IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ASHRAF BAZZAR,	)	
	)	
Plaintiff,	)	**CASE NO. ST-14-CV-370**
	)	
v.	)	
	)	
NASSER SALEM d/b/a FASHION SOURCE,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Pending before the Court are Plaintiff's May 28, 2015, Motion for Entry of Default Judgment, Defendant's July 31, 2015, request to File Defendant's July 10, 2015, Motion to Dismiss *nunc pro tunc,* Plaintiff's July 31, 2015, Motion for Modification of Deadlines set by July 15, 2015, Order, and Defendant's July 31, 2015, Response to Order to Show Cause and Motion to Set Aside Entry of Default. [1] For the following reasons Defendant's Motion to Set Aside Entry of Default will be granted, Plaintiff's Motion for Entry of Default Judgment will be denied, Defendant's request to file its Motion to Dismiss *nunc pro tunc* will be granted, and Plaintiff's Motion for Modification of Deadlines will be granted.

FACTUAL & PROCEDURAL HISTORY

Plaintiff filed a First Amended Complaint on September 8, 2014, naming Nassar Salem d/b/a Fashion Source as the Defendant. After Defendant failed to respond, the Acting Clerk of the Court entered a default on December 30, 2014, and Plaintiff moved for entry of default judgment on May 28, 2015. On June 23, 2015, Fashion Source's insurer retained counsel to defend this

[1] Plaintiff responded on August 13, 2015, to which Defendant replied on August 31, 2015.

action. However, without entry of an appearance by counsel, without moving to set aside the default, and without seeking leave of Court, on July 10, 2015, Defendant filed a Motion to Dismiss pursuant to Rule 12(b)(6). By Order dated July 15, 2015, this Court instructed Defendant to show cause why "his Motion to Dismiss should not be stricken or other sanctions imposed for his failure to enter an appearance, move to set aside his default, or seek leave of Court prior to filing the Motion to Dismiss." In response on July 31, 2015, Defendant's counsel filed a Notice of Appearance, a Response to Order to Show Cause and Motion to Set Aside Entry of Default, and requested the Court to grant Defendant leave to file its Motion to Dismiss *nunc pro tunc*.

STANDARDS

Pursuant to Superior Court Rule 50, incorporating Federal Rules of Civil procedure 59 to 61, "[f]or good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default, [or] judgment by default...."[2] However, because the inquiry should consider all the relevant circumstances, in certain instances, courts have also considered other equitable factors.[3] Motions to set aside default, however, should be construed liberally, and any doubts must be resolved in favor of the moving party.[4]

Default judgments are exclusively governed by Superior Court Rule 48. A hearing is usually required before a Court can enter default judgment, unless the damages sought are for a sum certain.[5]

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[2] Super. Ct. R. 50.
[3] *See, e.g., Indigo Am., Inc. v. Big Impressions, LLC*, 597 F.3d 1, 3 (1st Cir. 2010)(applying Fed. R. Civ. P. 55(c) to vacate an entry of default).
[4] *James v. Williams*, 26 V.I. 20, 22 (V.I. Terr. Ct. 1990)(citations omitted).
[5] Super. Ct. R. 48; *Appleton v. Harrigan*, 61 V.I. 262, 269 n.9 (2014)(Super. Ct. R. 48(a)(1) ("When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, ... the clerk upon request of the plaintiff ... shall enter judgment for the net amount due and costs against the defendant."); Fed. R. Civ. P. 55(b)(1) ("If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk ... must enter judgment for that amount and costs against a defendant.").

ANALYSIS

I. Motion to set Aside the Entry of Default

Defendant seeks relief from the default entered by the Acting Clerk of Court on December 30, 2014. While the entry of default is governed exclusively by Superior Court Rule 47,[6] ultimately, the "court has the discretion to set aside an entry of default for 'good cause' shown" under Superior Court Rule 50.[7] When "default judgment has not yet been entered after an entry of default, however, an even more liberal standard [is] employed when reviewing a Motion to set aside default because it is more appropriate to address an action on its merits whenever possible."[8] Any party adversely affected by entry of default may move to have the default set aside,[9] and the Court believes that if default judgment has not been entered, a parties response and willingness to defend, in and of itself supports a finding of good cause to proceed to a determination on the merits.

Even though the "good cause" standard in Superior Court Rule 50 applies to both default and default judgments, Federal Rule of Civil Procedure 55(c) clearly distinguishes between the two standards, stating "[t]he court may set aside entry of default for good cause, and it may set aside a default judgment under Rule 60(b)", requiring excusable neglect.[10] But because both rules adopt the standard of "good cause", the Court can rely on "federal decisions interpreting Rule 55(a)

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[6] *Appleton v. Harrigan*, 61 V.I. at 269; Super. Ct. R. 47 ("When a party against whom affirmative relief is sought has failed to appear, plead or otherwise defend … the clerk shall enter his default.").
[7] *James*, 26 V.I. at 22 (citations omitted).
[8] *Id.* at 22-23; *Deal Furniture & Appliance v. Four Winds Plaza P'ship*, 961 F. Supp. 117, 120 (D.V.I. 1997)(citations omitted)(the Appellate Division of the District Court of the Virgin Islands, interpreting Superior [then Territorial] Court Rule 50 also cautioning that "[d]etermining whether to grant a motion to set aside default is based on liberal as opposed to strict interpretation, and any doubt should be resolved in favor of the petition to set aside the [default] so that case[] may be decided on the[] merits.").
[9] *Chavayez v. Buhler*, 2009 V.I. Supreme LEXIS 26, *30-31 (V.I. 2009).
[10] Fed. R. Civ. P. 55(c); *see Appleton v. Harrigan*, 61 V.I. at 269, n.8 ("Although the entry of default in the Superior Court is governed exclusively by Superior Court Rule 47, and not Federal Rule of Civil Procedure 55(a), because these rules are nearly identical we may look to federal decisions interpreting Rule 55(a) for persuasive authority.").

for persuasive authority."[11] While the Court is unable to find binding precedent applying a good cause standard in relation to vacating entries of default, the Supreme Court of the Virgin Islands has identified in other instances that "'[e]xcusable neglect' and 'good cause' are essentially synonyms."[12] As a result, courts have balanced the excusable neglect factors when deciding a motion to vacate entry of default.[13] The factors for excusable neglect include:

> (1) whether the plaintiff will be prejudiced;
> (2) whether the defendant has a meritorious defense; [and]
> (3) whether the default was the result of the defendant's culpable conduct.[14]

Although this Court is hesitant to conclude that the Supreme Court of the Virgin Islands intended for the same stringent standard to be applied in instances of both a motion to vacate an entry of default as well as a default judgment, here, the Court reaches the same result applying the standard for excusable neglect.[15]

A. Prejudice

First, Plaintiff will not be significantly prejudiced by the Court setting aside the entry of default. Default was entered against Defendant on December 30, 2014. Plaintiff then filed a

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[11] *Id.*

[12] *Fuller v. Browne*, 59 V.I. 948, 954 (2013)(citing *Beachside Assocs., LLC v. Fishman*, 53 V.I. 700, 704 (2010))("Courts have equated Fed. R. Civ. P. 4(m)'s 'good cause' with the concept of 'excusable neglect' of Fed. R. Civ. P. 6(b)(2), which requires a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules.").

[13] *See Deal Furniture & Appliance v. Four Winds Plaza P'ship*, 961 F. Supp. 117, 121 (D.V.I. App. Div. 1997) (quoting *Skinner v. Guess*, 27 V.I. 193, 196 (D.V.I. App. Div. 1992))(internal citation and citations omitted); *See Vessup v. Cochran*, 38 V.I. 77, 82 (V.I. Terr. Ct. 1997), ("The Second Circuit Court of Appeals recently enunciated a definition of 'excusable neglect' concerning vacating default judgments. Even though this case does not involve a default judgment, the Court will borrow the Second Circuit's definition. Generally, the Second Circuit examines three criteria to determine if there is excusable neglect: 1) whether the default was wilful; 2) whether the opposing party has a meritorious defense; and 3) the level of prejudice that may occur to the non-defaulting party.")(citing *American Alliance Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F.3d 57, 59 (2d Cir. 1996)).

[14] *Cohen v. Gabriel Enterprises, Inc.*, 2013 WL 1154847, at *1 (D.V.I. Mar. 21, 2013)(*citing United States v. $55,518.05 in U.S. Currency*, 728 F.2d 192, 195 (3d Cir.1984)); *see Caesar v. Firstbank Puerto Rico*, 49 V.I. 1041, 1048 (D.V.I. 2008).

[15] *See Fuller v. Browne*, 59 V.I. at 954 (internal citations and citations omitted)(the Court found good cause for Defendant's untimely appeal, and remanded back to the Appellate Division to consider Defendant's appeal on the merits of the default judgment).

motion for default judgment on May 28, 2015, but waited until June 18, 2015, to notify Defendant's insurer that default had been entered and that Plaintiff had moved for default judgment.[16] Thereafter, on June 23, 2015, Defendant's insurer hired counsel, who then contacted Plaintiff's attorney to discuss the status of the case.[17] Plaintiff alleges that prejudice has been caused by the unnecessary expenditure of resources as a result of the default and argues that the reasonable time standard from Federal Rule of Civil Procedure 60 applies, making Defendant's motion untimely. However, the Rule 60 standard only applies to motions to set default judgments. While the Court recognizes that Plaintiff expended time preparing and filing the motion for entry of default, the motion for default judgment, and a notice of waiver of jury trial, the case itself is still in the early stages, and the Court is unable to find prejudice to Plaintiff based on the mere delay in the proceedings and final resolution of the case.[18] Since the Court has yet to enter default judgment, and because precedent favors setting aside defaults to decide cases on the merits, the Court finds that Plaintiff will not be prejudiced should the Court vacate the entry of default.[19]

B. Culpable Conduct

Next, Plaintiff argues that Defendant's failure to appear and failure to take action until ordered to do so by the Court is the equivalent of culpable conduct. Notably, Defendant was *pro*

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[16] In the letter to Defendant's insurer Plaintiff stated "there is no prejudice for Guardian to now step in to defend its insured as this lawsuit is presently procedurally postured." Plaintiff's August 13, 2015, Reply to Response to Order to Show Cause and to Motion to Set Aside Entry of Default, Ex. 2.

[17] Without filing an appearance with the Court or seeking Court approval, the parties agreed that Defendant could have until July 10, 2015, to respond to the Complaint. Defendant's July 31, 2015, Response to Order to Show Cause and Motion to Set Aside Entry of Default, Ex. A.

[18] *See Deal Furniture & Appliance*, 961 F. Supp. at 120 ("[Plaintiff] has not shown that vacating the default judgment would have subjected it to greater prejudice than that ordinarily experienced in the processing of a normal court docket, since mere delay in final resolution was never contemplated as a factor to be considered in determining prejudice.")(citation omitted).

[19] *See Medunic v. Lederer*, 533 F.2d 891, 893-94 (3d Cir. 1976)(citing *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245-46 (3d Cir. 1951)("[A] standard of "liberality," rather than "strictness" should be applied in acting on a motion to set aside a default judgment, and that any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits.")(internal citation omitted)).

se until June 23, 2015, and claims that the failure to respond was due to the fact that Defendant's "insurer was (and is) resolving coverage issues, making it unclear who would be financing Fashion Source's litigation costs."[20] Although it is clear that Defendant received notice of the current suit before the default was entered, once Defendant's insurer hired counsel, Defendant took prompt action toward defending the case shortly after the motion for default judgment was filed.

Further, Defendant asserts that his failure to first file the motion to set aside the entry of default or seek leave to file the Motion to Dismiss was due to a communication from Plaintiff's attorney indicating that he believed that the Clerk had not entered default against Fashion Source and further agreeing to give Defendant, without leave of Court, an extension of time to respond to the Amended Complaint.[21] Nevertheless, counsel for Defendant does not refute his failure to file an appearance before filing the July 10, 2015, Motion to Dismiss. Instead, counsel filed an appearance on July 31, 2015, and moved for the Court to grant leave *nunc pro tunc* for filing Defendant's Motion to Dismiss.[22] Plaintiff asserts that the Supreme Court of the Virgin Islands has found in similar circumstances that "even where a defendant appeared *pro se*, and was assured by another party, in error, that he did not have to respond to a complaint, such 'mistaken belief' was insufficient to warrant relief from the entry of default."[23] However, Plaintiff misstates the facts of *Appleton v. Harrigan*[24] in claiming that the Court refused to vacate the entry of default, when, in fact, the *Appleton* Court found the assertion insufficient to warrant relief from default judgment

[20] Defendant's July 31, 2015, Response to Order to Show Cause and Motion to Set Aside Entry of Default, at 5.
[21] *Id.* at Ex. A.
[22] While Super. Ct. R. 32-33 address the requirement for a Defendant to file an appearance, LRCi 5.2 specifically requires "the attorney for each party in any cause [to promptly] file an appearance in the office of the Clerk of the Court…."
[23] Plaintiff's August 13, 2015, Reply to Response to Order to Show Cause and to Motion to Set Aside Entry of Default, at 6, citing *Appleton v. Harrigan*, 61 V.I. 262, 268 (2014).
[24] 61 V.I. 262 (2014).

under Fed. R. Civ. P. 60(b).[25] Despite the fact that there appeared to be a miscommunication between counsel regarding whether default had been entered by the Clerk, and while it was Defendant's counsel's responsibility to independently review the Court's Docket, the Court is unable to determine that Defendant's counsel was attempting "to circumvent the rules and procedures of the Court" to justify a finding of inexcusable neglect on the part of Defendant so as to prevent the Court from vacating the entry of default.

C. Meritorious Defense

Lastly, the Court finds that Defendant's allegations, if true, are sufficient to sustain a meritorious defense to Plaintiff's claim of negligence and premises liability. Since the Court has not entered default judgment against Defendant or held a hearing on damages, the Court has limited information from the current pleadings concerning the validity of the claims in the Complaint. Defendant argues that Plaintiff failed to state a claim upon which relief can be granted because, "the injury was caused by a third party who was not an agent or employee of Fashion Source and since Plaintiff has not alleged that Fashion Source knew of the danger, ...the actions of the third party were not reasonably foreseeable to Fashion Source."[26] The Court finds, without taking into account the arguments raised in the motion to dismiss, that Defendant has asserted sufficient facts to support a finding that there exists a basis for a meritorious defense to Plaintiff's negligence and premises liability claim. For the foregoing reasons, the Court in its discretion, finds good cause to vacate the entry of default and allow the case to proceed to a decision on the merits.

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[25] *Id.*

[26] Defendant's July 31, 2015, Response to Order to Show Cause and Motion to Set Aside Entry of Default, at 5-6.

II. Motion for Default Judgment

In support of the Motion for Default Judgment, Plaintiff states that since Defendant "has failed to take appropriate steps to defend its insured in spite of its knowledge of this pending action" default judgment should be entered against Defendant. "[E]ven though Superior Court Rule 48 exclusively governs default judgment... Federal Rule of Civil Procedure 55(b) similarly provides that default judgment can be entered without a hearing only where the damages sought are a 'sum certain'."[27] Further, an entry of default does "not in itself warrant the court in entering a default judgment. There must be a sufficient basis in the pleadings for the judgment entered."[28]

Traditionally after the entry of default, the Superior Court "accepts the factual allegations of the complaint as true, except for those averring the amount of damages,"[29] and must determine "whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law."[30] Despite the fact that the May 28, 2015, Motion for Default Judgment was filed before the July 31, 2015, Motion to Set Aside Entry of Default, because the Court found good cause to set aside the entry of default, the motion for default judgment must now be denied. Since the Court has not entered default judgment, it is unnecessary for the Court to consider excusable neglect in its denial of the Motion. While Plaintiff asserts that the Court must first decide whether to enter default judgment before even considering the Defendant's Motions, the fact that Plaintiff's Motion was filed first is not dispositive. Regardless

[27] *Appleton v. Harrigan*, 61 V.I. 262, 269 n.9 (2014)("When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, ... the clerk upon request of the plaintiff ... shall enter judgment for the net amount due and costs against the defendant."); *see* Super. Ct. R. 48(a)(1); Fed. R. Civ. P. 55(b)(1) ("If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk ... must enter judgment for that amount and costs against a defendant.").
[28] *King v. Appleton*, 61 V.I. 339, 346 (2014)(citations omitted).
[29] *Appleton v. Harrigan*, 61 V.I. at 269 (citations omitted).
[30] *King v. Appleton*, 61 V.I. at 346 (citations omitted).

of the order in which the Court considers the motions, the Court would reach the same conclusion denying the motion for default judgment because Fashion Source is now actively defending the allegations made in the Complaint, and the Court disfavors default judgments when decisions can be reached on the merits.[31]

III. Motion to Dismiss

Plaintiff contends that the Court lacks discretion to "accept or consider" Defendant's July 10, 2015, Motion to Dismiss, until it first rules on Plaintiff's Motion for Default Judgment. In Plaintiff's July 31, 2015, Motion for Modification of Deadlines, Bazzar relies on *Smith v. Turnbull*,[32] and *Martinez v. Colombian Emeralds, Inc.*,[33] for the suggestion that the Court lacks discretion to consider the Motion to Dismiss. However, in both *Smith* and *Martinez*, the issue was not simply that both a motion to dismiss and a motion for default judgment were before the Court. Rather, there were procedural defects in the motions to dismiss.[34] Despite the fact that the Court agrees with Plaintiff that, because the entry of default was still in effect, the Motion to Dismiss was not properly before the Court on July 10, 2015, considering that the Court approved the motion to vacate the entry of default and denied the motion for default judgment, the motion to dismiss is now permissible.[35] The Court recognizes that, typically, pursuant to Fed. R. Civ. P. 12(a), a

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[31] *Skinner v. Guess*, 1992 U.S. Dist. LEXIS 6263, *5-6 (D.V.I. 1992).
[32] 54 V.I. 369 (2010)(" Superior Court is obligated to resolve motions for entry of default prior to considering subsequently-filed motions to dismiss pursuant to Rule 12(b)(6)").
[33] 51 V.I. 174 (2009).
[34] In *Martinez*, the Court found that "[a] restrictive interpretation of the time limits [when a Rule 12(b)(6) motion is made after the expiration of the time to plead and after the plaintiff has moved for an entry of default] is justified when, as in this case, a defendant agrees to a stipulated due date for pleading but ignores that date.... Thus, the trial court should have considered plaintiff's motion to strike the motion to dismiss and its motion for entry of default." *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 179 (2009). Similarly, in *Smith*, the Court recognized that a motion to dismiss must be filed before any responsive pleading, and the defendants waited "until almost four years after Smith had initiated and served his complaint and a year and a half after Stridiron and Turnbull had already submitted an answer," to file the motion to dismiss. *Smith v. Turnbull*, 54 V.I. 369, 373-74 (2010).
[35] *See Martinez*, 51 V.I. at 191 n.11 (2009)("Our decision is not intended to prevent trial courts from exercising discretion to consider untimely motions to dismiss in all cases.").

responsive pleading must be filed within twenty-one (21) days after being served with the Complaint, making Defendant's Motion untimely. However, unlike in *Smith,*[36] where other parties had long before submitted an answer, and *Martinez,*[37] where defendant had not timely pleaded in accordance with the parties court-approved stipulation, here, since Defendant has not yet filed an answer and Plaintiff previously agreed to give Defendant an extension of time to respond,[38] the Court will grant Defendant leave to file the Motion to Dismiss *nunc pro tunc.*[39]

CONCLUSION

For the forgoing reasons, Plaintiff's May 28, 2015, Motion for Entry of Default Judgment, is denied, Defendant's July 31, 2015, Motion to Set Aside Entry of Default is granted, Defendant's July 31, 2015, request to file Defendant's Motion to Dismiss *nunc pro tunc* is granted, and Plaintiff's July 31, 2015, Motion for Modification of Deadlines set by July 15, 2015, Order, is granted. An Order consistent with this Memorandum Opinion shall issue.

Dated: October 8, 2015

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella H. George
Acting Clerk of Court __/__/__

by: ________
Lori Boynes-Tyson
Court Clerk Supervisor 10/ 9 / 15

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[36] *See* cases cited *supra* n. 34.

[37] *Id.*

[38] Defendant's July 31, 2015, Response to Order to Show Cause and Motion to Set Aside Entry of Default, Ex. A ("And of course you may have time. How about until July 10 to respond to the Complaint.").

[39] *See* Fed. R. Civ. P. 12(a)-(b)((In the absence of a local statute, case law, or Superior Court rule addressing the issue adequately, the Federal Rules of Civil Procedure are applicable to the Superior Court); *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 179 (2009)("According to the specified time limitation on Fed. R. Civ. P. 12(b) motions, they must be made before pleading; and Rule 12(a), which allows twenty days for filing responsive pleadings, normally controls the time limit on Rule 12(b) motions.").