STATE ex rel. COOPER

13 CVS 7161

NORTH CAROLINA SUPERIOR COURT, WAKE COUNTY

January 8, 2015

Reporter
2015 NC Sup. Ct. Motions LEXIS 375 *

STATE OF NORTH CAROLINA, ex rel. ROY COOPER, Attorney General et al., Plaintiffs, v. ORION PROCESSING, LLC et al.; Defendants.

Type: Motion

Counsel

[*1] Michael J. Byrne (N.C. Bar No. 23577), Raleigh, NC.

Title

BRIEF IN SUPPORT OF DEFENDANT DERIN SCOTT'S MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND TO SET ASIDE ENTRY OF DEFAULT

Text

Defendant Derin Scott ("Scott") respectfully submits this brief in support of his motion to dismiss the Amended Complaint for lack of personal jurisdiction, filed August 27, 2014, and in support of his motion to set aside the entry of default against him as to the Original Complaint, filed June 11, 2014. [1]

Factual and Procedural Background

On May 22, 2013, Plaintiffs filed their complaint against Swift Rock Financial, Inc. ("Swift Rock"), Orion Processing, LLC ("Orion"), Scott, and Global Client Solutions, LLC ("Global").

On September 26, 2013, at 4:55 p.m., Plaintiffs filed a motion for entry of default against Swift Rock and Scott, with affidavits. Plaintiffs averred "that Defendant Derin Scott has been **[*2]** properly served pursuant to Rule 4(j1) of the North Carolina Rules of Civil Procedure, and that Defendant Derin Scott has failed to appear or to plead in this action." At 4:54 p.m. that day - before the motion and affidavits were filed - the Clerk of Court granted the motion and entered default against Swift Rock and Mr. Scott.

In support of their motion, Plaintiffs submitted the affidavit of the State's counsel, Ms. Weaver, attached to which was the affidavit of "Deputy D. Miller #250." Ms. Weaver's affidavit states, "On 22 May 2013, I transmitted a copy of Plaintiffs' Summons and Complaint to a private process server for service on Defendant Derin Scott at Defendant Scott's residence at 1507 Osprey Ridge Loop, Lago Vista, Texas 78645. Said private process server was unable to serve Defendant Derin Scott." Weaver Aff. P 4.

Nothing in Ms. Weaver's affidavit indicates what investigation, if any, the Plaintiffs performed prior to May 22, 2013, to determine whether Scott then resided at 1507 Osprey Ridge Loop, Lago Vista, Texas 78645.

Ms. Weaver's affidavit further states, "I also transmitted a copy of Plaintiffs' Summons and Complaint to the Travis County Sheriff's Office. Deputy **[*3]** Constable D. Miller with Precinct 2 of Travis County, Texas, attempted to personally serve Defendant Scott at his residence 1507 Osprey Ridge Loop, Lago Vista, Texas 78645 on May 30, June 3, and June 5, 2013." Weaver Aff. P 4.

Deputy Miller's affidavit is a form titled "Sworn Affidavit for Substitute Service Under Rule 106(b)" (referring to Texas Rule of Civil Procedure 106(b)). Deputy Miller states (1) that he is a Deputy Constable with Precinct 2, Travis County, Texas; (2) that he "attempted to serve citation in this cause upon Derin Scott at 1507 Osprey Ridge Loop, Lago Vista Tx 78645"; and (3) that on three occasions between May 30 and June 5, 2013, he visited "such address to attempt to serve citation in this cause on this party."

[1] Two weeks after the motion to set aside was filed, Plaintiffs filed their Amended Complaint.

The boilerplate of the form Affidavit invites the deputy who completes it to check off boxes to indicate what investigation he or she performed to determine that premises are "the usual place of abode" for the defendant. Specifically, the form Affidavit invites the affiant to check off whether their "investigation included" any of the following: (a) "talking with a person...at the address who confirmed the information checked above regarding the address"; **[*4]** (b) "talking with a neighbor...who confirmed the information checked above regarding the address"; (c) "observing vehicles at the address registered in the name of the person to be served"; (d) "confirming that utilities...at the address are in the name of the person to be served"; (e) "obtaining the attached U.S. Post Service confirmation that the person to be served receives mail at this address."

Deputy Miller did not check off any of these methods of investigating residency on the form Affidavit, thereby affirmatively indicated that he had performed none of them. Rather, the only alleged "investigation" that Deputy Miller indicates that he performed was "f) other: package at door." The deputy's affidavit says nothing about the "package at door," or what about it led him to conclude that "other: package at door" constituted a "sufficient investigation" for him to conclude that the premises were the "the usual place of abode" of Mr. Scott.

In her affidavit, Ms. Weaver states, "Deputy Miller attested that he had made sufficient investigation of the premises and was satisfied that the address of 1507 Osprey Ridge Loop, Lago Vista, Texas 78645 was Defendant Scott's residence, by, **[*5]** among other things, observing packages addressed to Defendant Scott left at the door of said residence." Weaver Aff. P 4. Ms. Weaver's statement is incorrect. Deputy Miller's affidavit contains no attestment that he inspected the "package at door" described in his affidavit to determine to whom it was addressed. Even if it could be inferred that Deputy Miller made such an inspection, his affidavit refers to a single "package at door," not packages.

Ms. Weaver's affidavit further states that (1) Plaintiffs' counsel transmitted a copy of the summons of the complaint to Mr. Scott's counsel in Fort Lauderdale, Florida, whom the affidavit says is Mr. Scott's counsel in another lawsuit, who represented that he was not authorized to accept service of process for Mr. Scott; and (2) according to filings with the Texas Secretary of State, Mr. Scott is the "sole office" [sic] of Swift Rock, and that Swift Rock was served with process through its registered agent. Weaver Aff. PP 5-6.

Ms. Weaver conclusorily claimed, without explanation, that Plaintiffs "had no reason to believe that additional attempts at personal or other service would be successful," and as a result, "the Plaintiffs served **[*6]** Defendant Scott by publication....by causing a notice of service of process to be published once a week for three successive weeks in a newspaper qualified for legal advertising… namely, in the Austin American-Statesman on 17 July, 24 July, and 31 July 2013." Weaver Aff. P 7.

On these grounds, Plaintiffs asserted that Scott had been validly served by publication, that his time for responding had expired, and that he was in default. Weaver Aff. P 8. In fact, although Mr. Scott lived at the Lago Vista property previously, in 2012 he and his family moved their residence to 7060 Southeast Congress, Hobe Sound, Florida. Affidavit of Derin Scott dated January 7, 2015 ("Scott Aff.") PP 23-24 (Exhibit A hereto). At that time, Mr. Scott's wife provided a change of address form to the local United States post office for Lago Vista, regarding the Scotts' change of address to Hobe Sound, Florida. Scott Aff. P 25. Since that time, Mr. Scott has continued to own the property in Lago Vista, Texas, and has received property tax notices from the Travis County, Texas tax authorities at his Hobe Sound, Florida address. Id. PP 23, 26. Consistent with this, the searchable online database for the Travis **[*7]** County tax office records shows Mr. Scott's mailing address to be 7060 Southeast Congress, Hobe Sound, Florida. [2]

On the issue of Scott's residence, plaintiffs' Amended Complaint avers, "In public record filings, as well as in deposition testimony given by defendant Scott in the Illinois Action in September 2013, defendant Scott states that his current residence is in Hobe Sound...Florida." AC P 37.

On June 11, 2014, Scott filed his motion to dismiss for lack of personal jurisdiction and his motion to set aside the entry of default against him.

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[2] See *http://propaccess.traviscad.org/clientdb/?cid=1*; search for "Scott Derin." Under Rule of Evidence 201(b), the Court may take judicial notice of the Travis County, Texas tax office's online records. See, e.g., *In re Brackett, 2010 WL 1254705*,

*3 (Bankr. N.D. W. Va.) and cases cited therein.

On June 25, 2014, Plaintiffs filed their Amended Complaint against Scott, the other original defendants, and new defendants World Law South, Inc. ("WLS") **[*8]** and Bradley Haskins ("Haskins"). The Amended Complaint alleges that Scott is the sole managing member of Orion and is the sole officer of Swift Rock. AC P 37. It further alleges that Scott has "formulated, directed, controlled, participated in, and had knowledge of" what the Plaintiffs conclusorily call "the illegal acts and practices of all other named defendants." Id. The acts and practices that the defendants are alleged to have engaged in - both personally and through their alleged "agents" - and that are alleged to be illegal include the following:

- Engaging in marketing practices and communications with North Carolina residents regarding debt settlement and/or related legal services;
- Entering into agreements with North Carolina residents to provide debt settlement services;
- Providing North Carolina residents with debt settlement and/or related legal services; and
- Collecting payments from North Carolina residents for services relating to consumer debt

See, e.g., AC PP 3, 13, 31, 61-68, 76, 81-84, 86, 88, 95-98, 106, 113-117, 125.

On August 27, 2014, Scott timely filed a motion to dismiss the Amended Complaint for lack of personal jurisdiction. **[*9]**

While Scott founded and owns Orion, he has no involvement in its management or daily operations and stopped working as Orion's "executive manager" in December 2009. Scott Aff. P 2. Scott has also not been involved in managing Swift Rock's daily operations, and by December 2009 only received reports and updates regarding its operations from time to time. Id. P 3. He is aware of a service agreement made between Orion and World Law Group in 2010, but he was not involved in negotiating it. Id. PP 4-5.

Mr. Scott has not controlled, directed or participated in marketing efforts to consumers that have may have been made by the other defendants, except that he may have had some involvement with non-substantive layout elements of the Swift Rock or Orion Processing web site. Id. P 6. He has not communicated with any North Carolina resident about the provision of consumer debt services by the other defendants, and has not controlled, directed, or participated in any such communications that others may have made. Id. P 7. He has not entered into any agreement with any resident of North Carolina regarding consumer debt services, and has not controlled, directed, or participated in any such agreements **[*10]** that the other defendants may have made. Id. P 8. He has not provided legal advice to any North Carolina resident, and has not controlled, directed, or participated in others' providing any such advice. Id. P 9. He has not prepared or had someone else prepare any pleadings or other papers for filing by or on behalf of a North Carolina resident in a consumer-debt related legal proceeding, and he has not controlled, directed, or participated in the preparation of any such papers by others. Id. P 10. He has not filed or had someone else file pleadings or other papers on behalf of a North Carolina resident in a consumer-debt related legal proceeding, and he not controlled, directed, or participated in the filing of any such papers by others. Id. P 11.

Mr. Scott has not provided or had someone else provide any debtor in North Carolina with papers to be filed for the debtor in any consumer-debt related legal proceeding, and he has not controlled, directed, or participated in the providing of any such papers by others. Id. P 12. He has not represented or purported to represent a North Carolina resident in any lawsuit or proceeding in North Carolina. Id. P 13. He has not collected any payment **[*11]** from any resident of North Carolina for the provision of services relating to consumer debt, and has not controlled, directed, or participated in the collection of any such payments by others. Id. P 14. He has not controlled, directed, or participated in the business operations or practices of World Law South, or any acts or practices by Brad Haskins individually. Id. PP 15, 16.

More generally, Mr. Scott has not personally engaged in business in North Carolina, maintained a residence in North Carolina, owned, leased, used, or possessed any real or personal property in North Carolina; maintained any bank accounts, offices, phone listings, or employees in North Carolina; maintained any agents for the purposes of transacting business in North Carolina; or had a place of business or mailing address in North Carolina. Id. PP 17-22.

Argument

I. The Amended Complaint Against Scott Should Be Dismissed for Lack of Personal Jurisdiction Because Scott Lacks Minimum Contacts with North Carolina.

Whether a North Carolina court may exercise personal jurisdiction over a defendant depends on whether such jurisdiction is conferred by the "long-arm" statute, *N.C. Gen. Stat.* ***[*12]*** *§ 1-75.4*, and on whether the exercise would be consistent with due process. *Dillon v. Numismatic Funding Corp., 291 N.C. 674, 676-77, 231 S.E.2d 629, 630 (1977)*. Under the long-arm statute, "North Carolina courts may obtain personal jurisdiction over a non-resident defendant to the full extent permitted by the Due Process Clause of the United States Constitution." *Wyatt v. Walt Disney World Co., 151 N.C. App. 158, 164, 565 S.E.2d 705, 709 (2002)* (internal quotation marks omitted).

"'When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry - whether defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process.'" *Rauch v. Urgent Care Pharm., Inc., 178 N.C. App. 510, 518, 632 S.E.2d 211, 217 (2006)* (quoting *Tejal Vyas, LLC v. Carriage Park, L.P., 166 N.C. App. 34, 38, 600 S.E.2d 881, 885 (2004)*). The court must determine whether the defendant had "certain minimum contacts with [North Carolina] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial **[*13]** justice.'" *Tejal, 166 N.C. App. at 38, 600 S.E.2d at 885* (quoting *International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)*). [3] "A defendant will be found to have sufficient contacts with North Carolina when he has 'purposefully availed [himself] of the privilege of conducting activities within the forum state and invoked the benefits and protections of the laws of North Carolina.'" *Rauch, 178 N.C. App. 518, 632 S.E.2d at 217* (quoting Tejal); see *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)* (personal jurisdiction proper only "where the contacts proximately result from **actions by the defendant himself that create a 'substantial connection' with the forum state**") (emphasis added). Each defendant's contacts with a forum state must be assessed individually. *Calder v. Jones, 465 U.S. 783, 790 (1984)*.

[*14]

"[P]ersonal jurisdiction over an individual officer or employee of a corporation may not be predicated merely upon the corporate contacts with the forum." *Robbins v. Ingham, 179 N.C. App. 764, 771, 635 S.E.2d 610, 615 (2006)*. "To base personal jurisdiction on the bare fact of a defendant's status as, e.g., corporate officer or agent, would violate his due process rights." *Saft America, Inc. v. Plainview Batteries, Inc., 189 N.C. App. 579, 596, 659 S.E.2d 39, 50 (2008)* (Arrowood, J., dissenting), reversed in part for reasons stated in dissent, *363 N.C. 5, 673 S.E.2d 864 (2009)*. "Accordingly, North Carolina precedent has consistently required that, before a defendant is subject to personal jurisdiction, there be evidence that he **personally** took some action subjecting him to North Carolina's jurisdiction." *Saft, 189 N.C. App. at 596, 659 S.E.2d at 50* (Arrowood, J., dissenting) (emphasis added). "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014)*. **[*15]**

As established by Mr. Scott's affidavit, contrary to the allegations of the Amended Complaint, Mr. Scott has not personally - directly or indirectly - engaged in the acts and practices complained of, so as to "create a substantial connection" between himself and North Carolina. Absent evidence showing that Mr. Scott, who has never resided in North Carolina, has personally engaged in such practices, this Court cannot exercise jurisdiction over him consistent with due process. As such, defendant respectfully submits that the case against him must be dismissed.

II. The Entry of Default Should be Set Aside.

If Scott's motion to dismiss for lack of personal jurisdiction is denied, then the entry of default against him should be set aside for three reasons. First, the entry of default was void ab initio because the Original Complaint was never validly served upon Mr. Scott. Second, even if the Original Complaint had been properly served, Plaintiffs' filing the Amended Complaint nullified the Original Complaint and accordingly nullified any default by Scott as to answering the Original Complaint. Finally, even if the entry of default as to the Original Complaint were not **[*16]** nullified by the Amended Complaint, and even if it were not void ab initio, it should be set aside for

[3] "'[D]ecisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution are binding on'" North Carolina courts. *Wyatt, at 167, 565 S.E.2d at 711* (quoting *McNeill v. Harnett County, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990)*).

other good cause.

A. **The Filing of the Amended Complaint Nullified Any Default as to the Original Complaint**.

"[A]n amended complaint has the effect of superseding the original complaint." *Hyder v. Dergance, 76 N.C. App. 317, 319-20, 332 S.E.2d 713, 714 (1985)* (citing *Hughes v. Anchor Enterprises, Inc., 245 N.C. 131, 95 S.E.2d 577 (1956)*). Accord, *Young v. City of Mount Ranier, 238 F.3d 567, 573 (4th Cir. 2001)* ("[A]n amended pleading supersedes the original pleading, rendering the original pleading of no effect.") Because the filing of an amended complaint supersedes and nullifies prior complaints, "any argument regarding the original complaint [is also rendered] moot." *Houston v. Tillman, 760 S.E.2d 18, 20 (N.C. App. 2014)* (holding that whether trial court erred in denying defendants' motion to dismiss the original complaint was rendered moot by the filing of an amended complaint); see also *Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 178, 303 S.E.2d 642, 644 (1983)* **[*17]** (same); *Skoog v. Harbert Private Equity Fund, II, LLC, 2013 WL 1223396*, *1 (N.C. Super.) (plaintiffs' filing of an amended complaint "moot[ed]" the defendants' motion to dismiss the original complaint); Mooring Capital Fund, LLC v. Comstock North Carolina, LLC, 2009 WL 4644708, *1 fn. 2 (N.C. Super.) (same)

The effect of an entry of default is that the defaulting party is deemed to have admitted all allegations of the complaint as to which there was a default, other than those as to the amount of damage. N.C.R. Civ. P. 8(d); *Emick v. Sunset Beach & Twin Lakes, Inc., 180 N.C. App. 582, 591, 638 S.E.2d 490, 497 (2006)*. Admissions by default as to the allegations of a complaint, however, are rendered meaningless and moot where that complaint has been superseded and nullified by an amended complaint. Default judgment cannot be entered based on a default as to a superseded complaint; any such default is itself a nullity and must be set aside. See, e.g., *U.S. S.E.C. v. Boey, 2013 WL 1775444*, *1 (D.N.H.) (denying motion for default judgment based on default as to a complaint that was superseded by an amended complaint; **[*18]** entry of default as to the original complaint "is a nullity"); Winston v. City of Laurel, 2012 WL 5381346, *2 (S.D. Miss.) (granting defendant's motion to set aside entry of default because, among other reasons, plaintiff's filing of an amended complaint superseded the original complaint and "mooted the Clerk's entry of default" as to the original complaint); Anderson v. CitiMortgage, Inc., 2011 WL 6301739 (D. Hawai'i), report and recommendation adopted by 2011 WL 6301427 (motion for default judgment was "moot" based on plaintiff's filing an amended complaint during the pendency of that motion; recommending that the district court set aside entry of default, which district court ordered); *Greater St. Louis Constr. Laborers Welfare Fund v. A.G. Mack Contracting Co., Inc., 2009 WL 2916841 (E.D. Mo.)* (where plaintiff obtained entry of default against defendant and a default order, then filed an amended complaint and moved for the defendant to be held in contempt as to the default order, held, amended complaint superseded the original rendering it without legal effect, so that the entry of default and order to compel accounting **[*19]** "must be set aside," rendering the contempt motion moot); *Bituminous Cas. Corp. v. Tindle Enters., Inc., 2009 WL 2843375*, *4 (W.D. Tenn.) ("A motion for default judgment based on an entry of default on an earlier complaint becomes moot once the amended complaint is filed."); *U.S. ex rel. SimplexGrinnell, LP v. Aegis Ins. Co., 2009 WL 577286 (M.D. Pa.)* (granting defendant's motion to set aside entry of default as to original complaint where plaintiff filed an amended complaint; "The entry of default was filed on account of [defendant's] failure to respond to the original complaint; however, for the reason stated above, the original complaint no longer exists. Consequently, the court will grant [defendant's] motion to set aside entry of default."); *Rock v. Am. Express Travel Related Servs. Co., Inc., 2008 WL 5382340*, *1-2 (N.D.N.Y.); *Best Western Int'l, Inc. v. Melbourne Hotel Investors, LLC, 2007 WL 2990132 (D. Ariz.)*; accord, *TD Banknorth, N.A. v. Hawkins, 5 A.3d 1042 (Me. 2010)*.

Based on black-letter North Carolina law, and consistent with the view of the many other courts that have considered **[*20]** the issue, default judgment cannot be entered based on a default as to a superseded complaint. Such a default is itself a nullity and must be set aside. Accordingly, this Court should set aside the entry of default as to Mr. Scott.

B. **The Entry of Default Is Void Ab Initio Because No Valid Service Upon Mr. Scott Was Made**.

Independent of the filing of the Amended Complaint, the entry of default is void ab initio because the Original Complaint was never validly served upon Mr. Scott.

*

"Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed." *Thomas & Howard Co., Inc. v. Trimark Catastrophe Servs., Inc., 151 N.C. App. 88, 91, 564 S.E.2d 569, 572 (2002)* (internal quotation marks omitted). "While a defective service of process may give the defending party sufficient and actual notice of the proceedings, such actual notice does not give the court jurisdiction over the party." *Id. at 91, 564 S.E.2d at 572* (internal quotation marks omitted); accord, *Johnson v. City of Raleigh, 98 N.C. App. 147, 389 S.E.2d 851*, disc. review denied, *327 N.C. 140, 389 S.E.2d 849 (1990)*; **[*21]** *Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984)*. "If an order or judgment is rendered without an essential element such as jurisdiction or proper service of process, it is void." *Wayne County ex rel. Williams v. Whitley, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984)* (citing *Wynne v. Conrad, 220 N.C. 355, 17 S.E.2d 514 (1941)*).

In North Carolina, service upon a natural person may be accomplished by various methods including "delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein"; delivering the same to an agent authorized to accept service for the person; and delivering the same by registered or certified mail or an authorized delivery service to the party to be served. N.C.R. Civ. P. 4(j)(1). Only if a party "cannot with due diligence" be served by one of the methods set forth in Rule 4(j)(1) may the party be served by publication. N.C.R. Civ. P. 4(j1).

"Service of process by publication is in derogation of the common law, and a statute sanctioning **[*22]** it must therefore be strictly construed both as a grant of authority and in determining if service has been effected in conformity therewith." *Barclays American/Mortgage Corp. v. BECA Enters., 116 N.C. App. 100, 103, 446 S.E.2d 883, 885 (1994)*. A determination of whether a plaintiff has exercised "due diligence" so as to authorize service by publication is based on the facts and circumstances of each case. Id. As a threshold matter, however, "the 'due diligence' test of Rule 4(j1) requires a party to use all resources reasonably available to accomplish service." Id. "Due diligence dictates that plaintiff use all resources reasonably available to [plaintiff] in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Fountain v. Patrick, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980)*.

Ms. Weaver's Affidavit contains no information whatsoever regarding what investigation, if any, Plaintiffs made to ascertain Mr. Scott's usual place of abode as of May 22, 2013. With regard to any **[*23]** such investigation that Plaintiffs may have performed after May 22, 2013, the only record evidence that is even arguably related to it is the Texas Deputy's statement, "other: package at door."

The Clerk made no finding or conclusion that the Plaintiffs had exercised had exercised due diligence in ascertaining the location of Mr. Scott before attempting service by publication. Even if such a finding or conclusion were implied, nothing in the Weaver and Miller affidavits filed after the Clerk had ruled supports such a conclusion. There was, in short, no record basis for the Clerk to conclude that valid service of process had been made upon Mr. Scott. On the contrary, the evidence is that Scott's change of address was on record with the Travis County tax office's online website well before the State concluded its purported service by publication on or after July 31, 2013. Because there was never valid service of the Original Complaint upon Mr. Scott, there was never an obligation for him to answer that Complaint. Entry of default against Mr. Scott was improper because there was no default. As a result, the entry of default should be declared void and set aside. [4]

[*24]

C. **Even if the Entry of Default as to the Original Complaint Were Not Void Ab Initio, It Should Be Set Aside for Other Good Cause**.

The court may set aside an entry of default "[f]or good cause shown." N.C.R. Civ. P. 55(d). "What constitutes 'good cause' depends on the circumstances in a particular case, and within the limits of discretion, an inadvertence which is not strictly excusable may constitute good cause, particularly 'where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant.'" *Peebles v. Moore, 48 N.C.*

[4] "The entry of default… is interlocutory in nature and is not a final judicial action." *State Employees' Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 265, 330 S.E.2d 645 (1985)*.

App. 497, 504, 269 S.E.2d 694, 698 (1980) (quoting *Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970)*), modified and aff'd, *302 N.C. 351, 275 S.E.2d 833 (1981)*. [5] "The law generally disfavors default and 'any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits." *Automotive Equip. Distr., Inc. v. Petroleum Equip. & Serv., Inc., 87 N.C. App. 606, 608, 361 S.E.2d 895, 896-97 (1987)*) (quoting *Peebles, 48 N.C. App. at 504-05, 269 S.E.2d at 698-97*). **[*25]** As the North Carolina Supreme Court has held, "[T]he better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise." *Peebles v. Moore, 302 N.C. at 356, 275 S.E.2d at 836*.

Among the factors considered by courts in determining whether "good cause" exists are whether the defendant was diligent in pursuit of the matter, whether plaintiff has suffered any harm by virtue of any delay, and whether defendant would suffer a grave injustice by being unable to defend the action. *Atkins v. Mortenson, 183 N.C. App. 625, 627-28, 644 S.E.2d 625, 627*, appeal dismissed, *361 N.C. 690, 652 S.E.2d 255 (2007)*. **[*26]**

While Mr. Scott is not a lawyer, he has been served with process in other lawsuits, and he understood that the original summons and complaint in this case were never served upon him. When the Amended Complaint and new summons were delivered to his Florida residence last year, he promptly sent those to the undersigned counsel, and, his motion to dismiss the Amended Complaint for lack of personal jurisdiction was timely filed. Scott Aff. P 27.

Even if Mr. Scott had been validly served with the original summons and complaint, the Plaintiffs have suffered no harm as a result of the delay in filing the motion to set aside the default. Since the beginning of this action, a broad preliminary injunction has been in place. Plaintiffs have had the opportunity to conduct, have conducted, and continue to conduct discovery from defendant Orion and a number of non-parties by subpoena. In July 2014, Plaintiffs elected to file an Amended Complaint naming as new defendants World Law South and Bradley Haskins. In October 2014, the Chief Justice designated this case as exceptional under Rule 2.1 of the General Rules of Practice. In December 2014, the State Bar filed a motion to hold all Defendants **[*27]** in contempt of court for allegedly violating the preliminary injunction. The Court's recently entered scheduling order establishes a schedule for expeditious discovery and resolution of all pending motions. Any delay in moving to set aside the entry of default against Mr. Scott has not harmed the Plaintiffs.

Finally, and perhaps most importantly, even if Mr. Scott were validly served, failing to set aside the default would work a grave injustice upon him. "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." N.C.R. Civ. P. 8(d). The entry of default against Mr. Scott binds him to admitting the allegations of the complaint as to which there is a default. *Emick v. Sunset Beach & Twin Lakes, Inc., 180 N.C. App. 582, 591, 638 S.E.2d 490, 497 (2006)* (quoting *Baxter v. Jones, 14 N.C. App. 296, 311, 188 S.E.2d 622, 631 (1972)*).

As detailed above, the Original Complaint has been nullified by the filing of the Amended Complaint, and so too, any deemed admissions by Mr. Scott solely as to the allegations of the Original Complaint no longer **[*28]** have any force or effect. If, contrary to North Carolina law, that were not the case, deemed admissions as to the Original Complaint could subject Mr. Scott to liability for, among other things, violating North Carolina's "debt adjusting" statutes. *N.C. Gen. Stat. § 14-423* et seq., and unfair or deceptive trade practices, under *N.C. Gen. Stat. § 75-1.1*. Specifically, the Original Complaint alleges that "defendants have engaged" in unlawful debt adjusting activities as to North Carolina debtors, and that,"[p]ursuant to *N.C. Gen. Stat. § 14-425*, the Attorney General is entitled to injunctive relief to restrain the defendants from further violations of the law, to the refunding of all fees unlawfully collected by the defendants from North Carolina debtors, and to the appointment of a receiver to assist in the recovery of funds unlawfully collected and held by the defendants." Original Complaint, PP 61, 63. The Original Complaint alleges that "World Law" has unlawfully collected from North Carolina debtors more than $ 2,116,013.20. *Id. PP 50, 61* and Exhibit 10. The Original Complaint prays that "defendants" be ordered to refund all of these funds. Prayer for Relief P C.

[5] Unlike setting aside a default judgment, which may involve a showing of excusable neglect and a meritorious defense, "to set aside an entry of default, all that need be shown is good cause." *Peebles, 48 N.C. App. at 503, 269 S.E.2d at 698*.

The Original **[*29]** Complaint also prays "[t]hat the defendants be ordered to pay appropriate civil penalties pursuant *N.C. Gen. Stat. § 75-15.2*." Prayer for Relief, P G. Plaintiffs contend that at least 813 North Carolina debtors were "customers of World Law for the period October 2010 through February 2013." Original Complaint Exh. 10, Affidavit of Michael Ramaikas, P 5.

Section 75-15.2 provides, "In any suit instituted by the Attorney General, in which the defendant is found to have violated *G.S. 75-1.1* and the acts or practices which constituted the violation were, when committed, knowingly violative of a statute, the court may, in its discretion, impose a civil penalty against the defendant of up to five thousand dollars ($ 5,000) for each violation."

Based on the Original Complaint's allegations, Mr. Scott could be subject to liability for civil penalties of at least $ 4,065,000.00, which is the product of the minimum number of debt adjusting violations alleged by the State (813) multiplied by the maximum civil penalty per violation ($ 5000).

Thus, assuming contrary to law that the entry of default as to the Original Complaint was of any force and effect, if that entry of default were not **[*30]** aside, Mr. Scott would face **personal liability of at least $ 2,116,013.20, and up to and potentially exceeding $ 6,181,013.20**. Allowing the State to obtain a judgment by default that falls anywhere within this extraordinary range of damages would work a grave and manifest injustice against Mr. Scott.

In *Atkins v. Mortenson, 183 N.C. App. 625, 644 S.E.2d 625*, appeal dismissed, *361 N.C. 690, 652 S.E.2d 255 (2007)*, defendant in a medical malpractice action was served at his residence by certified mail and forwarded the complaint and summonses to his malpractice insurance carrier but thereafter was "less than diligent" in monitoring whether a response was timely filed on his behalf. After no response was filed on defendant's behalf within the time allowed following proper service, plaintiff sought and obtained entry of default as to his complaint, which sought a "multi-million dollar judgment." The trial court set aside entry of default and granted defendant's motion for summary judgment based on insufficient evidence of breach of the standard of care and causation. The Court of Appeals affirmed. As to the entry of default, the Court of Appeals **[*31]** stated, "Although the evidence presented here indicates defendant was less than diligent in handling the suit filed against him, the facts also suggest plaintiff would not be significantly harmed by the delay if the entry of default were set aside, whereas defendant would suffer grave injustice if it were not." *Id. at 629, 644 S.E.2d at 628*. The Court noted that, in contrast to the facts of *Cabe v. Worley, 140 N.C. App. 250, 536 S.E.2d 328 (2000)*, "the merits of the defense available to defendant are undisputed," and the prospective "multi-million dollar judgment and damage to defendant's professional reputation are significantly greater than the $ 25,000 in damages facing the defendant in Cabe." Id. Said the Court, "we must weigh defendant's diligence against any harm to plaintiff from the delay or injustice to defendant if he is not allowed to defend the case." Id.

The law as set forth in Atkins compels the conclusion that the entry of default against Mr. Scott as to the Original Complaint should be set aside. Even if service of process upon Mr. Scott had been validly made, Mr. Scott believed - reasonably and in good faith - that service **[*32]** was not valid. Based on the preliminary injunction and the progress of this case from September 26, 2013 to the present, the delay in Mr. Scott's bringing the motion before the Court has caused the Plaintiffs no harm. Finally, if the default were left in place and, contrary to law, were deemed to have any force or effect, Mr. Scott would be barred from raising all valid jurisdictional and merits-based defenses to the allegations of the Original Complaint and face a judgment between $ 2.1 million and $ 6.2 million, following the flimsiest of service efforts by the State. On these facts, applicable law and basic considerations of due process compel the conclusion that, assuming arguendo the default entered against Mr. Scott is not void, it should be set aside.

Conclusion

Mr. Scott has not engaged in the acts and practices that are alleged in the Amended Complaint, so that he has not "create[d] a substantial connection" between himself and North Carolina. As a result, this Court lacks personal jurisdiction over Mr. Scott and the case against him must be dismissed. If the action against him is not dismissed, the entry of default against Mr. Scott as to the Original Complaint **[*33]** must be set aside. The entry was improper and void because service of the Original Complaint was never validly made upon Mr. Scott, and so there was no default. Even if that entry of default was not void ab initio, the filing and service of the Amended Complaint rendered it null and void. Finally, assuming

contrary to law that the entry of default as to the Original Complaint had any force or effect, there is good cause for setting it aside.

Dated: January 8, 2015.

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CERTIFICATE OF COMPLIANCE WITH BCR 15.8

This is to certify that the foregoing Brief is proportionally typed in 12-point Times New Roman font and that this Brief, including its headings, footnotes, quotations and case citations, but excluding its case caption on the first page of the Brief and its Certificates of counsel, contains no more than 7,500 words, based upon the word count reported by the undersigned counsel's word processing software (which reports that this Brief contains 6,174 words).

Date: **[*34]** January 8, 2014.

/s/ Michael J. Byrne
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CERTIFICATE OF SERVICE

I certify that on this day, I caused a copy of the foregoing Brief to be electronically filed with the North Carolina Business Court in accordance with Rule 6 of the Rules or Practice and Procedure for the North Carolina Business Court, which will automatically send notification of such filing to the following attorneys of record:

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