IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

DARI ARRINGTON, *Plaintiff,* v. MTI LIMO AND SHUTTLE SERVICES INC. AND JANE DOE, *Defendants.*	Civil Action No.: 22EV001922

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO SET ASIDE ENTRY OF DEFAULT JUDGMENT AND FINAL JUDGMENT AGAINST DEFENDANT MTI LIMO AND SHUTTLE SERVICES, INC. AND TO OPEN DEFAULT AND PLAINTIFF'S CROSS-MOTION FOR ATTORNEY'S FEES

Plaintiff in the above-styled action respectfully files this *Response to Defendant's Motion to Set Aside Entry of Default Judgment and Final Judgment against Defendant MTI Limo and Shuttle Services. Inc. and to Open Default and Plaintiff's Cross-Motion for Attorney's Fees*, showing this Court the following:

FACTS

Over one hundred days have passed between the time Defendant MTI Limo and Shuttle Services, Inc. ("Defendant MTI Limo" or "Defendant") was required to file its Answer with the Court and the time Defendant actually filed its Answer. The *only* reason Defendant MTI Limo finally decided to respond to this lawsuit is because Defendant was served with an Order from the Court to pay a judgment. *See* Order for Entry of Default Judgment and Final Judgment Against Defendant MTI Limo and Shuttle Services, Inc. attached here as Exhibit A. Defendant's motion to set aside the Court's judgment is completely without merit and granting Defendant's motion

would only reward a sophisticated, corporate defendant for flagrantly ignoring Georgia law and this Court.

Plaintiff filed his Complaint against Defendant MTI Limo on March 25, 2022. *See* the Complaint attached here as Exhibit B. Defendant was served with a copy of the Summons and Complaint on March 30, 2022. *See* the Affidavit of Service attached here as Exhibit C. Plaintiff filed proof of service on March 31, 2022. *Id.* Pursuant to Georgia law, Defendant MTI Limo's Answer was due April 29, 2022. O.C.G.A § 9-11-12(a). On June 16, Plaintiff filed his Motion for Entry of Default Judgment which this Court entered concurrently with the Court's Order of Final Judgment against Defendant MTI Limo on July 31, 2022. *See* Exhibit A and Plaintiff's Motion for Entry of Default Judgment attached here as Exhibit D.

At the bench trial on July 26, 2022, Plaintiff's counsel presented evidence of the egregious actions Defendant MTI Limo exhibited during the November 7, 2021 hit-and-run collision. Plaintiff testified that he was hit by an MTI Limo and Shuttle Services bus at the intersection of Lavista Road and Cheshire Bridge Road NE. Plaintiff described the pain, fear, and shock he felt after the MTI Limo bus hit him and dragged his vehicle. Plaintiff had to follow the bus after the collision until it stopped. Instead of the driver of the bus speaking with Plaintiff, the Director of Operations at MTI Limo and Shuttle Services, Cameron Ijames, approached the Plaintiff, gave him his business card, and tried to convince him that Defendant would "take care of it" without filing a police report. *See* ¶¶ 7 and 8 of the Affidavit of Mr. Dari Arrington attached here as Exhibit E. Cameron Ijames's LinkedIn profile and business card are attached here as Exhibit F and G respectively. As this Court heard, Plaintiff did the right thing by filing a police report.

Defendant MTI Limo was served with a copy of the Summons and Complaint on March 30, 2022 at 4:27 p.m. *See* Exhibit C. Yet, Mike Toye, the registered agent and owner of MTI Limo,

called Plaintiff's counsel **less than 30 minutes after Defendant received service**. *See* Call Summary from Mike Toye on March 30 at 4:56 p.m. attached here as Exhibit H. As Mr. Walker testified to during the July 26 bench trial, Mr. Toye asked Mr. Walker several times if Defendant could settle this lawsuit without notifying Defendant's insurance company. Mr. Walker advised that he could not discuss the case with Mr. Toye and suggested that Mr. Toye notify his insurance company of the lawsuit.

After ignoring this Court and flouting the Georgia Civil Practice Act, Defendant now seeks to avoid a valid judgment obtained in accordance with the law by filing Defendant's Motion to Set Aside Entry of Default Judgment and Final Judgment Against Defendant MTI Limo and Shuttle Services. Inc. and to Open Default ("Defendant's Motion"). For the following reasons, this Court should deny Defendant's Motion.

ARGUMENT AND CITATION TO AUTHORITY

I. The Court should not set aside its judgment because (1) if Defendant MTI Limo was improperly named in the Complaint, it was easily amendable and the time to assert that defense was before April 29, 2022, and (2) Defendant MTI Limo waived its right to all notices by failing to file pleadings in this action.

A. An improperly named Defendant is an amendable defect

The Georgia Civil Practice Act describes several ways in which a Plaintiff can amend parties to a Complaint and the time to raise the defense of a defect in the parties is in a timely filed Answer. Under O.C.G.A § 9-11-15(a), "A party may amend his pleading as a matter of course and without leave of court at any time before the entry of the pretrial order." In fact, the State Legislature has enacted several laws that provide procedures for joining, substituting, or otherwise amending parties to a civil lawsuit. *See* O.C.G.A § 9-11-17 through O.C.G.A § 9-11-25. In *Burch v. Dines*, the plaintiff obtained a default judgment against the defendant. 267 Ga.App 459 (2004).

The defendant appealed the trial court's ruling after the trial court denied the defendant's motion to set aside the judgment and open default. 267 Ga.App at 460. On appeal, the appellant-defendant argued that the trial court should have set aside the judgment based on the plaintiff's mistake in suing the defendants in their individual capacity rather than suing the relevant corporate entity. *Id.* at 461-62. The Court of Appeals affirmed the trial court's denial to set aside the judgment and open default, holding in part, that suing the allegedly incorrect defendants was not an appropriate reason for setting aside the judgment under O.C.G.A § 9-11-60. The Court reasoned, "that, instead, was a matter for the [defendants] to raise in defense of the underlying action." *Id* at 462.

Plaintiff could have amended his Complaint to name additional defendants if Defendant raised affirmative defenses by filing an Answer before April 29, 2022. The underlying wreck occurred on November 7, 2021 and Plaintiff filed this lawsuit March 25, 2022. Plaintiff had plenty of time to identify additional defendants through the process of discovery; however, Plaintiff was never afforded the opportunity to conduct discovery because Defendant ignored the Complaint. Defendant misquotes O.C.G.A § 9-11-60(d)(3)[1] and claims that "two nonamenable [sic] defects existed [sic]" in this matter. O.C.G.A § 9-11-60(d)(3) states, "A nonamendable defect which appears upon the face of the record or pleadings" may be the basis for setting aside a judgment. By its very nature, the first defect Defendant lists is easily amendable under O.C.G.A § 9-11-15, titled "Amended and Supplemental Pleadings." As the Court of Appeals stated in *Burch*, the allegedly incorrectly named defendant "was a matter for the [defendants] to raise in defense of the underlying action." 267 Ga.App at 462.

[1] Defendant uses the word "nonamenable" a total of twelve times throughout Defendant's Motion, including when Defendant quotes O.C.G.A § 9-11-60(d)(3), and only uses the word amendable three times.

B. Defendant waived further notice of the proceedings by failing to file an Answer.

The Georgia Civil Practice Act states, unequivocally, that a party to an action waives the right to all notices when they fail to file pleadings in an action. O.C.G.A § 9-11-5(a) reads, "the failure of a party to file pleadings in an action *shall be deemed to be a waiver* by him or her of all notices, *including notices of time and place of trial and entry of judgment*…". (emphasis added). In *Granite Loan Solutions, LLC v. King*, the plaintiff obtained a default judgment against the defendant, who appealed the trial court's denial to set aside the judgment and open default. 334 Ga.App 305 (2015). On appeal, the appellant-defendant argued that the trial court should have set aside the default judgment because the defendant did not receive notice of the damages hearing. *Granite Loan Solutions*, 334 Ga.App at 309. The Court of Appeals disagreed, holding "[i]t is well settled that the failure of a party to file pleadings in an action shall be deemed to be a waiver by him of all notices, including notices of time and place of trial, and all service in the action." *Granite Loan Solutions*, 334 Ga.App at 309 citing *T.A.I. Computer, Inc. v. CLN Enterprises, Inc.*, 237 Ga.App. 646, 649 (1999). Defendant cited to *City of Calhoun v. Hamrick* within footnote 9 of Defendant's Motion. 243 Ga. 716 (1979). Defendant contends that the holding in *Hamrick* is that "the failure to provide a party with notice of a final hearing is a nonamenable [sic] defect." 243 Ga. 716 (1979). In fact, Justice Undercofler's opinion in *Hamrick* holds the exact opposite of what Defendant claims. Specifically, Justice Undercofler wrote, "since the notice requirement *is waivable*, an inadequate notice is not a nonamendable defect appearing on the face of the record… thus it cannot be the basis for setting aside the judgments…". *Hamrick*, 243 Ga. at 718 (emphasis added) (internal quotations omitted).

Defendant was not entitled to receive notice that Plaintiff filed a Motion for Default Judgment and was not entitled to receive notice of the damages hearing. In Defendant's Motion,

the sworn testimony of Cameron Ijames states, "if MTI Limo had been notified that a hearing had been set in this matter, the hearing would have been attended by an MTI Limo representative and counsel to clear up the confusion." *See* ¶ 3 of Affidavit of Cameron Ijames. Defendant received notice of this lawsuit on March 30, 2022 but chose to ignore the legal consequences despite speaking with Plaintiff's counsel less than half an hour after being served with process. It is easy for Defendant to claim, in retrospect, that Defendant would attend a hearing, but Defendant's actions in willfully disregarding this Court and Georgia law speak louder than the words in Mr. Ijames's affidavit.

II. Defendant has not shown the Court that its judgment should be set aside and therefore cannot ask the Court to open default; however, even if the judgment were set aside, Defendant has not provided any evidence that default should be opened on grounds of (1) providential cause, (2) excusable neglect, or (3) proper case and has failed to set up a meritorious defense which is a condition precedent to proving those grounds.

A. Defendant has not provided the Court with any evidence or arguments that would support opening default.

Defaults may only be opened before a judgment is rendered and the choice to open default rests within the discretion of the trial judge who determines required pleadings were not filed due to providential cause, excusable neglect, or that a proper case has been made. Under O.C.G.A § 9-11-55(b), "At any time *before final judgment*, the court, in its discretion… may allow the default to be opened for providential cause preventing the filing of required pleadings for excusable neglect or where the judge…shall determine that a proper case has been made for the default to be opened…". (emphasis added); *see also Collier v. Cawthon*, 256 Ga.App. 825 (2002). In *Collier*, the Court of Appeals set forth the standard to open default stating, "a prejudgment default may be opened on one of three grounds *if* four conditions are met. The three grounds are: (1) providential cause, (2) excusable neglect, and (3) proper case; the four conditions are: (1) showing made under

oath, (2) offer to plead instanter, (3) announcement of ready to proceed with trial, and (4) setting up a meritorious defense." 256 Ga.App. at 826. The Court in *Collier* recognized the policy of liberality concerning opening defaults, but emphasized that, "[o]n appeal the test to determine whether the trial court erred in opening default is not whether this court would have granted or denied the motion had it been ruling thereon at the trial level. The test, as indicated above, is whether the trial court abused its discretion in denying the motion under the facts of this case." 256 Ga.App. at 827 (internal quotations and citations omitted).

The facts of this case do not support opening default and Defendant does not attempt to provide the Court with facts or legal authority to support opening default due to providential cause, excusable neglect, or a proper case. In support of Defendant's Motion, Defendant included the Affidavit of Mr. Ijames who provided sworn testimony that "none of MTI Limo's employees or vehicles were involved in an accident on November 7, 2021." *See* ¶ 1 of Affidavit of Cameron Ijames. However, Mr. Ijames spoke with the Plaintiff after the bus came to a stop and provided the Plaintiff with his business card. *See* ¶¶ 5-7 of Affidavit of Mr. Arrington. Mr. Ijames's sworn testimony in his affidavit states that, after receiving the Summons and Complaint, "we never heard anything else regarding this incident and thought the matter was resolved itself [sic]." *See* ¶ 2 of Affidavit of Cameron Ijames. According to his LinkedIn profile, Mr. Ijames has been the Director of Operations at MTI Limo and Shuttle Services Inc. for more than seven years and his duties include oversight of several regulatory and compliance related matters. *See* Exhibit F. Surely, the long-tenured Director of Operations at a commercial transportation company does not believe that lawsuits simply "resolve themselves." Had Defendant "performed any due diligence," Defendant would have realized that a lawsuit was pending in Fulton County State Court.

B. Defendant's Answer fails to set up a meritorious defense to Plaintiff's Complaint and therefore, Defendant cannot satisfy a condition precedent to determining whether default should be opened for providential cause, excusable neglect, or a proper case.

Of the forty-four paragraphs in Defendant's Answer, twenty of them cite a lack of information or lack of knowledge to answer Plaintiff's Complaint. That being said, Defendant's Answer emphasizes that it bears absolutely no responsibility for the November 7, 2021 hit-and-run collision. Defendant's Answer actually alleges that the Plaintiff was negligent, seeking to bar recovery.[2] Defendant's Answer occupies an anomalous state in which, Defendant apparently possesses no information to address the Complaint with substantive defenses but has just enough information to know the Plaintiff is responsible for *his* injuries. Defendant's Answer is anything but a meritorious defense and fails to meet a condition precedent to considering the three statutory grounds for opening default.

III. Defendant's legal arguments require the Court to award Plaintiff's attorney's fees because they are devoid of any justiciable issue of law or fact, and they are frivolous, groundless, and vexatious.

Reasonable and necessary attorney's fees and expenses of litigation shall be awarded against a party who asserts a legal position that is devoid any justiciable issue of law or fact. Under O.C.G.A. § 9-15-14(a) "reasonable and necessary attorney's fees and expenses of litigation **shall** be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a Court would accept the asserted claim, defense, or other position." In *Long v. City of Helen*, the Supreme Court found the trial court did not abuse its discretion by awarding attorney's fees and expenses because one claim made by the Plaintiff in

[2] In Defendant's Tenth Defense, Defendant uses the wrong gender pronoun to describe the Plaintiff and states, "Plaintiff is solely and wholly responsible for her [sic] alleged injuries."

the underlying lawsuit was made "despite a complete absence of any justiciable issue of law or fact" and the trial court determined the other claim was "interposed for delay or harassment." 301 Ga. 120, 122 (2017) *citing* O.C.G.A. § 9-15-14(a)-(b). *Cf. Gibson Construction Company v. GAA Acquisitions I, LLC et al*. 314 Ga.App 674, 676 (2012) (stating, "Generally speaking, an award of attorney fees cannot be sustained if it is based on an argument about the meaning of a statute, where the statute does not speak explicitly to the issue at hand, where the statute has not previously been interpreted with respect to that issue, and where some support for the argument can be gleaned from the text or purpose of the statute.").

Defendant's assertion regarding the lack of receiving notice is devoid of any justiciable issue of law and the Court is required to award fees and expenses. The text of O.C.G.A § 9-11-5(a) clearly states, "the failure of a party to file pleadings in an action *shall be deemed to be a waiver* by him or her of all notices, *including notices of time and place of trial and entry of judgment*…". (emphasis added). A cursory study of the Civil Practice Act would have shown Defendant that its position regarding a lack of notice is entirely frivolous and devoid of any justiciable issue of law. The Court of Appeals in *Gibson* explained that an award of attorney's fees generally cannot be awarded where the statute does not explicitly speak to the issue at hand; however, here O.C.G.A § 9-11-5(a) *explicitly* speaks to Defendant's position regarding notice and as such this Court must award attorney's fees because, as the Supreme Court stated in *Long*, there is "a complete absence of any justiciable issue of law or fact." 314 Ga.App 674; 301 Ga. at 122. To further illustrate the necessity of fees, the single case Defendant cited asserting notice was a nonamendable defect, *City of Calhoun v. Hamrick*, held exactly the opposite of what Defendant purported the case held. The Court is required to award attorney's fees and expenses under

O.C.G.A § 9-15-14(1) due to Defendant's position on lack of notice as it is devoid of any justiciable issue of law.

Under O.C.G.A. § 9-15-14(b), attorney's fees and expenses of litigation may be assessed where a party brought or defended an action that lacked substantial justification. The term "lacked substantial justification" means it was substantially frivolous, substantially groundless, or substantially vexatious. O.C.G.A. § 9-15-14(b).

Defendant's contention that a defect of the parties is a nonamendable defect is substantially groundless and substantially vexatious such that the Court should award attorney's fees. Under O.C.G.A § 9-11-15(a), "A party may amend his pleading as a matter of course and without leave of court at any time before the entry of the pretrial order." An alleged defect in the parties is not a reason to set aside a valid judgment obtained pursuant to Georgia law. *see Burch v. Dines*, 267 Ga.App 459, 460 (2004) (stating that suing the allegedly wrong defendant "was a matter for the [defendants] to raise in defense of the underlying action."). Defendant's argument to the contrary is groundless, vexatious, and Plaintiff asks the Court to award Attorney's fees and expenses under O.C.G.A § 9-15-14(b) for having to address these baseless arguments. Defendant's Motion is unambiguously inconsistent with Georgia law, and Defendant should be sanctioned for wasting the Court's time and judicial resources.

A trial court is required to make express findings of fact and conclusions of law as to the statutory basis for an award of attorney fees with respect to a claim or defense lacking a justiciable issue of law or fact. *Gilchrist v. Gilchrist*, 287 Ga.App. 133 (2007); *See also Bailey v. Maner Builders Supply Company, LLC*, 348 Ga.App. 882 (2019). A party seeking attorney's fees pursuant to O.C.G.A. § 9-15-14 must present evidence from which the trial court can determine what portion of an attorney's time and litigation expenses were incurred in pursuit or defense of a claim.

Reynolds v. Clark, 322 Ga.App. 788 (2013). An affidavit that separates billable time, enumerates specific tasks completed, and includes the hourly rate billed is sufficient proof of reasonability and necessity for a trial court to determine attorney's fees. *Id*. at 791.

In support of Plaintiff's cross-motion for attorney's fees, undersigned counsel has executed an affidavit that complies with the *Reynolds* requirements. 322 Ga.App. 788. A true and correct Affidavit of Campbell M. Walker is attached here as Exhibit I. To date, counsel billed 16.6 hours of time to review, research, and prepare Plaintiff's response at a billable hourly rate of $300.00 per hour, which is customary for his years of experience and the metro Atlanta market. Ultimately, Plaintiff's fees are warranted and should be awarded by this Court.

CONCLUSION

Plaintiff has conducted himself with the utmost regard for the law and has followed the rules every step of the way since he was injured in the egregious hit-and-run collision caused by Defendant MTI Limo. Defendant is asking the Court to not only ignore the fact that it disregarded the Summons and Complaint, but also reward the Defendant by setting aside a valid judgment obtained in accordance with Georgia law. Defendant did not follow the rules when its driver ran from the scene of the wreck; Defendant did not follow the rules when it ignored service of process; and, Defendant did not follow the rules when its owner, Mike Toye, asked to settle this case without notifying his insurance company.

WHEREFORE, The Court should DENY Defendant's Motion to Set Aside Entry of Default Judgment and Final Judgment against Defendant MTI Limo and Shuttle Services. Inc. and to Open Default and GRANT Plaintiff's Cross-Motion for Attorney's fees in the amount of $4,980.00 pursuant to O.C.G.A. § 9-15-14(a)-(b).

Respectfully submitted this 26TH day of August, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on all parties via Odyssey EFileGA electronic service and] first class mail addressed to the following attorneys of record:

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Respectfully submitted this 26th day of August, 2022.

TOBIN INJURY LAW

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