

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-2017-44 ✓

PNM CONSTRUCTION, INC.)	
)	
Plaintiff,	)	COMBINED ORDER ON
	)	DEFENDANT EASTERN MAINE
v.	)	DEVELOPMENT CORPORATION'S
	)	MOTION TO SET ASIDE DEFAULT
LMJ ENTERPRISES, LLC, et al.,	)	JUDGMENT AND FOR LEAVE TO
	)	FILE LATE ANSWER AND
Defendants,	)	PLAINTIFF'S MOTION TO STRIKE
	)	PORTION OF EASTERN MAINE
	)	DEVELOPMENT CORPORATION'S
	)	REPLY MEMORANDUM

Defendant Eastern Maine Development Corporation (“EMDC”) moves this Court pursuant to M.R. Civ. P. 55(c) and 60(b)(1) to set aside the entry of default and default judgment entered by the Clerk on January 23, 2018 and for leave to file a late answer to the Complaint brought by Plaintiff PNM Construction, Inc. (“PNM”). PNM opposed the motion and EMDC timely replied. PNM subsequently moved to strike most of EMDC’s reply brief pursuant to M.R. Civ. P. 7(e). The Court heard oral argument on both motions on February 20, 2018, at which both parties appeared through counsel and were heard.

PROCEDURAL HISTORY

This case arises out of a dispute over payment for demolition and renovations to a fire-damaged property performed by PNM. EMDC, along with three other creditor-defendants, hold mortgages on the subject property. PNM has sued LMJ Enterprises, LLC, the owner of the property, along with Mr. Lee Haskell, the principle of LMJ Enterprises, for breach of contract. PNM seeks to recover from the creditor-defendants on an unjust enrichment theory.

EMDC accepted service of the Complaint on December 28, 2017. For reasons that are

explained in more detail below, EMDC failed to file an answer or otherwise respond to the Complaint by the January 17, 2018 deadline for responsive pleadings. On January 19, 2018, PNM filed an affidavit and request for default and default judgment against EMDC with the Clerk of Court. *See* M.R. Civ. P. 55. The Clerk of Court entered default and issued a default judgment against EMDC on January 23, 2018.

EMDC brought the instant motion to set aside default judgment and for leave to file a late answer on January 29, 2018, after EMDC procured counsel and attempted to reach a negotiated resolution with PNM. (Def's Mot. at 3-4.) PNM opposed the motion, and EMDC timely replied. PNM subsequently moved to strike all but the final paragraph of EMDC's reply brief on the grounds that it exceeds the scope of PNM's opposition. *See* M.R. Civ. P. 7(e).

STANDARD OF REVIEW

“For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).” M.R. Civ. P. 55(c). “In order to ‘establish good cause, a party must show a good excuse for his or her untimeliness and a meritorious defense.’” *Levine v. KeyBank Nat'l Ass'n*, 2004 ME 131, ¶ 13, 861 A.2d 678 (quoting *Truman v. Browne*, 2001 ME 182, ¶ 9, 788 A.2d 168). *See also* M.R. Civ. P. 60(b)(1) (“excusable neglect” proper reason to order relief from judgment).

“[T]rial courts, considering the circumstances of each case, have a broad range of discretion in considering requests for relief and remedies pursuant to Rule 60(b).” *Ezell v. Lawless*, 2008 ME 139, ¶ 19, 955 A.2d 202. On appeal, orders setting aside default pursuant to M.R. Civ. P. 55(c) and orders granting relief from judgment pursuant to M.R. Civ. P. 60(b) will be set aside “only if the failure to grant the relief works a plain and unmistakable injustice against the moving party.” *Id.* (citing *Wooldridge v. Wooldridge*, 2008 ME 11, ¶ 7, 940 A.2d 1082); *Levine*, 2004 ME 131, ¶ 13,

DISCUSSION

This Court, and Maine Courts generally, have a strong preference for deciding cases on their merits. *See* 3 Harvey & Merritt, *Maine Civil Practice* § 55:7 at 207 (3d, 2011 ed.) (“The court should be lenient in recognizing that courts exist to do justice and are reluctant to lend their processes to the enforcement of unjust judgments. Any doubt should be resolved in favor of setting aside the default so that cases may be determined on their merits.” (citing *Thomas v. Thompson*, 653 A.2d 417, 420 (Me. 1995))). Nonetheless, a moving party bears the burden of showing good cause to set aside a default and order relief from a default judgment. M.R. Civ. P. 55(c). The good cause requirement has two prongs: (1) a good excuse for the default occurring and (2) a meritorious defense to the action. *Levine*, 2004 ME 131, ¶ 13, 861 A.2d 678. *See also Ezell*, 2008 ME 139, ¶ 22, 955 A.2d 202 (“To obtain relief from a default judgment under Rule 60(b)(1) for excusable neglect, a party must show (1) a reasonable excuse for her inattention to the court proceedings, and (2) a meritorious defense to the underlying action.”).

I. EMDC’S EXCUSE IS REASONABLE

EMDC’s excuse is based on two circumstances. First, EMDC’s President and CEO, Michael Aube, was absent when the Summons and Complaint were served on EMDC. (Barbee Aff. ¶ 5.) Second, Kitty Barbee, the Director of Business Services and Lending at EMDC, who accepted service on behalf of EMDC in Mr. Aube’s absence, mistakenly concluded that EMDC did not need to file a response because the “joint” mortgage held by EMDC and another creditor is a junior mortgage, and the debtor’s liability to the first-priority mortgagee far exceeds the value of the mortgaged property. (Barbee Aff. ¶¶ 6, 8.) It is apparently typical for EMDC, as junior mortgagee, to be named as a party-in-interest when a borrower defaults, and EMDC’s practice is

to decline to intervene in such suits where the debt to the senior mortgagee exceeds the value of the property, as was the case here. (Barbee Aff. ¶ 8.) Ms. Barbee was also cognizant of the fact that she had endorsed two insurance checks on behalf of EMDC. (Barbee Aff. ¶ 7.) Looking at the complaint, to her untrained eye, the dispute was between the senior mortgagee, PNM, and LMJ over insurance proceeds. (Def's Mot. at 5.) Ms. Barbee concluded that EMDC was a mere party-in-interest as a junior mortgagee, and consistent with EMDC's practice she declined to file an answer or seek the advice of counsel. (*Id.*)

The Court finds EMDC's mistake was reasonable under the circumstances. Ms. Barbee's conclusion that no answer was required was based on her understanding of EMDC's role as a subordinate mortgagee, her awareness of EMDC's practice, and her personal familiarity with a key detail in this case: she endorsed the insurance checks that are at issue in this case. Ms. Barbee's reasoning was sound, even if it did lead her to an erroneous conclusion. The Court is thus satisfied that EMDC has a good excuse for its inattention to these proceedings.

II. EMDC HAS A MERITORIOUS DEFENSE

EMDC has been sued for unjust enrichment. EMDC raises two defenses in its motion; first, that PNM is not entitled to an equitable remedy of unjust enrichment because PNM failed to exhaust its remedies at law; second, that PNM conferred no benefit on EMDC. *See Forrest Assocs. v. Passamaquoddy Tribe*, 2000 ME 195, ¶ 15, 760 A.2d 1041.

These same defenses have been raised by the other creditor-defendants in motions to dismiss and will be addressed in more detail in the Court's forthcoming order on those motions. Here, the Court determines only that EMDC has a meritorious defense to the underlying action sufficient to support a finding of good cause under M.R. Civ. P. 55(c).

III. PNM'S MOTION TO STRIKE

In its reply brief, EMDC for the first time raises the argument that the default judgment entered by the Clerk against EMDC is void because the amount of the judgment requested was “not for a sum certain or for a sum which can by computation made certain.” M.R. Civ. P. 55(b)(1). *See Steel Serv. Ctr. v. Prince Macaroni Mfg. Co.*, 438 A.2d 881, 882 (Me. 1981) (measure of recovery under the doctrine of unjust enrichment is not a sum certain or one which can be made certain by computation). PNM moves to strike the entirety of that argument from EMDC’s reply brief because it is beyond the scope of PNM’s opposition. *See* M.R. Civ. P. 7(e) (reply memorandums “shall be strictly confined to replying to new matter raised in the opposing memorandum”).

In light of the Court’s disposition on EMDC’s motion, the Court finds PNM’s motion to strike is moot. The Court has determined that EMDC has shown good cause to set aside the default and demonstrated excusable neglect justifying relief from default judgment. M.R. Civ. P. 55(c), 60(b). The Court thus does not reach the issue of whether the default judgment was improperly entered and *Steel Serv. Ctr.* has no bearing on the Court’s decision.

CONCLUSION

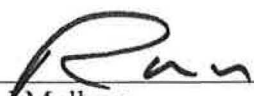
Based on the foregoing it is hereby ORDERED:

Defendant EMDC’s motion to set aside default judgment and for leave to file late answer is GRANTED.

Plaintiff PNM’s motion to strike portion of EMDC’s reply memorandum is DENIED to the extent that it is moot in light of the Court’s disposition on EMDC’s motion.

The Clerk is instructed to enter this Order on the docket for this case incorporating it by reference.

Dated: 3/5/18


Richard Mulhern
Judge, Business and Consumer Court

Entered on the Docket: 3-5-18
Copies sent via Mail Electronically