Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977).

prejudice will not be suffered by the plaintiff if the motion is granted."[42] The defendant must first establish excusable neglect before this Court will consider whether a meritorious defense or prejudice to the plaintiff exists.[43]

Excusable Neglect

Excusable neglect is neglect that "might have been the act of a reasonably prudent person under the circumstances."[44] Doubt should be resolved in favor of the movant,[45] but "litigants and their counsel may not be allowed with impunity to disregard the process of the Court."[46] "A mere showing of negligence or carelessness without a valid reason may be deemed insufficient."[47] Ultimately, a motion to vacate default judgment pursuant to Rule 60(b)(1) "is addressed to the sound discretion of the trial court."[48]

Christiana concedes that it was negligent[49] and that in "hindsight," it was "foolish for [Christiana] to believe that Mr. Shafkowitz was looking out for

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[42] *Verizon*, 2004 WL 838610 at *1. The Court notes an additional component to the movant's burden under Rule 60(b): the movant must seek timely relief. *Id*. at FN.4 (citing *Lewes Dairy, Inc. v. Walpole*, 1996 WL 111130, at *1 (Del. Super. Jan. 5, 1996) (Terry, J.)). Delaware courts have noted that a delay of six weeks in seeking relief from a default judgment was not excusable, even when a meritorious defense to the underlying action was available. *Id*. Here, the default judgment was entered January 30, 2013 and Defendant did not file its motion to vacate until April 26, 2013. Although this delay would appear "inexcusable" at first glance, the parties have not argued this element and the Court, therefore, assumes the motion's timeliness is not at issue.

[43] *Lee v. Charter Commc'ns VI, LLC*, 2008 WL 73720, at *1 (Del. Super. Jan 7, 2008) (Jurden, J) (citing *Apartment Cmtys. Corp. v. Martinelli*, 859 A.2d 67, 72 (Del. 2004)).

[44] *Cohen v. Brandywine Raceway Ass'n*, 238 A.2d 320, 325 (Del. Super. 1968).

[45] *McMartin v. Quinn*, 2004 WL 249576, at *1 (Del. Super. Feb. 3, 2004) (Stokes, J.) (citing *Model Fin. Co. v. Barton*, 188 A.2d 233, 234-35 (Del. Super. 1963)).

[46] *Cohen*, 238 A.2d at 325 (citing *Fed. Enters., Inc. v. Frank Allbritten Motors, Inc.*, 16 F.D.R. 109 (W.D. Mo. 1954)).

[47] *Id.*

[48] *Battaglia*, 379 A.2d at 1135.

[49] "Christiana's neglect which resulted in the entry of default, was that it relied too heavily on Mr. Shafkowitz's statements to Mr. Francone." Mot. ¶ 13.

Christiana's interest[s….]"[50] The issue is whether Christiana's admitted negligence is excusable under the circumstances presented here. Christiana did not engage or consult with its own counsel upon receipt of the Complaint because it relied on Mrfruz, pursuant to Mrfruz's obligation to defend and indemnify Christiana. Francone believed, based on that obligation and Shafkowitz's November 27, 2012 email, that Mrfruz was engaged in good faith negotiations with Emory Hill and that both Christiana and Mrfruz had an extension of time to answer.[51] The question becomes, then, was it reasonable for Francone to rely on Shafkowitz's assurances, especially after Shafkowitz failed to respond to Francone's December 11, 2012 email?

When Shafkowitz failed to respond to Francone's December 11, 2012 email, Francone should have followed up immediately with Shafkowitz and/or engaged Christiana's retained counsel immediately if Shafkowtiz was not responding. Instead, Francone ignored the Complaint for weeks and went on vacation. He did so without knowing how long an extension Shafkowitz had obtained and whether Emory Hill knew Shafkowtiz was purportedly representing Christiana. Emory Hill contends that Francone never made contact with Shafkowitz in mid-January, despite Francone's affidavit saying that to the best of his knowledge he did.[52]

[50] Christiana's Reply 3.
[51] *See* Mot. at Ex. C.
[52] Suppl. Resp. to Christiana's Mot. to Vacate Default J. ("Suppl. Resp.") 3.

Doubts about excusable neglect are resolved in favor of the movant,[53] so the Court will assume that Shafkowitz assured Francone in mid-January that Emory Hill and Mrfruz were still pursuing settlement, and that everything was fine. Additionally, the Court will resolve doubts about warning signs of Mrfruz's insolvency in favor of Christiana because Emory Hill has not offered any proof about when Christiana's problems with Mrfruz began.[54]

For approximately two and a half months after Christiana was required to answer the Complaint, it was only minimally involved in resolving the dispute because counsel for the party responsible for defending and indemnifying Christiana assured Christiana that he was engaged in the process of settlement and impliedly represented that an extension had been granted to both parties.[55] Christiana reasonably expected its tenant to resolve the situation with Emory Hill because its tenant had a legal duty to defend and indemnify Christiana.[56]

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[53] *McMartin*, 2004 WL 249576 at *1.
[54] Resp. ¶ 22.
[55] Mot. Ex. C.
[56] Plaintiff points out that this Court has not looked favorably in the past on parties who failed to acquire legal representation when served with a complaint. Aug. 21, 2013 Ltr. to Hon. Jan R. Jurden, Trans. ID 53836246 ("It is true that this Court has often found it unreasonable and inexcusable when defendants have failed to retain counsel."). *See Fin. & Brokerage Servs., Inc. v. Robinson Ins. Associates, Inc.*, 1990 WL 199503, at *4 (Del. Super. Nov. 21, 1990) (Steele, J.) ("[A] reasonable prudent person in similar circumstances would have contacted an attorney to determine his rights and/or liabilities.") (In failing to contact counsel, the defendant "acted unreasonably and carelessly."); *Murzyn v. Locke*, 2006 WL 1195628, at *2 (Del. Super. Mar. 13, 2006) (Cooch, R.J.); *Watson v. Simmons*, 2009 WL 1231145, at *2 (Del. Super. Apr. 30, 2009) (Vaughn, P.J.) (Stating that it is "unreasonable not to seek legal counsel upon receiving notice of a complaint."); *see also Keith v. Melvin J. Joseph Constr. Co.*, 451 A.2d 842, 846 (Del. Super. 1982) ("[A] reasonably prudent person would have, at least, consulted with an attorney to ascertain his legal rights and obligations. Such a course of action would have been particularly appropriate under the circumstances of this case since the defendant had attorneys on retainer."); *Concors Supply Co., Inc. v. Berger*, 1988 WL 130437, at *2 (Del. Super. Nov. 9, 1988) (Del Pesco, J.) (Defendant's failure to "protect his interest at the time of the original lawsuit was not the conduct of a reasonably prudent person, especially since he was already represented by an attorney in other matters."). Resolution of a Rule 60(b)(1) motion is at the discretion of the trial

As soon as notice of the default was communicated to Christiana, Christiana contacted Mrfruz's counsel,[57] engaged its own counsel, and entered an appearance with the Court.[58] Christiana was negligent, but its actions did not amount to "sheer indifference" or "without reason."[59] Here, Christiana's failures were ultimately based upon Mrfruz's agreement to defend and Shafkowitz's representations. Resolving doubts in Christiana's favor, and based upon the facts of this case, the Court finds that Christiana's neglect was excusable.[60]

Meritorious Defense

In addition to showing its neglect was excusable, Christiana must show that it has a meritorious defense and that the Emory Hill will not be substantially prejudiced if the judgment is vacated.[61] To assert a "meritorious defense," Christiana need only show that there is a possibility of a different result.[62]

Christiana asserts six defenses to Emory Hill's claims.[63] While Emory Hill accuses Christiana of "misstat[ing] fact and misapply[ying] the law to create the

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court, *Battaglia*, 379 A.2d at 1135, and it is the Court's duty to consider *all* of the circumstances of the case, *Model Fin. Co. v. Barton*, 188 A.2d 233, 235 (Del. Super. 1963). Francone reasonably believed that Mrfruz had an obligation to defend Christiana and that Shafkowitz had obtained an extension and was negotiating a settlement. But for Christiana's and Mrfruz's agreement, the outcome would be different.

[57] Mot., Ex. C.

[58] *Id.* ¶ 6.

[59] *Cf. Cohen*, 238 A.2d at 322-23 (Explaining that it was inexcusable for defendant to receive notice of a default and then to just "forget" about the matter when it was clear that the issue required immediate attention.).

[60] The Court notes that this is a close call.

[61] *Verizon*, 2004 WL 838610 at *1.

[62] *McMartin*, 2004 WL 249576 at *3.

[63] *See* Mot. ¶¶ 14-19. These defenses are: (1) failure to correctly state a valid commencement date; (2) failure to identify "the owner or reputed owner of the 'structure;'" (3) failure to correctly identify the structure; (4) defect in the affidavit of support; (5) failure to state precisely who the contract was made with; and (6) failure to file an affidavit that complies with 25 Del. C. § 2725(a).

appearance of several meritorious defenses," it does not contest all of the defects alleged by Christiana.[64] In particular, Emory Hill does not dispute that its affidavit in support of the Statement of Mechanics' Lien[65] is avowed to be "true and correct *to the best of [the affiant's] knowledge*."[66] This Court has repeatedly found statements of mechanics' liens defective—and has not allowed plaintiffs to amend if the time period for filing has passed—when the accompanying affidavit includes qualifying language to the statutorily required avowal that the mechanics' lien claim is "true and correct."[67] Because at least one of the uncontested defects alleged by Christiana may result in dismissal of the claim, Christiana has shown a meritorious defense to the mechanics' lien claim.

Christiana also claims that it can defend itself against Emory Hill's claims of *quantum meruit* and *quantum valebant*,[68] and unjust enrichment[69] because Emory Hill outfitted Christiana's rental suite for the operation of a frozen yogurt business by Mrfruz, and Christiana has not received a benefit from any "improvements" made to the unit.[70]

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[64] Resp. ¶¶ 27, 32.
[65] "The complaint and/or statement of claim shall be supported by the affidavit of the plaintiff-claimant that the facts therein are true and correct." 25 *Del. C.* § 2712(c).
[66] Compl., Ex. D (emphasis added).
[67] *See Oscar George, Inc. v. Potts*, 115 A.2d 479 (Del. 1955) (affirming the Superior Court's decision to dismiss a mechanics' lien claim when the affidavit of support stated that the claim was true and correct "to the best of his knowledge and belief"); *Atl. Millwork Corp. v. Harrington*, 2002 WL 31045223, at *2-3 (Del. Super. Sept. 12, 2002) (refusing to allow the plaintiff to amend its statement so as to omit the qualifying language "to the best of my knowledge"); *Am. E. Explosives, Inc. v. E. States Dev. Co.*, 2001 WL 492074, at *1 (Del. Super. Apr. 27, 2001) (Babiarz, J.) (same).
[68] *See* Compl., Count IV.
[69] *Id*., Count V.
[70] Resp. ¶ 20.

To establish a claim of *quantum meruit* against Christiana, Plaintiff must show: (1) that the services were performed by Emory Hill with the expectations that "the recipient of the benefit would pay for them;" and (2) "that the services were performed. . . under circumstances which should have put the recipient of the benefit upon notice that the plaintiff expected to be paid."[71] A claim of *quantum valebant* is established by showing "that the defendant received materials from the plaintiff and enjoys the benefit of them."[72]

Christiana argues that the circumstances under which Emory Hill undertook fit-out work for Mrfruz were not such that Emory Hill could reasonably expect payment from Christiana.[73] Plaintiff correctly notes that recovery under a claim of *quantum meruit* is for the reasonable value of the services, not the value of the benefit received.[74] This argument, however, does not address Christiana's assertion that it was not reasonable for Emory Hill to expect Christiana to pay for fit-out work for a tenant's frozen yogurt stand. Christiana's argument may not be successful, but it does constitute a meritorious defense to Count VI of the Complaint.

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[71] *C&C Drywall Contractor, Inc. v. Milford Lodging*, 2010 WL 1178233, at *3 (Del. Super. Jan. 13, 2010) (Young, J.) (quoting *Griffin Dewatering Corp. v. B.W. Knox Constr. Corp.*, 2001 WL 541476, at *7 (Del. Super. May 14, 2001) (Graves, J.) (internal quotation marks omitted)).

[72] *State ex rel. Structa-Bond, Inc. v. Mumford & Miller Concrete, Inc.*, 2002 WL 31101938, at *3 (Del. Super. Sept. 17, 2002) (Babiarz, J.) (citing *Constr. Sys. Grp., Inc. v. Council of Sea Colony, Phase I*, 670 A.2d 1337 (Del. 1995) (TABLE)).

[73] Christiana's Reply 6.

[74] Suppl. Resp. 4 (citing *Hynansky v. 1492 Hospitality Grp., Inc.*, 2007 WL 2319191, at *1 (Del. Super. Aug. 15, 2007) (Babiarz, J.)).

"Unjust enrichment is defined as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[75] It is "based on an unjustified enrichment of one party and resulting impoverishment of another party, in the absence of a remedy at law."[76] Emory Hill maintains that the work it completed (namely, installation of an HVAC system, electrical work, plumbing, and a fire sprinkler system) will benefit Christiana because the work involved generic improvements, completed in compliance with Christiana's own specifications.[77] Given this fact, Emory Hill asserts that Christiana's claim that the Mrfruz improvements are useless to the Mall is faulty and fails to allege a valid defense to unjust enrichment.[78] Christiana counters that it has not been enriched by the "improvements" to the rental space because it is not in the frozen yogurt business, and, once Mrfruz is evicted, Christiana will likely incur expenses removing the work in order to make way for a new tenant.[79] Christiana may not prevail in its argument that it has not been "enriched" by the work done by Emory Hill, but it has alleged a meritorious defense to Count V of the Complaint.

[75] *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988) (internal quotation marks omitted).
[76] *Hynansky*, 2007 WL 2319191 at *2 (citing *Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch. 1999)).
[77] Resp. ¶¶ 27-30.
[78] *Id.*
[79] Mot. ¶ 20.

Substantial Prejudice

Christiana has alleged meritorious defenses to the Complaint's claims, however, it must also show that Emory Hill will not suffer substantial prejudice if the default judgment is vacated.[80] The mechanics' lien statute is strictly construed.[81] Failure to comply with the requirements of the mechanics' lien statute[82] means failure to assert a mechanics' lien claim.[83] Consequently, amendments to mechanics' lien claims are generally not allowed once the time for filing a statement of mechanics' lien has passed.[84] Emory Hill argues that it will be substantially prejudiced if the default judgment is vacated because it is now well past the statutory filing period.[85]

Although this Court has allowed amendments when the amendment has not changed the nature of the claim,[86] generally, amendments are not permitted after the filing period has passed.[87] If this Court were to vacate the default judgment in this case, Emory Hill might successfully move to amend some of the alleged defects in its Complaint, but others, like the improper inclusion of the phrase "to

[80] *Verizon*, 2004 WL 838610 at *1.
[81] *Deluca v. Martell*, 200 A.2d 825, 826 (Del. Super. 1964).
[82] 25 *Del. C.* § 2712.
[83] *Builders' Choice, Inc. v. Venzon*, 672 A.2d 1, 2 (Del. 1995) (citing *E.J. Hollingsworth Co. v. Cont'l-Diamond Fiber Co.*, 175 A. 266 (Del. Super. 1934)).
[84] *Deluca*, 200 A.2d at 827.
[85] Resp. ¶¶ 34-36.
[86] *E.g. Deluca*, 200 A.2d at 828 (Allowing the amendment of the bill of particulars because adding the details about how the plaintiff arrived at the amount claimed would "in no way changes the basic claim"); *Westinghouse Elec. Supply Co. v. Franklin Inst. of State of Pennsylvania for Promotion of Mech. Arts*, 21 A.2d 204 (Del. Super. 1941) (Granting an untimely motion to amend when the general contractor was included as a party defendant but was included in the body of the complaint).
[87] *Deluca*, 200 A.2d at 827.

the best of my knowledge," in an otherwise valid affidavit, will almost certainly be fatal.[88]

The fact that Defendant has a defense that will almost certainly result in the dismissal of the claim is not ordinarily, in itself, a source of "prejudice" to the Plaintiff. It is the Plaintiff's responsibility to properly plead the claim. Nevertheless, Emory Hill argues the it would not be fair for Christiana to advance (and possibly prevail on) "hyper-technical" arguments at this stage.[89] Emory Hill filed its mechanics' lien claim well before the statutory period for filing had run.[90] If Christiana had responded to the Complaint in a timely manner, Emory Hill would have had approximately two full months left to amend the Complaint before the statutory filing period had run. The loss of the opportunity to amend technical defects in the strict, statutorily regulated mechanics' lien proceeding, due to the neglect of the opposing party, is substantially prejudicial to Emory Hill.

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[88] *See E.J. Hollingsworth*, 175 A. at 268 (Del. 1934) ("The statutory requirements are positive and substantial in character. It follows, therefore, that if the statement of claim fails to meet the requirements of the statute, the right to the lien is not implemented and the furnishings of materials does not become pregnant with lien; and, when the time for filing the statement of claim has expired, the Court is unable, by allowing an amendment to the statement of claim for the purpose of curing fatal defects, to breathe life into that which has no existence."); *see also, Const. by Franco v. Reed*, 1994 WL 750306 *1 (Del. Super. Dec. 12, 1994) (Silverman, J.) (After finding Plaintiff's assertion that the complaint "is true and correct to the best of his knowledge and belief" was fatal, the Court explained that "[t]he idea behind strict construction of mechanics' liens complaints and intolerance for deficiencies in them is that the mechanics' lien statute is in derogation of the common law."); *accord*, *Builders' Choice, Inc. v. Venzon*, 1995 WL 264593 *1 (Del. Super. Apr. 25, 1995) (Quillen, J.), *aff'd*, 672 A.2d 1 (Del. 1995).

[89] Suppl. Resp. 5.

[90] Plaintiff claims that the last day that payment was due was September 30, 2012. Resp. at ¶ 36. (Defendant does not dispute this date.) Therefore, Plaintiff had 120 days from that date to file a mechanics' lien claim. *See* 25 *Del. C.* § 2711(b).

Unlike other situations where this Court may freely allow amendments to a statement of claim,[91] amendments to a statement of claim in mechanics' liens proceedings are not allowed after a certain time period has lapsed in the absence of statutory authority.[92] Authority to grant the right to amend, as equitable as it may be under these circumstances, "should come from the General Assembly in view of the passage of time," not from this Court.[93] Thus, the question is, "under all of the circumstances of this case, would it be in furtherance of justice to open the default judgment and to permit the defendants to interpose a defense to the action?"[94]

Although Emory Hill's initial complaint does not strictly comply with the statutory requirements of the mechanics' lien statute, Christiana's neglect is the reason why Plaintiff lost its statutorily allowed opportunity to amend. Had Christiana answered the Complaint in a timely manner in compliance with 25 *Del. C.* § 2716 and Superior Court Rule 12(a), Emory Hill would have been able to amend.[95] By Christiana's own admission, had Emory Hill been able to amend, Defendant's defenses would be rendered invalid, resulting in a judgment for Emory Hill on the merits.[96] Considering all of the circumstances of this case, it

[91] "The [Rule 60(b)] proceeding is essentially equitable in nature, ruled by equitable principles, and the appeal is to the conscience of the Court." "In granting a motion to open a default judgment, the Court has the power to protect the rights of the judgment holder by imposing such terms as justice requires to avoid prejudice or loss occasioned by inaction of a defendant." *Battaglia*, 379 A.2d at 1136.
[92] *E.J. Hollingsworth*, 175 A. at 268.
[93] *Greenhouse v. Duncan Villiage Corp.,* 184 A.2d 479, 482 (Del. Super. 1962).
[94] *Kaiser-Frazer Corp. v. Eaton*, 101 A.2d 345, 353 (Del. Super. 1953).
[95] *W.D. Haddock Const. Co. v. D.H. Overmyer Co*., 756 A.2d 760 (Del. Super. 1969).
[96] *see* Christiana's Reply 8: "[A]llowing plaintiff to amend the filing will be the legal equivalent of denying Christiana's motion because it will essentially eliminate Christiana's legal defenses."

would not be in the furtherance of justice to open this default judgment in light of the resulting substantial prejudice to Emory Hill.[97]

Voidness

Christiana argues that the default judgment is void because Emory Hill failed to comply with Superior Court Civil Rule 4(f)(4)[98] in two respects. First, Christiana argues that Plaintiff's affidavit fails to include proof that the Notice to Lien Holders and Tenants of Filing of Action was posted on the Mall's property.[99] Second, Christiana argues that Plaintiff failed to send a copy of the Notice to other tenants with leasehold interests.[100]

Initially, the Court notes that failure to provide case law in support of an argument "will result in the Court deeming such legal arguments waived,"[101] and that the default judgment here is potentially *voidable*, not void.[102] Although

[97] In considering all of the circumstances, the Court notes that: (1) Emory Hill filed well before the expiration of the statutory filing period; (2) the running of the filing period is entirely due to Christiana's negligence; and (3) Christiana itself has admitted that it has no defenses to the merits of the mechanics' lien claim. The Court also notes that Christiana's co-defendant is insolvent, leaving Plaintiff to pursue judgment in Bankruptcy Court, which may involve protracted and potentially fruitless litigation.

[98] Super. Ct. Civ. R 4(f)(4) provides, in pertinent part: "In actions begun by scire facias, 2 returns without service of 2 consecutive writs, being the original writ and an alias writ, followed by a certification by the sheriff that he has posted a copy of the alias writ on the subject property and has mailed a copy of the alias writ by both certified mail, return receipt requested, and first class mail to the last known address (as stated in the praecipe) of the defendants, shall constitute legal and sufficient service."

[99] Mot. ¶ 22.

[100] Mot. ¶ 23.

[101] *See, e.g., Novkovic v. Paxon*, 2009 WL 659075, at *3 (Del. Super. Mar. 16, 2009) (Ableman, J.) (quoting *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008)).

[102] *York Federal Sav. and Loan Ass'n v. Heflin*, 1996 WL 30241, at *2 (Del. Super. Jan. 5, 1996) (Graves, J.) ("Delaware [] follows the rule that: 'Judgments rendered by a court having jurisdiction of the parties and subject matter may not be attacked as invalid in any collateral proceeding. Collateral attack is allowed only where the judgment is void, a void judgment being a judgment rendered without jurisdiction. If a judgment is merely voidable because of some other type of defect, its validity may not be impeached in a collateral proceeding.'") ("Moreover, the defect in a void judgment must be apparent on the face of the record such that it can be discovered without receipt of additional evidence.").

Christiana has offered no case law in support of its voidness arguments, the Court has considered them.

As to posting, the record reflects that the New Castle County Sheriff's Office filed an amended return of service, evidencing that the Notice to Lienholders was posted on Christiana Mall's "Zone A" on November 9, 2012.[103] The record further reflects that Plaintiff fully complied with the procedures set forth in Rule 4(f)(4). Therefore, the judgment is not voidable on this ground.

As to notice, Christiana's argument that Plaintiff failed to notify two additional lienholders is based on the Mall's 2003 deed, which includes two non-party entities as lienholders.[104] The two lienholders listed on the ten-years old deed are not part of the parcel's Title of Record,[105] and Christiana failed to rebut that. Moreover, on this Rule 4(f)(4) notice argument, Christiana lacks standing.[106] Therefore, the judgment is not voidable on this basis.

[103] Trans. ID 51718514.
[104] Mot. ¶ 23.
[105] Resp. ¶ 38.
[106] *Dumler v. Mabe*, 1979 WL 193424, at *1-2 (Del. Super. July 5, 1979) (Bifferato, J.) (Buyers of foreclosed property asked the Court to void the Sheriff's sale based on Rule 4(f)(4) notice insufficiencies to property lienholders.) (Holding that Buyers lacked standing to "contest the validity of the foreclosure sale based on a lack of notice to lienholders," the Court noted that deprivation of property without due process carries constitutional protections and "[t]he authority is overwhelming that constitutional rights are personal and may not be asserted vicariously.").

CONCLUSION

For the reasons set forth above, Defendant's Motion to Vacate Default Judgment is **DENIED**.

IT IS SO ORDERED.

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Jan R. Jurden, Judge

cc: Prothonotary