IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

TOM SITTON, THE ESTATE OF PAMELA SITTON, DECEASED, TOM SITTON ON BEHALF OF CHRISTIAN SITTON, and JULIE PUGH, Plaintiffs, v. CEEDA ENTERPRISES, INC. d/b/a RILEY'S SHOW BAR, JOHN DOES 1-3, and CORPORATIONS X, Y, and Z, Defendants.	)	CIVIL ACTION FILE NO. 16EV004325H

ORDER ON PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT AND DEFENDANT'S MOTION TO OPEN DEFAULT

This matter comes before the court on the motion for default judgment filed by Plaintiffs against Defendant Ceeda Enterprises, Inc. ("Ceeda") and the motion to open default filed by Ceeda. The court held a hearing on this matter on January 23, 2017. Having considered the entire record and oral argument of the parties, the court finds the following:

Plaintiffs filed this dram shop action on September 19, 2016, alleging that, on March 28, 2016, Shanieca Waters ran a red light and collided with an automobile driven by Pamela Sitton. The Sittons' son, Christian Sitton, and Pamela Sitton's mother, Julie Pugh, were passengers in the automobile. As a result of the collision, Christian Sitton and Pugh were seriously injured; Pamela Sitton passed away from her injuries. Plaintiffs allege that Defendants knowingly and unlawfully furnished alcohol to Waters, knowing that she would soon be driving a vehicle. Plaintiffs plead claims under O.C.G.A. § 51-1-40, for negligence, and for punitive damages.

Ceeda was served with process via service on its registered agent on September 20, 2016. Plaintiffs filed their motion for default judgment on November 11, 2016. Ceeda filed an unverified answer on November 17, 2016. On December 7, 2016, Ceeda filed its motion to open default.

> At any time before final judgment, the court, in its discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of required pleadings or for excusable neglect or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened, on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instanter, and shall announce ready to proceed with the trial.

O.C.G.A. § 9-11-55(b). The Clerk of Court's records indicate that Ceeda has only paid costs in the amount of $245.00 out of the total costs of $277.00. "The payment of costs is a mandatory condition precedent to opening default." *Campbell v. Moody*, 242 Ga. App. 643, 645 (2000); *accord Freese II, Inc. v. Mitchell*, 318 Ga. App. 662, 663 (2012) ("Payment of costs is a condition precedent for opening default under O.C.G.A. § 9-11-55(b)."). "When this statutory requirement is not met, the trial court lacks discretion to open the default." *Davis v. S. Exposition Mgmt. Co.*, 232 Ga. App. 773, 774 (1998). Ceeda has not fully complied with the requirement to pay costs.

> [D]efault may be opened if the defaulting party satisfies four conditions and one of the required three grounds. The four conditions are a showing made under oath, an offer to plead instanter, an announcement of ready to proceed to trial, and setting up a meritorious defense. The three grounds are providential cause, excusable neglect, and a proper case.

Wilcher v. Smith, 256 Ga. App. 427, 428 (2002) (citations and punctuation omitted). "Generally, the opening of a default rests within the sound discretion of the trial court. However, compliance with the four conditions is a condition precedent; in its absence, the trial judge has no discretion to open the default." *Id.* (citations and punctuation omitted); *accord Cotton v. Lamb*, 265 Ga. App. 73, 75 (2003).

O.C.G.A. § 9-11-55(b) "conveys very ample powers as to opening default; not only providential cause, which is broad, and excusable neglect, which is still broader, but finally, as if reaching out to take in every conceivable case where injustice might result if the default were not opened**,** the section goes on to say where the judge from all the facts shall determine that a proper case has been made." *Foster Co. v. Livingston*, 127 Ga. App. 317, 318 (1972) (citations omitted); *accord ABA 241 Peachtree, LLC v. Brooken & McGlothen, LLC*, 302 Ga. App. 208, 210 (2010) ("The 'proper case' ground has been construed to confer discretion on the trial court broader than that conferred on the other two grounds, as if reaching out to take in every conceivable case where injustice might result if the default were not opened." (citations and punctuation omitted)). "Nevertheless, the 'proper case' ground is not so broad as to authorize the opening of a default for any reason whatsoever." *Northpoint Grp. Holdings, LLC v. Morris*, 300 Ga. App. 491, 493 (2009) (citations and punctuation omitted). "[A] default may be opened under the 'proper case' analysis only where a *reasonable* explanation for the failure to timely answer exists." *Id.* (citations and punctuation omitted).

The rule permitting the opening of a default is "remedial in nature and should be liberally applied, for default judgment is a drastic sanction that should be invoked only in extreme situations. Whenever possible cases should be decided on their merits for default judgment is not favored in law." *Ewing v. Johnston*, 175 Ga. App. 760, 764 (1985); *accord Tomsic v. Marriott Int'l, Inc.*, 321 Ga. App. 374, 378 (2013); *Kaylor v. Atwell*, 251 Ga. App. 270, 271 (2001). Defaults are disfavored in this State; and "generally, a default should be set aside where the defendant acts with reasonable promptness and alleges a meritorious defense." *Tomsic*, 321 Ga. App. at 379 (citations and punctuation omitted); *accord Shortnacy v. N. Atlanta Internal Med., P.C.*, 252 Ga. App. 321, 324 (2001).

"[E]xcusable neglect and proper cause cannot be determined by fixed rules, but rather must be decided based on the operative circumstances in each particular case." *Henderson v. Quadramed Corp.*, 260 Ga. App. 680, 682 (2003) (citations omitted). "In cases such as this, no two are alike and each must stand on its own merits. The facts in each case are different and you must look at each in the light of the facts peculiar to that particular case." *Patterson v. Bristol Timber Co.*, 286 Ga. App. 423, 427 (2007) (citations and punctuation omitted).

The appellate courts of this State have

> recognized a number of factors for determining whether opening default would be appropriate in a particular case, including, but not limited to, whether and how the opposing party will be prejudiced by opening the default; whether the opposing party elected not to raise the default issue until after the time under OCGA § 9-11-55(a) had expired for the defaulting party to open default as a matter of right; and whether the defaulting party acted promptly to open the default upon learning no answer had been either filed or timely filed, and any additional delay occasioned by a failure to file promptly for opening default upon its discovery can be considered in determining whether defendants' neglect was excusable.

Strader v. Palladian Enters., LLC, 312 Ga. App. 646, 650 n.15 (2011) (citations omitted); *accord Kaylor*, 251 Ga. App. at 272 n.5.

"At a minimum, opening default requires proof of a providential cause which prevented the filing of the required pleadings, or excusable neglect, or a proper case. A legal excuse for nonappearance is an implicit requirement for opening default." *Sidwell v. Sidwell*, 237 Ga. App. 716, 717 (1999) ("Because [defendants] did not satisfy any of the three mandatory statutory grounds for opening default, the trial court had no discretion in the matter." (citations omitted)); *accord Butterworth v. Safelite Glass Corp.*, 287 Ga. App. 848, 850 (2007) ("A trial court does not abuse its discretion in refusing to open a default unless the defendant has alleged and proved some reason good in law why he failed to make a defense at the time he was required by law to present it." (citations and punctuation omitted)).

Ceeda contends that its counsel prepared an answer and attempted to e-file that pleading on October 19, 2016. During the transmission, counsel received a document on his computer that set out certain information regarding the filing of the answer. However, counsel for Ceeda surmises that he failed to press the "submit" button on the input screen. Consequently, Ceeda's answer was not successfully submitted, but rather reflected in the Clerk of Court's e-filing system as a "draft." Ceeda served a paper copy of its answer on counsel for Plaintiffs via U.S. mail on October 20, 2016. Counsel for Ceeda did not become aware of his filing error until he received Plaintiffs' motion for default judgment on November 11, 2016. Upon receipt of the motion, counsel contacted the support group at eFileGA.com to determine the problem with the filing that he attempted on October 19, 2016 and was informed that he had failed to press the "submit" button.

On these facts, the court finds that a case of excusable neglect has not been made out. "No excuse has been presented except inadvertence." *Weldon v. Williams*, 170 Ga. App. 589, 590 (1984). Additionally, the court finds, from all the facts of record, that this is not a proper case for opening default.[1]

A mistake by a defendant's counsel does not automatically equate to excusable neglect. "[T]he neglect of [defendant's] attorney is attributable to him and cannot suffice to excuse his failure to file a timely answer." *Butterworth v. Safelite Glass Corp*., 287 Ga. App. 848, 851 (2007); *accord Granite Loan Solutions, LLC v. King*, 334 Ga. App. 305, 307 (2015); *see also Williams v. City of Atlanta*, 280 Ga. App. 785, 787 (2006); *Azarat Mktg. Group v. Dep't of Admin. Affairs*, 245 Ga. App. 256, 258-59 (2000); *Coleman v. Superior Ins. Co*., 204 Ga. App. 78, 79-80 (1992); *Brown v. Nat'l Van Lines, Inc.*, 145 Ga. App. 824, 825 (1978). Counsel for Ceeda fails to explain why he did not attempt to verify that the answer had not been timely and properly filed. The Clerk of Court's e-filing system automatically generates e-mail notifications when a document has been successfully e-filed. *See, e.g., Barone v. McRae & Holloway, P.C.*, 179 Ga. App. 812, 814 (1986) (affirming trial court's refusal to open default where answer was timely served but filed one day late due to counsel's mistake as to the law).

Thus, this case does not present a situation similar to where a defendant timely submits a complaint to his insurer and has reason to believe the insurer will defend the lawsuit. *Cf. Copeland v. Carter*, 247 Ga. 542, 543 (1981); *Strader v. Palladian Enters., LLC*, 312 Ga. App. 646, 649-50 (2011) (affirming opening of default where defendant forwarded complaint to insurer and confirmed it had been received); *Shortnacy*, 252 Ga. App. at 324 (affirming opening of default where defendant "forwarded the matter to his insurer and was depending on that insurer to provide a defense"); *Pinehurst Baptist Church v. Murray*, 215 Ga. App. 259, 262 (1994) ("It is clear, from the facts of this case, that defendant relied upon its insurance carrier to select counsel and to make sure that defensive pleadings were timely filed. Any neglect by defendant in failing to follow the progress of the case was, therefore, excusable."); *with BellSouth Telcoms., Inc. v. Future Communs., Inc.*, 293 Ga. App. 247, 249 (2008) ("It is well settled that merely assuming that a complaint is being handled by an insurer is insufficient to establish excusable neglect as a matter of law.").

Even were the court inclined to find excusable neglect upon these facts, Ceeda has failed to set out a meritorious defense under oath. "The showing of a meritorious defense is one of the showings which must be made under oath, and is a condition precedent to the opening of a default. In the absence of such a showing under oath, the trial court has no discretion to open the default." *Wilcher*, 256 Ga. App. at 428-29; *see also Emergency Prof'ls of Atlanta, P.C. v. Watson*, 288 Ga. App. 473, 474 (2007) (noting that trial court denied defendant's motion to open

[1] The court notes that Plaintiffs have not demonstrated that they would be unduly prejudiced by the opening of default. *But see U. S. Xpress v. W. Timothy Askew & Co.*, 194 Ga. App. 730, 730 (1990) ("The discretion of the trial court in opening a default and permitting defendant to plead will not be interfered with by the appellate courts unless manifestly abused, to the injury of the plaintiff. We do not … convert this to a right to have default opened unless prejudice to plaintiff is shown.").

default where defendant failed to show a meritorious defense via verified answer or affidavit). A defendant meets this requirement if he shows, via a verified answer or an affidavit, that "if relief from default is granted, the outcome of the suit may be different from the result if the default stands." *Exxon Corp. v. Thomason*, 269 Ga. 761 (1998); *see also Herring v. Harvey*, 300 Ga. App. 560, 560-61 (2009) (affidavit of defendant's counsel sufficed to present meritorious defense); *Rapid Taxi Co. v. Broughton*, 244 Ga. App. 427, 429 (2000) (meritorious defense presented via defendant's affidavit). However, "a mere averment that meritorious defenses exist is insufficient." *Rapid Taxi*, 244 Ga. App. at 429 (citations omitted). "[T]he failure to make this showing is, in and of itself, fatal to the motion to open default, such that no other condition need be considered." *Butterworth*, 287 Ga. App. at 850 (citations omitted); *accord Water Visions Int'l, Inc. v. Tippett Clepper Assocs*., 293 Ga. App. 285, 287 (2008). Ceeda's answer is not verified. Nor was there any affidavit filed with the motion that demonstrates a meritorious defense.

Therefore, it is hereby **ORDERED** that Ceeda's motion to open default is **DENIED**. Plaintiffs' motion for default judgment is hereby **GRANTED** as to liability only. The court finds that Plaintiffs' damages are not liquidated. *See* O.C.G.A. 9-11-55(a).

It is hereby further **ORDERED** that, within fourteen (14) days after the date of entry of this Order, the parties shall confer and report to the court in writing whether they require discovery on the issue of damages and whether either party demands a jury trial with respect to damages. Should the parties require discovery, the parties shall e-file a joint proposed scheduling order in the format found on the court's website, http://fultonstate.org/judge-wesley-b-tailor-division-h/.

SO ORDERED, this 7th day of January, 2017.

/s/ Wesley B. Tailor
Wesley B. Tailor, Judge
State Court of Fulton County