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IN THE COUNTY COURT
IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-SC-002966
DIVISION: CC-Q

DAVID J. FITZPATRICK,

Plaintiff,

vs.

PAUL DAVIS RESTORATION, INC.,

Defendant.

**DEFENDANT PAUL DAVIS RESTORATION, INC.'S
MOTION TO SET ASIDE DEFAULT JUDGMENT**

Pursuant to Fla. R. Civ. P. § 1.540(b)(1), Defendant, Paul Davis Restoration, Inc. ("PDRI"), files this Motion to Set Aside Default Judgment entered in this matter. In support of its Motion, PDRI states as follows:

1. PDRI is a franchiser of insurance restoration services. JSK Corp. d/b/a Paul Davis Restoration of North Florida ("Franchisee") is the local franchisee of PDRI and is independently owned and operated. See Affidavit of Laura L. Ferrante, Esq. ("Ferrante Affidavit"), filed simultaneously with this motion, at ¶¶ 4, 5.

2. Franchisee is a separate corporation and neither it nor its owners have any ownership interest in PDRI. Nor does PDRI or its owners have any ownership interest in Franchisee. *Id.* at ¶ 5.

3. PDRI does not have any involvement of any kind in restoration work or emergency services performed by its franchisees, neither does it exercise control over the day-to-day operations of its franchisees, including Franchisee. *Id.* at ¶ 6.

4. On or about July 17, 2013, Plaintiff's Statement of Claim¹ and a Notice to Appear for Pretrial Conference on August 15, 2013 (collectively, the "Small Claims Process"), were served upon PDRI's corporate office located at One Independent Drive, Suite 2300, Jacksonville, Florida 32202. *Id.* at ¶ 3. It is unclear who accepted the Small Claims Process, but it was apparent from the substance of the claim that it was properly directed toward PDRI's Franchisee. *Id.* at ¶¶ 5, 6.

5. Unfortunately, due to clerical error, the pretrial conference date was not calendared pursuant to PDRI's customary practice since it was apparent that the matter involved the Franchisee. *Id.* at ¶ 7.

6. On September 3, 2013, PDRI first learned that judgment in the instant case had been rendered and contacted the undersigned to prepare this filing. *Id.* at ¶ 10.

LEGAL ARGUMENT

"It is axiomatic that Florida jurisprudence favors liberality in the area of setting aside defaults in order that parties may have their controversies decided on the merits .

¹ The sum and substance of Plaintiff's Statement of Claim is that "[o]n 11/29/2013 [sic] I arrived at my home at 11233 and noticed my tools were taken out of my tool box On October 21st 2013 [sic] my house caught on fire and we lost everything except my tool box We hired Paul Davis Restoration to rebuild the home Paul Davis Restoration hired outside contractors to rebuild the home and my tools came up missing (see attached police report)."

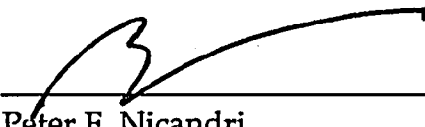
. . . [and] where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir, then upon timely application accompanied by a reasonable and credible explanation the matter should be permitted to be heard on the merits.” *Florida W. Coast R.R. v. Maxwell*, 601 So. 2d 298, 299 (Fla. 1st DCA 1992) (quoting *Latin Am. Prop. & Cas. Ins. Co. v. Italian Palace, Inc.*, 596 So. 2d 1174, 1175 (Fla. 4th DCA 1992) (“A default judgment will be set aside upon a showing that excusable neglect led to the default, a meritorious defense exists for the cause, and due diligence was used to set aside the default”)). Because the instant case falls squarely within the excusable neglect principle set forth above, *i.e.*, a clerical error resulted in the failure of PDRI to appear at the pretrial conference, PDRI respectfully submits that the judgment is due to be set aside based on its excusable neglect.

Moreover, as set forth in the Ferrante Affidavit, because PDRI does not have *any involvement of any kind* in restoration work performed by its franchisees, Plaintiff’s fundamental allegation – that he “hired Paul Davis Restoration to rebuild [his] home” – is plainly the subject of a meritorious defense. *See* Ferrante Affidavit at ¶ 9. Finally, the passage of only a single day between PDRI’s discovery that judgment had been entered and the filing of this motion demonstrate PDRI’s diligence in pursuing the relief sought. *Cf. Florida Eurocars, Inc. v. Pecorak*, 110 So. 3d 513 (Fla. 4th DCA 2013) (finding a thirty-nine day delay between retention of counsel and filing of motion to set aside default

reasonable); *Apolaro v. Falcon*, 566 So.2d 815 (Fla. 3d DCA 1990) (holding that a delay between thirty and forty days was reasonable because "a misunderstanding . . . delayed the actual filing of the motion which plaintiffs knew would be forthcoming"); *Franklin v. Franklin*, 573 So.2d 401 (Fla. 3d DCA 1991) (holding that nine months was not an unreasonable delay because the former husband "was not aware of his ability to contest [the judgment] until a co-worker told him that this might be done [and] [w]ithin a few days after that, he retained a lawyer and sought to do so").

WHEREFORE, Defendant, Paul Davis Restoration, Inc., respectfully requests that the Court enter an order setting aside the default judgment entered against PDRI and grant PDRI five days from the date of any such order to file a motion to dismiss Plaintiff's Statement of Claim.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to Rule 2.516, Fla. R. Jud. Admin., a true and correct copy of the foregoing has been furnished via U.S. Mail to Mr. David J. Fitzpatrick, 11233 Stanley Steamer Lane, Jacksonville, Florida 32246, on this 4th day of September, 2013.



Attorney

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