IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
APPELLATE CIVIL DIVISION AY

Case No.: 50-2020-AP-000042-CAXX-MB
Lower Tribunal Case No. 50-2019-SC-019779-XXXX-MB

QUEST DIAGNOSTICS, INC.
Appellants,

v.

CHERI HAYNIE,
Appellee.

ON APPEAL FROM THE COUNTY COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

Respectfully Submitted,

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PRELIMINARY STATEMENT

All references in this Brief to the Record on Appeal are designated by the symbol "R" followed by the page number(s): R. __-__.

STATEMENT OF THE CASE AND FACTS

Ms. Haynie, an injured employee covered under Florida's Workers' Compensation Law, sued Quest Diagnostics, Inc. ("Quest") for attempting to collect an illegitimate debt. R. 4-10. The parties agree that—despite being properly served and having more than seven weeks' notice—Quest was defaulted for failing to appear at the pre-trial conference.[1]

Quest moved to vacate the default arguing excusable neglect, a meritorious defense, and due diligence. R. 13-23. The court held a special set hearing and issued an unelaborated Order stating Quest "remains defaulted." R. 30-33. It later rendered Final Judgment for $1,256.48, reserving jurisdiction to determine the amount of attorney's fees. R. 104-105.

The Record does not contain a transcript of the proceedings and there is no error on the face of the default Order, Order denying Quest's Motion to Vacate, or Final Judgment. There is also nothing in the Record to support Quest's purported statements of fact that "the Lower Court determined Quest had shown excusable

[1] Quest incorrectly refers to a "clerk's default" throughout its brief and lower court filings. R. *passim*; Initial Brief *passim*. But it was the trial judge that entered the January 17th default Order.

neglect but had not shown a meritorious defense" or that "the Lower Court failed to properly consider the arguments raised in Quest's motion and the affidavit filed in support." Initial Brief, P. 2. The Record also does not show that any alleged failure by the court to consider the Affidavit was preserved for appeal. Moreover, Quest's representation of the lower court's proceedings is not correct.

SUMMARY OF ARGUMENT

Quest makes multiple statements about the proceedings that are not supported by the Record. And it does not claim there is error on the face of the Final Judgment or any order. Quest has not met its burden on appeal. Further, there are ample reasons to support that the trial court properly exercised its discretion in denying the Motion to Vacate. Quest's Affidavit improperly relies on hearsay and does not establish a meritorious defense or excusable neglect. The lower court's ruling should be affirmed.

ARGUMENT

Standard of Review

"[A] showing of *gross* abuse of a trial court's discretion is necessary on appeal to justify reversal of the lower court's ruling on a motion to vacate." *North Shore Hospital, Inc. v. Barber*, 143 So. 2d 849, 852 (Fla. 1962). *But see George v. Radcliffe*, 753 So. 2d 573, 575 (Fla. 4th DCA 1999) ("[A]lthough not articulated in *North Shore,* . . . . [I]t makes sense to use abuse of discretion, not gross abuse, as the standard of review, when the trial court has denied a motion to vacate.").

I. Quest relies on statements not supported by the Record and it has not met its burden on appeal.

In addition to the previously referenced unsubstantiated and uncited purported statements of fact, Quest relies on several other statements not supported by the Record. In its Summary of Argument, Quest states "the Lower Court overlooked Quest's evidence and arguments." Initial Brief, P. 4. In section one of the Initial Brief, Quest argues that the trial court improperly refused to accept that an affidavit can be sufficient for vacating defaults. Initial Brief, P. 5-6. And in section two, Quest states: "The Lower Court committed manifest error by refusing to consider Quest's uncontroverted testimony and its denials contained in the affidavit when finding Quest had not demonstrated a meritorious defense." Initial Brief, P. 8. These recitations are not supported by the Record. Moreover, they are not correct.

Interestingly, Quest's Initial Brief is only signed by Dale Golden. But he was not in attendance at the hearing on Quest's Motion to Vacate. Mr. Golden's associate, Charles McHale, appeared by phone. *See* R. 28-29. And again, there is no transcript.

Florida's Small Claims Rule 7.170 states: "If the defendant does not appear at the scheduled time, the plaintiff is entitled to a default to be entered by either the judge or clerk." The trial judge properly defaulted Quest for failing to appear. The court can exercise its discretion to set aside a default "if the moving party demonstrates: (1) excusable neglect in failing timely to file a response; (2) a meritorious defense; and (3) due diligence in requesting relief after discovery of the default." *Santiago v. Mauna Loa Investments, LLC*, 189 So. 3d 752, 758 (Fla. 2016) (internal citations omitted). "Failure to satisfy *any* of the three elements results in denial of the motion to vacate." *Id.* (Emphasis added.)

"In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." *Singh v. U.S. Bank, N.A. for Citigroup Mortgage Loan Trust, Inc.*, 223 So. 3d 436, 437 (Fla. 2d DCA 2017) (citing *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). "Without a record of the hearing, [the appellate court] cannot determine what issues were raised or argued by the parties during the hearing, and therefore, may reverse the decision 'only if an error of law appears on the face' of the order

under review." *G & S Development Corp. v. Seitlin*, 47 So. 3d 893, 895 (Fla. 3d DCA 2010). And "[a] reviewing court may not attribute a determination to the trial court's order based on the [appellate] court's own review of the underlying record." *Florida Highway Patrol v. Jackson*, 288 So. 3d 1179, 1182 (Fla. 2020).

Further, "[e]ven when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it." *Applegate*, 377 So. 2d at 1152.

There is nothing in the Record to support Quest's statements about why the court denied the Motion to Vacate. Quest also does not challenge the face of any order. And there is nothing that shows which issues, if any, were preserved for appeal. *See* § 90.104(1)(b), Fla. Stat. (2019) (A court may not find error when evidence is excluded unless "the substance of the evidence was made known to the court by offer of proof or was apparent.").

On appeal, Quest must show that the trial court abused its discretion. "Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (citation omitted).

Quest has not demonstrated that the trial judge's action was arbitrary, fanciful, or unreasonable. It has also not established that no reasonable person would take the

view adopted by the trial order. Quest has not met its burden on appeal. So, the trial court's ruling should be affirmed.

II. Ms. Haynie stated a cause of action.

In section three of the Initial Brief, Quest asserts that Ms. Haynie failed to adequately plead Quest's knowledge. But Quest ignores multiple paragraphs of the Complaint and it does not specify why this is pertinent to the issue on appeal.

In *Santiago*, the Florida Supreme Court reviewed a trial court's denial of a motion to vacate a default that was entered where a complaint allegedly failed to state a cause of action. *Santiago,* 189 So. 3d 752. The Third District Court of Appeal initially found that since the complaint failed to state a cause of action, a judgment based on the default was void, and the default must be set aside. *Id.* at 754-755, 757-758. But the Florida Supreme Court held that the Third District erred by failing to apply the proper standard to set aside a default—whether there is excusable neglect, a meritorious defense, and due diligence. *Id.* at 758. It was also error to conclude that a judgment based on a complaint that fails to state a cause of action is void. *Id.* at 755.

Regardless, Ms. Haynie stated a cause of action. Pursuant to Florida Small Claims Rule 7.050(a)(1), a complaint must concisely "inform the defendant of the basis and the amount of the claim." There is no dispute regarding the sufficiency of the amount claimed. And pursuant to paragraph eight of the Complaint, the suit is

based on section 559.72(9), Florida Statutes, which states: "In collecting consumer debts, no person shall: . . . Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate." R. 5. Notably, Quest does not dispute that it "improperly attempted to collect a consumer debt," as Ms. Haynie pleaded in paragraph fourteen of her Complaint. R. 6. Rather, Quest only claims a lack of knowledge and that the element of knowledge was not properly pleaded.

As to pleading knowledge, Paragraph twelve of the Complaint states: "Defendant, Quest, *knew* that Plaintiff was covered by Florida's Workers' Compensation Law." R. 5. (emphasis added). And paragraph nine describes that law: "Pursuant to Florida Statute section 440.13(13)(a), "[a] health care provider may not collect or receive a fee from an injured employee within this state, except as otherwise provided by [chapter 440]." R. 5. Paragraph ten alleges that Quest is a "health care provider." R. 5. And Exhibit A of the Complaint, an invoice from Quest, evidences that Quest even knew the name of Ms. Haynie's workers' compensation insurance carrier when they improperly billed her. R. 5, 8.

Quest apparently expects Ms. Haynie to provide evidence of its actual knowledge and prove that in her pleading. Initial Brief, P. 10. ("[The Complaint] does not evidence the requisite 'actual knowledge' necessary to plead and prove a § 559.72(9) claim against Quest.") Even though this is not required in the pleading phase of a case, Ms. Haynie did provide evidence of Quest's knowledge through

Exhibit A. *See Nielsen v. City of Sarasota*, 117 So. 2d 731, 733 (Fla. 1960) ("[I]n a civil case, a fact may be established by circumstantial evidence as effectively and as conclusively as it may be proved by direct positive evidence."); *Cable News Network, Inc. v. Black*, 45 Fla. L. Weekly D2296a (Fla. 4th DCA Oct. 7, 2020) ("'[A] plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence.' This includes an accumulation of contemporaneous documents and communications reflecting the defendant's knowledge or state of mind.") (internal citations omitted).[2]

Quest also asserts that Ms. Haynie tacitly admitted lack of knowledge in her pleading. Initial Brief, P. 10-11. But a tacit omission occurs by silence *after* someone else states something that a reasonable person would refute. *See* § 90.803(18)(b), Fla. Stat. (2019); C. Ehrhardt, Florida Evidence § 803.18b (2020 Edition) ("A tacit admission only occurs when the proponent introduces evidence from which the trial judge may find that the silence of the adverse party was intended as an assent to the statement."). Ms. Haynie has not tacitly admitted this issue. Rather, she pleaded knowledge and stated a cause of action. Further, as detailed in the following section, Quest did not properly raise this issue.

[2] Parenthetically, what health care provider provides non-emergency service or even makes an appointment with a potential patient without first confirming the source of payment? And if the payment source is insurance, what provider does not confirm the type of coverage before providing service?

III. Quest's Affidavit improperly relies on hearsay and does not establish a meritorious defense or excusable neglect.

To vacate a default, a defendant can demonstrate a meritorious defense by either "an unverified pleading or an affidavit." *Gibraltar Service Corp. v. Lone & Associates, Inc.*, 488 So. 2d 582, 584 (Fla. 4th DCA 1986). Excusable neglect must be demonstrated by "affidavit or other sworn statement." *Id*. Quest has not filed or proposed any pleadings. Instead, it relies on the Affidavit of Claudia C. Metz. But that is based on hearsay and does not establish a meritorious defense or excusable neglect.

In paragraphs three and four of the Affidavit, Ms. Metz claims her statements are based on her personal knowledge, as well as her review of Quest's business records. R. 20. She relies on an Exhibit A, which is allegedly Quest's notes, to support her assertion that Quest did not know this was a workers' compensation matter until after the account was sent to collections. R. 22. Despite Quest's references to this Exhibit in page three of the Affidavit and page seven of the Initial Brief, it is not attached to the Affidavit nor is it in the Record. And a witness cannot testify about the contents of records not in evidence. "While the business-records exception to the hearsay rule allows the admission of '[a] memorandum, report, record, or data compilation,' it does not authorize hearsay *testimony* concerning the contents of business records which have not been admitted into evidence."

Thompson v. State, 705 So. 2d 1046, 1048 (Fla. 4th DCA 1998) (citing § 90.803(6)(a), Fla. Stat. (1995)).

Quest relies on Ms. Metz' testimony about the contents of an apparent business record which is not in evidence to try to establish a meritorious defense. In other words, Quest relies on inadmissible hearsay to try to establish this critical issue.

The only other contentions in the Affidavit that could arguably pertain to a meritorious defense are found in paragraphs seventeen and eighteen. Paragraph seventeen states that the "Complaint does not allege [Quest] *knew* Plaintiff's debt was subject to Worker's Compensation." R. 22. This is a false statement of fact. Again, paragraph twelve of the Complaint states: "Defendant, Quest, knew that Plaintiff was covered by Florida's Workers' Compensation Law." R. 5. And paragraph eighteen of the Affidavit states that the Complaint "claims only that [Quest] could have learned that the debt was subject to Workers' Compensation if it had looked at United Heartland's website." R. 22. But this too is a false statement of fact. Contrary to the above-stated standard in *Gibraltar*, Quest did not file a pleading and its Affidavit does not support its claim of a meritorious defense.

Further, even if Quest's Exhibit A was attached, it would not be admissible under the business records exception to hearsay. Footnote one of the Affidavit states: "All documents reviewed in preparation of this Affidavit were made in the regular

course of [Quest's] business and it was the regular course of [Quest's] business to make such records within a reasonable time of the transaction or occurrence reflected in the documents." But section 90.803(6)(a), Florida Statutes, defines business records and the applicable foundation that must be met to introduce them as:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness.

Quest fails to lay the proper foundation in several ways. And "[i]f evidence is to be admitted under one of the exceptions to the hearsay rule, it must be offered in *strict* compliance with the requirements of the particular exception." *Yisrael v. State*, 993 So. 2d 952, 957 (Fla. 2008) (internal citation omitted).

Additionally, the Affidavit refers to contact between Quest's and Ms. Haynie's counsels. R. 21. Ms. Metz apparently repeats what she was "advised" about that. R. 21. But repeating what someone else said is generally hearsay. *See* § 90.801, Fla. Stat. (2019).

Quest also failed to establish excusable neglect.

"Before a trial judge may vacate a default, a corporate defendant must allege and prove excusable neglect of an officer or agent." *Scherer v. Club, Inc.*, 328 So. 2d 532, 533 (Fla. 3d DCA 1976) (citing *Winky's Inc. v. Francis*, 229 So. 2d 903, 906

(Fla. 3d DCA 1969)). Here, Ms. Metz states that she is a "Paralegal" for Quest. R. 21. According to the Affidavit, Quest apparently has (or at least had) a single "litigation person who was in charge of handling and processing lawsuits of this type." R. 21. That person retired at some undisclosed time "[a]t the end of 2019." R. 21. And Quest had not "fully implemented" its "transition to a new person" to undertake that position and responsibility. R. 21. This, and the holidays, led to the summons and complaint "being overlooked." R. 21. Ms. Metz does not "allege and prove the excusable neglect of an officer or agent." *Scherer*, 328 So. 2d at 533.

Further, because the exact circumstances constituting excusable neglect, mistake, or inadvertence are not clearly defined, the facts of each case are of "singular importance" in determining whether relief should be granted. *Schwab & Co., Inc. v. Breezy Bay, Inc.*, 360 So. 2d 117, 118 (Fla. 3d DCA 1978). "It is the duty of the trial court, not the appellate courts to make the determination of whether or not the facts constitute excusable neglect, mistake, or inadvertence sufficient to excuse compliance with the rules." *Id.*

In *Schwab*, the Third District found the trial court did not abuse its discretion in denying a motion to set aside a default as the defendant's reliance on its insurer to timely assert its defense was not excusable neglect. *Id.* And in *Santiago*, the Florida Supreme Court affirmed a trial court's decision to deny a motion to set aside a default where the defendant was served and called its attorney's office, but "took

no further action to assure a timely response to the complaint was filed." *Santiago*, 189 So. 3d at 758. Here, despite being timely served, Quest apparently did not make any calls or take any action until after the default was entered.

In *Bequer v. National City Bank*, 46 So. 3d 1199 (Fla. 4th DCA 2010), the Fourth District found a defendant's failure to explain what happened to the complaint and subsequent correspondence—even though it outlined policies and procedures in an affidavit—was not excusable neglect. In this case, not only did Quest's Affidavit not explain what happened to the Complaint after it was served, Quest did not outline its policies and procedures.

Comparing the Affidavit here with the one used to justify affirming an order vacating a default in *Plotkin v. Deatrick Leasing Co.*, 267 So. 2d 368 (Fla. 3d DCA 1972) provides further guidance. In *Plotkin*, the affidavit set forth that "the defendant is a national corporation and that it has an established procedure for the processing of all summonses and complaints which are served." *Id.* at 369. It also stated that the established procedure was not followed there because "the first knowledge the defendant had of the suit was a notice of default sent to it by certified mail." *Id.* The affidavit specified that despite having an experienced and knowledgeable manager, the summons and complaint were not forwarded to the corporation's insurance department. *Id.* And because the manager resigned and his whereabouts were

unknown, that defendant was unable to include what happened with the initial process in the affidavit. *Id.*

Quest's Affidavit does not provide the appropriate level of detail to make a finding of excusable neglect. It acknowledges being timely served with the complaint more than seven weeks before the pre-trial conference, but it does not provide evidence of a system, policy, or procedure to timely address legal issues. There is nothing indicating any protocol in the event the person responsible for handling and processing lawsuits gets sick, quits, or—as allegedly happened here—retires. (Consider too that retirees generally give notice prior to their last day of employment.) And despite Quest's Motion to Vacate claiming the default was because of a calendaring error, the Affidavit makes no mention of this. The Motion also states that the person who retired was "in charge of handling and processing all new lawsuits." R. 15.

Ultimately, Quest's position is that it had a person in charge of handling and processing lawsuits, that person retired, and Quest did not timely make a replacement or alternate arrangements. This is *not* excusable neglect. It is a lack of due consideration for service of process and the court's commands. Quest has not demonstrated a clerical or secretarial error, reasonable misunderstanding, system to ensure lawsuits are timely responded to, or any other excusable mistake. *Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103 (Fla. 4th DCA 1985).

Instead, its Affidavit evidences a lack of diligence. And "[a] party cannot obtain relief . . . 'solely by reference to that party's own lack of diligence.'" *Suntrust Mortg. v. Torrenga*, 153 So. 3d 952, 954 (Fla. 4th DCA 2014) (citation omitted). "While this court has been liberal in its application of the excusable neglect doctrine, relying on that doctrine should not be a litigation strategy." *Id.* at 954.

"The failure of a party to take the required steps necessary to protect its own interests, cannot, standing alone, be grounds to vacate judicially authorized acts to the detriment of other innocent parties." *John Crescent, Inc. v. Schwartz*, 382 So. 2d 383, 385 (Fla. 4th DCA 1980). "The law requires certain diligence of those subject to it, and this diligence cannot be lightly excused." *Id.*

CONCLUSION

Quest relies on multiple unsubstantiated statements about the proceedings and basis of the lower court's ruling. It does not provide a transcript and does not claim there is error on the face of any order. Quest has not met its burden. Further, the Record supports the trial court's decision to deny Quest's Motion to Vacate. Quest did not file or propose any pleadings. And its Affidavit improperly relies on hearsay and does not establish a meritorious defense. Quest also did not allege the excusable neglect of an officer or agent, and even if it had, Quest's position does not establish that issue. Ms. Haynie prays this Court affirms the lower court's Final Judgment and remands for further proceedings.

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to Dale T. Golden, Golden Scaz Gagain, PLLC, 201 North Armenia Avenue, Tampa, FL 33609-2303, dgolden@gsgfirm.com, Attorney for Appellant/Defendant, by e-mail via the Florida Courts E-filing Portal on October 12, 2020.

/s/ Evan M. Rosen

CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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