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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

FIERCE INVESTMENTS LTD., Plaintiff, v. AZTEC COPPER INC., an Arizona corporation; RON ARNOLD, an individual; and CHRISTINE REEVES, an individual, Defendants.	No. CV2018-003675 **RESPONSE TO AZTEC COPPER INC.'S MOTION TO SET ASIDE DEFAULT** (Assigned to Hon. Daniel J. Kiley)

Default was entered against Defendants Aztec Copper Inc. ("Aztec" or the "Company"), Ron Arnold, and Christine Reeves on April 9, 2018 (ten days after Plaintiff Fierce Investments Ltd. ("Fierce") filed its Application for Entry of Default) in this shareholder action. Fierce's claims were not for a sum certain, but rather sought judicial enforcement of its right to inspect the books and records of the Company and for a declaration that Arnold and Reeves breached their fiduciary duty as officers and directors of the Company for refusing to allow Fierce to inspect the Company's books and records. Therefore, Commissioner Lindsay Abramson set a

default hearing on Fierce's request for a judgment. On the eve of the default hearing, Aztec[1] hastily filed a Motion to Set Aside Default and a Motion to Vacate Default Hearing to avoid entry of a final judgment. While the mere filing of these motions required the Commissioner to vacate the default hearing and transfer the matter to this Division, Aztec's motions do not automatically set aside the default that was long ago entered against Defendants. Indeed, Aztec's Motion to Set Aside Default is wholly inadequate and does not even attempt to establish the basic grounds for setting aside a default. Specifically, Aztec does not (and cannot) show there is good cause to set aside the default; its Motion is devoid of any reasonable excuse for appearing late; and its bare (and incorrect) assertion that Fierce is not a shareholder is based on hearsay, not facts, and is not a meritorious defense.

Aztec's Motion to Set Aside Default is deficient under the plain language of Ariz. R. Civ. P. 55(c), as well as the analysis set forth in numerous Arizona cases regarding when a default may be set aside. This Court should not countenance Aztec's cavalier attempt to circumvent these well-established principles. Therefore, Fierce respectfully requests that the Court deny Aztec's Motion to Set Aside Default and enter the proposed Judgment lodged with Fierce's Motion to Set Default Hearing and also filed concurrently herewith.

FACTUAL BACKGROUND

This is a shareholder action brought by Fierce, a registered holder of 40,000,000 common shares of Aztec, to obtain judicial enforcement of its right to inspect the books and records of the Company pursuant to A.R.S. § 10-1602.

On or about October 15, 2002, Fierce acquired 40,000,000 shares in Fierce pursuant to an agreement between Fierce, Ruero International and Compania Minera Ruero, as sellers, and Aztec and Prime Aztec de Mexico as purchasers (the "Aztec Agreement"). Since becoming a shareholder in the Company, Fierce has become concerned about whether the shares it owns

[1] Defendants Ron Arnold and Christine Reeves did not move to set aside the default and, therefore, a default judgment should be entered against them.

have been improperly diluted. It is also concerned about other corporate issues that it has raised in correspondence to the Company. In addition, Fierce has legitimate concerns about whether the Directors and Officers of the Company are properly complying with judgments entered against the Company and/or may have engaged in misconduct.

On January 26, 2018, Fierce made a demand to inspect the books and records of Aztec (the "Demand"). A copy of the Demand in attached as Exhibit A. The Demand was promptly delivered to the statutory agent for the Company and to its business address provided in the records of the Arizona Corporation Commission. In its Demand, Fierce sought to inspect certain books and records for "the purposes of obtaining an informed understanding of the true financial condition of the Company; assessing the value of the Fierce Shares; and determining whether the affairs of the Company have been conducted appropriately under applicable law." Among other things, Fierce sought:

- the articles or restated articles of incorporation of the Company;
- bylaws or restated bylaws of the Company;
- resolutions adopted and/or voted on by the board of directors creating one or more classes or series of shares;
- minutes of all shareholders meetings, and records of all action taken by shareholders of the Company without a meeting;
- written communications to any or all shareholders;
- financial statements prepared in accordance with A.R.S. § 10-1620;
- any agreement among shareholders under A.R.S. § 10-732;
- minutes of any meeting of the board of directors and records of action taken by the shareholders or board of directors without a meeting;
- accounting records of the Company;
- the record of shareholders of the Company; and
- the Company's most recent financial statements showing in reasonable detail its assets and liabilities and the results of its operations.

[Ex. A]

On February 21, 2018, a Canadian lawyer responding on behalf of Aztec asserted that an entity incorporated under Canadian law, "1829752 Alberta Inc.," is the successor-in-interest to Aztec Copper Inc. A copy of the Response is attached as Exhibit B. The Response asserted that 1829752 Alberta Inc. is incorporated under Alberta statutes and is not subject to the Arizona statute cited in the Demand. Therefore, the request to inspect books and records was rejected. Prior to the Response, Fierce had no information about 1829752 Alberta Inc. and this new information only heightened Fierce's legitimate concerns about the financial condition and management of the Company.

On March 6, 2018, shortly after its Demand was rejected, Fierce filed the instant action pursuant to A.R.S. § 10-1604, seeking an order from this Court for the inspection and copying of the records requested in the Demand. Fierce's Complaint also asserts a claim against the Directors and Officers of Aztec, Ron Arnold and Christine Reeves, for breach of fiduciary duty because Arnold and Reeves – who are represented by the same Canadian attorney who responded for Aztec – breached their fiduciary duty by failing to permit inspection of the company's books and records upon receiving the Demand. Arnold and Reeves also breached their fiduciary duty by failing to comply with a Bahamian judgment that has been entered against the Company. Fierce claims that the individual Defendants' breach of fiduciary duty has damaged and is continuing to damage Fierce.

The Summons and Complaint were served on Aztec on March 7, 2018. Aztec failed to answer or otherwise respond to the Complaint by March 27, 2018, the deadline provided for by Ariz. R. Civ. P. 12(a)(1)(A)(i). Therefore, on March 29, 2018, Fierce filed an Application for Entry of Default pursuant to Ariz. R. Civ. P 55(a) (the "Application"). Aztec was served with the Application on April 2, 2018. Pursuant to Ariz. R. Civ. P. 55(a)(4), the default became effective on April 12, 2018, ten days after the Application was filed.

Because Fierce's Complaint does not seek a sum certain, it filed a Motion to Set Default Hearing on July 27, 2018. On August 2, Commissioner Lindsay Abramson set a default hearing

for August 22, 2018. One day before the hearing, Aztec filed a Motion to Set Aside Default. Aztec's Motion was filed more than ***five months*** after Fierce's Complaint was served, and more than ***four months*** after default was entered.

Aztec's belated Motion to Set Aside Default is less than two pages, and specious on its face. It is not accompanied by any admissible evidence and rests on conclusory (and inaccurate) assertions. It should be denied.

ARGUMENT

Aztec bears the burden of showing "good cause" to set aside the default that was entered approximately five months ago. *See State ex rel. Corbin v. Marshall*, 161 Ariz. 429, 431–32, 778 P.2d 1325, 1327–28 (App.1989) ("The moving party has the burden of demonstrating good cause for vacating the entry of default—that is, grounds such as mistake, inadvertence, excusable neglect and due diligence."). Aztec never acknowledges its burden, and comes nowhere close to meeting it.

A. Default Was Properly Entered Against Aztec

Rule 55(a) provides that, "[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided in these rules, default may be obtained" after the party seeking default files an application for default and provides notice as provided by the rules. "The filing of the application for default constitutes the entry of default. A default is effective 10 days after the application for entry of default is filed." Ariz. R. Civ. P. 55(a)(4).

Here, Aztec failed to answer or otherwise respond to the Complaint. Fierce filed an application for default on March 29 and served it on Aztec's statutory agent on April 2. Thus, the default became effective on April 12, 2018. Aztec does not dispute that default was properly entered against it.

B. Aztec's Motion to Set Aside Is Insufficient

It was only when final judgment was about to be entered that Aztec appeared. But, even then, its Motion to Set Aside Default is insufficient.

Rule 55(c) provides that a "court may set aside an entry of default ***for good cause***, and it may set aside a final default judgment under Rule 60(c)." (Emphasis added.) The Supreme Court of Arizona has consistently held that in considering a request to set aside an entry of default under Rule 55(c), the "good cause" requirement is the same as the requirements for setting aside a judgment under Rule 60(c). *DeHoney v. Hernandez*, 122 Ariz. 367, 371, 595 P.2d 159, 163 (1970); *Harper v. Canyon Land Dev. LLC*, 219 Ariz. 535, 200 P.3d 1032 (App. 2008).

To set aside a default that has been entered, the moving party has the burden to show (i) that it acted promptly in seeking relief from entry of default, (ii) that its failure to file a timely answer was due to either mistake, inadvertence, surprise or excusable neglect, and (iii) that it had a meritorious defense, supported by sufficient facts ***offered under oath***. *Richas v. Superior Court of Ariz. in and for Maricopa Cty.*, 133 Ariz. 512, 652 P.2d 1035 (1982); *see also Webb v. Erickson*, 134 Ariz. 182, 185–86, 655 P.2d 6, 9–10 (1982) (holding that, to satisfy Rule 55(c), the moving party must show each of the following: (1) his actions were "excused by one of the grounds enumerated in Rule 60(c)"; (2) "he acted promptly in seeking relief from the entry of default"; and (3) "he had a meritorious defense"); *Evans v. C & B Dev. Corp.*, 417 P.2d 372, 373 (App. 1966) ("It is requisite that the party asking for relief show (1) mistake, inadvertence, surprise or excusable neglect, and (2) a substantial and meritorious defense and of what it consists, under oath."). Here, Aztec does not satisfy any of these requirements, much less all of them.

1. <u>Aztec did not take prompt action in seeking relief</u>.

Aztec's Motion to Set Aside ignores the issue of promptness. Aztec does not claim that it acted promptly, nor could it when it waited almost six months after the Complaint was filed and almost five months after default was entered to seek relief from the Court. The moving party

has the burden to adequately explain the delay in order for the court to exercise its discretion to set aside a default. *See Richas*, 133 Ariz. at 515, 652 P.2d at 1038 ("The burden of explanation is upon the party seeking to set aside the entry of default.") (*citing Sloan v. Florida–Vanderbilt Dev. Corp*., 22 Ariz. 572, 574, 529 P.2d 726, 728 (App. 1974)). Aztec does not provide ***any*** explanation for its delay.

But even if Aztec had not conceded this point, the Court need look no further than the undisputed facts in this case to determine that Aztec did not act promptly: (1) service was properly made on Aztec; (2) Aztec is a corporate entity represented by counsel; and (3) counsel for Defendants was aware of the filings in this case – and, in fact, communicated with counsel for Fierce about the Demand – yet, Aztec did nothing for months to defend the action.

In short, Aztec did not take prompt action in seeking relief from the entry of default. This alone requires denial of the Motion. *See Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 309, 666 P.2d 49, 54 (1983) (holding that because defendant failed to establish one of the elements necessary to obtain relief under Rule 55(c), the court need not consider the other requirements).

2. <u>Aztec does not demonstrate excusable neglect in failing to answer or otherwise respond to Fierce's Complaint</u>.

Aztec also ignores that it bears the burden to show excusable neglect. It is black letter law that there must be some legal justification <u>and</u> a substantial factual basis to set aside a default. *See Richas*, 133 Ariz. at 514. Even where the moving party submits an affidavit, the Supreme Court has held that, "[t]he affidavit or testimony must be based upon personal knowledge and must allege facts sufficient to establish what occurred and explain why it should be found excusable." *Id*. at 515; see also *Western Coach Corp. v. Mark V Mobile Homes Sales, Inc*., 23 Ariz. 546, 534 P.2d 760 (App. 1975) (holding that affidavit that presented no factual explanation at all as to why statutory agent neglected to forward summons and complaint to principal and which was not based on personal knowledge was insufficient to establish "excusable neglect" on part of agent).

Here, Aztec made no effort to provide any legal justification for its failure to file a timely answer. Aztec also failed to supply any factual basis—much less sworn testimony in an affidavit—that would warrant setting aside the default. Because Aztec has not demonstrated that excusable neglect caused its failure to answer or otherwise respond, its Motion must be denied.

3. Aztec does not satisfy its burden to show that it has a substantial and meritorious defense.

The only argument raised in Aztec's Motion is that "there is a meritorious defense for Aztec, namely, that Plaintiff [purportedly] is not a shareholder and has no basis for asking this Court to enter the Orders requested." [Motion at 2] However, Aztec provided only self-serving second-hand hearsay, with no affidavit, to support its claim of a meritorious defense. Aztec now claims [at 1] that Aztec cancelled Fierce's 40,000,000 shares in 2006.[2] In support of this bare assertion, Aztec attaches an unauthenticated, self-serving "summary of a corporate review of Aztec's current shareholders, done by Harder & Company, a Canadian law firm located in Vancouver, B.C." [Motion at 2] According to Aztec, this document, purportedly prepared on April Fool's Day in 2011, establishes that Fierce is no longer a shareholder of Aztec. But an unauthenticated, self-serving "summary" purportedly prepared by Aztec's own counsel comes nowhere close to satisfying Aztec's burden of showing facts under oath that would be sufficient to demonstrate a meritorious defense. *See Richas*, 133 Ariz. 512, 652 P.2d 1035.

Aztec's unwillingness to provide testimony under penalty of perjury to support its belated claim about share cancellation is understandable; one of the few documents that Fierce does possess are minutes from the November 2009 Aztec shareholder meeting. At this meeting, some three years after Aztec purportedly cancelled Fierce's shares (according to the argument made

[2] Aztec also asserts [at 1] that Fierce has not come forward with evidence that it owned the 40,000,000 shares, ignoring that (1) Fierce has no obligation to supply evidence at the pleading stage and (2) Aztec concedes that Fierce was issued the shares, since there would have been no reason for Aztec to have (purportedly) canceled the shares in 2006 had they not been issued!

in its Motion), Fierce was recognized as an Aztec shareholder. A copy of the meeting minutes are attached as Exhibit C. The existence of these 2009 minutes – which flatly contradict Aztec's claim about share cancellation – underscores that Arizona requires sworn testimony to set aside a default because some parties will say or do almost anything to avoid judgment being entered, and the Court should not waste its time when that party has already failed to answer in a timely manner.

CONCLUSION

Aztec has not met its burden of showing "good cause" to set aside the default entered five months ago. It makes no effort to satisfy two of the three elements required under Arizona law to set aside a default, and makes only a minimal and inadequate effort to satisfy the third element, in support of which it supplies self-serving hearsay rather than the requisite sworn testimony. Aztec's motion should be denied. Fierce is entitled to the relief sought in its Complaint and respectfully requests that the Court sign the Judgment previously lodged with the Court.

Respectfully submitted this 10th day of September, 2018.

COPPERSMITH BROCKELMAN PLC

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