STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JAMES C. BARNEY, and NANCY B. BARNEY, husband and wife, and JAMES C. BARNE AND NANCY B. BARNEY REVOCABLE TRUST,

Plaintiffs,

vs.

ALLSCAPE, INC., a Washington Corporation,

Defendant.

Case No. **CV 2010 4765**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE DEFAULT, GRANTING PLAINTIFFS' MOTION TO ENFORCE DEFAULT AND ORDER DENYING PLAINTIFFS' MOTIONS TO STRIKE

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

Plaintiffs James and Nancy Barney, trustees of the James C. Barney and Nancy B. Barney Revocable Trust (hereinafter Barneys) filed their Complaint on June 3, 2010, alleging: unlawful and deceptive business practices, breach of contract, and negligence against Allscape Inc., a Washington corporation. On August 17, 2010, Richard Binder (Binder), President of defendant Allscape, attempted to file an Answer and Counterclaim on behalf of Allscape, despite neither Binder, nor Vice President Howard Huhs (Huhs), being an attorney licensed to practice law in Idaho. Barneys filed a motion to strike the purported Answer and Counterclaim on August 30, 2010, and made application for entry of default on the same date. On September 1, 2010, this Court entered its Order Striking the Answer and Counterclaim, its Order for Entry of Default, and Entry of Default. On September 7, 2010, Binder and Huhs filed a second pleading entitled: "Right to Self Defense Without Attorney Regarding (1) Order Striking Answer

and Counterclaim (2) Order for Entry of Default", purporting to be filed on behalf of Allscape. Default Judgment was entered by the Court on September 20, 2010, in the amount of $1,000 on Count I of the Complaint and $34,055.49 on Counts II, III, and IV of the Complaint. Default Judgment, p. 2. Barneys were also awarded costs and attorneys fees in the amount of $3,093.05. *Id.* On September 23, 2010, the Judgment was domesticated in Washington and a writ of garnishment was issued on October 11, 2010. Barney's were thereafter notified that Spokane Teacher Credit Union was holding $38,792.58 of Allscape's deposits toward satisfaction of the Judgment.

On November 1, 2010, an attorney for Allscape filed a single pleading captioned: "Notice of Appearance and Defendants' Motion and Memorandum to Set Aside Default Judgment in Accordance with IRCP 59(c) and 60(b)." On November 24, 2010, Barneys filed their "Memorandum in Opposition to Defendant's Motion to Set Aside and Affidavit of Mischelle R. Fulgham." Oral argument on Allscape's motion to set aside default was held on January 19, 2011. At the beginning of oral argument on the motion to set aside, the Court heard argument on plaintiffs' motions to strike the affidavits of Thomas Nieburh and Second Affidavit of Howard Huhs. At the conclusion of that argument, the Court stated on the record that plaintiffs' motions to strike the affidavits of Thomas Nieburh and Second Affidavit of Howard Huhs were denied.

II. STANDARD OF REVIEW.

The decision to grant or deny a motion to set aside a default judgment, pursuant to either I.R.C.P. 55(c) and 60(b), is committed to the sound discretion of the trial court. *Baldwin v. Baldwin,* 114 Idaho 525, 75 P.2d 1244 (Ct.App.1988). Denial of an I.R.C.P. 60(b) motion is reviewed for an abuse of discretion. *Alderson v. Bonner,* 142 Idaho 733, 743, 132 P.3d 1261, 1271 (Ct.App. 2006). For good cause shown the court may set

aside an entry of default and, if judgment by default has been entered, may likewise set it aside in accordance with I.R.C.P. 60(b). I.R.C.P. 55(c).

III. ANALYSIS

Preliminarily, according to the caption of its motion and the conclusion on page 5 of its memorandum, Allscape seeks relief in part based upon I.R.C.P. 59(c). Idaho Rule of Civil Procedure 59(c) has no applicability to the instant matter because Allscape is not moving the Court for a new trial and Allscape has not properly served such a motion within fourteen days after entry of judgment. I.R.C.P. 59(c). In the footer of the memorandum Allscape correctly lists I.R.C.P. 55(c).

Allscape moves this Court for an order setting aside default judgment on the basis of excusable neglect under I.R.C.P. 60(b)(1) Defendant's Motion and Memorandum to Set Aside Default Judgment in Accordance with IRCP 59(c) and 60(b), pp. 3-4.

Allscape contends its inability to retain counsel due to economic reasons amounts to excusable neglect. *Id.,* p. 4. In addition, Allscape notes its Answer and Counterclaim denied the allegations in the Barney's Complaint and:

> AllScape's shareholders and director sought to defend the lawsuit. It had meritorious defenses, logical argument, and valid facts to dispute the Plaintiffs' claims.

Id., p. 4. However, at no point in Allscape's "Defendant's Motion and Memorandum to Set Aside Default Judgment in Accordance with IRCP 59(c) and 60(b)", does Allscape enlighten the Court as to what those "…meritorious defenses, logical argument, and valid facts to dispute the Plaintiffs' claims…" might be. Allscape argues that, because it could not afford an attorney, it acted reasonably in filing an Answer and Counterclaim "on its own behalf." *Id.*

In response, Barneys argue the failure to file a responsive pleading within the time allotted, despite any intention to defend a suit, is generally insufficient to demonstrate excusable neglect. Memorandum in Opposition to Defendant's Motion to Set Aside, p. 6, citing *Gro-More, Inc. v. Butts,* 109 Idaho 1020, 1023, 712 P.2d 721, 724 (Ct.App. 1985); *Marano v. Dial,* 108 Idaho 680, 681, 701 P.2d 300, 301 (Ct.App. 1985). Barneys argue:

> Defendant's conduct in this matter, at most, amounts to gross negligence. It was only after the Barneys successfully garnished Defendant's financial accounts, thereby allegedly freezing its working capital, that Defendant moved to set aside this Court's judgment. But for the Barneys' successful execution efforts, there is nothing to indicate that the defendant would have actively involved itself in this litigation.
> …
> This Court's *Default Judgment* reflects that it was served upon the defendant via facsimile on September 20, 2010. Rather than immediately move to set aside the judgment as a "reasonably prudent person" would have done, the Defendant waited for the Barneys to take significant further action in reliance upon the judgment. Accordingly, the Barneys have been prejudiced by the Defendant's lack of diligence to this matter.

Memorandum in Opposition to Defendant's Motion to Set Aside, pp. 7-8. Barneys concede that Idaho courts favor deciding cases on the merits (judgments by default are not favored and, generally, the Court is to grant relief from the default order to reach a judgment on the merits), but Barneys claim Allscape now seeks to profit from its procrastination and should "bear the loss and responsibility stemming from its unreasonable behavior." *Id.,* p. 9. *See Johnson,* 104 Idaho 727, 732, 662 P.2d 1171, 1176.

Barneys state Allscape is not entitled to relief under the general catch-all provision of I.R.C.P. 60(b)(6) because of the mutually exclusive nature of I.R.C.P. 60's subsections. Barneys claim Allscape cannot seek relief under I.R.C.P. 60(b)(1) ["mistake, inadvertence, surprise or excusable neglect"], and simultaneously seek relief

under I.R.C.P. 60(b)(6) ["any other reason justifying relief from the operation of the judgment"]. Memorandum in Opposition to Defendant's Motion to Set Aside, pp. 9-10. Indeed, the Idaho Supreme Court has stated:

> However, I.R.C.P. "60(b)(1) and 60(b)(6) are mutually exclusive provisions, such that a ground for relief asserted, failing under 60(b)(1), cannot be granted under 60(b)(6)." *Pullin v. City of Kimberly,* 100 Idaho 34, 37 n.2, 592 P.2d 849, 852, n.2 (1979) (citation omitted). "[A]lthough the court is vested with broad discretion in determining whether to grant or deny a Rule 60(b) motion, its discretion is limited and may be granted only on a showing of 'unique and compelling circumstances' justifying relief." *Miller v. Haller,* 129 Idaho 345, 349, 924 P.2d 607, 611 (1996) (quoting *Matter of Estate of Bagley,* 117 Idaho 1091, 1093, 793 P.2d 1263, 1265 (Ct.App. 1990)).

Eby v. State, 148 Idaho 731, 736, 228 P.3d 998, 1003 (2010). However, just because the two provisions are "mutually exclusive" does not mean Allscape cannot argue the two provisions in the alternative.

Barneys go on to argue that Allscape's motion must fail for failure to provide a meritorious defense. *Id.,* pp. 11-12. "In its brief, Defendant concludes without more, that it has a meritorious defense. There is no suggestion or demonstration of what this defense might be." *Id.,* p. 11. Finally, Barneys argue, in the alternative, that if the Court opts to grant Allscape the relief sought, the Court grant the relief with two conditions: (1) payment of all fees and costs incurred by Barneys in defending the instant motion and (2) requirement that Allscape post a bond in an amount sufficient to satisfy the judgment entered in this matter. *Id.,* p. 12.

A. Idaho Rule of Civil Procedure 60(b)(1), "Excusable Neglect".

In exercising its discretion in relieving a party from a final judgment or order for mistake, inadvertence, surprise, or excusable neglect under I.R.C.P. 60(b)(1), this Court must examine whether the party engaged in conduct which, although constituting neglect, would nonetheless be excusable because a reasonably prudent person might

have done the same thing under the circumstances. *Schraufnagel v. Quinowski,* 113 Idaho 753, 754, 747 P.2d 775, 776 (Ct.App. 1987), *disapproved on other grounds, Golay v. Loomis,* 118 Idaho 387, 393, 797 P.2d 95, 101 (1990). In determining whether the defendant acted with excusable neglect, that is, acting such that a reasonable person might have done the same thing under the circumstances, mere indifference or inattention does not amount to excusable neglect. *Thomas v. Stevens,* 78 Idaho 266, 271, 300 P.2d 811, 813 (1956); *LeaseFirst v. Burns,* 131 Idaho 158, 162, 953 P.2d 598, 602 (1998). Additionally, "[t]he party claiming excusable neglect must have exercised due diligence in the prosecution of his rights…" *Olson v. Kirkham,* 111 Idaho 34, 38, 720 P.2d 217, 221 (Ct. App. 1986).

Relief under I.R.C.P. 60(b)(1) would have required Allscape to act as a reasonable person would have under the same circumstances. In this regard, the attempt by two laypersons to represent a corporate entity is not reasonable.

Allscape has set forth no authority for its contention that, in the absence of a financial ability to retain legal counsel, a party may be deemed to have acted reasonably in representing itself and untimely filing a responsive pleading. Instead, Allscape argues: "…the purpose of mandating that Corporations be represented by legal counsel is simple: pro se litigants slow the legal process down and create confusion." Defendant's Motion and Memorandum to Set Aside Default Judgment in Accordance with IRCP 59(c) and 60(b), p. 3. No citation is given for this proposition. This proposition is false for a variety of reasons.

First, it is illegal. The unlawful practice of law by Binder and Huhs is a misdemeanor offense, punishable by up to six months in the county jail and a $500.00 fine. Idaho Code § 3-420.

Second, in Idaho, a *pro se* litigant may only represent his or her own interests. The Idaho Supreme Court has stated:

> We recognize the inherent right of a natural person to represent himself Pro Se, but this right does not extend to representation of other persons or corporations.

Weston v. Gritman Memorial Hospital, 99 Idaho 717, 720, 587 P.2d 1252, 1255 (1978). In *Indian Springs LLC v. Indian Springs Land Inv., LLC,* 147 Idaho 737, 215 P.3d 457 (2009), the Idaho Supreme Court discussed its holdings in two previous cases: *White v. Idaho Forest Indus.,* 98 Idaho 784, 572 P.2d 887 (1977) and *Kyle v. Beco Corp.,* 109 Idaho 267, 707 P.2d 378 (1985), in which the Court adopted the rule that business entities must be represented by attorneys before the Idaho Industrial Commission; the rule applies equally to the practice of law before any judicial body:

> In sum, the law in Idaho is that a business entity, such as a corporation, limited liability company, or partnership, must be represented by a licensed attorney before an administrative body or a judicial body.

Indian Springs, 147 Idaho 737, 744-45, 215 P.3d 457, 464-65.

Third, *pro se* litigants are held to the same standards and rules as litigants represented by attorneys. *Golay v. Loomis,* 118 Idaho 387, 393, 797 P.2d 95, 101 (1990). But, in determining the Rule 60(b) standard of excusable neglect, the Idaho Court of Appeals has held that the applicable inquiry "is not, strictly speaking, what a lawyer would have done. Rather, we consider whether the movant's conduct was that which 'might be expected of a reasonably prudent person under the same circumstances'". *State Dept. of Law Enforcement By and Through Cade v. One 1990 Geo Metro,* 126 Idaho 675, 681, 889 P.2d 109, 115 (Ct.App. 1195) (quoting *Hearst Corp. v. Keller,* 100 Idaho 10, 11, 592 P.2d 66, 67 (1979)). Thus the questions for this Court become whether Allscape acted as a reasonably prudent person (in this instance

likely a reasonably prudent corporation) would have in (a) opting to answer the Complaint more than 20 days after receipt of the summons and Complaint and (b) opting to improperly attempt to represent the corporation as a *pro se* litigant. These two questions cannot be answered in the affirmative.

Contrary to Allscape's assertion, the consequence of Binder and Huhs representing Allscape has nothing to do with Allscape's claimed concept that "…pro se litigants slow the legal process down and create confusion".

The Court must also determine whether the party seeking to have a default judgment set aside has pled facts which, if established, present a meritorious defense. *Johnson v. Pioneer Title Co. of Ada County,* 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct. App. 1983). A party seeking to set aside a default judgment must show a meritorious defense and go beyond the mere notice requirements that would have been sufficient if the party had pled them before the default; factual details must be pled with particularity. *Hearst Corp. v. Keller,* 100 Idaho 10, 12, 592 P.2d 66, 68 (1979).

Ultimately, this "meritorious defense issue" issue is fatal to Allscape's motion to set aside the default. Barneys point out the Answer and Counterclaim were duly stricken by this Court. More importantly, Allscape has presented no affidavits, no proof of any kind as to their defense. There are simply no facts before the Court demonstrating *any* meritorious defense by Allscape. Memorandum in Opposition to Defendant's Motion to Set Aside, p. 11. Not only must a party seeking to have a default judgment set aside plead a meritorious defense, but it must do so with particularity. *Hearst Corp.,* 100 Idaho 10, 12, 592 P.2d 66, 68. The purpose of this requirement was set forth in *Marco Distributing, Inc. v. Biehl,* 97 Idaho 853, 555 P.2d 393 (1976), in which the Supreme Court wrote:

> The purpose of this requirement is to eliminate from the class of default judgment which are set aside and subsequently tried on the merits those in which the defendant has no defense and thus no purpose would be served in delaying entry of judgment against the defendant, while a showing of a meritorious defense would 'underscore the potential injustice of allowing the case to be disposed of by Default.' 19 Wright & Miller, FED.PRAC. & PROC., § 2697 (1973).

97 Idaho 853, 856, 555 P.2d 393, 397. Allscape's Answer and Counterclaim having been stricken, there is simply nothing demonstrating a meritorious defense before the Court, to say nothing of a meritorious defense which goes beyond the mere notice requirements that would have been sufficient if the party had pled them before the default and pleading factual details with particularity.

B. Idaho Rule of Civil Procedure 60(b)(6), "Catchall" Provision.

Barneys correctly note "Rule 60(b)(6) is intended to apply 'in exceptional circumstances which are not addressed by the first five numbered clauses of the Rule.' *Info-Hold, Inc. v. Sound Merchandising, Inc.,* 538 F.3d 448, 459 (6th Cir. 2008)." Memorandum in Opposition to Defendant's Motion to Set Aside, p. 9. "'Courts must apply subsection (b)(6) only as a means to achieve substantial justice when something more than one of the grounds contained in rule 60(b)'s first five clauses is present.' *Ford Motors Co. v. Mustangs Unlimited, Inc.,* 487 F.3d 464, 468 (6th Cir. 2007)" *Id.* "'The something more must include unusual and extreme situations where principles of equity mandate relief.' *Id." Id.* In this case, Allscape has provided absolutely no evidence of "something more" than excusable neglect. Idaho Rule of Civil Procedure 60(b)(6) is not available to Allscape.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must deny defendant Allscape's Motion to Set Aside Default Judgment.

IT IS HEREBY ORDERED defendant Allscape's Motion to Set Aside Default Judgment is DENIED.

IT IS FURTHER ORDERED plaintiffs Motion to Enforce Default is GRANTED.

IT IS FURTHER ORDERED as set forth on the record at oral argument on January 19, 2011, plaintiffs' motions to strike the affidavits of Thomas Nieburh and Second Affidavit of Howard Huhs are DENIED.

Entered this 28th day of February, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of February, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Michelle R. Fulgham Lukins & Annis, P.S.	664-4125	Douglas A. Pierce James, Vernon & Weeks, P.S.	664-1684

_____
Jeanne Clausen, Deputy Clerk