

**IN THE CIRCUIT COURT OF JASPER COUNTY MISSOURI
AT JOPLIN**

CITY OF JOPLIN, MISSOURI, ET AL.,
PLAINTIFFS

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v.

CASE NO. 15AO-CC00088

**WALLACE BAJJALI DEVELOPMENT
PARTNERS, L.P, ET AL.**
DEFENDANTS

DEFENDANT’S MOTION TO SET ASIDE DEFAULT JUDGMENT PURSUANT TO RULE 74.05(D)

COMES NOW, Defendant Wallace Bajjali Development Partners, LP (“WBDP”), and pursuant to Rule 74.05(d), moves this Court to set aside the Default Judgment adjudicating Defendant WBDP liable to Plaintiffs for the sum of \$1,475,000.00. In support, WBDP would show the Court as follows:

Legal Standard

“Upon motion stating facts constituting a meritorious defense and for good cause shown, an interlocutory order of a default or default judgment may be set aside.” Rule 74.05(d). Default judgments are not favored by the courts of this state - given the “distaste” the judicial system has for a judgment by default. *Hoskin v. Younger Cemetery Corp., Inc.* 838 S.W.2d 476, 479 (Mo. App. E.D. 1992) (citing, *Gibson by Woodall v. Elley*, 778 S.W.2d 851, 854 (Mo. App. 1989)). “[A]ppellate courts favor a trial on the merits rather than default, particularly when a substantial defense exists.” *Id.* (citing, *Plybon v. Benton*, 806 S.W.2d 520, 524 (Mo. App. 1991)). This court may exercise discretion in ruling on WBDP’s motion, but “the discretion not to set aside a judgment is a good deal narrower than the discretion to set aside said judgment.” *Id.* (citing, *Schulte v. Venture Stores*, 832 S.W.2d 13, 15 (Mo. App.1992)).

WBDP’s Motion and evidence establish that: (1) WBDP has a meritorious defense to Plaintiffs’ claims; and (2) good cause exists (the reason WBDP failed to timely answer the Original Petition and Summons) for setting aside the Default Judgment. It was solely by reason of WBDP’s mistake or conduct (that was neither intentionally nor recklessly designed to impede the judicial process) that WBDP did not timely answer the lawsuit. Accordingly, pursuant to Rule 74.05(d), the Default Judgment entered against WBDP must be set aside.

Evidence in Support of Rule 74.05(d) Motion

In support of this Motion, WBDP provides the following Affidavits and Exhibits which are attached and incorporated by reference for all purposes.

- Exhibit A** Affidavit of Costa Bajjali, the corporate representative of WBDP;
- Exhibit A-1** Plaintiffs' Termination Letter sent to WBDP (s. 2/3/15);
- Exhibit A-2** WBDP's Registration with the Missouri Secretary of State (f. 9/24/12);
- Exhibit B** Affidavit of Brian Hickman, the corporate representative of CT Corporation System;
- Exhibit C** Court's Docket Entry Sheet, including the following documents:
 - Exhibit C-1** Plaintiffs' Original Petition (f. 3/25/15);
 - Exhibit C-2** Summons issued to WBDP (f. 3/27/15);
 - Exhibit C-3** April 3, 2015 letter from CT Corporation System, concerning attempted service on WBDP (f. 4/8/15);
 - Exhibit C-4** Return of Service for WBDP (f. 4/10/15);
 - Exhibit C-5** Motion for Default Judgment (f. 5/7/15);
 - Exhibit C-6** Default Judgment (s. 5/13/15);
 - Exhibit C-7** Hearing Transcript (s. 6/16/15); and
 - Exhibit C-8** Undelivered Envelope (Judgment) addressed to WBDP (f. 6/5/15).

WBDP requests that the Court take Judicial Notice of **Exhibits C**, and **C-1** to **C-8**, which can be readily verified as part of the Court's file, maintained by the Court Clerk.

Basis to Set Aside Default Judgment

Good cause exists warranting that this Court set aside the Default Judgment. Not only does WBDP demonstrate that it has a meritorious defense, but WBDP also proves that the only reason it failed to timely answer the lawsuit is because WBDP, *through no fault of its own*, was never actually served, and never actually received the Summons and Original Petition. Plaintiff attempted to deliver the Summons and Petition to WBDP's *former registered agent*, CT, which immediately returned the process to Plaintiffs' counsel with a letter of explanation, copied to the Court. In that letter CT states: (1) it had discontinued providing statutory representation services as WBDP's registered agent; (2) it did not have a valid forwarding address for WBDP; and (3) it had not, in fact, sent WBDP any of the papers (the Summons and Petition) concerning the lawsuit.

At that point, Plaintiffs easily could have effected service on WBDP (as a foreign entity authorized to do business in Missouri which no longer maintained a registered agent) by delivering the Summons and Petition to the Secretary of State. Instead, and with knowledge that WBDP had never received the Summons and Petition, Plaintiffs improperly obtained a Default Judgment against WBDP – at a time when WBDP was unaware that these claims were being adjudicated.

Procedural History

Plaintiffs City of Joplin (“COJ”) and Joplin Redevelopment Corporation (“JRC”) filed this lawsuit against WBDP and its two principals, David Wallace (“Mr. Wallace”) and Costa Bajjali (“Mr. Bajjali”) on March 25, 2015. **Ex. C-1** (Plaintiffs’ Original Petition). A Summons was issued for each of the three Defendants, but Plaintiffs only sought to effect service on Defendant WBDP. **Ex. C** (Docket Entry Sheet); **Ex. C-2** (WBDP Summons). On April 3, 2015, the Summons issued for Defendant WBDP was delivered to its former registered agent, CT Corporation System (“CT”) in Clayton, Missouri. **Ex. C-4** (WBDP Return of Service); **Ex. B**, at ¶ 4. On that same day, CT sent written notice to Plaintiff’s counsel, with the notice copied to the Court, advising both that:

We are returning documents served received for [WBDP].

According to our records, our statutory representation services were discontinued and all process sent to the last known address on our records was returned as undeliverable.

Since we do not have any other address in our files to which we can forward the papers, we are returning them to you and filing resignation of agent in all states where permitted.

Please understand that we take no position as to the validity of the service. We are merely stating that after reasonable efforts, we do not have any address to which to forward the papers.

Ex. C-3 (Letter from CT). Included with the letter which CT sent by regular mail to Mr. Blanchard was the Summons and Original Petition which CT had received from the process server.

Ex. B, at ¶¶ 4-5; **Ex. C-3**

It is undisputed that CT did not forward the Summons and Petition to WBDP, since those items were promptly returned to Plaintiffs’ counsel. **Ex. B**, at ¶¶ 4-5. The copy of CT’s letter to Plaintiff’s counsel (which was mailed to the Court) was received and filed by the Court Clerk on

April 8, 2015. **Exs. C; C-3.** On April 10, 2015, Plaintiffs' counsel filed the Summons / Return of Service with the Court Clerk, representing that Defendant WBDP had been properly served. **Exs. C; C-4.** Then, on May 7, 2015, Plaintiffs filed a Motion for Default Judgment, in which Plaintiffs again specifically represented that WBDP "was properly served with process on April 3, 2015." **Exs. C; C-5.** Thus, despite Plaintiffs' actual knowledge that CT had never delivered or even attempted to deliver the Summons and Original Petition to WBDP; and that CT had advised Plaintiffs that CT's statutory representations services (as WBDP's registered agent) had been "discontinued", Plaintiffs told the Court that WBDP had been "properly served".

Plaintiffs presented their Motion for Default Judgment to the Court on May 13, 2015. During the hearing, Plaintiffs once again represented to the Court that Defendant WBDP had been "served through their agent, CT Corporation" (**Ex. C-7**, p. 3 (12-19)) - without ever calling the Court's attention to the fact that CT had not forwarded the Summons to WBDP, and that WBDP had never actually received the Summons. At the time these statements were made to Judge Crane, Plaintiffs - or at least their counsel - were well aware that WBDP had never actually received the Summons and Original Petition because CT specifically stated: (1) it had discontinued providing statutory representation services as WBDP's registered agent; (2) it did not have a valid address to forward the process. More importantly, CT actually returned the documents to Plaintiffs' counsel. **Ex. B**, at ¶¶ 4-5; **Ex. C-3** ("We are returning documents . . ."). Had Plaintiffs' counsel advised Judge Crane (who was subsequently recused) that under these circumstances, Plaintiffs *knew* that WBDP had never actually received the Summons and Original Petition, Plaintiffs' Motion would most likely have been denied. Instead, apparently unaware of the defective process, the Court entered a Default Judgment against WBDP, adjudicating it liable to Plaintiffs for \$1,475,000.00 in damages **Ex. C** (Docket Entry Sheet); **Ex. C-6.**

WBDP filed a Motion for New Trial, which the Court denied. Plaintiffs' remaining claims against Mr. Wallace and Mr. Bajjali individually have never been adjudicated, as the Summons issued to each has never been served. **Ex. C.**

Good Cause Exists, Warranting that the Default Judgment be Set Aside

In order to set aside an interlocutory order of default or default judgment, Rule 74.05(d) requires that the movant establish good cause. “Good cause includes a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process.” *Id.* Good cause exists in this case because of what can only be deemed a clerical error which occurred at the office of CT, WBDP’s former registered agent. As a consequence, it is undisputed that Defendant WBDP never actually received the Summons and Original Petition, nor was it advised that service had even been attempted on CT. **Ex. B**, at ¶ 6; **Ex. A**, at ¶ 6. Thus, WBDP was denied the opportunity to timely answer the lawsuit and assert its defenses to Plaintiffs’ claims. In addition, WBDP was denied the right to assert its compulsory counterclaims,¹ and the opportunity to possibly remove this case to Federal Court. Moreover, although Plaintiffs actually knew (by virtue of CT’s letter) that WBDP had never received the Summons and Petition, Plaintiffs failed to call this significant

¹ Rule 55.32(a) states:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The Supreme Court has repeatedly recognized that the clear purpose of this rule is “to serve as ‘a means of bringing all logically related claims into a single litigation, through the penalty of precluding the later assertion of omitted claims.’” *State ex rel. J.E. Dunn, Jr. & Associates, Inc. v. Schoenlaub*, 668 S.W.2d 72, 75 (Mo. banc 1984) (quoting, *Cantrell v. City of Caruthersville*, 359 Mo. 282, 221 S.W.2d 471, 474 (1949) (emphasis added).

The Supreme Court has often spoken of the underpinnings of the compulsory counterclaim rule utilizing terms usually associated with res judicata, noting that a particular claim was “barred” by the failure to assert it as a counterclaim. As the court of appeals stated in taking this approach in *Beasley v. Mironuck*, 877 S.W.2d 653, 656 (Mo.App. E.D.1994):

The compulsory counterclaim rule is simply the codification of the principles of res judicata and collateral estoppel. Claims and issues which could have been litigated in a prior adjudicated action are precluded in a later action between the same parties or those in privity with them.

Id. at 656. *See also Elam v. City of St. Ann*, 784 S.W.2d 330, 333 (Mo.App. E.D.1990) (res judicata and compulsory counterclaim, although not identical, “overlap to the extent that one commentator refers to the compulsory counterclaim as a form of ‘claim preclusion by rule’”). Missouri is by no means alone in treating the compulsory counterclaim rule as a special application of the principles of res judicata. Rule 55.32 is based on Federal Rule 13(a). Where, as here, the Missouri and federal rules are essentially the same, federal precedents constitute persuasive, although not binding, authority. *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 820 (Mo. banc 2000). In the instant case, WBDP’s compulsory counterclaims include, *inter alia*, its claim that the COJ breached the Master Predevelopment Agreement by failing to timely pay WBDP approximately \$1.4375MM, which the COJ has now very publicly acknowledged it owes to WBDP. (This fee is based on WBDP’s 5.75% of the Library Project’s \$25MM value.)

matter to the Court's attention. As set forth below, the series of events which resulted in WBDP (1) never receiving the Original Petition and Summons; and (2) being unaware that service had even been attempted (and that WBDP was possibly required to answer the lawsuit) were solely caused by mistake or conduct that is not intentionally or recklessly designed to impede the judicial process.

In their Petition, Plaintiffs identify WBDP as a Texas limited partnership authorized to conduct business in Missouri; and identify CT as WBDP's registered agent in Missouri. **Ex. C-1**, pp.1-2, at ¶¶ 3-4. Upon filing the Petition, Plaintiffs requested that a Summons be issued for WBDP, identifying CT as the registered agent. **Ex. C-2**. In the Summons, Plaintiffs incorrectly identified WBDP's Texas address (to which process was to be forwarded) as an incomplete address (missing the suite number) where WBDP had maintained its office back in 2011 (13135 Dairy Ashford Road [Suite 150] Sugar Land, Texas 77478) (the "2011 Office Address"). **Ex. C-2**. *More than three years before this lawsuit was filed*, WBDP had relocated its office from the 2011 Office Address, moving to its new office address (13131 Dairy Ashford Drive, Suite 175, Sugar Land, Texas 77478) (the "Correct Office Address"). **Ex. A**, at ¶ 3. Notably, in September of 2012, when WBDP filed its Registration with the Missouri Secretary of State, it properly identified the Correct Office Address as its Texas address. **Ex. A**, at ¶ 5; **Ex. A-2**. In fact, between late 2011 and early 2015, the only address that WBDP maintained in Texas is the Correct Office Address. **Ex. A**, at ¶¶ 3-4. And, between late 2011 and early 2015, Plaintiffs and WBDP communicated with one another frequently. Consequently, Plaintiffs were well aware that the Correct Office Address was WBDP's proper address in Texas during this time period. **Ex. A**, at ¶ 4.

By January of 2015, as a direct consequence of Plaintiffs' failure to pay WBDP money which the COJ now concedes it owes, WBDP was forced to close its Texas office located at the Correct Office Address. **Ex. A**, at ¶ 3. Before WBDP's lease for space at the Correct Office Address ended on January 31, 2015, WBDP established a forwarding address with the United States Postal Service to cause all mail addressed to WBDP at the Correct Office Address to be timely forwarded to the forwarding address (9119 Highway 6 Suite 230-313 Missouri City, Texas 77459) (the "Forwarding Address"). **Ex. A**, at ¶ 3. After January 21, 2015, WBDP has received all of its mail at the Forwarding Address (including mail which the USPS properly forwarded from

the Correct Office Address). *Id.*

By no later than February 3, 2015, more than one month before this lawsuit was filed, Plaintiffs knew that the Forwarding Address was WBDP's proper mailing address, because that is the address where Plaintiffs' termination letter was delivered to Mr. Bajjali, as the President of WBDP. **Ex. A**, at ¶ 4; **Ex. A-1**. In addition, Plaintiffs identify the Forwarding Address in their Original Petition. **Ex. C-1**, p. 2, at ¶ 8.

Nevertheless, Plaintiffs filed with the Court a Return of Service concerning the Summons and Original Petition which had been delivered to CT, a company that had discontinued providing statutory representation services to WBDP on January 1, 2015. **Ex. C-4**; **Ex. B**, at ¶¶ 4-5. At the time of filing, Plaintiffs had actual knowledge that CT made no attempt to send the Summons and Petition to WBDP: CT specifically advised Plaintiffs' counsel that WBDP had never been served, and CT was no longer was providing statutory representation services to WBDP. **Ex. C-3**. In fact, CT had returned the documents (the Summons and Original Petition) to Plaintiffs' counsel. **Ex. B**, at ¶¶ 4-5. Thus, despite knowing that: (1) WBDP had not, for many years, maintained its Texas office at the 2011 Office Address; (2) CT had never forwarded the process to WBDP; and (3) CT had stated unequivocally that it had never forwarded the process and was no longer providing statutory representation services for WBDP, Plaintiffs nevertheless moved for, and obtained, the Default Judgment. **Exs. A** at ¶¶ 3-5; **A-1**; **A-2**; **B**; **C-3**; **C-4**; **C-5**; and **C-6**.

Prior to May 22, 2015, the date when WBDP received a copy of the Default Judgment, WBDP had no knowledge that a Summons had been issued to WBDP or delivered to CT. **Ex. A** at ¶ 6. WBDP never received any communication from CT, Plaintiffs, or Plaintiffs' counsel that the Original Petition and Summons were issued or to be served upon WBDP, and WBDP never received the Summons and Petition from CT. *Id.*; **Ex. B**, at ¶¶ 4-6. Consequently, WBDP was unaware of any obligation to file an Answer or other responsive pleadings; therefore, it did not. **Ex. A**, at ¶ 6. As a result, WBDP was denied the opportunity to respond to the lawsuit. *Id.* In fact, because Mr. Wallace had sought bankruptcy protection, WBDP believed that the case was stayed. **Ex. A**, at ¶ 7. And, had the Court Clerk not mailed a copy of the Judgment to Mr. Bajjali at the Forwarding Address, WBDP would never have received notice of the Judgment, since the address provided by Plaintiffs' counsel was the 2011 Office Address (without a suite number) which WBDP had not used in more than three years. **Exs. A** at ¶ 6; **C-8** (establishing that Notice of the

Judgment was mailed to WBDP at the 2011 Office Address (albeit an incomplete address – omitting the suite number), and subsequently returned to the Clerk as undeliverable). Finally, WBDP was unaware that CT had ceased providing statutory representation services for WBDP in the State of Missouri. **Ex. A**, at ¶ 6.

While the detailed explanation set forth above may initially seem confusing, the net result is quite simple.

- At the time Plaintiffs filed the lawsuit, they identified WBDP’s Texas address as the 2011 Office Address (missing the suite number) – an address which WBDP had not used in more than three years.
- Immediately after Plaintiffs delivered the Petition and Summons to CT, CT advised Plaintiffs in writing that CT had discontinued providing statutory representation services as WBDP’s registered agent.
- Immediately after Plaintiffs delivered the Petition and Summons to CT, CT advised Plaintiffs in writing that CT did not forward the process to WBDP because it did not have WBDP’s valid address.
- Immediately after Plaintiffs delivered the Petition and Summons to CT, CT returned those items to Plaintiffs’ counsel, noting that CT did not forward the process to WBDP because it did not have WBDP’s valid address.
- On April 8, 2010, the Court received CT’s letter noting that: (1) CT had discontinued providing statutory representation services as WBDP’s registered agent; (2) CT had not forwarded the process to WBDP; and (3) CT had returned the process to Plaintiffs’ counsel.
- At the time Plaintiffs moved for the Default Judgment, Plaintiffs were aware that: (1) the address they had given the Court and the CT was an invalid address; (2) CT had discontinued providing statutory representation services as WBDP’s registered agent; (3) CT had not forwarded the Summons and Petition to WBDP; and (4) the Summons and Petition were mailed back to Plaintiffs’ counsel.²
- At the time Plaintiffs moved for the Default Judgment, there was no reasonable basis for Plaintiffs to assume or conclude that WBDP was even aware that it might be obligated to file an Answer or other response pleadings in the lawsuit.

² Not to put too fine a point on the matter, but counsel had an ethical duty to the Court to make known the fact that Defendant did not have actual knowledge of the attempted service of process concerning the lawsuit. Rule 4-3.3(a) applies to all *ex-parte* proceedings, including a motion for default judgment, and states: “In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.”

- At the time Plaintiffs moved for the Default Judgment, WBDP had no knowledge that it might be obligated to file an Answer or other responsive pleadings, or that Plaintiffs' claims were being adjudicated.

Consequently, the Default Judgment which the Court entered against WBDP must be set aside because WBDP had absolutely no knowledge of the Summons and Petition, or that it had been delivered to CT. Similarly, WBDP was unaware of any obligation to file an Answer or other responsive pleadings.

A motion to set aside a default judgment is treated as an independent action requiring an independent judgment of the court: Review is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976); *Pyle v Firstline Transport. Sec., Inc.*, 230 S.W.3d 52, 57 (Mo. App. W.D. 2007). The court may exercise discretion in its decision, but "the discretion not to set aside a judgment is a good deal narrower than the discretion set aside said judgment." *Hoskin v Younger Cemetery Corp, Inc.*, 838 S.W.2d 476, 479 (Mo. App. E.D. 1992) (citing, *Schulte v. Venture Stores*, 832 S.W.2d 13, 14 (Mo. App. 1992)). The reason for this directive is the distaste the court system holds for default judgments. *Gibson by Woodall v. Elley*, 778 S.W.2d 851, 854 (Mo. App. 1989). Courts favor a trial on the merits instead of a default, particularly when a substantial defense exists. *Plybon v. Benton*, 806 S.W.2d 520, 524 (Mo. App. 1991). Thus, appellate courts are more likely to interfere when the trial court has denied the motion to set aside. *Schulte*, 832 S.W.2d at 15.

In *Pyle*, the appellate court articulates the standard warranting that a default judgment be vacated:

Under Rule 74.05(d), a default judgment may be set aside "[u]pon motion stating facts constituting a meritorious defense and for good cause shown." . . . In other words, it is contingent upon the movant to (1) file his motion within a reasonable time, (2) show a meritorious defense, and (3) show good cause for failure to answer the original summons.

Pyle, 230 S.W.3d at 57 (citing, *In re Marriage of Macomb*, 169 S.W.3d 191, 193 (Mo. App. 2005)). The *Pyle* case is very instructive: The court properly reversed the trial court's denial of the defendant's motion to vacate, finding sufficient evidence of a meritorious defense, and good cause - because the summons *which had been served upon CT* was forwarded to the defendant, but subsequently misfiled by a clerical worker at Defendant's office. *Id.* at 61.

“Good cause” is defined as “a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process.” Rule 74.05(d). As the court notes in *Pyle*, good faith mistakes can constitute good cause warranting that the default judgment be vacated even though a party has negligently failed to timely file an answer. *Pyle*, 230 S.W.3d at 58.

Good cause should be interpreted liberally not only to prevent a manifest injustice, but also to avoid a threatened one, especially in cases tried without a jury where evidence on only one side is presented.

Id. (citing, *Heintz Elec. Co. v. Tri Lakes Interiors, Inc.*, 185 S.W.3d 787, 793 (Mo. App. 2006)). The court concluded that good cause existed because even though the defendant’s registered agent, CT, was properly served, the summons and petition which were delivered to the defendant’s office were subsequently misfiled by a clerical worker. *Pyle*, 230 S.W.3d at 58. In comparison with the facts in this case, *even if the Court deems that CT had not discontinued providing representation services as WBDP’s registered agent, and was properly served*, CT never actually forwarded the Summons and Original Petition to WBDP. **Ex. B**, at ¶ 6; **Ex. A**, at ¶ 6. Moreover, CT promptly returned the documents to Plaintiffs’ counsel and *told him* that CT had not forwarded the documents to WBDP. **Ex. B**, at ¶¶ 4-6; **Ex. C-3**. If good cause exists in a case when CT receives a summons and petition, forwards it to the defendant, and the defendant’s clerical worker loses it; then good cause must exist in a case when CT receives the process, returns it to Plaintiffs’ counsel, advises Plaintiffs’ counsel and the Court that the process was never delivered, and no one disputes that the defendant (WBDP) did not receive the process. Document handling mistakes constitute good cause warranting the default judgment be set aside. “Indeed, clerical errors or misplacement of documents is frequently the reason for which Missouri courts find good cause for failure to answer.” *Pyle*, 230 S.W.3d at 58 (citing, *Heintz*, 185 S.W.3d 787; *Winsor v. Terex-Telelect-Inc.*, 43 S.W.3d 460 (Mo. App. 2001), *overruled on other grounds by McElroy*, 156 S.W.3d at 401; *Billingsley v. Ford Motor Co.*, 939 S.W.2d 493 (Mo. App. 1997)).

In the instant case, the evidence raises a reasonable inference that the mistake (CT’s failure to forward the process to WBDP or even advise WBDP of the service attempt) was caused by a clerical person and involved mere inadvertence. When, as here, there is no evidence that the conduct was intentionally or irresponsibly designed to impede the judicial process, the matter should be regarded as establishing good cause. *Pyle* at 59 (citing, *Myers v. Pitney Bowes, Inc.*, 914

S.W.2d 835, 839 (Mo App. 1996)).

It is important that Plaintiffs' counsel was not only aware that CT did not forward the Summons and Original Petition to WBDP, but CT also immediately returned those original documents to Plaintiffs' counsel, with an explanation as to why they were being returned. **Ex. B**, at ¶¶ 4-5. Thus, CT timely informed Plaintiffs that WBDP had never actually received the Petition and Summons, and Plaintiffs' had actual knowledge that WBDP had not been properly served. In a case affirming the trial court's denial of the motion to vacate, the court rejected the defendant's due process argument because there was no evidence of technical compliance coupled with knowledge that the defendant had not been served. *Sieg v Int. Environmental Mgmt., Inc.*, 375 S.W.3d 145 (Mo. App. W.D. 2012). The defendant argued violation of the due process requirement under *Murphy v. Helena Rubinstein Co.*, where the U.S. District Court for the district of New Jersey concluded that due process was violated. 234 F.Supp. 893, 895 (D.N.J. 1964), *Sieg*, 375 S.W.3d at 156. Rejecting the argument, the court stated:

A plaintiff's technical compliance with an objectively reasonable notice procedure fails to satisfy due process *when the plaintiff actually knows* that the defendant did not receive notice of the lawsuit.

Sieg, 375 S.W.3d at 156. Citing a U.S. Supreme Court decision, the court emphasized the difference when a plaintiff *knows* that the defendant did not actually receive notice. *Id.* (citing, *Jones v. Flowers*, 547 U.S. at 229-34, 126 S.Ct. 1708. That is the precise circumstance here. By its letter which CT delivered to Plaintiffs' counsel, CT not only advised Plaintiffs and the Court that the documents had not been forwarded to WBDP, CT also returned those documents to Plaintiffs' counsel. *See also Preferred Laser Services, Inc. v. Abate*, 117 S.W.3d 678 (Mo. App. E.D. 2003)(applying a different procedural rule, the court set aside the judgment, noting the court's mistaken belief that the notice had been properly sent to the defendant's correct address – when the notice was sent to an old address and was returned as undeliverable).

As demonstrated above, good cause exists warranting that the Default Judgment be set aside. WBDP was unaware that a Summons had ever been issued, or delivered to CT. Not only did CT not forward the Summons and Petition to WBDP, those original documents were promptly returned to Plaintiffs' counsel, who was specifically advised that CT had never provided the documents to WBDP. Given these circumstances, it was Plaintiffs' counsel's duty to bring this

matter to the Court's attention rather than seeking the Default Judgement. Clearly having received notice that CT had discontinued providing statutory representation services, Plaintiffs could have effected service through the Secretary of State. *See Ex. A-2* ("The Secretary of State is appointed agent for service of process if the foreign limited partnership fails to maintain a registered agent.")³

WBDP has a Meritorious Defense, Warranting that the Default Judgment be Set Aside

Rule 74.05(d) also requires that the WBDP state facts establishing a meritorious defense. To demonstrate a meritorious defense, it is not necessary to present extensive and airtight evidence. *Pyle*, 230 S.W.3d at 60 (citing, *Heintz*, 185 S.W.3d at 791). WBDP need only make "some showing of at least an arguable theory of defense." *Id.* The term "meritorious defense" has been interpreted liberally – meaning "any factor likely to materially affect the substantive result of the case." *Id.* at 792 (quoting, *Tinsley v. B & B Engines, Inc.*, 27 S.W.3d 859, 861 (Mo. App. 2000)):

This concept is not intended to impose a high hurdle, but is meant to allow the case to be decided on its merits where there are legitimate issues to be considered. A party satisfies the requirement if he or she sets forth allegations which, if supported by evidence, would defeat or adversely affect the plaintiff's claim. Whether the evidence is credible is to be determined *after* the default judgment is set aside at a subsequent trial on the merits.

Pyle, 230 S.W.3d at 60 (citing, *Heintz*, 185 S.W.3d at 792)(citations omitted).

The dispute between Plaintiffs COJ and JRC and Defendant WBDP arise from two contracts (a Master Predevelopment Agreement and a Land Assemblage Disposition and Management Services Agreement). Both contracts (attached as Exhibits A and B to Plaintiffs' Original Petition) are between 40 and 50 pages. **Ex. C-1.** The crux of the dispute (as pled by the Plaintiffs) is the allegation that WBDP failed to honor its obligations under the contracts. **Ex. C-1.**

³ It is significant that the address which WBDP registered and maintained on file with the Missouri Secretary of State is the Correct Office Address (13131 Dairy Ashford Drive, Suite 175, Sugar Land, Texas 77478). *See Ex. A-2.* Thus, had Plaintiffs properly sought to effect service through the Missouri Secretary of State (based upon CT's notification that it had discontinued providing statutory representation services), pursuant to the January 21, 2015 forwarding order filed with the U.S.P.S., the process would have been forwarded to WBDP at the Forwarding Address. In its Orders entered on August 20, 2015 and August 28, 2015, this Court erroneously concluded, "Service of Process on the Secretary of State would have also been fruitless in that a copy of the judgment mailed to Defendant by the Circuit Clerk at the address listed on the registration filed at the Secretary of State's office was returned as undeliverable." In fact, the judgment copy mailed by the Circuit Clerk was sent to the 2011 Office Address (provided by Plaintiffs' counsel), and was not sent to the Correct Office Address as disclosed in WBDP's registration with the Secretary of State. *See Ex. C-8* (Notice of Judgment addressed to WBDP at 2011 Office Address returned as undeliverable); **Ex.A-2** (WBDP registration with Missouri Secretary of State reflects Correct Office Address).

As set forth below, not only does WBDP have a meritorious defense to Plaintiffs' claims, WBDP has compulsory counterclaims it intends to assert. **Ex. A**, at ¶ 8. WBDP honored its obligations (or was excused from further performance): The COJ and JRC failed to honor their obligations.

WBDP entered into the Master Predevelopment Agreement ("Master Agreement") with Plaintiffs COJ and JRC. **Ex. A**, at ¶ 9. WBDP entered into the Land Assemblage Disposition and Management Services Agreement ("Land Agreement") with JRC. **Ex. A**, at ¶ 9. Under the Master Agreement, WBDP was to provide pre-development and development services to the COJ and JRC, including assistance in obtaining project funding through state and federal programs, as well as public / private partnerships. *Id.* In consideration for such services, WBDP was to be paid a fee, based upon a percentage of each project developed. In total, approximately 19 distinct projects were identified. WBDP spent thousands of man-hours providing services under the Master Agreement. To facilitate this work, WBDP deployed resources from its Texas office, as well as establishing a Joplin office with four full-time employees. *Id.*

Originally, in negotiating the Master Agreement, WBDP requested it be paid by the COJ and JRC as services were provided and expenses incurred. **Ex. A**, at ¶ 10. The COJ and JRC mandated that WBDP be compensated by way of a development fee (a percentage of each project's value) only when projects were approved. *Id.* The COJ and JRC also agreed to reimburse WBDP for 50% of its "Pursuit Costs" (capped at \$1,000,000.00), with the remaining amounts due when projects were approved or completed. Ultimately, WBDP agreed to these terms - conditioned upon the COJ granting WBDP a right of exclusivity; as well as a limitation preventing the COJ and JRC from using (without WBDP's express consent) proprietary information which WBDP had developed. (Article XI of the Master Agreement). In addition, the Master Agreement provided substantial penalties for early termination (Section 8.4 of the Master Agreement). *Id.*

WBDP incurred and submitted to the COJ and JRC more than \$2,000,000.00 in "Pursuit Costs." **Ex. A**, at ¶ 11. Of the damages awarded under the Default Judgment, \$1,000,000.00 constitutes Pursuit Costs which WBDP incurred and paid on the COJ and JRC's behalf. *Id.* For reasons set forth below, WBDP is not only entitled to retain these Pursuit Costs which the COJ and JRC had previously paid, but also recover the remaining Pursuit Costs which WBDP incurred and which the COJ and JRC have not yet paid. *Id.*

Concerning the Land Agreement, the JRC was obligated to pay WBDP a Transfer Fee and reimburse WBDP for actual expenses concerning any transactions closed. **Ex. A**, at ¶ 12. WBDP spent countless man-hours identifying and aggregating property to be acquired by the JRC, and properly earned those fees for services provided. *Id.* \$475,000.00 of the damages awarded under the Default Judgment constitute Transfer Fees for services which WBDP provided. *Id.* For the reasons set forth below, WBDP is not only entitled to retain the Transfer Fees which the JRC has paid, but also recover remaining amounts due under the Land Agreement.

Prior to the COJ or JRC's termination letter dated February 3, 2015, neither entity ever claimed or contended that WBDP had failed to perform any material obligation under the Master Agreement or the Land Agreement. **Ex. A**, at ¶ 13. Conversely, during the same time period, WBDP advised the COJ and JRC on numerous occasions that they had failed to honor their obligations under the Master Agreement or the Land Agreement. *Id.* For example, although the COJ and JRC approved the \$25MM Library Project (meaning WBDP was entitled to receive its development fee under the Master Agreement), the COJ and JRC refused to remit to WBDP the amount (\$1.4375MM) owed, causing WBDP to suffer undue financial hardship. The COJ's failure to timely remit this Library Fee prevented WBDP from continuing to provide services under the Master Agreement and Land Agreement. Oddly enough, the COJ now concedes it owes this amount, and is offering to pay the funds directly to WBDP's lender – Prime. *Id.* The COJ and JRC's material breaches of the parties' agreements excused WBDP's further performance. Under these circumstances, neither the COJ nor the JRC had a right to terminate the contracts without first remitting the compensation to which WBDP is entitled under Section 8.4 of the Master Agreement. *Id.*

Moreover, the JRC and COJ repeatedly violated the Exclusivity Provision in the Master Agreement by taking a number of projects away from WBDP, and allowing other entities to pursue them. **Ex. A**, at ¶ 14. The COJ, on its own or through incentives provided to other entities, repeatedly violated the Exclusivity Provision in the Master Agreement, by advancing the following specific projects: the Principal Reduction Program (J-HAP), Multi-Purpose Event and Sports Complex; and the Hotel & Convention Center. These actions were in direct violation of the Exclusive Developer clause in the Master Agreement, and constitute a material breach of that agreement. In doing so, the COJ and JRC also violated the prohibition on use of information

developed by WBDP by using it and providing it to others without first obtaining WBDP's express written consent. *Id.*

WBDP's Joplin employees, and many of WBDP's Texas employees, including Mr. Bajjali and Mr. Wallace spent countless man-hours working with the City Manager, Mark Rohr, and many other individuals in the COJ and the JRC for the express purpose of acquiring and developing opportunities to facilitate the COJ's recovery from the devastating effect of the tornado. **Ex. A**, at ¶ 15. The critical work which WBDP performed included orchestrating and/or assisting the COJ and the JRC in its efforts to identify state and federal funding opportunities; such as Tax Increment Financing, Super TIF Legislation, the Community Block Development Grant (US Department of Housing and Urban Development), and the Economic Development Administration; and working with a variety of other professionals, such as Stifel Nicolaus (bond consultants) and Dentons (attorneys) in these efforts, and in the creation and implementation of additional programs, such as the Principal Reduction Program a/k/a the Joplin Homeowners Assistance Program (J-HAP). All of these efforts by WBDP and its employees and consultants provided substantial benefits to the COJ and JRC, for which WBDP was never compensated. *Id.*

The facts set forth above establish that WBDP has both meritorious defenses to the COJ and JRC's claims, and compulsory counterclaims which WBDP intends to assert to recover damages caused by the COJ and JRC's actions. **Ex. A**, at ¶ 16. More succinctly, WBDP invested substantial resources, including thousands of man hours and the up-front payment of hundreds of thousands of dollars in pursuit costs (advanced on behalf of the COJ and the JRC) in order to establish a comprehensive redevelopment plan. **Ex. A**, at ¶¶ 9-16. WBDP's incentive in committing these resources was the COJ and JRC's contractual obligation to timely reimburse WBDP for advances, and timely pay the percentage fees, as individual projects were approved. *Id.* WBDP's right to be the Exclusive Developer for the duration of the development assured it that the money WBDP invested could be recovered in the long term, as additional projects were approved. WBDP successfully worked with the COJ and JRC to identify and obtain millions of dollars in financing opportunities through both state and federal funding and public / private structures. The COJ and JRC's subsequent breaches of the parties' agreements - by failing to timely pay WBDP its fees on approved projects (such as the Library Project); and repeatedly violating the Exclusivity Provision (by awarding projects and sharing proprietary information with others) not only excused

WBDP from further performance, these actions actually prevented WBDP's performance. *Id.* These events, coupled with Plaintiffs' ultimate decision to prematurely terminate the agreements (without cause and without remitting the required termination fees) establish the factual bases for WBDP's defenses to Plaintiffs' claims (and Defendant WBDP's compulsory counterclaims).

Conclusion

The circumstances of this case warrant that the Court set aside the Default Judgment entered against WBDP. Good cause exists – in that WBDP was completely unaware that the Summons had been issued or any service attempted upon its former registered agent, CT. And, CT promptly returned the papers to Plaintiffs' counsel, putting him and the Court on notice that CT had discontinued providing statutory representation services, and WBDP had not been notified of the Summons and Petition. WBDP has a meritorious defense to Plaintiffs' claims. Because WBDP has not only been denied the right to respond to the lawsuit and assert its defenses, but also the opportunity to assert its compulsory counterclaims, and possibly elect to remove the case, the Motion to Set Aside the Default Judgment should be granted.

Prayer

WHEREFORE, Defendant Wallace Bajjali Development Partners, LP moves the Court to grant this motion and set aside the Default Judgment; allow Defendant WBDP to timely file pleadings in response to Plaintiffs' Original Petition; and order such other and further relief to which Defendant is entitled.

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I hereby certify that a copy of this Motion was served through the Missouri E-filing system on this 30th day of October 2015 to all parties of record.

/s/ William J. Fleischaker