STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

RIGELSTAR DEVELOPMENT, LLC and
ENDEAVOR FITNESS, LLC,
Plaintiffs,

Case No. 19-30564-CB
Hon. Michael P. Hatty

v.

PASQUALE BATTAGLIA and NEXGEN
BUILDING SYSTEMS, LLC,
Defendant.
_____/

OPINION AND ORDER ON DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 1st day of October, 2020

THIS MATTER comes before this Court on Defendant Battaglia's Motion to Set Aside Default Judgment. This Court having reviewed the parties' briefs, having heard oral argument on September 17, 2020, being otherwise fully advised in the premises, and for the reasons stated herein, DENIES Defendant's Motion.

I

Plaintiffs commenced this action on November 21, 2019, relating to the construction of a commercial gym on Eager Road in Howell. Plaintiff Rigelstar Development is the owner of the parcel and Plaintiff Endeavor Fitness owns the business that will operate in the newly constructed facility. The project is being financed through a $1.5 million construction loan from Huntington Bank. Plaintiffs allegedly contracted with Defendants to provide construction management services and for the design, materials, and labor for the building's foundation for the ultimate cost of $243,588.31. Plaintiffs assert claims of breach of contract, negligence,

violations of MCL 570.152 and MCL 570.1110, misappropriation, fraud, breach of fiduciary duty, and slander of title, arguing Defendants drew payments from the loan account for work that was not performed, failed to credit Plaintiffs for payments they provided, attempted to receive payment for change orders that were not approved, and wrongfully filed a claim of lien against the property when they were eventually terminated. Plaintiffs further assert that they incurred additional costs through replacement services. With regard to Defendants' claim of lien, Plaintiffs asserted that work on the project had stalled due to the issues that it created regarding financing.

On December 23, 2019, Defendant Battaglia, in pro per and on behalf of Defendant Nexgen, filed a "Response to Complaint and Counterclaim." On January 23, 2020, this Court granted Plaintiffs' motion to strike these pleadings, provided Defendants with 14 days to retain counsel, and awarded Plaintiffs $250 in costs and fees. There were two issues with Defendants' pleadings. The first was that an individual cannot represent a corporation in litigation unless they are licensed to practice law. *Bolt v City of Lansing*, 221 Mich App 79, 84 n 3; 561 NW2d 423 (1997), rev'd on other grounds 459 Mich 152; 587 NW2d 264 (1998). The second was that Defendants' pleading did not respond to the allegations in the complaint and combined the answer with the counter-complaint. MCR 2.111 and MCR 2.115(B). Subsequent to this hearing, plaintiffs filed a first amendment complaint on February 3, 2020.

On February 6, 2020, attorney Stephen LaCommare filed his appearance on behalf of both Defendants. Then, on February 10, 2020, Defendants, now represented by Mr. LaCommare, filed their amended answer. No counterclaim was filed. On February 27, 2020, Plaintiffs filed a motion for partial summary disposition. In addition to this motion, Plaintiffs filed the "joint" pretrial report, though there was apparently no input from Defendants.

This Court held its initial court conference on March 11, 2020. Attorney Christopher McMahon appeared for that conference in person but Mr. LaCommare had to be called on his cell phone after he did not appear. However, the conference was held with Mr. LaCommare appearing remotely. Defendants' failure to participate in the litigation was discussed at that time, as well as the Court's general requirements for pleading dispositive motions. To that end, this Court entered a stipulated case management scheduling order on March 11, 2020, that provided, in pertinent part, Defendants were to file a serve a pretrial statement and provide Plaintiffs with initial disclosures by March 19, 2020 (Defendants did not file a pretrial statement and Plaintiffs reported that no initial disclosures were provided); Defendants were to provide a draft joint statement of undisputed and disputed facts relative to Plaintiffs' motion for partial summary disposition by March 16, 2020, so that a joint statement could be file by March 19, 2020 (Plaintiffs asserted that Defendants did not so provide a draft and no joint statement was filed); and all preliminary witness lists and exhibit lists were to be filed no later than April 3, 2020 (Plaintiffs filed theirs on March 19, 2020, but Defendants did not file their lists).

This Court was initially prepared to hear Plaintiffs' motions for partial summary disposition and default judgment on June 17, 2020. However, Defendants failed to appear for that hearing. This Court adjourned Plaintiffs' motions to July 1, 2020; ordered Defendants to file and serve responses to the motions no later than June 24, 2020; awarded Plaintiffs $250 in costs; and further ordered that this amount and the prior amount (total of $500) be paid to Plaintiffs no later than June 24, 2020. This Court also ordered that it would hear argument on any additional costs on that day. A proof of service filed on June 22, 2020, indicates that Defendants were served with this order by e-mail on June 17, 2020, and by mail on June 18, 2020.

Defendants did not file responses as ordered and failed to appear for the July 1, 2020 hearing. Therefore, this Court entered an order granting Plaintiffs' motion for default judgment in the amount of unpaid sanctions and an order granting Plaintiffs' motion for partial summary disposition and discharge of lien. A proof of service filed on July 6, 2020, indicates that those orders were served on Defendants by mail on July 2, 2020. On August 6, 2020, this Court held a hearing on plaintiffs' motion for entry of default judgment against defendants based on their underlying claim for money damages against defendants. Again, defendants did not appear and this Court granted plaintiffs' motion and entered final judgment against defendants in the amount of $190,118.96. A proof of service filed on August 10, 2020, indicates that defendants were served with this default judgment by mail on August 7, 2020.

Of note in this matter is that even though Defendants' counter-complaint, filed in pro per, was stricken by this Court on January 23, 2020, the Court's docket management software program still lists Defendant Battaglia as an in pro per counter-plaintiff. Therefore, all notices issued by this Court were sent to both Mr. LaCommare and Defendant Battaglia personally. Specifically, this Court sent the initial scheduling order entered on January 16, 2020; the July 27, 2020 order setting the status conference; the June 17, 2020 order of this Court adjourning Plaintiffs' motions for partial summary disposition and default judgment, which ordered payment of costs to Plaintiffs and required a response; and the July 1, 2020 order of this Court entering default judgment as to costs against Defendants, granting Plaintiffs' motion for partial summary disposition, and discharging the lien to Defendant Battaglia directly.

Defendant Battaglia, apparently not defendant Nextgen, is now represented by a new attorney and brings this motion, supported by affidavit, to set aside the default judgments entered in this matter. In support of his motion, Defendant asserts first that he was "abandoned" by Mr.

LaCommare. He further asserts that the underlying contract contains an arbitration provision that should have prevented this Court from hearing this matter in the first place. Of note is that Defendant alleges that the copy of the contract attached to Plaintiffs' amended complaint is missing the pages containing the subject arbitration clause. Finally, Defendant argues that he should not be held personally liable for the claims alleged by Plaintiffs.

Plaintiffs respond by arguing that Mr. LaCommare's purported negligence should be attributed to Defendant and not serve as good cause to set aside the default judgment. Plaintiffs further argue that Defendant waived the affirmative defense regarding arbitration and that their complaint lies in equity to discharge the lien and tort, thus their claims would operate outside of that provision of the contract. As to Defendant's personal liability, they point out that he can be held personally liable for the alleged torts and specifically point out that Defendant filed the claim of lien in his name personally. Finally, Plaintiffs raise issue with Defendant's argument that the full and complete contract was not attached to the amended complaint. This Court will note at the outset that upon review of the file, not only is the provision concerning arbitration contained in the copy of the contract attached to Plaintiffs' amended complaint, it is also contained in the copy of the amended complaint attached as an exhibit to Defendant's instant motion.

II

MCR 2.603(D)(1)-(2) provides that other than for reasons of lack of jurisdiction over the defendant and grounds for relief provided for under MCR 2.612, a default may be set aside if a motion requesting such relief is filed before entry of the default judgment and "only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(4) provides that an order setting aside a default "must be conditioned on the defaulted

party paying the taxable costs incurred by the other party in reliance on the default… [together with any] other conditions the court deems proper, including a reasonable attorney fee."

Good cause sufficient to set aside a default means: "(1) a substantial irregularity or defect in the proceeding upon which the default is based, [or] (2) a reasonable excuse for failure to comply with the requirements that created the default." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999). The Michigan Court of Appeals created a totality of the circumstances test for determining whether a party has demonstrated good cause for purposes of setting aside a default or default judgment. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 236; 760 Mich App 213; 760 NW2d 674 (2008). The trial court should consider the following factors in making this determination:

> (1) Whether the party completely failed to respond or simply missed the deadline to file;
> (2) If the party simply missed the deadline to file, how long after the deadline the filing occurred;
> (3) The duration between entry of the default judgment and the filing of the motion to set aside;
> (4) Whether there was defective process or notice;
> (5) The circumstances behind the failure to file or file timely;
> (6) Whether the failure was knowing or intentional;
> (7) The size of the judgment and the amount of costs due under MCR 2.603(D)(4);
> (8) Whether the default judgment results in an ongoing liability (as with paternity or child support); and
> (9) If an insurer is involved, whether internal policies of the company were followed.
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> *Shawl* at 238.

The requisite affidavit of meritorious defense must be based on "personal knowledge of the facts, state admissible facts with particularity, and show that the affiant can testify competently to the facts set forth." *Huntington National Bank v Ristich*, 292 Mich App 376, 392; 808 NW2d 511 (2011). To determine whether a meritorious defense has been presented, courts

may consider whether "(1) [t]he plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement; (2) [a] ground for summary disposition exists… or (3) [t]he plaintiff's claim rests on evidence that is inadmissible." *Shawl* at 238.

Both the lists of factors to consider in determining whether good cause and a meritorious defense exists are not exhaustive, and the court should only consider those factors that are relevant to the case and should exercise its discretion in deciding how much weight each factor should receive. *Id* at 239. Ultimately, the decision whether or not to set aside a default should be based on the totality of the circumstances:

> We base the need for a "totality of the circumstances" test in part on the broad elements considered in the cases discussed earlier and in part on the Michigan Supreme Court's recognition that although "good cause" and a "meritorious defense" are separate requirements that may not be blurred and that a party must have both, there is some interplay between the two: If a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice. With an already existing relationship between the two requirements, we believe that balancing these factors to come up with an overall assessment under the totality of the circumstances provides a better, more easily applied rule because it supplies a flexibility that takes into consideration the variable, fact-intensive nature of default cases, avoiding bright-line distinctions that fail to balance the dueling public policy issues of having cases decided on the merits and not setting aside properly entered default judgments.
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> *Id* at 237 (internal quotations omitted).

III

Plaintiffs are correct that a lawyer's negligence is attributable to the client and does not normally constitute grounds for setting aside a default judgment. *White v Sadler*, 350 Mich 511, 525; 87 NW2d 192 (1957). Defendant, relying upon *Pascoe v Sova*, 209 Mich App 297; 530 NW2d 781 (1995), argues that his prior counsel was more than negligent and that he abandoned Defendant. However, the facts in this matter are distinguishable from *Pascoe*. Both that opinion of the Michigan Court of Appeals, and the prior case which was discussed therein, *Bye v*

Ferguson, 138 Mich App 196; 380 NW2d 175 (1984), dealt with cases where the court permitted an attorney to withdraw and the client received no notice of such withdrawal prior to the default judgment. No such facts are present here. Therefore, Plaintiffs are correct that Defendant's proper recourse is in suit against his former attorney. *White* at 524, citing *Cornelissen v Ort*, 132 Mich 294; 93 NW 617 (1903).

As to Defendant's purported meritorious defense, This Court concurs with Plaintiffs that the affirmative defense of an agreement to arbitrate must be raised in the party's responsive pleading. MCR 2.116(C)(7) and MCR 2.116(D)(2). Particularly, Defendant's initial answer was stricken by this Court and Defendant's amended answer and answer to Plaintiffs' amended complaint serve as Defendant's responsive pleading. MCR 2.118(B)(2). As to Defendant's personal liability, Plaintiffs are also correct that Defendant may be held liable for his personal actions, which would include the filing of the lien, which was in Defendant's name. *Elzovic v Bennett*, 274 Mich App 1, 14; 731 NW2d 452 (2007).

IV

For these reasons, and in considering the factors discussed in *Shawl*, supra, this Court finds that Defendant has failed to show good cause or a meritorious defense meriting the setting aside of the default judgment in this matter. Accordingly, Defendant's motion is DENIED.

IT IS SO ORDERED.

Hon. Michael P. Hatty
Circuit Court Judge