

attorney's address, whom I asked to accept and collect personal correspondence on behalf of myself while I was out of town or incarcerated." Affidavit of Matt Ruck in Support of Motion to Dismiss, p. 2, ¶15. This same address, 201 N. Main Street in Moscow, Idaho appears on the MLDC check returned for insufficient funds. Exhibit to Affidavit of Cameron Phillips, filed February 14, 2008. On May 30, 2007, Equipment Corps filed this lawsuit against Ruck and his wife, and MLDC. On June 2, 2007, Rausch appeared and filed an Answer only on behalf of the Rucks.

On May 20, 2008, this Court ordered Rucks dismissed based on the parties' stipulation. MLDC filed a Motion to Dismiss for Lack of Personal Jurisdiction. Following oral argument held June 9, 2008, on June 12, 2008, this Court entered an Order denying MLDC's Motion to Dismiss for Lack of Personal Jurisdiction. In that Order this Court ordered MLDC to file an Answer or other responsive pleading. Order (Denying Defendant's Motion to Dismiss), pp. 1-2. No Answer has been filed by MLDC.

On July 24, 2008, MLDC's attorney David Eash filed a Motion for Withdrawal of Attorney for Defendant and an Affidavit of David E. Eash in Support of Motion to Withdraw. Oral argument on that motion to withdraw was held August 21, 2008, following which this Court issued its Order Authorizing Withdrawal of Attorney for Defendant. That order contained the requisite language that MLDC had 20 days from the date of service or mailing of that order to "appoint another attorney" or to file written notice to the Court stating how MLDC will proceed without an attorney (the latter being an impossibility since MLDC is a corporation).

MLDC failed to submit such written notice to this Court. Since MLDC failed to have new counsel appear on its behalf, Equipment Corps made application for default and default judgment on September 17, 2008. On September 22, 2008, this Court

ordered that the Clerk of the Court make entry of default, and this Court signed and filed an Entry of Default and Judgment was entered and filed against MLDC for a total amount of \$93,904.64. MLDC subsequently had Gregory Rauch appear on its behalf, and on November 7, 2008, Rauch filed a Motion to Set Aside Default. Oral argument on MLDC's Motion to Set Aside Default was held on December 11, 2008.

II. ANALYSIS.

A. Standard of Review.

The decision whether to grant 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 Rule 60(b). I.R.C.P. 55(c). (emphasis added). 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. *Johnson v. Pioneer Title Co. of Ada County*, 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct. App. 1983).

B. Having Failed to Establish Excusable Neglect, MLDC's Motion to Set Aside Default Must be Denied.

In exercising its discretion in relieving a party from a final judgment or order due to mistake, inadvertence, surprise, or excusable neglect, the 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). The Court must also determine whether the party seeking to set aside the default judgment has pled facts which, if established, present a meritorious defense to the action. *Johnson*, 104 Idaho 727, 732, 662 P.2d 1171, 1176. 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).

What is of *paramount* importance is MLDC was served with the Order Authorizing Withdrawal of Attorney for Defendant when, on August 25, 2008, Eash mailed a copy of such document by certified mail to “M.L.D.C., Inc., 101 Convention Center Dr., #700, Las Vegas, NV”, and that mailing was signed for on August 28, 2008. Plaintiff’s Memorandum in Opposition to Motion to Set Aside Default and Default Judgment, p. 3; (David E. Eash) Affidavit of Service filed September 18, 2008, pp. 1, 2. At oral argument, counsel for MLDC argued that this address is for an entity that serves as the corporate address and registered agent for service of process for thousands of other corporations. That is of no import, as the choice of entity to be used as registered agent is a choice made by those controlling MLDC. Eash also served a copy of the Order Authorizing Withdrawal of Attorney for Defendant upon MLDC at its address at 201 Main Street, Moscow, ID 83843. *Id.*

What is of *little* importance are the following facts argued by MLDC: 1) that on August 25, 2008, Eash sent MLDC a copy of the Order Authorizing Withdrawal of Attorney for Defendant, to MLDC’s 201 N. Main Street, Moscow address, the former address of Matt Ruck’s attorney, Gregory Rauch; 2) this notice was eventually forwarded to Rauch’s new office on September 12, 2008, but Rauch was no longer

counsel for MLDC on that date; 3) Rauch was then unable to reach a representative of MLDC before going on a two-week vacation, and Rauch reached Ruck (a former officer and employee) upon his return from that vacation on September 30, 2008; 4) Ruck then took several days to forward the notice to one of Defendants' current employees; 5) that employee then took several days to forward the notice to corporate headquarters, at which point MLDC took more time to enter into an agreement with Rauch for representation; and 6) "[b]efore a notice of appearance and/or answer could be filed, M.L.D.C. Inc. received a default judgment in the mail on October 30, 2008.... this default judgment was stapled by Plaintiff's attorney to the back of several documents related to an entirely different case." *Id.* at 3. Motion to Set Aside Default and Brief in Support Of, pp. 2-3.

MLDC now argues excusable neglect exists such that this Court should relieve them from the final judgment in this case. *Id.* MLDC states the default notice did not reach them until October 30, 2008, and that, because MLDC is an out-of-state corporation, an "understandable time delay resulted." *Id.* at 4. MLDC argues: 1) the notice of withdrawal was sent to the address of the Moscow water department (formerly Mr. Rauch's address); 2) MLDC received no notice of any default proceedings; 3) complication existed surrounding MLDC's finding new counsel for an out-of-state corporation; and 4) the "untimely" vacation of Rauch, when taken together amount to excusable neglect. *Id.*

Additionally, MLDC claims its meritorious defense consists of it having received nonconforming goods from Equipment Corps. MLDC states it informed Equipment Corps, who agreed to take the goods back and even charged Defendants' credit card to do so. MLDC alleges Equipment Corps then let the nonconforming goods sit idle until

they were stolen in Louisiana post-Hurricane Katrina, and that it was Equipment Corps' failure to mitigate their damages which caused any loss. *Id.* at 5.

Equipment Corps replies that the Order of Withdrawal of Attorney for Defendant was mailed by Eash to MLDC at *various* addresses, not exclusively to the Moscow address, and that notice thereof was signed for in Las Vegas, Nevada on August 28, 2008. Plaintiff's Memorandum in Opposition to Motion to Set Aside Default and Default Judgment, p. 3. Equipment Corps adds the notice sent to Rauch's previous address was nevertheless received by Rauch on September 12, 2008, and that Rauch does not indicate whether he attempted to contact MLDC directly in addition to contacting its former employee, Mr. Ruck. *Id.* Further, Equipment Corps argues Eash complied with I.R.C.P. 11(b)(3) by providing notice to MLDC both at the address listed for Rauch on the Idaho State Bar website and at the address of MLDC's registered agent in Nevada, and that it was then incumbent upon MLDC to file and serve written appearance within 20 days. *Id.*, at p. 4.

Equipment Corps states that MLDC has not properly demonstrated excusable neglect because MLDC received and signed for the Order Authorizing Withdrawal of Attorney for Defendant on August 28, 2008, and did nothing. *Id.*, at p. 5. Although Rauch was arguably not counsel for MLDC at the time the notice was received, MLDC was served via the mailing and signature of its registered agent for service of process in Nevada, and at that time service of the Order Authorizing Withdrawal of Attorney was complete. Following service on its registered agent, MLDC had an obligation to comply with that Order, and failed to do so. *Id.*, at p. 6.

Finally, as to MLDC's claim of a meritorious defense in this matter, Equipment Corps points out that there are no sworn statements in the record concerning its

conduct regarding the allegedly nonconforming goods. *Id.* “There is no answer proffered with the motion, nor is there anything at all for the Court to consider other than the unsworn statements and arguments of counsel set forth in his objection.” *Id.*

In determining whether MLDC acted with excusable neglect, i.e. 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). This Court is convinced that no reasonable person or reasonable corporation would do the same thing under similar circumstances. This Court is convinced that MLDC was at best indifferent or inattentive, and thus, it failed to act as a reasonable corporation should. 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). MLDC failed to exercise any diligence after its registered agent, on August 28, 2008, signed for the copy of the Order Authorizing Withdrawal of Attorney for Defendant which was mailed by MLDC’s withdrawing counsel on August 25, 2008. (David E. Eash) Affidavit of Service filed September 18, 2008, pp. 1, 2.

While MLDC argues the Order Authorizing Withdrawal of Attorney for Defendant was improperly mailed to Rauch’s former address in Moscow, Idaho, in Eash’s Affidavit of Service, filed September 18, 2008, Eash states he served said Order upon MLDC at the Moscow address *and* the “101 Convention Center Drive, Suite 700, Las Vegas, NV 89109” address on August 25, 2008. Affidavit of Service, p. 2. Attached to Eash’s affidavit is a certified mail receipt which shows that the item was signed for on August 28, 2008. Thus, whether or not Rauch was on vacation, failed to contact MLDC directly,

or took time before agreeing to represent Defendants in this matter, does not matter. MLDC was properly notified of Eash's withdrawal and this Court's Order that MLDC had "20 days from the date of service or mailing" that they were ordered to appoint another attorney *or appear by filing a written notice* stating how they would proceed without an attorney." See Order Authorizing Withdrawal of Attorney for Defendant, p. 1. MLDC has not explained to the Court why they failed to act upon receipt of the Order at their Las Vegas corporate headquarters.

MLDC's claim that they received no notice of any default proceedings is of no import. It was the Order Authorizing Withdrawal of Attorney for Defendant, mailed to MLDC by Eash on August 25, 2008, and signed for in Las Vegas on August 28, 2008 that provided notice. The fact that the same Order was mailed to Rauch and received and signed for on September 12, 2008, only strengthens the fact that MLDC was served with that Order. The Order clearly states:

...if Defendant fails to file and serve an additional written appearance, in person or through a newly appointed attorney, within such 20-day period, such failure shall be sufficient grounds for entry of default and default judgment against the Defendant, *without further notice to the Defendant.*

Order Authorizing Withdrawal of Attorney for Defendant, p. 2. (emphasis added). As required by *Olson*, MLDC, in claiming excusable neglect, did not exercise due diligence in the prosecution of its rights. 111 Idaho 34, 38, 720 P.2d 217, 221. While the Order Authorizing Withdrawal of Attorney for Defendant was received by MLDC on August 28, 2008, no appearance by MLDC or counsel for MLDC was made until November 7, 2008, when Rauch filed his Notice of Appearance.

MLDC's argument that default notice did not reach them until October 30, 2008, is also without merit. MLDC claims that the default judgment was stapled *by plaintiff's attorney* to the back of several documents which were related to an entirely different

case. Motion to Set Aside Default and Brief in Support Of, p. 3. In all likelihood, that claim is false, because it was the Clerk of the Court that served the Judgment upon MLDC on September 22, 2008, not plaintiff's attorney. See Judgment, p. 2.

Regarding MLDC's "meritorious defense", these facts are governed by the Uniform Commercial Code, Chapter 2 - Sales, codified at I.C. §§ 28-2-101 *et seq.* Whether MLDC has a meritorious defense as they claim turns on who had the risk of loss. Here, MLDC likely claims Idaho Code § 28-2-510(2) applies; that because the goods were nonconforming, MLDC rightfully revoked acceptance and, to the extent there was a deficiency in insurance coverage, they may treat the risk of loss as having rested on the seller from the beginning. However, this action arose because MLDC's check was returned for insufficient funds. See Affidavit of Cameron Phillips, filed February 14, 2008. Idaho Code § 28-2-511(3) states that payment of a check is conditional "and is defeated as between the parties by dishonor of the check on due presentment." Thus, subsection (3) of § 28-2-510 would likely apply:

Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

I.C. § 28-2-510(3). It should be noted that, as MLDC has to this day not filed an Answer, issues surrounding whether there was acceptance, rightful rejection, notice of breach, etc. may remain but are unclear at this time. Nonetheless, it is MLDC's burden *at this juncture* (on MLDC's Motion to Set Aside Default) to establish to this Court's satisfaction that it has meritorious defenses. MLDC has failed to do this.

III. ORDER.

IT IS HEREBY ORDERED defendant MLDC's Motion to Set Aside Default is

DENIED.

Entered this 13th day of January, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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