

IN THE CIRCUIT COURT, EIGHTEENTH
JUDICIAL CIRCUIT, IN AND FOR
SEMINOLE COUNTY, FLORIDA

AMICI SALON & SPA, LLC,

Plaintiff,

CASE NO.: 03-CA-2323-15L

vs.

MARTA BROWN, an individual and
M.A. SIMMONS, INC., doing business
as CAPELLO HAIR DESIGNERS,

Defendants.

DEFENDANT M. A. SIMMONS, INC.'S

VERIFIED MOTION TO SET ASIDE ENTRY OF DEFAULT,

OPPOSITION TO PLAINTIFF'S MOTION FOR FINAL JUDGMENT,

AND

SUPPORTING MEMORANDUM OF LAW

COMES NOW, Defendant M.A. Simmons, Inc., by and through its undersigned counsel and, files this Motion to Set Aside Entry of Default, Opposition to Plaintiff's Motion for Summary Judgment, and Supporting Memorandum of Law, pursuant to Rules 1.130(a), 1.140(b), 1.150, 1.500(d), and 1.540(b), Florida Rules of Civil Procedure, and in support thereof, states as follows:

BACKGROUND AND FACTS IN SUPPORT OF MOTIONS

1. On or around September 26, 2003, Plaintiff filed a Complaint incorrectly naming

Patty Hubbard, d/b/a Capello Hair Designers, Inc., an administratively dissolved corporation, as a defendant. Capello Hair Designers, Inc., was a Florida corporation dissolved on or around September 9, 2000, with which Patty Hubbard had nothing to do.

2. Patty Hubbard is one of the shareholders in M.A. Simmons, Inc., an active Florida corporation, which owns a beauty salon. She is also the President of M.A. Simmons, Inc.

3. Shanda Kozicki was the manager of the beauty salon owned by M.A. Simmons, Inc.

4. The Complaint is based on causes of action for breach of a confidentiality and non-competition agreement (restrictive covenant). Neither Patty Hubbard nor M.A. Simmons, Inc., is a party to the agreement. Neither Patty Hubbard nor M.A. Simmons, Inc., signed the agreement.

5. Plaintiff amended its Complaint on or about April 27, 2004. Plaintiff filed a "First Amendment to Complaint" modifying Count IV of the Complaint and, it appears, removing Patty Hubbard, d/b/a Capello Hair Designers, Inc., as a defendant, and naming M.A. Simmons, Inc. d/b/a Capello Hair Designers (referred to herein occasionally as "Simmons, Inc.") as a defendant, substituting it for Patty Hubbard.

6. Plaintiff's First Amendment to the Complaint contains a single cause of action (Count IV), presumably pleaded against Simmons, Inc., for "aiding, abetting and assisting" in violation of the covenant not to compete that the Plaintiff had with another person, Marta Brown.

7. Around the time the Plaintiff filed its Complaint in this matter, the manager of Simmons Inc.'s beauty salon, Shanda Kozicki, spoke with the Plaintiff's attorney, Mikel Carpenter, Esquire, one or more times regarding this matter.

8. Attorney Carpenter advised Ms. Kozicki that Amici Salon & Spa, Inc., was going sue her beauty salon (Simmons, Inc.) and was going to prevail at trial, so there was no use in Simmons, Inc., attempting to defend itself. He advised Ms. Kozicki that the beauty salon (Simmons, Inc.) had no defenses and it was futile to fight the matter. He also advised Ms. Kozicki that attempting to defend the case would just result in a greater award of attorney's fees against the beauty salon. Ms. Kozicki relayed these discussions with Plaintiff's counsel to Ms. Hubbard.

9. After the Complaint was filed, Ms. Hubbard asked Sharon Kozicki, as the manager of the beauty salon, to represent M.A. Simmons, Inc., in the litigation of this case, and Ms. Kozicki began to do so.

10. After the Complaint was filed, Ms. Kozicki had one or more additional discussions with Plaintiff's attorney, Mikel Carpenter, about the case. At no time did Mr. Carpenter ever advise Ms. Kozicki or M.A. Simmons, Inc., that they should get an attorney to represent it or that Ms. Kozicki could not represent it.

11. As a result, M.A. Simmons and its shareholders believed that M.A. Simmons, Inc., had properly responded for the purpose of raising available defenses, had answered the Complaint, had properly raised material defenses, and were going to be allowed to defend M.A. Simmons, Inc., at trial. Moreover, Ms. Kozicki participated in the litigation and the discovery on behalf of M.A. Simmons, Inc. They held this belief until August 9, 2004,

12. On or about August 9, 2004, Ms Kozicki appeared on behalf of M.A. Simmons, Inc., at a hearing in this case, before Judge Nancy Alley. During this hearing Ms. Kozicki was informed for the first time that she could not represent M.A. Simmons, Inc., and that M.A.

Simmons, Inc., was required to hire an attorney to appear for it in this case and defend it.

13. On the same day, August 9, 2004, M.A. Simmons, Inc., retained the undersigned law firm to represent it in this matter.

14. On August 11, 2004, undersigned counsel filed the attached Answer and Affirmative Defenses on behalf of M.A. Simmons, Inc. Exhibit "2."

15. Ms. Kozicki's and M.A. Simmons, Inc.'s failure to file a proper Motion to Dismiss and/or Answer and Affirmative Defenses, should be considered to be excusable neglect arising from Ms. Kozicki's status as a nonlawyer. She believed, as did M.A. Simmons, Inc., that she could and was properly representing the corporation.

16. Furthermore, at no time prior to the August 9, 2004, hearing did the opposing counsel or the Court advise M.A. Simmons, Inc. or Ms. Kozicki that she was not allowed to represent M.A. Simmons, Inc.

17. Had M.A. Simmons, Inc., been advised that it needed to retain counsel to represent it and had it retained counsel to represent it after being served in September 2003, counsel would have immediately recognized the valid, meritorious defenses that existed for M.A. Simmons, Inc. An attorney for Ms. Hubbard or M.A. Simmons, Inc., would have immediately filed the appropriate Motions to Dismiss and/or Answer and Affirmative Defenses to properly raise and preserve these on behalf of the Defendant. The fact that a nonlawyer beauty salon manager did not know how to do this should be seen as excusable neglect.

18. Furthermore, this constitutes a mistake on the part of M.A. Simmons, Inc., in that it did not know until the hearing before Judge Alley on August 9, 2004, that its manager, Shanda Kozicki, could not appear for it or represent it in these proceedings.

19. On June 7, 2004, a default was entered by the Clerk of Court against Defendant Simmons Inc., for failing to respond to the complaint.

20. Defendant M.A. Simmons, Inc., has a number of meritorious defenses in this case. Chief of these is the fact that the Plaintiff has failed to even plead a valid cause of action against M.A. Simmons, Inc., under Florida Law. **Accordingly, entry of any judgment against M.A. Simmons, Inc., based on what was pleaded by the Plaintiff will constitute reversible error.**

21. Among the other meritorious defenses of M.A. Simmons, Inc., is the fact that Plaintiff is seeking to enforce a restrictive covenant against M.A. Simmons, Inc. However, neither M.A. Simmons, Inc. nor Patty Hubbard was a party to the restrictive covenant nor did either one sign it. **Accordingly, Florida law, specifically Section 542.335(1)(a), Florida Statutes, prohibits the enforcement of the restrictive covenant against M.A. Simmons, Inc., or Patty Hubbard.**

22. Plaintiff has filed a Motion for Summary Judgment against Defendant Marta Brown. However, Plaintiff has not filed a Motion for Summary Judgment against Defendant M.A. Simmons, Inc. Instead, Plaintiff has filed a Motion for Entry of a Final Judgment against Defendant M.A. Simmons, Inc.

23. The present Motion and Opposition, as well as its supporting Memorandum of Law, and the attached exhibits, should be considered to be a response to and opposition to all pending motions by Plaintiff against this Defendant.

24. The Affidavit of Patty Hubbard, President of M.A. Simmons, Inc., in support of this Motion is attached. (Exhibit "1")

25. As shown by the Answer and Affirmative Defenses filed in this case (copy

attached as Exhibit "2"), which is incorporated herein by reference, a number of other meritorious defenses exist for Defendant M.A. Simmons, Inc., and it should be allowed to defend itself in this matter.

26. Additionally, this Defendant intends to file an additional affidavit, the affidavit of Shanda Kozicki, in further support of these Motions.

VERIFIED MOTION TO SET ASIDE ENTRY OF DEFAULT

27. Paragraphs 1 through 26 above are incorporated herein by reference.

28. These facts show that the entry of a default judgment some nine (9) months after the service of the Complaint on Patty Hubbard, was attributable to both an honest, explainable mistake on the part of M.A. Simmons, Inc. and Patty Hubbard, as well as because of excusable neglect of the Defendant. Furthermore, these facts show the existence of a number of meritorious defenses and that M.A. Simmons, Inc. is most likely to prevail in obtaining a judgment in its favor.

29. These facts demand that M.A. Simmons should be allowed its day in court pursuant to Article 1, Sections 21 and 22, of the Constitution of the State of Florida.

30. Moreover, equity and fairness require that M.A. Simmons, Inc., be afforded the opportunity to defend itself in this action.

31. Rule 1.500(d), Florida Rules of Civil Procedure, entitled "Setting Aside Default," permits the Court to set aside a default under circumstances such as we have in the present case.

Rule 1.540(b), Florida Rules of Civil Procedure, provides, in part:

On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, decree, order or proceeding for the following reasons: (1)

mistake, inadvertence, surprise or excusable neglect. . . .

The Court may also consider due diligence of the Defendant and equitable grounds.

32. The court's file reflects that a clerk's default was entered against Defendant by the Clerk of the Court on June 7, 2004. Defendant would show that this Motion to Set Aside the Entry of Default is brought within the reasonable time requirement of bringing such motions. Polani v. Payn for Use and Benefit of Prudential Prop. & Casualty Ins. Co., 654 So.2d 202 (Fla. 4th DCA 1995); Conidaris v. Credit Alliance Corp., 558 So.2d 523 (Fla. 5th DCA 1990).

33. Defendant would show that through mistake, inadvertence and excusable neglect, a response was not filed on behalf of Simmons Inc. Cinkat Transportation, Inc. v. Maryland Casualty Co., 596 So.2d (Fla. 3rd DCA 1992). Additionally, Defendant would show that it has a meritorious defense. An Affidavit of Ms. Hubbard, which is filed in support of this Motion, is attached hereto as Exhibit "1" and incorporated herein by reference.

34. Defendant would show that the Plaintiff would not be prejudiced by this Court's entering an order setting aside the Clerk's default. Further, any reasonable doubt should be resolved in favor of granting the Motion to Set Aside the Default at least in the absence of gross negligence by Defendant. Hunt Exterminating Co., Inc. v. Crum, 598 So.2d 113 (Fla. 2nd DCA 1992).

ACCORDINGLY, Defendant M.A. Simmons, Inc., respectfully requests the Court to set aside the Entry of Default against it and to to authorize and deem as properly filed its Answer and Affirmative Defenses as filed on or about August 11, 2004, allowing it to defend itself in this matter.

**M.A. SIMMONS, INC.'S VERIFIED OPPOSITION TO PLAINTIFF'S MOTION FOR
ENTRY OF FINAL JUDGMENT**

35. Paragraphs 1 through 26 above are incorporated herein by reference.

36. These facts also show that a final judgment should not be entered against M.A. Simmons, Inc., in this case.

ACCORDINGLY, Defendant M.A. Simmons, Inc., respectfully requests the Court to **deny** Plaintiff's Motion for Entry of Final Judgment against it and to authorize and deem as properly filed Defendant M.A. Simmons, Inc.'s Answer and Affirmative Defenses as filed on or about August 11, 2004, allowing it to defend itself in this matter.

MEMORANDUM OF LAW IN SUPPORT OF MOTIONS

Legal authority in support of setting aside the Entry of Default against M.A. Simmons, Inc., was included and discussed in paragraphs 29 through 33 above. It is incorporated herein by reference.

Additionally, Rule 1.500(d), Florida Rules of Civil Procedure, entitled "Setting Aside Default" permits the Court to set aside a default under circumstances such as we have in the present case. Rule 1.540(b), Florida Rules of Civil Procedure, provides, in relevant part: "On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment. . . ." The Court may also consider due diligence of the Defendant and equitable grounds.

These Motions are brought within the reasonable time requirement of bringing such motions. Polani v. Payn for Use and Benefit of Prudential Prop. & Casualty Ins. Co., 654 So.2d

202 (Fla. 4th DCA 1995); Conidaris v. Credit Alliance Corp., 558 So.2d 523 (Fla. 5th DCA 1990). Within twenty-four (24) hours of the August 9, 2004 hearing before Judge Alley, Defendant M.A. Simmons had retained the undersigned law firm and the undersigned law firm had filed its Notice of Appearance in the case. Within two (2) days of the August 9, 2004 hearing, undersigned counsel had filed an Answer and Affirmative Defenses on behalf of Defendant M.A. Simmons, Inc., as well as responses to discovery.

Despite the intervention of the two (2) hurricanes which struck Florida and the fact that the Courts were closed for what would have been two (2) regular business days because of the disaster, Defendant M.A. Simmons, Inc., has now filed these Motions, well within ten (10) days of the August 9, hearing. Because the Courts were closed from August 14 through August 18 inclusive, this should certainly constitute timely filing of these Motions.

Through mistake, inadvertence and excusable neglect, legal representation was never obtained and a formal response or answer to the Plaintiff's Complaint was never filed by Defendant, M.A. Simmons, Inc. An Affidavit of Patricia Hubbard, President of Capello Hair Designers, which is filed in support of this Motion, is attached hereto as Exhibit "1" and incorporated herein by reference.

Furthermore, on the face of the Complaint, several defenses are shown in that this Defendant never signed the contract which is the subject of this litigation and Count IV of the Complaint does not state a cause of action recognized by Florida law. Moreover, Count IV, the only Count pleaded against this Defendant, requests both equitable relief and monetary damages in the same count. This internal inconsistency renders Count IV repugnant and nullity. Many other meritorious defenses are raised in the attached exhibits. This Defendant has meritorious

defenses in light of the sole count pleaded against it.

In the case of Rice v. James, 740 So.2d 7 (Fla. 1st DCA 1999), the District Court reversed an order by the lower court which refused to set aside a judgment entered upon default. The appellant asserted a meritorious defense in sworn pleadings accompanying her motion to set aside the judgment. The appellees suggested that the appellant's credibility is suspect and that she would not ultimately prevail on the facts. The District Court emphasized the importance on pursuing contested matters at a trial on the merits. "Florida courts have a longstanding policy favoring adjudications on the merits. . . ." Rice v. James, at 8.

Article 1, Section 21, of the Constitution of the State of Florida states:

Access to courts. -- The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Under Florida law, a corporation is considered to be a person and this Constitutional right applies to corporations such as Defendant M.A. Simmons, Inc. Article 1, Section 22, of the Constitution of the State of Florida, affords persons in Florida the right to a trial by jury. This also applies to corporate persons.

Defendant M.A. Simmons should not be deprived of its right to its day in court lightly. Under the existing circumstances, it should be allowed to defend itself in this action.

WHEREFORE, Defendant M.A. Simmons, Inc., respectfully requests the Court set aside the Entry of Default against it, deny Plaintiff's Motion for Final Judgment, authorize and deem as properly filed Defendant M.A. Simmons, Inc.'s Answer and Affirmative Defenses (as filed and served on or about August 11, 2004), and to allow it to defend itself in this matter.

VERIFICATION

I the undersigned, do hereby swear that I am Patty Hubbard, shareholder and President of Defendant M.A. Simmons, Inc., that the statements of fact above in paragraphs 1 through 24 are

true and correct and are based on my direct knowledge thereof, and that I am a competent adult.

PATTY HUBBARD
President
M.A. SIMMONS, INC.

NOTARIZATION

The foregoing affidavit was sworn to and subscribed before me, an officer duly authorized in the State of Florida, to take oaths and acknowledgments, this _____ day of August, 2004, by Patty Hubbard, who is personally known to me and who did take an oath and who executed the foregoing, and who acknowledged the foregoing to be freely and voluntarily executed.

(Stamp/Seal)

Notary Public
Print Name: _____
My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail, postage prepaid to: Mikel W. Carpenter, Esquire, Attorney for Plaintiff Amici Salon & Spa, LLC, 218 Annie Street, Orlando, Florida 32806; and Marta Brown, Defendant (pro se), 1033

Crystal Bowl Circle, Casselberry, Florida 32707 on this _____ day of August, 2004.

GEORGE F. INDEST III, ESQUIRE

Florida Bar No.: 382426

JASON L. HARR, ESQUIRE

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ATTORNEYS FOR DEFENDANT,

M.A. SIMMONS, INC.

ATTACHMENTS:

Exhibit "1" - Affidavit of Patty Hubbard

Exhibit "2" - Answer and Affirmative Defenses dated 8/11/2004

JLH

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