IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

FATIMA CAMILO and DAVID CAMILO, Plaintiffs,	)	CIVIL NO. ST-11-CV-7
vs.	)	
AKEEM FRETT, Defendant.	)	ACTION FOR DAMAGES

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Akeem Frett's Motion to Set Aside Default Judgment pursuant to SUPER. CT. R. 50.[1] The Motion will be granted, the default judgment will be vacated and the parties will be referred to mediation.

I. BACKGROUND AND PROCEDURAL HISTORY

On June 16, 2010, Defendant Akeem Frett ("Frett") was involved in a one-car accident when the car he was driving crashed into a building located at 7th Street, Suite B Sugar Estate, St. Thomas, Virgin Islands (the "Collision"). Plaintiff Fatima Camilo ("Camilo") owned and operated a beauty salon within that building.

Camilo alleged damages arising from the Collision in a Complaint filed against Frett on January 4, 2011. Default was entered against Frett on March 18, 2011 (the

[1] Frett filed the Motion on May 14, 2015; Camilo filed an Opposition on June 24, 2015; and Frett did not file a reply. Camilo filed a "Supplemental Opposition to Defendant's Motion to Set Aside Judgment" on July 6, 2016. And Frett filed an Opposition to Plaintiff's Supplemental Opposition to Defendant's Motion to Set Aside Default Judgment on September 19, 2016. In the Virgin Islands, only a motion, response in opposition, and a reply may be filed with a court without an accompanying motion for leave to file. Neither party filed a motion to leave to file a supplemental brief. Consequently, the Court will strike both supplemental briefs.

"March 2011 Default"), but the parties stipulated to set aside the March 2011 Default on April 21, 2011. An attorney represented Frett in the stipulation and then filed an Answer to the Complaint on June 1, 2011. Camilo filed a motion for partial summary judgment on Frett's liability and Camilo's damages on October 24, 2011.

On March 1, 2012, Frett's counsel moved to withdraw and as grounds therefor stated he had written numerous letters to Frett requesting information but Frett never responded. Ultimately, on April 4, 2014, this Court granted the motion to withdraw conditioned upon counsel providing notice to Frett. That order also directed Frett to obtain new counsel or advise the Court he would represent himself. It also directed Frett to respond to Plaintiff's motion for summary judgment. The Court was satisfied with the attorney's proof of mailing the order to Frett. But Frett never appeared nor filed a response to the Motion For Summary Judgment. Therefore, on October 22, 2014, this Court granted Camilo's motion for partial summary judgment as to liability. On December 2, 2014, Camilo filed another motion for default judgment against Frett, and the Court scheduled an evidentiary hearing for January 22, 2015. Frett was personally served by the Superior Court Marshal (the "Marshal") with a copy of the Order setting the hearing on damages for January 22, 2015. The Court held the evidentiary hearing as scheduled and accepted evidence of Camilo's damages.[2] The Court then entered default judgment against Frett (the "February 2015 Default Judgment")—which ordered Frett to pay Camilo a sum of Thirty

[2] Frett arrived late at the hearing, but he did participate.

Thousand Three Hundred Ten Dollars and 75/100 Dollars ($30,310.75). On May 14, 2015, Frett filed the Motion to Set Aside Default Judgment (the "Motion")—which is the motion at issue in this opinion.

II. LEGAL STANDARD

Frett moves to set aside the February 2015 Default Judgment pursuant to SUPER. CT. R. 50 ("Rule 50"). Rule 50 states that the Court may set aside a default judgment for "good cause shown" and further states that Fed. R. Civ. P. 59 to 61 provide the legal standards governing motions to set aside default judgments.[3]

Frett also relies on Fed. R. Civ. P. 60(b). But, Frett does not state which subsections of rule 60(b) he attempts to invoke. A fair reading of his Motion reveals that he likely intended to move for relief under Rule 60(b)(1) for excusable neglect and 60(b)(3) for fraud. Therefore, the Court will analyze those sections.

III. ANALYSIS

A. Excusable Neglect Under Rule 60(b)(1)

On Frett's motion to vacate the default judgment under Fed. R. Civ. P. 60(b)(1), Frett bears the burden of demonstrating that: (1) he has a meritorious defense, (2) vacating the judgment will not prejudice the plaintiff, and (3) the default judgment

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[3] SUPER CT. R. 50.

was not the result of the defendant's culpable or inexcusable conduct.[4] The decision of whether to set aside a default or default judgment is ultimately left to the discretion of the trial judge.[5]

i. Meritorious Defense

Frett does not make a single argument regarding any meritorious defense he might have to to defeat Camilo's claims. And, while his Answer does state a number of negative and affirmative defenses, Frett's Motion fails to allege any factual allegations to bolster his Answer.

The Court finds *Spencer v. Navarro*[6] instructive on this issue. In *Spencer*, Navarro sued Spencer in small claims court after an alleged hit-and-run. The trial court entered default against Spencer when Spencer failed to appear for a bench trial. Spencer subsequently moved for reconsideration and the trial court held an evidentiary hearing. Spencer alleged that she was at home during the alleged collision and was thus not driving the vehicle that collided with Navarro. The trial court weighed Spencer's testimony against Navarro and ultimately denied the motion for reconsideration because it found that Spencer did not have a meritorious defense.

The Virgin Islands Supreme Court disagreed. The Supreme Court reversed the trial court on grounds that, if proven true at trial, Spencer's defense would defeat

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[4] *Spencer v. Navarro*, 2009 V.I. Supreme LEXIS 25, *4 (V.I. 2009); *see also Malpere v. Malpere*, 46 V.I. 118, 123 (V.I. Terr. Ct. 2004).
[5] *Malpere*, 46 V.I. at 128.
[6] 2009 V.I. Supreme LEXIS 25, (V.I. 2009).

Navarro's claims.[7] In reaching this decision, the Supreme Court noted that Spencer's answer contained detailed factual assertions to support her defenses.[8]

Frett offers no meritorious defense. At best he merely argues that the Camilo's claim for damages is excessive. Therefore, this factor cuts against vacating the default judgment. However, the Court notes that though Camilo offered oral testimony regarding the value of the items that were lost, she did not proffer copies of receipts or estimates to substantiate her estimate.

ii. Prejudice to the Plaintiff

Neither party briefed the issue of prejudice that may be visited upon Camilo if the Court grants Frett's Motion. Consequently, the Court must embark on its own journey to determine whether Camilo will be prejudiced if the Court grants Frett's Motion.

The Court finds *Ramirez v. Roy V. Savage Ltd.*[9] instructive on the issue of prejudice. In *Ramirez*, plaintiff Ramirez was crushed between a boarding ladder on the motor vessel owned by the defendant and a car parked at the Charlotte Amalie waterfront in December 1997. Ramirez sued Roy V. Savage Ltd. ("Savage")—the owner of the vessel—in June 1998. She subsequently amended her complaint in November 1999 to add Festus Pemberton—the vessel's operator and the owner of Savage—as a defendant in the action. Notably, in December 1999 Savage's attorney

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[7] *Spencer*, V.I. Supreme LEXIS 25, *8.
[8] *Id.* at *5.
[9] 49 V.I. 178, 184 (V.I. Super. Ct. 2007).

moved to withdraw as counsel because Savage failed to confer with the attorney despite the attorney's repeated attempts.

After neither defendant answered the complaint, Ramirez moved for default judgment against the defendants, a hearing was held, and the court granted the motion in December 2003. After hearing testimony on damages, the court awarded $269,073.91 to Ramirez. In order to satisfy the judgment, the Marshal attached three tow trucks and a boat belonging to defendants. The next day, an attorney representing Pemberton filed a motion to vacate the default judgment.

With respect to the prejudice to the plaintiff prong of the Rule 60(b) analysis, the *Ramirez* court held that Ramirez would be prejudiced if the court vacated the default because nine years had passed since she sustained her injuries and she still had not recovered anything from the defendants. The court also noted that ten months had passed between the time that default judgment was entered and defendant's filing a motion to vacate the default judgment. The court found that Ramirez should not be burdened by Pemberton's dilatoriness with respect to defending the action. The court found the fact that nearly nine years had passed between the time that the injury occurred and the defendant's request to vacate the default weighed heavily in favor of finding prejudice to Ramirez.

In the case at bar, the Collision occurred seven years ago, the action was filed six years ago, and default judgment was entered two years ago. Frett moved to vacate the default judgment two months later, and the matter has remained pending while awaiting court action. The latter delay cannot be charged to either party. But considering his appearance at the default judgment hearing and his promptness in filing the motion to vacate the judgment, coupled with no argument from Camilo that she would be prejudiced, the Court finds that prejudice to Camilo would not be burdensome if the judgment were set aside. Consequently, the prejudice to plaintiff prong of the Rule 60(b) analysis cuts in favor of setting aside the February 2015 Default Judgment.

iii. Culpability of the Defendant

Frett's Motion focuses primarily on the argument that his previous counsel failed to maintain attorney-client contact and, as such, he is not culpable. He contends that his attorney only attempted to contact him via mail and never made any attempt to contact him via telephone, that Frett has never lived at the physical address to which the letters were directed and that Frett's insurance agency had his address, although he does not specify what that address is. Frett also argues that as a member of the VI Police Department since 2010, he is well known in the community. He further argues that his attorney had a conflict of interest because he represented Frett and the insurance carrier simultaneously and that the attorney was more loyal to Frett's carrier than to Frett. The Court will address these arguments in turn.

The Court finds it directed copies of its orders to Frett personally after his attorney was permitted to withdraw, but it does not have proof he was served with all the orders. Therefore, the Court concedes it has no proof Frett was aware of the developments. But the Court believes Frett had a duty to attempt to contact his attorney in the four years after the initial telephone about the claims pending against him. Therefore, Frett is partially culpable.

However, Frett's also challenges the evidence provided by Camilo at the hearing on damages. He argues that Plaintiff's affidavit that rendered an estimate of her damages is false and the estimated value of the damages is grossly excessive. The Court finds that the argument regarding the value of items is persuasive, as Camilo provided no receipts or estimates for replacement. Instead she created her own "Estimate" with no verification of the value. Consequently, after weighing all of the foregoing factors, the partial summary judgment on liability will not be vacated; but, having reconsidered the lack of proof of damages and award of damages, the Court finds vacating the February 2015 Default Judgment is fair and equitable. Consequently, the Court will hold a hearing on Camilo's damages and offer both parties the opportunity to provide relevant evidence if they are not able to settle at mediation.

In light of the decision to vacate the default judgment, the Court need not address Frett's argument that his attorney had a conflict of interest or mis-placed loyalty.

B. Fraud

Under Rule 60(b)(3), the Court may set aside a judgment obtained by fraud, misrepresentation, or other misconduct of an adverse party.[10] "'Fraud,' as

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[10] See Fed. R. Civ. P. 60(b)(3).

contemplated by Rule 60(b)(3), is that 'which prevents a party from having an opportunity to present his claim or defense in court or deprives a party of his right to a day in court.'"[11] The movant bears the burden of proving fraud under Rule 60(b)(3) by "clear and convincing evidence."[12]

Here, Camilo submitted an affidavit which attested to the damages she incurred as the result of Frett's Collision. And, the Court held a hearing—which Defendant Frett attended—to determine Camilo's damages. Frett argues that the "estimate" of damages submitted by Camilo is false and fraudulent, and thus, this Court should set aside the default judgment because said estimate is "ludicrous."[13] But, Frett's fraud claim fails to speak to the standard in Rule 60(b)(3).

Frett submits no evidence to substantiate his allegations of fraud and, therefore, has failed to satisfy his burden of proof under Rule 60(b)(3). Examples in which relief under Rule 60(b)(3) has been granted include, for example, "cases where evidence is withheld in violation of discovery orders, thereby precluding the plaintiff from proving his or her case at a trial on the merits, or where a judgment is procured by perjury."[14] Camilo's calculation of her damages did not prevent Frett from presenting a defense to Camilo's action, nor did it deprive him of his day in court.[15] Rather, Camilo's damage calculations merely set a value on Frett's liability—which

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[11] *Bryan v. Bryan*, 2016 V.I. LEXIS 44, *27 (V.I. Super. Ct. Apr. 13, 2016) (internal citations omitted).
[12] *Id.*
[13] Motion to Set Aside Default Judgment, p. 9.
[14] *See Bryan*, 2016 V.I. LEXIS 44, at *28.
[15] *See Bryan*, 2016 V.I. LEXIS 44, at *27; *see also Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1384 (9th Cir. 1978) ("[J]udgment may be set aside only where the fraud is extrinsic or collateral to the matters involved in the action.").

was determined upon his default. Furthermore, Frett's sole piece of evidence—his affidavit—does not even purport to support a finding of fraud. Consequently, the Court will not set aside the February 2015 Default Judgment on the basis of fraud. But of course, as noted above, it will be set aside for purposes of considering damages.

IV. CONCLUSION

Frett has not challenged liability. He offers no meritorious defense, but instead argues that sum of the default judgment is excessive. The Court finds that Camilo offered no receipts or estimates for her losses. Therefore, the Court will vacate the default judgment and schedule the matter for another hearing on damages, but will first refer the matter to mediation.

An order consistent herewith will be entered.

DATED: July 17, 2017

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA GEORGE
Clerk of the Court

BY:
for **LORI BOYNES TYSON**
Chief Deputy Clerk 7/17/2017