

IN THE UTAH COURT OF APPEALS

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Sierra Wholesale Supply,	)	MEMORANDUM DECISION
L.L.C., a Utah limited	)	(Not For Official Publication)
liability company,	)	
	)	Case No. 20041021-CA
Plaintiff and Appellee,	)	
	)	
v.	)	F I L E D
	)	(December 15, 2005)
	)	
Radiant Technologies, Inc., a	)	2005 UT App 540
Florida corporation doing	)	
business in Utah,	)	
	)	
Defendant and Appellant.	)	

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Third District, Salt Lake Department, 030928544  
The Honorable Anthony B. Quinn

Attorneys: Barnard N. Madsen and Trent M. Sutton, Provo, for  
Appellant  
John A. Snow and Cassie J. Medura, Salt Lake City,  
for Appellee

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Before Judges Davis, Greenwood, and Thorne.

GREENWOOD, Judge:

Defendant Radiant Technologies, Inc. appeals the trial court's denial of its motion, made pursuant to rule 60(b)(1) of the Utah Rules of Civil Procedure, see Utah R. Civ. P. 60(b)(1), to set aside a default judgment in favor of Plaintiff Sierra Wholesale Supply, L.L.C. We affirm.

"We grant broad discretion to [a] trial court's rule 60(b) rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review." Fisher v. Bybee, 2004 UT 92, ¶7, 104 P.3d 1198. "It is true that the law disfavors default judgments . . . . Nonetheless, the [trial court] has 'considerable discretion under [r]ule 60(b) in granting or denying a motion to set aside a [default] judgment' and for this court to interfere, 'abuse of that discretion

must be clearly shown.'" Black's Title, Inc. v. Utah State Ins. Dep't, 1999 UT App 330, ¶5, 991 P.2d 607 (fourth alteration in original) (quoting Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986)).

Defendant argues that the trial court abused its discretion by concluding that Defendant failed to demonstrate excusable neglect in its motion to set aside the default judgment. "To be relieved from the default, [Defendant] must show that [its] motion to set aside was timely, that [it] has a meritorious defense, and that the default occurred for a reason specified in [r]ule 60(b)."<sup>1</sup> Id. at ¶6. Rule 60(b) provides, in relevant part:

On motion and upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ."

Utah R. Civ. P. 60(b). "To demonstrate that the default was due to excusable neglect, '[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.'" Black's Title, 1999 UT App 330 at ¶10 (alteration in original) (quoting Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973) (emphasis omitted)).

The thrust of Defendant's argument is that its neglect in contesting Plaintiff's complaint was excusable because its president, John Winning, was out of his office convalescing from back surgery at the time Plaintiff's requests to enter default judgment were received and Mr. Winning did not return to the office until after default judgment had been entered. However, "[i]llness alone is not sufficient to make neglect in defending one's action excusable.'" Id. (alteration in original) (quoting

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<sup>1</sup>There is also a dispute regarding the timeliness of Defendant's rule 60(b)(1) motion. However, because we conclude that Defendant failed to demonstrate excusable neglect, we need not consider this issue. See Black's Title, Inc. v. Utah State Ins. Dep't, 1999 UT App 330, ¶6, 991 P.2d 607 (requiring the movant to show that the "motion to set aside was timely, that [it] has a meritorious defense, and that the default occurred for a reason specified in rule 60(b)." (emphasis added)).

Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741, 743 (1953)). "A movant seeking relief may not simply rest on the assertion that he was ill to excuse his inaction; he must show that the nature of the illness incapacitated him such that he was unable to act." Id.

Defendant has made no such showing in this case. Although Defendant avers that its president was out of the office recovering from back surgery, no affidavit was submitted to the trial court detailing how this so incapacitated Defendant, a corporation doing business on a national scale, that it was unable to take steps to protect its rights. See Warren, 260 P.2d 741, 743 (finding that excusable neglect was not demonstrated by an affidavit that did not "identify the nature of the illness" or demonstrate how the director and trustee of the defendant corporation "was so incapacitated that he could not have called an attorney to have his rights and the rights of the corporation protected."). We agree with the trial court's observation that it seems unlikely that the president of such a corporation would be "out of the office for back surgery and no one is looking at his mail." Even if this were the case, however, it does not demonstrate that Defendant acted with the "due diligence" necessary to show excusable neglect. See Black's Title, 1999 UT App 330 at ¶10 (quotations and citation omitted). The trial court acted within its discretion in refusing to set aside the default judgment on these grounds.

Moreover, although Defendant's registered agent, after being served, mistakenly forwarded Plaintiff's complaint and summons to the wrong law firm, Plaintiff sent copies of its requests for default directly to Mr. Winning. Thus, Defendant was on notice that Plaintiff sought default judgment against it, and that it needed to act to protect its rights.<sup>2</sup>

In sum, the trial court properly exercised its discretion in denying Defendant's motion to set aside the default judgment.

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<sup>2</sup>Likewise, Defendant's neglect was not made excusable because the original default judgment mistakenly indicated that judgment was to be entered in favor of Defendant rather than Plaintiff. Plaintiff's requests for default judgment, sent to Mr. Winning prior to the entry of the original default judgment, correctly indicated that Plaintiff sought default judgment against Defendant.

The facts and circumstances show that default resulted from Defendant's lack of due diligence rather than excusable neglect.

Accordingly, we affirm.

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Pamela T. Greenwood, Judge

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WE CONCUR:

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James Z. Davis, Judge

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William A. Thorne Jr., Judge