



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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JAN L. BRODIE

RETIRED JUDGES

July 18, 2019

JUDGES

John D. Wilburn
McGuire Woods LLP
1750 Tysons Boulevard, Suite 1800
McLean, VA 22102

Terrence M. Bagley
McGuire Woods LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219

James B. Feinman
Law Offices of James B. Feinman
1003 Church Street
P.O. Box 697
Lynchburg, VA 24505

Re: *Volkswagen "Clean Diesel" Litigation*, CL-2016-9917

Dear Counsel:

This matter came before the Court on June 28, 2019, for argument on the Defendant's Motion to Permit Filing of Responsive Pleadings and Relief from Default Judgment. At the conclusion of the hearing, the Court took the matter under advisement.

BACKGROUND

Volkswagen Group of America, Inc. ("VWGoA" or "Defendant") is a subsidiary of Volkswagen Aktiengesellschaft ("VW Germany"). The underlying case involves the VW Clean-Diesel Litigation arising from the recall of VW vehicles in December of 2014, and subsequent disclosure to the Environmental Protection Agency ("EPA") and the California Air Resources Board ("CARB") that it had installed a cheat device on certain fraudulent vehicles to comply with

American emission standards. VWGoA is headquartered in Herndon, Virginia within the county of Fairfax.

Hundreds of consumers' complaints were transferred to this Court in 2016 and the matters have been pending for years. The cases were unified under a single case number, CL-2016-9917, with each counsel of record for plaintiffs and VWGOA notified. Counsel of record for plaintiffs and VWGoA have since filed multiple motions and proposed orders (including a stipulated protective order signed by all counsel of record) under the unified case number with notice and service to all necessary parties. Now, this matter comes before the Circuit Court of Fairfax on VWGoA's Motion to Permit Filing of Responsive Pleadings and Relief from Default Judgment. A hearing was held on the 28th day of June, 2019.

ARGUMENTS

Defendant's Motion to Permit Filing of Responsive Pleadings and Relief from Default Judgment

Defendant primarily bases its motion on the argument that good cause exists to relieve Defendant from the defaults. Specifically, Defendant asserts that Plaintiffs' counsel's service strategy was chaotic and confusing and that Plaintiffs' counsel neglected to inform Defendant's counsel of the default proceedings as required by Rule 3:19(a). In determining whether to grant relief from default judgment, a court considers the lack of prejudice to the opposing party, the good faith of the moving party, the existence of a meritorious claim or substantial defense, and the existence of legitimate extenuating circumstances. *See Emrich v. Emrich*, 9 Va. App. 288, 293 (Va. Ct. App. 1989). Defendant argues that each factor weighs in favor of setting aside the defaults.

First, Defendant argues that the defaults resulted from Plaintiffs' "chaotic service effort": the simultaneous service of 516 service packages for eighty-five (85) cases containing seventy-nine (79) name variations for three Volkswagen entities, including a nonexistent joint venture, named in the Complaints. *See* Def. Reply in Supp. of its Mot., 5. Defendant's paralegal instructed the Corporation Service Company (the "CSC" or "registered agent") to accept service on its behalf in forty-seven (47) cases with thirteen (13) name variations. CSC then alerted Plaintiffs' counsel to give him an opportunity to correctly identify and serve the intended entities. Plaintiffs' counsel did not cure the errors. Defendant negates Plaintiffs' allegation that VWGoA strategically rejected service in these cases, stating there is nothing unique about these cases and it did not stand to gain any advantage by "strategically" rejecting service. *See* Def. Reply in Supp. of its Mot., 6. Defendant argues that the confusing service effort, VWGoA's continued participation in the cases, and its efforts to remedy the defaults demonstrate its good faith and legitimate extenuating circumstances sufficient to relieve VWGoA from default.

Second, Defendant argues that prejudice will not result from permitting the filing of responsive pleadings. Defendant posits that any prejudice is a direct result of Plaintiffs' counsel's violation of Rule 3:19(a), because Plaintiff filed motions for default judgment and subsequent briefing without notifying VWGoA's counsel of record. Permitting filing of responsive pleadings will only require Plaintiffs to prove their cases against VWGoA. Thus, Defendant contends that responsive pleadings will put these Plaintiffs in the same position as the other plaintiffs in these coordinated cases, which is not a cognizable prejudice.

Third, Defendant argues that relief from default will promote the ends of justice. Defendant alleges that Plaintiffs' Complaints fail to state valid legal claims against VWGoA. Thus, allowing Defendant to present these issues to the Court for adjudication on the merits will promote justice by preventing entry of default judgment on pleadings that fail to state valid legal claims. Defendant concludes that good cause exists to relieve VWGoA from default and permit the filing of responsive pleadings in these cases.

Plaintiffs' Opposition to the Motion

Plaintiffs argue that its service of process accords with Virginia law and that VWGoA acted in bad faith in instructing CSC to reject the defective service packages. The brief cites *Arminius Chemical Co. v. White's Adm 'x*, 112 Va. 250 (1911), among other cases, for the proposition that Virginia law does not require an exact name match in the service of process. Plaintiffs argue that Virginia Code section 8.01-277 provides a remedy for errors or defects in service of process and that Defendant failed to utilize the provided remedy in this case.

Plaintiffs allege that VWGoA attempted to conceal the fact that its outside counsel knew of the rejection of service of process. This, Plaintiffs contend, demonstrates VWGoA's "guilty knowledge of the intent to evade the jurisdiction of the Circuit Courts of Virginia." See Pl. Suppl. Resp., at 2. Plaintiffs allege that VWGoA's direction to its registered agent not to forward the defective process to VWGoA is a scheme to avoid the jurisdiction of Virginia Courts, by escaping the operation of Virginia Code section 8.01-288.¹ Further, they claim that VWGoA's representation that Plaintiffs' counsel's service strategy was chaotic and confusing is belied by the exhibits showing a forty-eight (48) minute time period in which VWGoA decided to reject the service of process. Thus, the number of summons and complaints could not have been "truthfully a burden." See Pl. Suppl. Resp., at 3.

Plaintiffs further attempt to distinguish the present facts from the *Yu v. Wu* case cited in VWGoA's brief. See Def. Reply in Supp. of its Mot., at 6; *Yu v. Wu*, 35 Va. Cir. 181 (Va. Cir. Ct. 1994) (Fairfax). In *Yu*, process was served by posting and the defendant never received it. *Yu*, 35 Va. Cir. at 182. Unlike *Yu*, process was served on Defendant's registered agent and Defendant rejected the defective service. See Pl. Suppl. Resp., at 4.

ANALYSIS

The main issue on Defendant's Motion is whether or not good cause exists to set aside the default judgments Plaintiffs obtained against the Defendant in July 2018. Examination requires an analysis of Virginia case law focusing on the late filing of responsive pleadings and relief from default judgment.

¹ "...Process which has reached the person to whom it is directed within the time prescribed by law, if any, shall be sufficient although not served or accepted as provided in this chapter." Va. Code § 8.01-288 (2018); Pl. Suppl. Resp., 3

Standard of Review

A defendant who fails to timely file a responsive pleading as prescribed by the Rules is in default. Va. Sup. Ct. R. 3:19(a). In a case of default, the defendant is not entitled to notice of further proceedings in the case, “*except that* written notice of any further proceedings shall be given to *counsel of record*, if any.” Va. Sup. Ct. R. 3:19(a) (emphasis added). “The court may by written order relieve a defendant of a default judgment after consideration of the extent and causes of the defendant’s delay in tendering a responsive pleading, whether service of process and actual notice of the claim were timely provided to the defendant, and the effect of the delay upon the plaintiff.” See Va. Sup. Ct. R. 3:19(d)(1). Virginia law does not favor default judgments and prefers to set aside default judgments to decide underlying issues on the merits. See *Brown’s Buck, Inc. v. Granite State Ins. Co.*, 78 Va. Cir. 22, 24 (Va. Cir. Ct. 2008) (Alexandria) (citing *Grant v. Doe*, 31 Va. Cir. 254, 255 (Va. Cir. Ct. 1993) (Louisa)). In determining whether to set aside the default and allow for the filing of responsive pleadings, factors to be considered include the degree of prejudice to the plaintiff, the good faith of the moving party, the presence of a meritorious claim or defense, and the existence of legitimate extenuating circumstances. See *AME Fin. Corp. v. Kiritsis*, 281 Va. 384, 392 (2011); *Emrich*, 9 Va. App. at 293; see also *Grant*, 31 Va. Cir. at 255 (including significance of the interest at stake and the degree of the defaulting party’s neglect in the list of factors to consider).

Relieving Defendant from Default Will Not Result in Prejudice to the Plaintiffs

A preliminary factor the court considers in assessing a motion for relief from default judgment is the degree of prejudice to the plaintiff. See *Park Corp. v. Lexington Ins. Co.*, 812 F.2d 894, 896 (4th Cir. 1987). Prejudice to the plaintiff “beyond that suffered by any party which loses a quick victory” is necessary to satisfy a finding of prejudice to the plaintiff. See *Jay-Ton Constr. Co. v. Bowen Constr. Servs.*, 62 Va. Cir. 414, 433 (Va. Cir. Ct. 2003) (Portsmouth) (citing *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988)); see also *Bank United v. Hamlett*, 286 B.R. 839, 843 (W.D. Va. 2002) (The prejudice must be something more than “the ordinary loss of advantage that would result anytime a party loses the advantage of a judgement.”).

Prejudice may result when the party’s delay in responding to pleadings is “such that it causes ‘loss of evidence, create(s) difficulty of discovery, or provide(s) greater opportunity for fraud and collusion.’” *DirectTV, Inc. v. Aiken*, No. Civ.A. 3:03CV00049, 2004 WL 547221 at *3 (W.D. Va. 2004) (W.D. Va. Mar. 16, 2004) (quoting *Davis v. Musler*, 713 F.2d 907, 916 (2d Cir. 1983)); see also *Jay-Ton Constr.*, 62 Va. Cir. at 433 (citing *Maaco Enters., Inc. v. Beckstead*, No. 02CV85, 2002 WL 31757608, at *2 (E.D. Pa. Dec. 9, 2002) (“Regarding the first principle, prejudice to the plaintiff exists if ... relevant evidence has become lost or unavailable.”)). Plaintiffs must demonstrate a manner in which it would be prejudiced by the setting aside of the default judgment. See *DirectTV*, 2004 WL 547221, at *3. “Delay in and of itself does not constitute prejudice to the opposing party.” *Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.* 616 F.3d 413, 418 (4th Cir. 2010). In *Tech. Advancement Group, Inc. v. IvySkin, LLC*, the opposing party argued it would experience prejudice by being forced to litigate the merits of a case after a lengthy delay and some litigation costs. *Tech. Advancement Group, Inc. v. IvySkin, LLC*, No. 2:13cv89, 2014 WL 4201095, at *5 (E.D. Va. Aug. 22, 2014). There, the court reasoned that a

long delay and litigation costs did not constitute sufficient prejudice to the opposing party under the relevant case law. *Id.*

In this case, there would not be any cognizable prejudice to the Plaintiffs by an order setting aside entry of default against the Defendant. Plaintiffs neither suggested their claims will be impaired by such order nor demonstrated that any relevant evidence has become lost or unavailable. Rather, Plaintiffs advance the allegation that the filing of responsive pleadings would cause prejudice in the form of “enormous costs, considerable prejudice, and delay incurred.” *See* Def. Reply in Supp. of its Mot., at 7 (citing Resp. at 15). However, these allegations are not indicative of any legitimate prejudice. Costs and delays are an expected side effect of litigation. *See DirectTV*, 2004 WL 547221 at *3 (referring to attorney’s fees and costs due to the delay as “slight and insubstantial” in its analysis of prejudice to the plaintiff). The case law does not support such unsubstantiated allegations as evidence of cognizable prejudice. Plaintiffs’ counsel did not attempt to elaborate on any potential prejudice, or even use the word “prejudice” in the opposition brief. *See* Pl. Suppl. Resp. Had the parties’ respective attorneys merely conversed with each other regarding these service issues, perhaps the situation would have been remedied without default.

Additionally, Plaintiffs do not demonstrate that the delay has created difficulty of discovery for the parties, or that it provided any opportunity for fraud or collusion. Defendant argues that the discovery that has occurred since Defendant sought relief from default “underscores how VW America has acted in good faith to parse through the 79 different defendant-name variations to determine whether Plaintiffs intended to serve VW America (or someone else).” *See* Def. Reply in Supp. of its Mot., at 1. Plaintiffs’ counsel does not allege that the delay has created any difficulty of discovery. *See* Pl. Suppl. Resp. In terms of opportunities for fraud and collusion, it makes little sense that Defendant would accept service in forty-seven (47) cases with fourteen name variations, while rejecting sixty-six (66) other name variations for fraudulent or collusive purposes. The closest Plaintiff comes to making such a claim is its argument that Defendant rejected service in order to “evade the jurisdiction of the Circuit Courts of Virginia.” *See* Pl. Suppl. Resp., ¶ 3. Not only is this argument unsubstantiated, it is belied by the fact that Defendant has continued to participate in the coordinated proceedings. Therefore, permitting Defendant to file responsive pleadings will not result in prejudice to the Plaintiffs.

Defendant Did Not Act in Bad Faith

“[T]rial courts must screen for cases where circumstances demonstrate good cause for delay.” *Jay-Ton Constr. Co. v. Bowen Constr. Servs.*, 62 Va. Cir. 414, 433 (Va. Cir. Ct. 2003) (citing *Emrich v. Emrich*, 9 Va. App. 282, 293 (1989)). Determination of whether the moving party acted in good faith is based on analysis of the source of the default. *See Jay-Ton Constr.*, 62 Va. Cir. at 432. Dilatory behavior or unreasonable tactics attributable to the moving party demonstrates a lack of good faith. *See Emrich*, 9 Va. App. at 292-93. The tactics must be associated with the actions of the party itself, rather than the conduct of the party’s attorney. *See Jay-Ton*, 62 Va. Cir. at 433.

In this case, no evidence exists to show that Defendant engaged in unreasonable tactics calculated to delay litigation. Plaintiffs’ counsel alleged that Defendant’s in-house counsel created a “scheme” to reject defective service of process. *See* Pl. Suppl. Resp., at 1. Plaintiffs’ brief cites

Arminius Chemical Co. v. White's Adm'x, 112 Va. 250 (1911), among other cases decided in the late 19th century, for the proposition that Virginia law does not require an exact name match in service of process. *See* Pl. Suppl. Resp., at 2. However, this case does not support Plaintiffs' argument that Defendant acted in bad faith by rejecting defective service of process. In *Arminius Chemical Co.*, the plaintiff mistakenly excluded the word "Incorporated" in her original pleading addressing Arminius Chemical Company. *Arminius*, 112 Va. at 266. The defendant argued that its attorney was only authorized to receive service of process for Arminius Chemical Company, Incorporated, not Arminius Chemical Company, which were two separate and distinct legal entities. *See id.* There, the Virginia Supreme Court found that only Arminius Chemical Company, Incorporated, existed at the time the lawsuit began and that its attorney was authorized to receive service of process on its behalf. *See id.* For those reasons, the Court upheld the lower court's decision allowing plaintiff to amend her pleading. *See id.*

From this case Plaintiffs' counsel draws its argument that Defendant "resort[ed] to 'self-help'" in rejecting service of process for service packages naming incorrect or nonexistent entities. *See* Pl. Suppl. Resp., ¶ 2. However, the facts in *Arminius* are easily distinguishable from the facts of the case here. Unlike the defendant's agent in *Arminius* who was authorized to receive service for the entity, Defendant's registered agent here is only authorized to receive service for VWGoA, not any Volkswagen-related entities. *See Arminius*, 112 Va. at 266; Def. Reply in Supp. of its Mot., ¶¶ 4, 5. Additionally, Plaintiffs' argument that Virginia law does not require an exact name match in service of process does not mean that extreme errors—such as naming nonexistent joint ventures as a party—must be accepted by a defendant. Rather, the case law implies minor grammatical or spelling errors of a party's name in a Complaint will not disqualify the plaintiff's service of process. *See Arminius*, 112 Va. at 266. In *Arminius*, the plaintiff mistakenly excluded the word "Incorporated" from the single defendant company's name in the pleading. *Id.* Here, Plaintiffs' counsel included *seventy-nine* different name variations for *three* Volkswagen entities named as defendants in the Complaints. *See* Def. Reply in Supp. of its Mot., ¶¶ 6, 7. And in fact, one of the entities named (the "joint venture") does not even exist. *See* Def. Reply in Supp. of its Mot., ¶ 7. Furthermore, like the plaintiff in *Arminius* who was made aware of the errors, Plaintiffs' counsel was made aware of the errors both before service and after receiving CSC's rejection letters. *See Arminius*, 112 Va. at 266; Def. Reply in Supp. of its Mot., at 4, 6. However, unlike the plaintiff there, Plaintiffs' counsel here neglected to correct those errors. *See id.*

Defendant did not act in bad faith in rejecting service of process for sixty-six (66) name variations in the 516 service packages. Plaintiffs' counsel simultaneously served 516 service packages containing seventy-nine (79) name variations on Defendant's registered agent. *See* Def. Reply in Supp. of its Mot., at 5. Defendant had instructed CSC to accept service only where the name of the defendant exactly matched the corporate name for VWGoA many years prior to the events leading to this litigation. *See* Def. Reply in Supp. of its Mot., ¶ 5. It is not unreasonable for Defendant's paralegal and registered agent to be overwhelmed by such a confusing service effort. Defendant may have been under the impression that Plaintiffs' counsel would correct the service errors if the service was meant to reach Defendant. *See* Def. Reply in Supp. of its Mot., at 7. And, as discussed further below, Plaintiffs' counsel did not notify Defendant's counsel of his intent to move for default judgment in the rejected cases due to Defendant's failure to file responsive pleadings. *See id.* It appears that miscommunication abounded on both sides—but most significantly, Defendant made a good faith effort to remedy the defaults as soon as it became aware

of them in July of 2018. These facts do not show that Defendant behaved unreasonably or carelessly. Because Defendant's actions upon receiving defective service of process were not unreasonable and because Defendant made a good faith effort to remedy the defaults, there is good cause to permit Defendant to file responsive pleadings.

Plaintiffs' Counsel Did Not Provide Proper Notice to Defendant's Counsel of Further Proceedings

"A defendant in default is not entitled to notice of any further proceedings in the case ... *except that* written notice of *any further proceedings* shall be given to counsel of record, if any." Va. Sup. Ct. R. 3:19(a) (emphasis added). Whether or not proper notice was given to the defaulting party plays a significant role in the court's determination of whether or not to set aside a default judgment. *See Byrum v. Lowe & Gordon, Ltd.*, 225 Va. 362, 364-65 (1983) (defendants' admission that plaintiff notified them before attempting to obtain a default judgment demonstrated that plaintiff acted reasonably while defendants engaged in dilatory conduct). *See also Landcraft Co., Inc. v. Kincaid*, 220 Va. 865 (1980) (adequate notice should be given to the defaulting party).

Plaintiffs' counsel neglected to provide notice of any further proceedings to Defendant's counsel of record. Def. Reply in Supp. of its Mot., at 7. This violates the exception clause of Rule 3:19(a). *See* Va. Sup. Ct. R. 3:19(a). After these cases were transferred to this Court, Plaintiffs' counsel should have served Defendant's counsel of record with the motions for default judgment and subsequent briefing; however, Plaintiffs' counsel neglected to do so. *See* Def. Reply in Supp. of its Mot., at 7-8. Since entry of the pretrial order of July 14th, 2016, Plaintiffs' counsel has been aware that all filings would be maintained under the unified case number. Further, filings under the unified case number include stipulated agreed orders that clearly identified all counsels of record.

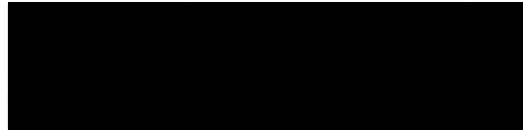
Had Plaintiffs' counsel conferred with Defendant's counsel regarding the rejected service, this issue would likely never have arisen. At the very least, Defendant's counsel would have had notice that Plaintiffs' counsel was moving forward with the cases in which service was confusing and chaotic. Thus, it seems only fair to set aside the default judgment and permit Defendant's counsel to file responsive pleadings.

CONCLUSION

The laws of Virginia and the United States have long supported the principle that parties should have their “day in court,” so to speak, and present their issues to a court for adjudication on the merits. This legal principle informs both state and federal rules of civil procedure. The Rules of the Virginia Supreme Court give judges the discretion to grant relief from default judgment when the ends of justice would be best served by adjudicating a claim on the merits. *See, e.g., Riddle v. CARS*, 45 Va. Cir. 236, 239 (Va. Cir. Ct. 1998) (Rockingham). Meritorious claims and defenses appear to be present in this case. Defendant has asserted that Plaintiffs’ allegations fail to state valid legal claims against Defendant, thus contending that many of Plaintiffs’ claims, on which this Court granted default judgment, could be subject to dismissal. Conversely, Plaintiffs argued that the Complaints allege causes of action for fraud and Consumer Protection Act claims. These points of contention demonstrate that it would promote the ends of justice to set aside the default and permit Defendant to file responsive pleadings.

For the reasons stated above, this Court finds that there is good cause to permit filing of responsive pleadings and set aside the default judgment, and as such, Defendant’s Motion is granted.

Very truly,

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Bruce D. White

OPINION LETTER