

IN THE CIRCUIT COURT FOR ESCAMBIA COUNTY, FLORIDA

SKANSKA USA CIVIL SOUTHEAST INC.

Plaintiff,

v.

CASE NO: 17220 CA 000533

ATLANTIC MERIDIAN CONTRACTING CORP.

Defendant/Counter Plaintiff.

AMC'S MOTION TO VACATE OR SET ASIDE THE CLERK'S DEFAULT

Defendant, ATLANTIC MERIDIAN CONTRACTING CORP. (AMC), in accordance with rules 1.500(b) or 1.540(b), Florida Rules of Civil Procedure, files this motion to set aside the clerk's default and states as follows:

1. Skanska is playing a "gotcha".
2. Plaintiff Skanska filed this action on April 20, 2020 — before Skanska had even sent notice of termination to AMC. Its lawyers did not actually send Skanska's or their own Notice of Termination until April 22, 2020 — two days after filing suit. See AMC's First Notice of Filing of Exhibits (NOF) Exhibit 5 (Ex.). (All references to exhibits are part of that NOF.)
3. At that time, Skanska's general counsel as well as other Skanska lawyers and Skanska's project site team knew that AMC was represented by Tom Henderson, a lawyer in Washington DC, because Mr. Henderson had sent them a letter on April 15, 2020. NOF Ex. 6. Indeed, Skanska's lawyers sent the April 22, 2020 Notice of Termination to Mr. Henderson but did not inform him that Skanska had already filed a lawsuit.

4. When lawyers have been communicating prior to a lawsuit being filed, it is a common practice of lawyers in northern Florida to provide a copy of the filed complaint to the other lawyer.

5. That professional courtesy was not done here.

6. Nearly always, the defendant's lawyer agrees to accept service of the complaint pursuant to the rules.

7. AMC is an out-of-state entity with its home office in Savannah, Georgia. Its registered agent in Florida is Legaline Corporate Services, Inc. located in Fort Myers, Florida.

8. AMC first learned of the lawsuit on Friday May 22, 2020, when I received an email from a lawyer located in Charlotte North Carolina who represents the entity who issued a Letter of Credit to Skanska on behalf of AMC for the job, informing me that Skanska had filed a lawsuit and that a motion for entry of clerk's default was pending against AMC.

9. I am aware that filing "any document" bars a Clerk's default under Rule 1.500(a), so I filed a notice of appearance on May 22, 2020. After filing that notice of appearance (which was served via e-portal), I emailed Skanska's lawyers identifying myself as AMC's lawyer and attached the NOA. I asked for a copy of the affidavit of service and informed them that "AMC's President has no knowledge that AMC was served with the complaint." I received the affidavit from them on Monday, May 25, 2020

10. AMC first learned on May 25, 2020 that the complaint had been sent via FEDEX to it on April 24, 2020, when an employee went to AMC's office specifically to look for it because AMC had just learned on May 22, 2020 of the lawsuit. He found the envelope under a door that entered into AMC's garage/equipment area where it had been rained on.

11. Because of the global COVID-19 Pandemic, AMC's staff had vacated its office pursuant to the governor of Georgia's directives. It is rational to believe that Skanska's lawyers were aware that business operations for most areas in the eastern United States had been disrupted for several weeks because of the pandemic and that many states were prohibiting certain business from operating from their normal offices and were requiring home quarantine except for essential services. It is rational to believe that Skanska's lawyers could have reasoned that these circumstances might have accounted for AMC's delayed response especially where Skanska's lawyers could see that service had been made upon a registered agent service rather than an AMC employee.

12. AMC was served on April 24, 2020 and its 20th day to respond fell on May 14; Skanska filed the motion for clerk's default at 10:27am the next day — May 15.

13. Skanska's surreptitious efforts to score a quick cheap victory actually violate Skanska's own contract terms which requires two negotiation processes before a party can file suit. First, the Subcontract requires that "within 30 days after a Party sends notice to the other Party of any dispute, each Party shall designate a senior representative to engage in direct negotiation to resolve the Dispute. The senior representative will meet in person...and make a good faith attempt to resolve the Dispute." See 11.4, Exhibit A to the Complaint. Skanska made no effort to comply with this provision. Indeed, AMC had just served — on April 19, 2020 — a Notice of Claim. See Exhibit 1 to AMC's Amended Counterclaim. Recall, Skanska filed suit the next day.

14. If that process fails, the Subcontract requires formal mediation administered by the American Arbitration Association (AAA) before suit can be filed. Skanska made no effort to comply with this provision.

15. On May 26, 2020, AMC filed an Answer and Defenses to the Complaint and Counterclaim which asserted in part that the matter should be stayed to require the parties to mediate pursuant to 11.4 of the Subcontract. And on May 28, 2020, Skanska's lawyer emailed me about scheduling a Zoom mediation. Ex. 7.

16. On June 4, 2020 I emailed Skanska's lawyer about scheduling mediation to occur with physical attendance of the parties, waiving the AAA administration/scheduling of the mediation in lieu of handling that ourselves and to try to get Skanska to return some of AMC's property and materials. Ex. 8. The next day Skanska's lawyer replied:

...We are following up with the project about the issues raised and will be in touch next week. We are ok not having AAA involvement in the mediation process-assuming we can reach an agreement on the mediator in short order.

17. I never heard back.

18. Instead, today Skanska filed a Motion to Strike Answer, Affirmative Defenses and Counterclaim. Until I read that motion, I did not know that a clerk's default had been entered.

19. So in review, Skanska knew that it had filed suit before it terminated the contract, knew that it had prematurely terminated the contract, knew that it had not followed either of the contract's presuit negotiation process requirements, knew that AMC was represented by counsel but did not inform him of the lawsuit, knew that AMC's registered agent was a process service company and not actually an AMC employee, knew of the global

business interruption impacts caused by the COVID-19 crisis, knew that most people in most business operations were working from home, knew that it was filing a motion for clerk's default at 10:27am on the first day that it could obtain a clerk's default.

20. Further, Skanska knew that within a week after the default, AMC had counsel of record, knew that AMC's President had no knowledge of the lawsuit or anyone at AMC being served with the lawsuit, knew within a couple of days of AMC's counterclaim and defenses and that AMC asserted that this action be stayed and for the court to require the parties to mediate and knew that it initiated communication with AMC's lawyer about scheduling the mediation to fulfill the contract requirement which would satisfy AMC's basis for a stay.

21. Skanska's mediation communications had to have been a feint and subterfuge to prolong the lapse of time because Skanska knew at the time of those communications that the clerk's default had been entered. There would have been no reason for Skanska to communicate about mediation to satisfy the contract and progress the case if Skanska believed that it had already won the case on liability. Indeed, there would be no reason to mediate at all. Skanska should not be rewarded for its gamesmanship and should be estopped from asserting its motion based on these communications clearly suggesting that Skanska intended to mediate. See *Jaszay v. H.B. Corp.*, 598 So. 2d 112, 113 (Fla. 4th DCA 1992) (defendant estopped from asserting the limitations defense because it stipulated to a sixty-day extension of the pre-suit screening period required under section 766.106, Florida Statutes (1991). "To repeat Judge Schwartz's famous quote, we will not countenance such "gotcha"

maneuvers. *Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337 (Fla. 3d DCA), *cert. denied*, 378 So.2d 342 (Fla.1979).”

22. In fact, if Skanska really believed that the clerk’s default barred AMC’s Answer, Defenses and Counterclaim filed on May 26, 2020, then Skanska could have promptly filed its motion to strike many days ago. Instead, Skanska laid in the grass to spring a “gotcha” by allowing the clock to run to 31 days after the entry of the default before filing its motion to strike:

The trial court should not have rewarded this “gotcha” tactic, and we will not do so here. *See Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337, 1339 (Fla. 3d DCA 1979) (“[T]he courts will not allow the practice of the ‘Catch–22’ or ‘gotcha!’ school of litigation to succeed.”); *see also Harley v. Lopez*, 784 So.2d 447, 448 (Fla. 3d DCA 1999) (refusing to reward “gotcha” tactics, which have been “long abhorred by this court”); *M–5 Commc’ns, Inc. v. ITA Telecomms., Inc.*, 708 So.2d 1039, 1039 (Fla. 3d DCA 1998) (“[R]eversal is ... mandated by an application of the anti-gotcha rule in its original and purest *446 form.”).

Andreans v. Impact Pest Mgmt., Inc., 157 So. 3d 442, 445–46 (Fla. 2d DCA 2015)

23. AMC was not aware of the clerk’s default until it received Skanska’s Motion to Strike on June 15, 2020.

24. In Florida, there is a “principle of liberality in setting aside defaults so that lawsuits may be decided on their merits.” *Lindell Motors, Inc. v. Morgan*, 727 So. 2d 1112, 1113 (Fla. 2d DCA 1999) (citing *Bland v. Viking Fire Protection, Inc. of the Southeast*, 454 So. 2d 763 (Fla. 2d DCA 1984)); *see also J.J.K. Int’l, Inc. v. Shivbaran*, 985 So. 2d 66, 69 (Fla. 4th DCA 2008) (Florida courts prefer to resolve cases on the merits rather than on a technicality) (citations omitted). Additionally, “[t]he courts of this state have generally been quite liberal in setting aside default judgments, and any reasonable doubt should be resolved in favor of granting the

motion in order to permit a trial on the merits.” *Cunningham v. White*, 390 So. 2d 467, 468 (Fla. 3d DCA 1980) (citing *North Shore Hosp., Inc. v. Barker*, 143 So. 2d 849 (Fla. 1962)).

A trial court should vacate an ex parte default when ‘the plaintiff seeking default had actual knowledge that the defendant was represented by counsel and intended to defend the lawsuit, but failed to contact the defendant’s counsel prior to seeking default.’ When the plaintiff is aware that the defendant is represented by counsel and intended to defend on the merits, Florida Rule of Civil Procedure 1.500(b) requires the plaintiff to serve the defendant with notice of the application for default and to present it to the court for entry. A clerk’s default entered in accordance with Florida Rule of Civil Procedure 1.500(a) under these circumstances is invalid and renders a resulting judgment void. When a plaintiff with actual knowledge that the defendant is represented by counsel and intends to the lawsuit makes an ex parte application for a clerk’s default, the effect is to insure that the defendant does not have a reasonable opportunity to correct what was obviously an administrative error. A default entered in violation of the due process notice requirement of rule 1.500(b) must be vacated without regard to whether the defendant can establish a meritorious defense or whether the defendant can demonstrate inadvertence or excusable neglect under Florida Rule of Civil Procedure 1.540(b).” *U.S. Bank Nat’l Ass’n v. Lloyd*, 981 So. 2d 633, 640 (Fla. 2d DCA 2008) (citations omitted).

25. However, if this court determines that the clerk’s default is not void, then a party seeking to set aside a clerk’s default needs demonstrate excusable neglect in failing to respond, a meritorious defense, and due diligence in seeking relief once the defendant has learned of the default. *See, e.g., Schwartz v. Business Cards Tomorrow, Inc.*, 644 So. 2d 611, 611 (Fla. 4th DCA 1994) (citing rule 1.540(b)).

26. A secretarial or clerical error usually constitutes excusable neglect where there was no substantial prejudice to the plaintiff. *Broward City v. Perdue*, 432 So. 2d 742, 743 (Fla. 4th DCA 1983).

27. Additionally, AMC demonstrates its meritorious defense by articulating legal grounds or ultimate facts, that if proven at trial, would constitute a complete defense. *See*

Westinghouse Elevator Co., A Div. of Westinghouse Elec. Corp. v. DFS Constr. Co., 438 So. 2d 125, 126-27 (Fla. 2d DCA 1983). The general denial of a complaint's allegations and filing affirmative defenses establishes meritorious defenses for purposes of setting aside a clerk's default. See *Yelvington Transport, Inc. v. Hersman*, 513 So. 2d 1361 (Fla. 3d DCA 1987).

28. AMC's Answer denied the complaint's allegations, and Affirmative Defenses and Counterclaim establishes its meritorious defenses. Moreover, not only does AMC have meritorious defenses it has a substantial counterclaim as demonstrated by AMC's Amended Counterclaim filed June 15, 2020 pursuant to Rule 1.190 allowing a party file an amended pleading without leave of court if filed within 20 days of the original pleading. AMC's Answer was filed May 26, 2020.

29. Finally, where, as here, the delay in responding to the default is not unreasonable under the circumstances and caused Skanska no prejudice. Indeed, Skanska knew 27 days after service of the complaint that AMC had counsel of record in the case. The default should be vacated. See *Lindell Motors, Inc. v. Morgan*, 727 So. 2d 1112, 1113 (Fla. 2d DCA 1999) ("A litigant who timely moves to set aside a default, asserting a credible explanation of human error, is entitled to be heard on the merits."). AMC was diligent in responding to the default once it was made aware of its existence.

WHEREFORE, Defendant Atlantic Meridian Contracting Corp. requests that this court vacate or set aside the default entered by the Clerk of Court, and deny Skanska's motion to strike AMC's Answer, Affirmative Defenses, and Counterclaim.

CERTIFICATE OF SERVICE

Pursuant to Rule 2.516, *Florida Rules of Judicial Administration*, this document is being filed electronically on June 15, 2020 with service through the Court's transmission facilities on all persons appearing before this Court.

/s/ Shawn M. Heath

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