2009-CA-02037-RT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Arvind Kumar	Appellant
Tony Savage	Appellant
Tracey Savage	Appellant
Shanna Loper	Appellee
John W. Crowell	Attorney of Record for Appellants
P. Nelson Smith	Attorney of Record for Appellee
Hon. Lee J. Howard	Trial Court Judge

Respectfully submitted, this the 15th day of September, 2010.

JOHN W. CROWELL

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GENERAL COMMENTS

In her Brief, Loper ignores some facts, mischaracterizes others and misstates the applicable law that applies to these issues. Although the four cases cited by Loper do involve cases where one party is attempting to set aside a default judgment, they do not support Loper's position.[1]

1. Shanna Loper's employer was Mit-Sar, LLC.

To confuse the issues, Loper makes reference to a franchise agreement which is characterized as a "lease" establishing an employer/employee relationship between Loper and Kumar. First, the reference to the franchise agreement is improper[2], since it was not a part of the record in this case, but was a part of the debtor's examination conducted by Loper's counsel on April 8, 2010, after the record in this case had been lodged with this court. Second, if Loper had bothered to review the materials furnished to her, she would have realized that the property underlying the hotel was leased to Mit-Sar, LLC and that Kumar and his wife, as franchisees, had formed a limited liability company, Mit-Sar, LLC, and had delegated the operation of the hotel to Mit-Sar, LLC. These facts are demonstrated by documents attached to Appellants' Motion to Strike or Amend. Tracey Savage, who hired and fired Loper, Mit-Sar was the employer (T-19-20).

2. Although Loper repeatedly equates the judgment in this case to a trial on the merits, that statement is misleading. The final judgment in this case was not entered until October 29, 2009. A default was entered by the clerk, an interlocutory judgment directing a writ of inquiry was entered on February 17, 2009, a hearing was conducted on April 21, 2009, and an

[1] References in the brief are to the Record (R_) bates numbered pages in the Record Excerpts (RE__) and the Transcript (T-___) or the Exhibits (Ex __).

[2] Appellants are submitting a separate motion to strike or alternatively to supplement the record.

order was entered in which the Court made a finding as to damages on June 8, 2009. Defendant's Motion to Vacate was filed immediately thereafter, and prior to the time that the lower court entered a final judgment. More importantly, Loper misstates the import of Rule 55 M.R.C.P. Although that rule, and its comment, speaks generally of a default judgment constituting an adjudication of the facts, nowhere does that rule or any authority hold that a party is not entitled to attempt to set aside a judgment and offer evidentiary support bearing on the three factors which the court must consider in deciding a Motion to Vacate.

3. For the second time, Loper reaches outside the record and makes reference to a Certificate of Rehabilitation (Loper Brief at 4) without even providing a copy of the document to which she refers. [3]

4. Loper claims that the Appellants have "filed nothing of evidentiary value" to support their position, but as will be demonstrated, Loper ignores evidence which goes to all three factors to be considered by this Court.

5. Loper claims that the sole basis for the Motion to Vacate in this appeal is the argument that Appellants were entitled to three days notice of the Application for Default. It is true that Appellants were entitled to receive that notice but, even more compelling, it is the undisputed fact that these Appellants acted appropriately in responding to the Complaint, and never indicated directly or by any representatives, that they did not intend to defend the claim. M.R.C.P. 55(b) and 60(b) both afford a basis for the relief sought.

[3] This reference by Appellee is also the subject of the Motion to Strike.

ARGUMENT

A. The Facts Support the Defendant's Claim for Relief.

1. Shanna Loper was an employee of Mit-Sar, LLC. All of the documents introduced into evidence, and the uncontradicted testimony of Tracey Savage, who hired and fired Loper (T-19-20) and the Affidavit of Arvind Kumar – to which there was no objection – (RE at 29-31) established that employment relationship.

2. Tracey Savage fired Loper because she forged customers' signatures on 2 separate credit card charges (T-21-23, 42, Ex D-1, D-2). The first customer reported that Loper would not furnish him with a receipt (T-21) and when he asked for a copy the next day, he found Loper had signed his name and added an excessive tip (T-21,22). The second customer testified Loper had agreed to come to his room in exchange for a $250 tip. (T-23).

3. Savage testified that Loper was not an ideal employee. Shanna drank on the job. (T-24). Loper never came to her and never complained to Savage, and Savage never heard about any complaints to Arvind Kumar. (T-24-26) Savage overheard Loper make sexual comments. (T-26). Loper never appeared upset or troubled, she touched the bottoms and breasts of other employees and sat on customers' laps. (T-26) and the employees were constantly joking with each other(T-26-27). She saw Loper touching other employees on the rear. (T-35). She saw many of the employees, including Loper, pop each other on the behind in a joking fashion. It was just play. (T-36).

4. Savage's son is 22, almost died at age 3 and has a first grade education. Savage never saw him do anything but joke with Loper and other employees. (T-27). Tony Savage lives with his mother and has never lived outside her home. (T-42). He has learning disabilities. (T-42). He has never worked at any job other than working at the Holiday Inn (T-44). He was paid

by tips from bartenders. He saw Loper giving lap dances for money. (T-46). Loper was loud and uses profanity (T-46-47). Loper was a flirt and rubs on the customers. (T-47). She touched Tony and popped him on the butt. (T-47). Tony always considered that joking around and it didn't offend him. (T-48). Loper also pinched his breasts and that didn't offend him. (T-48). One time Loper grabbed the bartender's boobs and would slap and feel on one of the waiters. (T-48). Loper never complained about touching or joking around. (T-48, 49). Tony didn't remember Loper ever coming to him and complaining about any of these matters. (T-49, 50) and she never appeared to be uncomfortable. (T-50). Savage first heard about the complaint when she saw the letter from Loper after she was fired. (T-28). She fired Loper before the letter was received. (T-35).

5. Tracey Savage called Ed Pleasants who was an attorney for Arvind. (T-28 – 29). Savage talked to Pleasants on her behalf as well as for Tony and Kumar. (T-29) Pleasants told Savage that he talked with the Plaintiff's attorney and he furnished her with a copy of a letter August 26, 2008 (T-29, Exhibit 3). Pleasants told Loper's counsel that he was representing Arvind, Tracey and Tony Savage and he said "categorically and emphatically" that they deny every single claim by Loper. (T-60). Pleasants also said that Loper was fired because of repeated inappropriate conduct as a waitress which included stealing money from customers. He also said that her allegations are completely untrue. (T-60). The letter clearly states that the defendants will resist the claim and Savage continued to have communication with Pleasants about the issue. (Ex 3).

6. Savage first became aware of the lawsuit when she was served with the summons. (T-30) Savage contacted Ed and then learned that Tony and Arvind had been served as well. She knew that she had 30 days to respond. (T-31). Tracey Savage told her son she was going to take

the summons to Pleasants. (T-50). Ed Pleasants represented Kumar at the time and Tony had seen him several times. (T-51). Tony always intended to defend the allegations and denied the allegations that are in the complaint. (T-51). Tracey talked to Pleasants on a weekly basis and reminded him that there were only so many days to respond.

7. Pleasants brought her an answer stating that he filed the motion with the Court within 30 days. (T-31). Loper identified the answer that Ed Pleasants furnished to her, dated July 2009. (T-33, 40; Ex 4). She understood from Pleasants that once the answer had been filed that all she needed to do was wait and see what happened next. (T-32).

8. Tracey, as for herself and the other Appellants, had no reason to believe that it was necessary for her to do anything else after having received a copy of the answer (T-32) and she was waiting on Ed Pleasants to tell her what to do. (T-32). Kumar told her that he would take care of everything with regard to Ed Pleasants. (T-37). She met with Pleasants after the Complaint was filed with Kumar at a restaurant and at the hotel where they talked about the case. (T-38). She talked with Pleasants on the phone 3 or 4 times during the 30 day period after the service. (T-39). She asked him if he everything taken care of and how they were looking and he said he had everything taken care of not to worry about it. (T-40). After she learned of the default she tried to contact Pleasants but was unable to do so. (T-41). She was shocked to learn that it had gone into default. (T-32). With regard to the complaint, Savage testified that none of the allegations were true and that there was no sexual harassment or outrageous conduct. (T-34). She had never seen anything done by Kumar or Tony Savage that would fall into that category. (T-34) Loper never complained to her about any conduct. (T-34).

9. The only communication that Loper's attorney had with Pleasants after the summons were served was when Pleasants called him telling him that he was not representing

the defendants. (T-54). When he asked Pleasants who was going to represent them, Pleasants said, "...I am turning it over to Taylor Smith. If he accepts it, he will be the one defending them." (T-50). Loper's counsel made no effort to have any communication with any other attorney at any time. (T-55).

10. Pleasants never told Loper's attorney that Appellants would not resist and defend the claim (T-63). If the court sets aside the default judgment.

11. Loper is going to have to relive these events and there is a potential of witnesses disappearing, evidence getting lost and ability to find Mr. Pleasants. (T-58). Loper's attorney attempted to locate Mr. Pleasants. (T-59). In the August 18, 2008 letter (Ex. 3),

B. Loper Mischaracterizes the Authorities Which She Has Cited in Her Brief

Loper cites *Rush v. North American Van Lines*, 608 So. 2d 1205 (1992) for the proposition that once a default is entered, it is taken as a complete and final adjudication of issues necessary to justify the relief and is given the same effect as a judgment rendered after a trial on the merits. According to Loper, once a default is established, the Appellants ". . . have no further standing to contest the factual allegation of the plaintiff's claim for relief." (Loper's Brief at 6). She also refers to the comment to M.R.C.P. Rule 55. Of course, *Rush* contains some very distinctive facts, one of which was that when the court in that case set the matter for hearing, it required that a copy of the order setting the hearing be mailed to all defendants, and the clerk made a notation in the record that had been done. More importantly here, although the court did make the bare comment that once the default is established, defendant has no further standing to contest the factual allegations of plaintiff's claim for relief," the court goes on to specifically recognize the right that Appellants are seeking here, as follows:

> If he wishes an opportunity to challenge plaintiff's right to recover, his only recourse is to show good cause for setting aside the default under Rule 55(c) and, to contest the amount of recovery. (608 So. 2d 1209)

Although the comment to Rule 55 includes the precise language set forth in the Rush opinion, it goes further, as follows:

> Relief from a default judgment must be requested by a formal application as required by Rule 60(b). Because the request is for relief from a final disposition of a case, the party in default must take affirmative action to bring the case before the trial court a second time . . .

Accordingly, neither the *Rush* opinion nor Rule 55 prevent a movant from offering evidence in support of its motions for relief. Because these Appellants filed their motions based upon Rule 55(c) and Rule 60(b), M.R.C.P., *Rush* has no applicability here.

On pages 6 and 7 of her brief, Loper implies that it is insufficient for Appellants to retain an attorney to represent their interest, and that they must act diligently to be sure that that interest is protected. Citing *American States Insurance Company v. Rogillio*, 10 So. 3d 463 (Miss. 2009), Loper claims Appellants were not sufficiently diligent in their efforts to contest the claim. The facts in *Rogillio* are also distinctive. In that case, it was shown that the complaint and summons were mishandled by the insurance company, and that although there had been some discussions between the insurance company and plaintiff's counsel, the company took no steps to retain an attorney to make an appearance in the case. In *Rogillio*, where the insurance company's money was at risk, the Court found that the failure of a trained adjuster to act with diligence, and having offered no explanation as to why he did not take the proper action, precluded the relief from the default judgment which was sought.

These Appellants have no training, formal or otherwise, in the handling of litigation. As Loper correctly notes, they did read the Summons and did understand that action was required within 30 days of receipt. Instead of tossing this Complaint and Summons aside, as was done in

Rogillio, Appellants took the affirmative step to retain an attorney, and through Tracey Savage, who was their designated representative, they stayed in touch with him. Based upon his representation that he was taking the necessary steps, and based upon the further representation that he had filed an Answer in the form introduced as Exhibit 4, they relied upon him to represent their interest. Surely Loper doesn't contend that Appellants should have ignored the representations that their attorney was making and gone to the courthouse to confirm that he had filed an answer on their behalf.

Loper also cites *H & W Transfer & Cartage Service, Inc. v. Griffin*, 511 So. 2d 895 (Miss. 1997) for the proposition that merely providing the insurance agent with a copy of the Summons did not evidence sufficient diligence in order to justify relief from the judgment.

The facts in *Griffin* are also distinctive. After the Complaint and Summons were provided to the insurance agent, the carrier contacted Plaintiff's counsel and engaged in settlement discussions. When those negotiations were not fruitful, Plaintiff's counsel did what Loper's counsel should have done in this case. He wrote a letter to the insurer advising it that it should retain counsel to defend the case and answer the Complaint before a specific date. The claims representative acknowledged receiving the letter, but sent the suit papers to an incorrect address, so no defense counsel ever received those documents.

In both *Rogillio* and *Griffin* the Court found that there was no logical reason for the failure of the insurance carriers to take the steps necessary to defend the claim. Although it was not specifically stated, we believe that part of the rationale for that finding is that insurance companies are trained and experienced in handling claims and lawsuits, and that their failure to act appropriately justifies the loss which they will suffer.

In contrast here are three individual defendants who have no practical insurance or claim experience. Instead of contacting an insurance agent, these Appellants did what our courts would expect them to do. They had already retained Ed Pleasants who had denied to Loper's counsel that any payment would be forthcoming and that all claims would be vigorously disputed. Once the lawsuit was filed, they gave the Complaint and Summons to him with the request, and understanding, that he was going to, and did, take the necessary steps to protect them. They were provided with a copy of an answer which their attorney represented to them had been filed on their behalf. The actions of Appellants were reasonable.

C. The Law Supports the Relief Sought by Defendants

The basic principles which our Court, and others, have applied to measure motions like this, are well recognized and simply stated. They are:

1. "Default judgments are not favored." *Pointer v. Huffman*, 509 So. 2d 870, 875 (Miss. 1987); *Guaranty National Ins. Co. v. Pittman*, 501 So. 2d 387, 388 (Miss. 1987).

2. "Where there is a reasonable doubt as to whether or not a default judgment should be vacated, the doubt should be resolved in favor of opening the judgment and hearing the case on the merits." *McCain v. Dauzat*, 791 So. 2d 839, 843 (Miss. 2001); *Southwest Surety Ins. Co. v. Treadway*, 113 Miss. 189, 74 So. 143, 146 (1917).

3. "For good cause shown, the Court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Mississippi Rules of Civil Procedure 55(c) and 60(b).

4. When considering whether to set aside a default judgment, a trial court must consider (1) the nature and legitimacy of the defendant's reason for the default, i.e. whether the defendant has good cause for the default, (2) whether [the] defendant in fact has a colorable

defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default judgment is set aside. *American States Ins. Co. v. Rogillio*, 10 So. 3d 463, 468 (Miss. 2009); *Guaranty National Ins. Co. v. Pittman*, 501 So. 2d. 387 (Miss. 1987) and *H&W Transfer and Cartage Service, Inc. v. Griffin, supra* at 511 So. 2d 895, 898.

5. The second prong of the three part test, that is whether the defendant has a colorable defense to the merits, ". . . outweighs the other in importance . . ." *Bailey v. Georgia Cotton Goods Company*, 543 So. 2d 180, 182 (Miss. 1989); *Stanford v. Parker*, 822 So. 2d 886, 888 (Miss. 2002); *Allstate Ins. Co. v. Green*, 794 So. 2d 170, 174 (Miss. 2001).

D. Defendants Were Entitled to Notice of the Application for Default Under Rule 55(b)

Rule 55(b) requires three days' notice if the party against whom judgment by default is sought has appeared in the action, he or his representative appearing on his behalf, shall be served with written notice of the application for judgment at least three days prior to the hearing. Although, traditionally, for an action to constitute an appearance one had to file documents in or actually physically appear before the court, those requirements have been relaxed considerably for Rule 55 purposes. *Holmes v. Holmes*, 628 So. 2d at 1361, 1363 (Miss. 1993). All that is required is that "once a party is made an *indicia* of defense or denial of the allegations of the complaint, such party is entitled to at least three days written notice of the application for default judgment. *Wheat v. Eakin*, 491 So. 2d 523, 525 (Miss. 1986). This Court has also noted that informal contacts between parties may constitute an appearance. *Holmes*, 628 So. 2d at 1364 (citing cases with written documents which were exchanged between the parties or filed with the

Court where there were conversations initiated by defendant's counsel indicated an intent to defend).

In *Holmes*, this Court specifically found that the defendant had made an appearance in the action because letters exchanged between counsel for the parties demonstrated that the defendant intended to defend the action. *Holmes*, 628 So. 2d 1364. That, at a minimum, is what occurred here.

Loper relies on the *Rogillio* case as being persuasive authority for her argument that the judgment should be upheld. But there are considerable differences in the facts. The Court in *Rogillio* noted the significance of the *Holmes* decision, and others holding that a formal appearance in court is not necessary to justify the relief. But the Court rejected the contention of American States to that effect because its claims specialist only spoke over the telephone with Rogillio's attorney, and there was a dispute about the substance of that conversation as follows:

> Although an appearance need not be a formal entry of appearance or a physical presence in court, in the illustrative cases as summarized above, the defendants either (1) served or sent a document to the plaintiff indicating in writing the defendants' intent to defend, (2) filed a document with the court indicating in writing the defendants' intent to defend, or (3) had counsel communicate to opposing counsel the defendants' intent to defend.

10 So. 3d at 476.

The proof is undisputed here that Ed Pleasants, despite his apparent failure to file an answer, clearly and emphatically expressed the intention of the Appellants to defend and resist the claims. Although Loper's counsel notes in his file memo that Pleasants later advised him he would not be defending the case, he does not even claim that Pleasants ever said that there would be no defense and, in fact, according to the memo of Loper's counsel, Pleasants told him that he was going to send the case to another attorney for handling. The strength of Pleasants' earlier

letter and his representation to Loper's counsel that the case would be handled by another attorney is strong written evidence of the Appellants' intention to resist the claim.

E. Appellants Have a Strong Defense to be Asserted

The most important factor is whether the Appellants have a colorable defense to the merits of the claim. First, the proof that was offered by the Plaintiff to support her claim is of the thinnest nature. For example, the trial court noted in its initial findings that there was only one minor physical contact by Defendant Tony Savage. (RE 6). Moreover, the unauthenticated and garbled tape recording offered by Loper indicated that there was a third person present during the single conversation between the parties. There was no evidence that Loper ever sought or obtained any type of treatment, whether medical or psychological, for the upset she alleges. Plaintiff did not offer any documentation of her alleged earnings loss; she offered no tax returns and no records relating to profits earned in her alleged businesses. On the other hand, there was strong proof by Appellants, detailed on pages above in this brief, that they have a colorable defense to the claim. In addition, as noted in Appellants' initial brief, counsel for Loper at the hearing, admitted there was proof of a colorable defense (T-70).[4]

F. Plaintiff Has Demonstrated No Prejudice.

Finally, setting aside the judgment will result in no prejudice to the Plaintiff. The court's consideration of this motion was obviously of no consequence to her, since she didn't even attend the hearing on the motion to vacate. Mere delay does not alone constitute prejudice, and Plaintiff made no showing that delay would result in her loss of evidence, increased difficulties in discovery or greater opportunities for fraud or collusion. *Lacy v. Sitel Corporation*, 227 F.3d.

[4] "...then you get into prong number 2 about the defensive standing of the defendant, well, obviously from the testimony you got this morning, Your Honor, you do have that, ..." (T-70).

290, 293 (5th Cir. 2000). There is no risk of a loss of evidence because the Plaintiff has already established a record. Plaintiff has made no showing of prejudice. On the other hand, prejudice to the Defendants is great.

As the Court said in *Dauzat* case, quoting *Guaranty Nat. Ins. Co. v Pittman,* 501 So 2d 377, 388 (Miss 1987), the 3 part test "...boils down almost to a balancing of the equities – in whose favor do they preponderate,...Furthermore, [w]here there is a reasonable doubt as to whether or not a default judgment should be vacated, the doubt should be resolved in favor of opening the judgment and hearing the case on the merits."

CONCLUSION

The facts of this case warrant setting aside the default judgment against the Appellants in this cause. Defendants have at all times disputed and denied the Plaintiff's claims and her counsel was aware. The proof shows that Appellants had "appeared" and clearly indicated to Plaintiff's counsel that they intended to defend this matter. Most importantly, Defendants had a colorable defense against the merits of the Plaintiff's claim. Plaintiff has at all times been aware of Defendants' position in this matter and will not be prejudiced by allowing them to continue with that position. On the contrary, Defendants will be greatly prejudiced if the judgment is upheld.

Respectfully submitted this 15th day of September, 2010.

ARVIND KUMAR, TONY SAVAGE AND TRACEY SAVAGE, Appellants

BY: _____

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ARVIND KUMAR, INDIVIDUALLY AND D/B/A HOLIDAY INN OF COLUMBUS, BHAVNA KUMAR, TONY SAVAGE AND TRACEY SAVAGE — **APPELLANTS**

VERSUS — **CAUSE NO. 2009-TS-02037**

SHANNA LOPER — **APPELLEE**

CERTIFICATE OF MAILING

I, Mary D. McDaniel, certify pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure that on the 15th day of September, 2010, I mailed, via regular U.S. Mail, to the Mississippi Supreme Court Clerk the original and four (4) copies of the Reply Brief of Appellants.

SO CERTIFIED, this the 15th day of September, 2010.

Mary D. McDaniel

AC\29,303-007\Rebuttal Brief of Appellant