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IN THE CIRCUIT COURT OF THE FOURTH
JUDICIAL CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA

CASE NO.: 2017-CA-705
DIVISION: CV-H

KEVIN S. SANDERS, LLC, a limited liability
company; KEVIN S. SANDERS, an
individual,

Plaintiff,

v.

LEWIS TODD BARNETT,

Defendant.

_____ /

**DEFENDANT'S MOTION TO VACATE CLERK'S DEFAULT AND
SET ASIDE FINAL JUDGMENT OF REPLEVIN**

COMES NOW Defendant, LEWIS TODD BARNETT (hereinafter "Defendant"), by and through the undersigned counsel and pursuant to Rule 1.500(d) and 1.540(b), Florida Rules of Civil Procedure, and hereby moves this Court for an Order Vacating Clerk's Default and Vacating Final Judgment, which were entered on March 6, 2017 and March 9, 2017, respectfully, and in support thereof states the following:

FACTS AND PROCEDURAL HISTORY

1. Plaintiff filed its Complaint in the above-captioned matter on February 3, 2017, and served Defendant on February 9, 2017.
2. On February 27, 2017, the undersigned counsel filed and served a Notice of Appearance of Counsel and a Motion for Extension of Time to Respond to Complaint.
3. The undersigned reached out to Plaintiff in an effort to set an amenable extension to respond to the Complaint, however, Plaintiff would not agree to same.

4. Therefore, the undersigned's office began making attempts to contact Plaintiff's office in an effort to schedule a hearing on the Motion for Extension of Time. However, the undersigned's office was repeatedly unsuccessful.

5. Despite Plaintiff's knowledge of the undersigned's Notice of Appearance and Motion for Extension of Time, Plaintiff filed a Motion for Default on March 6, 2017, and a Default was entered by the Clerk on March 6, 2017.

6. Subsequent thereto, Plaintiff wrote this Court a letter stating Final Judgment should be entered due to Defendant's failure to respond, and Final Judgment was entered on March 29, 2017.

7. That same day, the undersigned's firm was finally able to coordinate a hearing on Defendant's Motion for Extension of Time, and a Notice of Hearing was filed.

8. A hearing on Defendant's Motion for Extension of Time is currently scheduled to take place on April 26, 2017.

9. Upon reviewing Plaintiff's Complaint and the exhibits attached thereto, the undersigned finds there are meritorious defenses to this action surrounding Plaintiff's allegations.

MOTION TO VACATE AND MEMORANDUM OF LAW

1. Both the Clerk's Default and the Final Judgment should be vacated because the Clerk's Default was entered in contravention to the Florida Rules of Civil Procedure, and entry of the Final Judgment was premised on this improper Default.

2. A default may be entered by the Clerk "[w]hen a party against whom affirmative relief is sought has failed to file or serve any *document* in the action" *Fla. R. Civ. P. 1.500* (emphasis added).

3. “For purposes of construing the right to enter a default under rule 1.500(a), the term ‘paper’ is construed liberally and includes any written communication that informs the plaintiff of the defendant’s intent to contest the claim. *Becker v. Re/Max Horizons Realty, Inc.*, 819 So. 2d 887, 890 (Fla. 1st DCA. 2002) (citing Philip J. Padovano, *Florida Civil Practice*, § 9.2 (2001 ed.)).

4. *Becker* is analogous to the case at bar, as there, the defendant filed a motion for extension of time to respond to a breach of contract complaint prior to the clerk’s entry of default against the defendant. *Id.* The Court found the clerk’s entry of default was void due to the defendant’s filing of a “paper” prior to default being entered against him. *Id.*

5. A clerk cannot properly enter default against a defendant after a motion for extension of time has been filed and docketed, even though default can be properly entered before a defendant files any paper in the action. *720 S. Howard, LLC v. Gina Investments, LLC*, 202 So. 3d 133 (Fla. 2d Dist. App. 2016) (finding the clerk’s entry of default erroneous).

6. Furthermore, under Rule 1.500(b), Florida Rules of Civil Procedure, “[t]he court may set aside a default, and if a final judgment consequent thereon has been entered, the court may set it aside” in accordance with Rule 1.540(b), Florida Rules of Civil Procedure.

7. Rule 1.540(b) states a judgment may be set aside based on mistake or based on the judgment being void.

8. Although a defendant who seeks to set aside a default judgment ordinarily needs to demonstrate excusable neglect in failing to respond, a meritorious defense, and due diligence in seeking relief, a movant does not need to establish these elements if the default judgment is void. *Mullne v. Sea-Tech Const. Inc.*, 84 So. 3d 1247, 1249 (Fla. 4th DCA 2012) (citing *Green Solutions Int’l, Inc. v. Gilligan*, 807 So.2d 693, 696 (Fla. 5th DCA 2002)).

9. In Plaintiff's Cover Letter to the Court asking judgment to be entered, Plaintiff clearly argues to the Court that Final Judgment should be entered due to the entry of default against the Defendant—a default that was improperly entered and is thus void.

10. Therefore, the Court's entry of Final Judgment after Defendant had been improperly defaulted and before Defendant's hearing on his Motion for Extension of Time could be heard should be deemed void and/or entered in mistake.

11. The true purpose of the entry of a default is not to furnish an advantage to the plaintiff so that a defense may be defeated or a judgment reached without contest by the defendant, but rather to speed the cause thereby preventing a dilatory or procrastinating defendant from impeding the plaintiff in the establishment of his claim. *Coggin v. Barfield*, 8 So. 2d 9, 11 (Fla. 1942).

12. Due consideration shall be given to the public policy favoring liberality in setting aside defaults so that suits may be decided on their merits. *Johnson v. Johnson*, 845 So. 2d 217, 220 (Fla. 2d DCA 2003).

13. Upon being retained, the undersigned immediately filed a Notice of Appearance and a Motion for Extension of Time in an effort to show diligence and not for the purpose of delaying this action.

14. The undersigned went a step further in reaching out to Plaintiff in an effort to agreeably set a deadline for Defendant's response to Plaintiff's Complaint.

15. It is Plaintiff's own actions that have delayed this proceeding thus far; additionally, Plaintiff has taken advantage of the fact the Defendant could not get a hearing any sooner than April 26, 2017, on his Motion for Extension of Time.

16. This Court should grant this Motion so that the undersigned has the opportunity to sufficiently analyze the Complaint, and so that the case can be decided on the merits.

WHEREFORE, Defendant, TODD LEWIS BARNETT, respectfully requests this Court enter an Order Vacating Clerk's Default and Vacating Final Judgment and grant any other relief this Court deems just and proper.

Respectfully Submitted,

HEEKIN LAW, P.A.

/s/ Theresa Carli

Theresa Carli, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed using the Florida Courts E-filing Portal this 2nd day of April, 2017, which will serve a copy on the following: Kevin S. Sanders, 817 Willow Branch Ave., Jacksonville, Florida 32205, **ksslaw1@comcast.net**.

/s/ Theresa Carli

Attorney

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