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

CASE NO.: 16-2018-CA-003731
DIVISION: CV-B

SAN MARCO LIMITED PARTNERSHIP,
a Florida limited partnership,

Plaintiff,

Vs.

MAERD1974, a Florida limited liability
company; LEVI JORDAN, an individual,
and all others in possession,

Defendants.

**MAERD1974'S VERIFIED MOTION TO SET ASIDE DEFAULT
AND DEFAULT JUDGMENT AS TO COUNT I**

COMES NOW MAERD1974, a Florida limited liability company, via undersigned counsel, and pursuant to Fla. R. Civ. P. 1.540(b), moves this Honorable Court, under verification, to set aside the default and default judgment entered against it as to Count I of the complaint and, in support thereof states:

I. PROCEDURAL AND FACTUAL HISTORY

- 1) MAERD1974 entered into a leasehold agreement with the Plaintiff on or about January 30, 2018.
- 2) At the time of the execution of the lease and throughout its duration through suit, MAERD1974 was represented by former partner Levi Jordan.
- 3) In and around late June 2018, the undersigned partner became aware that Levi Jordan had:
 - 1) misappropriated tens of thousands of dollars from MAERD1974 and its partners meant

to be paid as rent under the lease agreement; 2) misrepresented to the partnership that MAERD1974's rent obligations under the lease were current; 3) withheld the fact that the MAERD1974 was in default with the lease and faced an eviction action; and 4) as registered agent for MAERD1974, had withheld the fact that MAERD1974 had been served process, allowing for a default to be entered against MAERD1974.

- 4) Immediately upon becoming aware of the eviction action last week, the undersigned partner contacted the attorney for the Plaintiff to express MAERD1974's circumstances and desire to remain in the leasehold.
- 5) Simultaneously, the MAERD1974 partnership voted to remove Levi Jordan from the partnership for his self-acting and various breaches of the partnership and fiduciary duties.
- 6) In rapid succession, MAERD1974 (hereinafter "Defendant") filed the instant motion.

II. ARGUMENT

The Defendant is entitled to the relief requested because Florida law favors adjudication of disputes on their merits, because it can show excusable neglect and surprise in not answering the Complaint within 5 days and because the resulting defaults were issued improvidently.

A. Setting Aside Clerk's Defaults and Default Judgments

In general, courts may set aside defaults in light of several factors, including surprise and excusable neglect. Fla. R. Civ. P. 1.540(b). More specifically, to set aside a default, a party must show (1) excusable neglect for failing to file a responsive pleading and (2) a meritorious defense to justify setting aside a judgment. See Florida Aviation Academy v. Charter Air Center, Inc., 449 So. 2d 350, 352-53 (Fla. 1st DCA 1984); Winter Park Arms, Inc. v. Akerman, et al., 199 So. 2d 107, 108 (Fla. 4th DCA 1967).

The well settled policy of Florida Courts is to grant motion to set aside defaults so that courts may adjudicate disputes on their merits, rather than on the procedural device of a default. Coggin v. Barfield, 8 So. 2d 9 (Fla. 1942).

The true purpose of the entry of a default is to speed the cause thereby preventing a dilatory or procrastinating defendant from impeding the plaintiff in the establishment of his claim. It is not procedure intended to furnish an advantage to the plaintiff so that a defense may be defeated or a judgment reached without the difficulty that arises from a contest by the defendant.

Id. at 11. *See also* North Shore Hosp., Inc. v. Barber, 143 So. 2d 849 (Fla. 1962). If there is any reasonable doubt in the court's discretion whether to set aside a default, the court should err on the side of letting the matter go forward on the merits. *Id.* at 853 (cited in Hanft v. Church, 671 So.2d 249, 250 (Fla. 3d DCA 1996); Ole, Inc. v. Yariv, 566 So. 2d 812 (Fla. 3d DCA 1990); Florida Aviation Academy v. Charter Air Center, Inc., 449 So. 2d 350, 352-53 (Fla. 1st DCA 1984); County Nat'l Bank v. Sheridan, Inc., 403 So. 2d 502 (Fla. 4th DCA 1981). *See also* Edwards v. City of Fort Walton Beach, 271 So. 2d 136 (Fla.1972); Doane v. O'Donnell, 467 So. 2d 424 (Fla. 4th DCA 1985); Broward County v. Perdue, 432 So.2d 742 (Fla. 4th DCA 1983).

Florida courts universally recognize the liberality of setting aside defaults if there is excusable neglect or surprise and a meritorious defense. Cinkat Transp., Inc. v. Maryland Cas. Co., 596 So.2d 746, 747 (Fla. 3d DCA 1992); Gulf Maintenance & Supply, Inc. v. Barnett Bank of Tallahassee, 543 So. 2d 813 (Fla. 1st DCA 1989); EGF Tampa Assocs. v. Edgar V. Bohlem, 532 So. 2d 1318 (Fla. 2d DCA 1988); Reicheinbach v. Southeast Bank, N.A., 462 So. 2d 611 (Fla. 3d DCA 1985). *See also* H. Trawick, Florida Practice & Procedure. § 25-2, 25-3 (1985).

As discussed below, this case presents more than sufficient justification of excusable neglect, surprise, and meritorious defense necessary to set aside the clerk's default and the default judgment.

B. Considering the Defendant's Bad Acting Former Partner's Conduct in Withholding the Fact that the Case Existed, Excusable Neglect and Surprise Exist

The excusable neglect and surprise in this case flow directly from the misconduct of former MAERD1974 partner Levi Jordan, who 1) misappropriated tens of thousands of dollars from MAERD1974 and its partners meant to be paid as rent under the lease agreement; 2) misrepresented to the partnership that MAERD1974's rent obligations under the lease were current; 3) withheld the fact that the MAERD1974 was in default with the lease and faced an eviction action; and 4) as registered agent for MAERD1974, withheld the fact that MAERD1974 had been served process, allowing for a default to be entered against MAERD1974.

The First District Court of Appeal in Gulf Maintenance, 543 So. 2d at 813 addressed setting aside defaults. There, counsel for the defendant contacted the plaintiff's counsel, advising him of the defendants' defenses and possible counterclaims. Subsequently, counsel exchanged correspondence. After a period of no communication between counsel, the plaintiff obtained new counsel, filed suit and eventually a notice of default, without notifying counsel for the defendants. Ultimately plaintiff received a final default judgment totaling \$92,920.33. The defendants appealed the denial of their motion to set aside default judgment and default, and the district court reversed. The court, quoting Coggin v. Barfield, 8 So. 2d 9, 11 (Fla. 1942), reiterated that the "true purpose of the entry of a default is to speed the cause . . . not . . . to furnish an advantage to the plaintiff so that a defense may be defeated or a judgment reached without the difficulty that arises from a contest by the defendant." Id. at 816.

The Gulf Maintenance court explained that "entry of default is appropriate where a defendant does not intend to appear and defend the merits of the action . . . [o]n the other hand, default is not appropriate in cases where the plaintiff knows that a defendant is represented by counsel who intends

to assert matters in defense of the cause of action.” Id. The facts at bar are more forceful than in Gulf Maintenance, because here the Defendant was hamstrung by the misconduct of a bad acting former partner, who withheld the fact that the suit was filed, causing Defendant to be defaulted.

Likewise, in Ole, Inc. v. Yariv, 566 So. 2d 812 (Fla. 3d DCA 1990), the district court reversed the trial court and set aside the default judgment and default because the “plaintiffs had actual knowledge that Ole intended to defend the lawsuit.” Id. at 814. In Ole, the plaintiffs’ counsel sent a copy of the demand letter and complaint to Ole’s distributor, which forwarded it to the Ole administrative office. Afterward, Ole’s insurance agent contacted plaintiff’s counsel and stated that it intended to defend the suit and was seeking counsel. The Ole decision is even more compelling by the fact that plaintiffs’ counsel never communicated with Ole’s attorney. Nonetheless the court concluded that plaintiffs’ counsel’s knowledge that Ole was seeking representation and intended to defend was sufficient to vacate the default judgment and default. Id. at 815. .

More recently, in National Union Fire Ins. Co. of Pitt. v. McWilliams, 799 So. 2d 378 (Fla. 4th DCA 2001), the district court also held that default judgment was required to be set aside where there was knowledge by the party seeking default that the adverse party was represented by counsel and no notice to the attorney was given. The McWilliams court held that “an ex parte default should be set aside where 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.” Id. at 380.

The Gulf Maintenance, Ole, and McWilliams decisions support setting aside the default at bar. Accordingly, the Defendant has shown excusable neglect and surprise, the first element of justifying an order setting aside the clerk’s default and the default judgment. Next, it must show a meritorious defense.

C. The Defendant's Bad Acting Former Partner Presents a Meritorious Defense

The Defendant has a meritorious defense to the Complaint, in that the former MAERD1974 partner Levi Jordan, 1) misappropriated tens of thousands of dollars from MAERD1974 and its partners meant to be paid as rent under the lease agreement; 2) misrepresented to the partnership that MAERD1974's rent obligations under the lease were current; 3) withheld the fact that the MAERD1974 was in default with the lease and faced an eviction action; and 4) as registered agent for MAERD1974, withheld the fact that MAERD1974 had been served process, allowing for a default to be entered against MAERD1974.

D. The Defendant has not acted with gross negligence, has shown excusable neglect and surprise, and has several meritorious defenses, and is therefore due to have an opportunity to defend Plaintiff's Complaint on the merits.

Anything short of gross negligence by a party seeking to have a default set aside will justify such an order. Serrano v. Ayala, 728 So. 2d 1231 (Fla. 3d DCA 1999)(“default should have been set aside because the plaintiff knew the defendant intended to defend the lawsuit, and because the default was not due to the defendant's gross negligence.”)(cites omitted).

Immediately upon learning of the lawsuit , the Defendant contacted counsel for Plaintiff and filed the instant motion.

III. CONCLUSION

Based upon the foregoing, it is clear that:

1. The Defendant's excusable neglect and surprise in this case flowed directly from its former partner's bad conduct and deception;
2. The Defendant has a meritorious defenses to the lawsuit;

3. The Defendant has exercised due diligence in seeking relief from this Court upon learning of the defaults; and
4. Equity mandates that the case be resolved on its merits.

WHEREFORE, the Defendant respectfully requests the Court enter an order setting aside the clerk's default and default judgment and allow this matter to proceed on the merits.

CERTIFICATE OF SERVICE

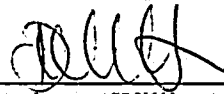
I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service filing, this 28TH day of June, 2018, to LIANA ROTHSTEIN HOOD, ESQ.,

/s/ Earl M. Johnson, Jr.
ATTORNEY

** (VERIFICATION ON FOLLOWING PAGE)

VERIFICATION

I HEREBY VERIFY that the foregoing facts and allegations contained in the Verified Complaint are true and accurate to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to read 'DW', is written over a horizontal line.

Dominique Williams

Dated: 27 June 2018

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