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Case No. 6283-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CANCAN DEVELOPMENT, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 6283-VCL
	)	
SANDRA MANNO,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: September 13, 2011
Date Decided: September 21, 2011

Robert S. Saunders, Arthur R. Bookout, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, Delaware; *Attorneys for Plaintiff.*

P. Clarkson Collins, Jr., Jason C. Jowers, MORRIS JAMES LLP, Wilmington, Delaware; *Attorneys for Defendant.*

LASTER, Vice Chancellor.

Defendant Sandra A. Manno has moved pursuant to Rule 60(b) for relief from a default judgment entered on April 12, 2011. Two features distinguish her request. First, the default judgment was not entered for a customary reason such as her failure to appear. Rather, Manno advised that she would not contest its entry on the merits. Second, and consequently, Manno does not seek to vacate the judgment in its entirety. She only seeks relief from an award of reasonable attorneys' fees and costs to plaintiff CanCan Development, LLC ("CanCan" or the "Company"). Alternatively, Manno asks that the effectiveness of the fee award be stayed pending the outcome of a related action, suggesting that the amount currently due could be offset against whatever monetary relief she hopes to be awarded there.

Manno relies on Rule 60(b)(1), pursuant to which relief may be granted upon a showing of "[m]istake, inadvertence, surprise, or excusable neglect." But the default judgment and award of attorneys' fees did not result from any of these factors. It rather resulted from her non-Delaware counsel's litigation strategy of attempting to moot this case by representing that Manno would not contest her removal as a manager, while at the same time continuing to litigate her removal in a later-filed New Jersey action. Manno also relies on Rule 60(b)(6), pursuant to which relief may be granted for "any other reason justifying relief from the operation of the judgment." Her current predicament, which is of her own making, does not otherwise justify relief. The Rule 60(b) motion is denied.

I. FACTUAL BACKGROUND

On March 16, 2011, CanCan filed this action pursuant to 6 *Del. C.* § 18-110 to obtain a summary determination that Manno had been removed as a manager of the Company. On March 21, CanCan moved to expedite. On March 23, I heard CanCan's motion. In accordance with this Court's custom, I extended Manno's Texas lawyer the courtesy of appearing on her behalf during the initial scheduling conference.

Before the conference, I reviewed CanCan's limited liability company agreement and considered CanCan's reading of the removal provisions, which appeared more than colorable and likely the only reasonable reading. During the conference, Manno's lawyer did not offer any alternative reading. Indeed, he could not identify any defense Manno might have to CanCan's complaint, other than his belief that Manno could not be served with process in a civil proceeding brought in the State of Delaware (a position contrary to 6 *Del. C.* § 18-109). Manno's lawyer indicated that other attorneys were reviewing those issues and that Manno would retain Delaware counsel promptly.

At the close of the conference, I scheduled the matter for an expedited merits hearing and required Manno to answer the complaint by April 1, 2011. On March 31, having not retained Delaware counsel, Manno's Texas lawyer caused a paralegal in his office to send me a copy of a letter that he sent earlier that day to CanCan. The earlier letter stated:

> Sandra Manno has elected not to file an answer in this case. This election is based on the transfer of membership units from Joseph Py to Robert A. Granieri. This makes the verified complaint and proposed order a moot case since Mr.

> Granieri and his father now have a supermajority. We are advising Vice Chancellor J. Travis Laster of this decision.

Dkt. 19, Ex. C. Neither the lawyer's letter nor the paralegal's cover letter explained what defense Manno otherwise might have had or why Granieri and his father did not have a supermajority of CanCan's voting power when they originally removed Manno.

Despite having represented that the removal issue was resolved, the same Texas lawyer, who apparently also is admitted in New Jersey, filed a plenary action in New Jersey Superior Court on March 25, 2011. Count XI of that complaint sought to litigate Manno's removal as a manager and to recover compensatory and consequential damages on the grounds that "[t]he Defendants have used undue influence, extortion, fraud and deceit and other methods to terminate Sandra Manno as Manager of CanCan . . . ." Dkt. 9, Ex. A, ¶ 45. The complaint noted the existence of the Delaware case but alleged that it "may be adjudicated on procedural grounds and not adjudicate the Defendant's tortuous [sic] conduct." *Id.*

By motion dated April 5, 2011, CanCan moved for a default judgment. CanCan explained that it was forced to file the Section 18-110 proceeding after receiving from Manno's counsel (i) a letter dated March 8 that challenged Manno's removal as a manager and (ii) an email dated March 11 that again disputed her removal. CanCan described Manno's filing of the New Jersey action and her attempt to litigate her removal there. CanCan noted that despite purportedly conceding that Manno no longer was a manager, Manno's non-Delaware lawyer insisted on continuing to litigate her removal in

New Jersey. CanCan asked for the entry of a default judgment conforming to the relief requested in the complaint, which included a prayer for attorneys' fees and costs.

On April 11, 2011, Manno's Texas lawyer, writing on his New Jersey letterhead, advised me that "Sandra Manno has no objection to the order being entered removing her as a Manager of [CanCan] since the actions of Joseph F. Py in transferring his Membership shares to Robert A. Granieri has [sic] mooted the procedural issues." Dkt. 20, Ex. J. Manno's lawyer again did not explain what defense Manno otherwise might have had. He argued that any award of attorneys' fees would depart from the American Rule. He acknowledged the New Jersey action but did not attempt to explain how Manno justifiably could continue to dispute her removal there.

On April 12, 2011, having considered the submissions, I entered default judgment in the form requested by CanCan. In my view, the case warranted an award of attorneys' fees because Manno appeared to be attempting in bad faith to eat her cake and still have it, *viz.*, she wanted to concede her removal for the limited purpose of escaping from Delaware while continuing to litigate her removal in New Jersey. Moreover, Manno's lawyer still had not articulated any colorable defense to what appeared to be the only reasonable reading of the removal provisions in CanCan's limited liability company agreement. Manno thus appeared to be seeking to impose litigation costs on CanCan by fighting over an issue where she did not have a defensible position.

CanCan subsequently moved to quantify the amount of the fee award. I scheduled a hearing for May 17, 2011, and directed Manno to file her response within ten days. During the hearing, her out-of-state counsel again argued against the fee award. I

reviewed the history of the case and noted that Manno still had not articulated any basis for defending the Delaware action or continuing to litigate in New Jersey. I determined that the attorneys' fees sought by CanCan were reasonable and granted the amount requested.

After the case was closed, Manno finally hired Delaware counsel. She first attempted to notice an appeal, which she later voluntarily dismissed. She then moved for relief from judgment pursuant to Rule 60(b).

II. LEGAL ANALYSIS

Under Court of Chancery Rule 55(c), this Court "may set aside judgment by default in accordance with Rule 60(b)." The limited grounds for granting relief from judgment in Rule 60(b) implicate two significant values: (i) "the integrity of the judicial process," and (ii) "the finality of judgments." *Wolf v. Triangle Broad. Co.*, 2005 WL 1713071, at *1 (Del. Ch. July 18, 2005) (quoting *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 634-35 (Del. 2001)). When a default judgment results from a defendant's failure to respond, Delaware courts will err on the side of granting relief to promote the policy of deciding litigation on the merits. *See, e.g., Battaglia v. Wilmington Sav. Fund Soc.*, 379 A.2d 1132, 1135 (Del. 1977). When a judgment has been entered for other reasons, as here, a Rule 60(b) motion should not be easily granted. *See Wolf*, 2005 WL 1713071, at *1.

A. Relief Under Rule 60(b)(1)

Under Rule 60(b)(1), the Court may vacate a judgment "upon such terms as are just" if a defendant can show that the judgment resulted from "[m]istake, inadvertence,

surprise, or excusable neglect." Ct. Ch. R. 60(b)(1). To prevail under Rule 60(b)(1), the defendant must establish (i) mistake, inadvertence or excusable neglect in the conduct that led to the default judgment; (ii) a meritorious defense to the action that would allow for a different outcome to the litigation; and (iii) that the plaintiff will not be prejudiced. *See, e.g., Apt. Cmtys. Corp. v. Martinelli*, 859 A.2d 67, 71-72 (Del. 2004) (affirming denial of Rule 60(b)(1) motion because movant failed to establish excusable neglect); *Artisans' Bank v. Chase Alexa, LLP*, 2011 WL 1533429, at *2 (Del. Super. Apr. 21, 2011) (denying Rule 60(b)(1) motion because movant consciously chose not to respond and instead sought to litigate in a different action).

Manno argues that she had a viable defense to the complaint based on her understanding of the allocation of voting rights at CanCan. She contends that she intended to raise and litigate her defense, but that when one of the other CanCan members transferred his interests to the Granieris after the scheduling conference, she lacked the votes to block her removal even if her understanding were correct. She says that in light of changed circumstances, she made a responsible decision not to litigate. She avers that she and her lawyer mistakenly did not realize that she had to articulate a colorable defense to avoid a fee award.

If Manno had acted responsibly in light of changed circumstances to moot the dispute over her removal as a manager, then I would not have entered a default judgment that awarded fees to CanCan. But that is not what Manno did. She rather sought only to moot the issue *in Delaware* while continuing to litigate the same issue *in New Jersey*. This was the litigation equivalent of keeping her fingers crossed behind her back.

Manno's recently retained Delaware counsel argues that the summary nature of the Delaware proceeding prevented Manno from raising the issues she sought to litigate in New Jersey. Manno made no such argument at the time, and this seems to be an instance of savvy Delaware counsel trying to clean up someone else's mess. Regardless, the scope of a proceeding brought under Section 18-110, like its corporate analogue under 8 *Del. C.* § 225, can readily encompass the issues Manno wanted to litigate in New Jersey.[1] Indeed, it is hard to imagine how this Court could have given effect to the Granieris' removal vote if they had procured the underlying interests through undue influence, extortion, fraud, and deceit, as Manno alleged (albeit in conclusory fashion) in her New Jersey complaint.

In light of her tactical gambit of conceding in Delaware to litigate in New Jersey, Manno cannot claim that the default judgment and award of attorneys' fees resulted from mistake, inadvertence, or excusable neglect. It rather resulted from the litigation strategy that she and her counsel consciously adopted. Manno now claims that she and her counsel mistakenly failed to understand that a default judgment might include an award

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[1] *See, e.g., Levinhar v. MDG Med., Inc.*, 2009 WL 4263211, at *10-11 (Del. Ch. Nov. 24, 2009) (holding dismissal of a § 225 proceeding had res judicata effect on breach of fiduciary duties issues that could have been litigated in the summary proceeding); *Agranoff v. Miller*, 1999 WL 219650, at *17-18 (Del. Ch. Apr. 12, 1999), *aff'd*, 737 A.2d 530 (Del. 1999) (resolving claims for breach of fiduciary duty and tortious interference in a § 225 action); *Jackson v. Turnbull*, 1994 WL 174668, at *2 (Del. Ch. Feb. 8, 1994), *aff'd*, 653 A.2d 306 (Del. 1994) (noting that in a § 225 action "it is frequently the case that, in order to determine the rightful directors of a company, underlying transactions must be analyzed and resolved"); *Kahn Bros. & Co. v. Fischbach Corp.*, 1988 WL 122517, at *5 (Del Ch. Nov. 15, 1988) (Allen, C.) (holding that directors' alleged fraud in obtaining office was not collateral to a § 225 proceeding).

of fees and costs where the complaint requested that relief and the Court found a basis for it. But that is also the rule in Texas, where Manno's out-of-state lawyer is admitted to practice.[2] Moreover, by letter dated April 11, 2011, Manno's lawyer argued against any award of fees under the American Rule. He obviously understood that CanCan sought an award of attorneys' fees under the bad faith exception.

Manno also has not convinced me that she possessed a meritorious defense that would have resulted in a different outcome. In her Rule 60(b) motion, Manno finally explained her understanding of the allocation of voting rights at CanCan. That understanding is contrary to a plain reading of the limited liability company agreement. But assuming it were colorable, I do not believe it would have changed the result. At bottom, Manno wanted to end the litigation in Delaware while continuing to litigate in New Jersey. Without a fee award, Manno would have imposed costs needlessly on CanCan. As long as Manno wanted to fight on in New Jersey, I would have entered the form of order granting attorneys' fees and costs. Relief is therefore unavailable to Manno under Rule 60(b)(1).

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[2] *See, e.g., Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 330 S.W.3d 342, 360 (Tex. App. 2010) ("The default judgments conclusively established that, as alleged in the petitions, Paradigm is liable for Retamco's attorney's fees.") (internal quotation marks omitted); *Siddiqui v. W. Bellfort Prop. Owners Ass'n*, 819 S.W.2d 657, 659 (Tex. App. 1991) ("[B]y failing to answer, [the defendant] legally admitted her liability for reasonable attorney's fees since the plaintiff's petition included a specific request for such an award . . . .").

B. Relief Under Rule 60(b)(6)

Rule 60(b)(6) is a catch-all, allowing the Court to vacate a judgment if the movant can sufficiently show "any other reason justifying relief." Ct. Ch. R. 60(b)(6). Rule 60(b)(6) "only encompasses circumstances that could not have been addressed using other procedural methods, [that] constitute an 'extreme hardship,' or [when] 'manifest injustice' would occur if relief were not granted." *Wolf*, 2005 WL 1713071, at *1 (footnote omitted). Manno has not shown "extreme hardship" or "manifest injustice." She merely suffered the consequences of an ill-advised litigation strategy. She could have filed a timely appeal. Parties who wish to avoid similar outcomes would be well advised to retain Delaware counsel promptly, and in any event before the conclusion of a case.

Under the circumstances, it would be unjust to relieve Manno of her fee obligation and force CanCan to bear the expense of pursuing and obtaining a default judgment. Delaware courts have held that a plaintiff may be awarded attorneys' fee and costs as a condition for vacating a default judgment.[3] Were I to grant Manno's motion, these

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[3] *See Battaglia v. Wilmington Sav. Fund Soc.*, 379 A.2d 1132, 1136 (Del. 1977) (remanding with direction to the trial court "to award plaintiff counsel fees, court costs and any other expenses, including those incurred by this appeal, to which the Court, in its discretion, deems her entitled, as a result of defendant's failure to act before the default judgment was taken"); *Williams v. DelCollo Elec., Inc.*, 576 A.2d 683, 688 n.5 (Del. Super. 1989) ("The court costs of all proceedings reasonably connected with the entry and the reopening of the judgment will be borne by defendant . . . ."); *see also Pinkett ex rel. Britt v. Nationwide Mut. Ins. Co.*, 832 A.2d 747, 751 (Del. Super. Ct. 2003) (denying motion for default judgment but requiring defendant to pay attorney's fees incurred by plaintiff in pursuing it).

authorities would support conditioning the relief on Manno paying the fees she currently seeks to avoid. I will simply leave the original order in place.

C. Set-Off

To the extent her Rule 60(b) motion is denied, Manno asks that execution of the judgment be stayed pending resolution of Civil Action No. 6429-VCL, a plenary action in which the parties have asserted various claims against one another. She anticipates being able to offset the fee award against a recovery in the plenary action.

"A set-off is a counterdemand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action." 80 C.J.S. *Set-Off and Counterclaim* § 3 (2011). "A claim for set-off is an independent action which may be raised as a counterclaim. It is a claim for affirmative relief, rather than a defense." *Id.* (footnote omitted). "A contingent or unmatured obligation which is not presently enforceable cannot be the subject of set-off." *Id.* "[T]here is no right to set-off of a possible unliquidated liability against a liquidated claim that is due and payable." 80 C.J.S. *Set-Off and Counterclaim* § 58 (2011).

Under these hornbook principles, Manno cannot use the default judgment as a set-off. First, Manno has it backwards. The right to invoke the default judgment as a set-off belongs to CanCan and could be pled by CanCan as a defense to Manno's offensive claim in the plenary action. Second, Manno's attempt at set-off is premature. Her claim against CanCan is contingent and unmatured; she has no right to set-off CanCan's unliquidated potential liability in the plenary action against CanCan's liquidated, due, and payable claim from this case.

III. CONCLUSION

Manno's motion for relief from judgment is DENIED. **IT IS SO ORDERED.**