

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

VIVIAN L. MEDINILLA
JUDGE

LEONARD L. WILLIAMS JUSTICE CENTER
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DE 19801-3733
TELEPHONE (302) 255-0626

December 11, 2018

Phillip A. Giordano, Esquire
Gordon, Fournaris &
Mammarella, P.A.
1925 Lovering Avenue
Wilmington, Delaware 19806

Adam Balick, Esquire
Melony Anderson, Esquire
Balick and Balick, LLC
711 N. King Street
Wilmington, Delaware 19801

Re: *Gam, LLC v. Blue Swan, Inc., et al.*
C.A. No.: N18C-06-120 VLM

Dear Counsel:

This is the Court's ruling on Defendants' Motion to Vacate Entry of Partial Default Judgments. For the reasons stated below, Defendants' Motion is **GRANTED**.

Procedural and Factual Background

The allegations in the Complaint arise from a contract dispute between Gam, LLC ("Plaintiff" and/or "Landlord") and Blue Swan, Inc. and L. Ronald Olivere (collectively "Defendants" and/or "Tenants"). Defendants operated a dry cleaner, laundry, and alterations business at the premises and entered into a ten-year lease (the "Lease") with Plaintiff on or about December 12, 2003.¹ Mr. Olivere signed an Individual Personal Guarantee on December 12, 2003, whereby he agreed to be personally liable for all amounts due under the Lease.² At an unspecified time, the parties agreed to renew the Lease for an additional five years.³

¹ Compl. ¶ 4.

² *Id.* ¶ 5.

³ *Id.* ¶ 6.

The Defendants failed to meet their contractual obligations to pay rent. In the Spring of 2018, Plaintiff gave notice to Defendants that that it was terminating the Lease unless past due payments were made.⁴ On April 27, 2018, Plaintiff sent Defendants a Notice Letter that they were in default and gave them ten days to cure.⁵ Defendants failed to make their required payments in an amount of \$281,922.91.⁶

On May 29, 2018, Plaintiff initially filed suit in Justice of the Peace Court (“JP Court”) for summary possession and the jurisdictional limit of damages of \$15,000 for unpaid rent. On June 15, 2018, Plaintiff filed the Complaint against Defendants in this Court for breach of contract.

It is undisputed that during the time of various filings, the parties, through counsel, engaged in regular and frequent discussions about the sale of Defendants’ business in an effort to resolve the pending claim(s). It was contemplated that portions of the proceeds of the sale of the business might be used to pay past due amounts. Counsel for Defendants represented that he believed that Plaintiff was not pursuing litigation in this Court because of the continued negotiations between the parties. He did not enter an appearance or otherwise plead on behalf of Defendants nor did Plaintiff communicate to Defendants or counsel its intent to seek default judgment in this Court.

On July 9, 2018, the JP Court entered default judgment for Plaintiff. On July 20, 2018 and July 26, 2018, Plaintiff filed, and this Court entered, Partial Default Judgment against Defendants in the amount of \$295,874.35. On July 30, 2018, the JP Court vacated *sua sponte* the default judgment it entered on July 9, 2018. On August 30, 2018, default judgment was again entered in JP Court, but Plaintiff only sought default judgment for summary possession because it had acquired default judgment in this Court.

When Defense counsel became aware of the judgment(s) on September 27, 2018, he immediately filed this Motion to Vacate Entry of Partial Default Judgments. On November 11, 2018, Plaintiff filed a Response in Opposition to Defendants’ Motion to Vacate Entry of Default Judgment. The Court held a hearing on December 4, 2018.

⁴ Compl. ¶ 10.

⁵ *Id.* ¶ 11.

⁶ *Id.* ¶ 12.

Standard of Review

Under Superior Court Rule 55(c), the Court may set aside a default judgment under Rule 60(b).⁷ Delaware courts favor Rule 60(b) motions as they allow for the adjudication of cases on the merits and allow parties to have their day in court.⁸ Under Rule 60(b), “[o]n 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[.]”⁹ “A motion to vacate a default judgment pursuant to Superior Court Civil Rule 60(b) is addressed to the sound discretion of the Court.”¹⁰ Any doubts should be resolved in favor of the moving party.¹¹

Discussion

Defendants argue relief from default judgment is appropriate under Rule 60(b),¹² for excusable neglect. Excusable neglect has been defined “as neglect which might have been the act of a reasonably prudent person under the circumstances.”¹³ The burden is on the defendant to establish excusable neglect.¹⁴ To establish a basis for relief, a 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) a showing that substantial prejudice will not be suffered by the plaintiff if the motion is granted.”¹⁵

Defendants have met their burden. The parties’ regular and frequent communications about the possibility of selling Defendants’ business led

⁷ DEL. SUPER. CT. CIV. R. 55(c).

⁸ *Verizon Delaware, Inc. v. Baldwin Line Construction Co., Inc.*, 2004 WL 838610, at *1 (Del. Super. Apr. 13, 2004) (citing *Keystone Fuel Oil Co. v. Del-Way Petroleum, Inc.*, 364 A.2d 826, 828 (Del. 1976)).

⁹ DEL. SUPER. CT. CIV. R. 60(b).

¹⁰ *Verizon Delaware, Inc.*, 2004 WL 838610, at *1 (citing *Battaglia v. Wilmington Sav. Fund Soc’y*, 379 A.2d 1132, 1135 (Del. 1977)).

¹¹ *Id.*

¹² *See generally* Defs.’ Mot.

¹³ *Verizon Delaware, Inc.*, 2004 WL 838610, at *1 (citation omitted).

¹⁴ *Perry v. Wilson*, 2009 WL 1964787, at *1 (Del. Super. July 8, 2009) (citing *Apartment Comtys. Corp. v. Martinelli*, 859 A.2d 67, 70 (Del. 2004)).

¹⁵ *Verizon Delaware, Inc.*, 2004 WL 838610, at *1 (citing *Lewes Dairy, Inc. v. Walpole*, 1996 WL 111130, at *2 (Del. Super. Jan. 5, 1996)).

Defendants' counsel to believe, albeit mistakenly, that Plaintiff was not pursuing its claims in this Court. This Court finds that the conduct was that of a reasonably prudent person under the circumstances, and counsel provided valid reasons to believe that the litigation was "on hold" in light of the ongoing negotiations.

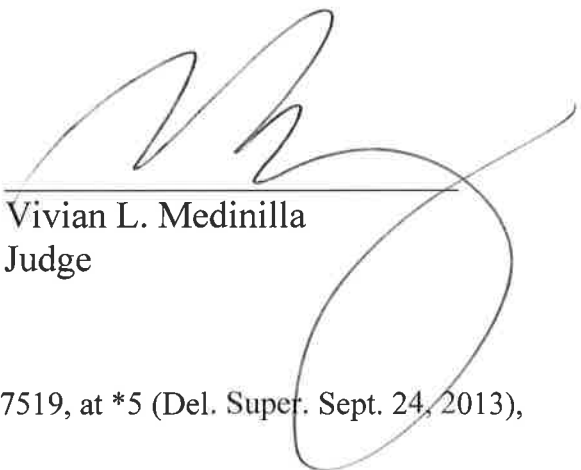
As to whether Defendants have a meritorious defense to the action that would provide a different outcome if the issue was heard on the merits, Defendants "need only show that there is a possibility of a different result."¹⁶ Although not fully developed, this Court considers that Defendants may have meritorious defenses, including Plaintiff's failure to mitigate or *res judicata*. Without getting into the merits of the defense, for example, as to the *res judicata* defense, the materials submitted to the Court on this issue are a bit unclear.

The JP Court action was initially decided on July 9, 2018, but was vacated *sua sponte* on July 30, 2018. In between these time periods, the Superior Court entered default judgment on July 20, 2018 and July 26, 2018. Thus, Plaintiff obtained the jurisdictional limit from JP Court and then obtained default judgments in this Court prior to the JP Court action being vacated. Although unclear if it will be successful, any doubts as to Defendants' ability to raise a *res judicata* defense are resolved in favor of Defendants as the moving party.

Finally, the Court finds that Plaintiff will not suffer a substantial prejudice as a result of granting the motion. The Default Judgments were filed in July of 2018 and Plaintiff has yet to execute on them. Therefore, Plaintiff will not be substantially prejudiced if the motion is granted.

Thus, Defendants' Motion to Vacate Entry of Partial Default Judgment is **GRANTED**.

IT IS SO ORDERED.



Vivian L. Medinilla
Judge

¹⁶ *Emory Hill and Co. v. Mrfruz LLC*, 2013 WL 5347519, at *5 (Del. Super. Sept. 24, 2013), *aff'd on other grounds*, 90 A.3d 1087 (Del. 2014).