IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 12-034121 (07)

P &S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, *et al.*,

Plaintiffs,

v.

JANET A. HOOKER CHARITABLE TRUST, a charitable trust, *et al.*,

Defendants.
_____/

PLAINTIFFS' RESPONSE TO PARAGON VENTURES' LIMITED MOTION TO SET ASIDE CLERK'S ENTRY OF DEFAULT

Plaintiffs, P&S Associates, General Partnership ("P&S"), S&P Associates, General Partnership ("S&P") (S&P and P&S are collectively referred to as the "Partnerships"), and Philip Von Kahle, as Conservator on behalf of P&S and S&P (the "Conservator" and collectively with the Partnerships, "Plaintiffs"), by and through the undersigned counsel, hereby respond to Defendant Paragon Ventures' Limited ("Paragon") Motion to Set Aside Clerk's Entry of Default ("Motion") and in support thereof state:

SUMMARY OF ARGUMENT

Paragon's admitted tactical decision not to respond to the complaint does not constitute "excusable neglect" -- which it is required to demonstrate to avoid final default judgment and set aside the Clerk's entry of Default against it here. Because, as set forth below, Paragon failed to respond to the complaint due to a tactical decision – and not because of any mechanical or operational error – Paragon's Motion should be denied as a matter of law.

BACKGROUND

1. On or about December 23, 2013, Plaintiffs properly served a copy of summons and the Complaint in the above captioned case (the "Complaint") onto Paragon's registered agent.

2. According to a sworn affidavit provided by Paragon with their instant Motion, Paragon consulted with its lawyers in January 2014, on how Paragon should respond to the Complaint, and Paragon was advised that "it was unlikely in the first instance that a Florida court had jurisdiction over a BVI company and that a response to the Complaint was not necessary." (Affidavit of Debbie Du Feu ¶¶ 10-12).

3. As a result, Paragon chose not to respond to the Complaint. *Id.*

4. On February 7, 2014, the Clerk entered default against Paragon.

5. On July 3, 2014, Plaintiffs filed a Motion for Final Default against Paragon.

6. On August 4, 2014, Paragon filed the Motion to deny Plaintiff's Motion for Final Default and to set aside the Clerk's entry of Default against Paragon.

LEGAL ARGUMENT

In this case, to vacate the default, Paragon must demonstrate that (1) the failure to file a responsive pleading was the result of excusable neglect, (2) that it has a meritorious defense; and (3) that it was reasonably diligent in seeking to vacate the default after it was discovered. *Hepburn v. All Am. Gen. Const. Corp.*, 954 So. 2d 1250, 1252 (Fla. 4th DCA 2007). The failure to demonstrate any one of those three elements is fatal to Paragon's Motion. *Id.*

Even assuming that Paragon can demonstrate the second and third element, the Motion must be denied because Paragon cannot establish the existence of the first: excusable neglect.

Church of Christ Witten in Heaven of Ga., Inc. v. Church of Christ Written In Heaven, Miami, Inc., 947 So. 2d 557, 558 (Fla. 3d DCA 2006) ("Although courts favor the disposition of cases on the merits, a trial court abuses its discretion when it sets aside a default judgment underlying which is a legally insufficient motion to vacate").

"It has never been the role of the trial courts of this state to relieve attorneys of their tactical mistakes", even if Fla. R. Civ. P. 1.540 allows a court to relieve a party from a final judgment based on excusable neglect. *BMW of N. Am., Inc. v. Krathen*, 471 So. 2d 585, 589 (Fla. 4th DCA 1985). "The rules of civil procedure were never designed for that purpose, and nothing in Rule 1.540(b) suggests otherwise." *Id.*

While courts have found excusable neglect exists when an "error occurs due to a breakdown in the mechanical or operational practices or procedures of the attorney's office equipment or staff[,]" (*Carter v. Lake County*, 840 So. 2d 1153, 1158 n. 6 (Fla. 5th DCA 2003)), "reconsideration of tactical decisions and judgment calls does not constitute a basis for finding excusable neglect." *S2 Global, Inc. v. Tactical Operational Support Services, LLC*, 119 So. 3d 1280, 1284 (Fla. 4th DCA 2013).

In *S2 Global, Inc. v. Tactical Operational Support Servs., LLC*, 119 So. 3d 1280, 1284 (Fla. 4th DCA 2013), the Fourth District Court of Appeals specifically found that "[r]econsideration of tactical decisions and judgment calls does not constitute a basis for finding excusable neglect." There, the appellees did not timely file a motion to dismiss pursuant to Rule 1.061. *Id.* The Court found that excusable neglect did not exist because "appellees' counsel had a good grasp of the issues involving his clients, and made strategic decisions to handle the case a certain way." *Id.* The Court found that excusable neglect did not exist because "[t]he appellees' proffered reasons for the lengthy delay in moving to dismiss the Florida case do not deal with

calendaring, secretarial, or administrative errors" and that "Appellees did not inadvertently miss court dates." *Id.*

Similarly, excusable neglect did not exist in *Greer v. Jacobsen*, 880 So. 2d 717, 720-21 (Fla. 2d DCA 2004) when the Second District Court of Appeal reversed and remanded for the trial court to reinstate the default judgment because the defendant's attorney "was under the wrong impression that he was not required to respond to the amended complaint because he had served a motion for extension of time and a notice of appearance directed to the original complaint." *Id.* at 720. The *Greer* court stated that "[t]he attorney's errors, even if constituting mistakes of law, tactical errors, or judgmental mistakes, do not constitute excusable neglect." *Id.* The *Greer* court stated that "an attorney's inadvertence or ignorance of the rules does not constitute excusable neglect." *Id.*

The law that an attorney's intentional decision, negligence, error, inadvertence, or ignorance of the law does not constitute excusable neglect has been followed by numerous courts. *Melton Mgmt., Inc. v. Krott-Shaughnessy*, 872 So. 2d 320, 321 (Fla. 4th DCA 2004) (stating that excusable neglect did not exist when "Melton intentionally chose not to pursue a claim for costs in the first action"); *see also Peterson v. Lake Surprise II Condo. Assoc.*, 118 So. 3d 313 (Fla. 3d DCA 2013) ("A conscious decision not to comply with the requirements of the law cannot be 'excusable neglect' under the rule or any other equivalent requirement"); *Spencer v. Barrow*, 752 So. 2d 135, 138 (Fla. 2d DCA 2000) ("While there may have been some 'confusion' on the part of appellees and/or their attorneys, there was no 'confusion' as to the law of Florida as it existed at all times applicable to appellees' efforts to seek attorney's fees. Inadvertence or mistake of counsel or ignorance of the rules does not constitute excusable neglect.").

And, Paragon's Motion fails to cite to any cases that find excusable neglect in situations such as this one: where Paragon made a tactical decision not respond to the Complaint based on its mistaken understanding of the law. Instead, all of the cases cited by Paragon in support of its alleged "excusable neglect" address operational errors – which isn't the case here. *See Gilbraltar Svc. Corp. v. Loan and Assoc., Inc.*, 488 So. 2d 582, 584-85 (Fla. 4th DCA 1986) (holding that an attorney's failure to properly record the date of a responsive pleading constituted excusable neglect); *Kuehne & Nagel, Inc. v. Esser Intern., Inc.*, 467 So. 2d 457, 458 (Fla. 3d DCA 1985) (finding excusable neglect where an attorney's clerk removed the complaint and summons from counsel's desk without the attorney's knowledge).

Paragon's affidavit and Motion conclusively establish that Paragon's decision not to timely respond to the Complaint was caused not by excusable neglect, but by a tactical decision that it made in consultation with its counsel regarding the jurisdiction of this Court. That decision was a judgment call by Paragon and its attorneys. It was not caused by any sort of "calendaring, secretarial or administrative error" by Paragon or its counsel, but as a direct result of Paragon's conscious decision not to act in response to the Complaint because it believed – contrary to the law – that "it was unlikely in the first instance that a Florida court had jurisdiction over a BVI company and that a response to the Complaint was not necessary." (Affidavit of Debbie Du Feu ¶¶ 10-12). Paragon knowingly assumed the risks of its failure to respond to the Complaint.[1] As such, Paragon's refusal to respond to the Complaint based on its tactical decision does not constitute excusable neglect. *See Greer v. Jacobsen*, 880 So. 2d 717, 720-21 (Fla. 2d DCA 2004) (holding that an attorney's mistaken impression that filing a motion for

[1] Paragon's Motion also reveals that it had access to multiple lawyers and therefore was doubly aware of the risks and consequences of its decision not to respond to the Complaint in any way.

extension of time relieved him of his obligation to timely respond to a complaint did not constitute excusable neglect).

Based on the foregoing, Paragon's Motion should be denied.

WHEREFORE Plaintiffs respectfully request that the Court deny the Motion, enter default judgment against Paragon, and award any other relief it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail upon counsel identified below registered to receive electronic notifications this 6th day of August, 2014 upon the following:

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