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BARBARA A.
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CLERMONT COUNTY, OHIO

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

TOTAL QUALITY LOGISTICS, LLC	:	
Plaintiff	:	**CASE NO. 2014 CVH 001621**
vs.	:	**Judge McBride**
LONE STAR DEDICATED LLC	:	**DECISION/ENTRY**
Defendant	:	

Bricker & Eckler LLP, Jeffrey P. McSherry, counsel for the plaintiff Total Quality Logistics, LLC, 9277 Centre Pointe Drive, Suite 100, West Chester, Ohio 45069.

Davidson Law Offices Co., L.P.A., Timothy A. Garry, Jr., counsel for the defendant Lone Star Dedicated LLC, 127 N. Second Street, P.O. Box 567, Hamilton, Ohio 45011.

This cause is before the court for consideration of a motion to set aside default judgment filed by the defendant Lone Star Dedicated LLC.

The court scheduled and held an evidentiary hearing on the motion on June 3, 2015. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The plaintiff Total Quality Logistics, LLC (hereinafter referred to as "TQL") filed its complaint in the present action on December 10, 2014. TQL brought forth several claims in its complaint including claims that the defendant Lone Star Dedicated LLC (hereinafter referred to as "Lone Star") breached its Broker/Carrier Agreement with TQL and that it was negligent in failing to transport freight so that it arrived safely and undamaged at its intended destination.[1]

Certified mail service was sent to Lone Star in care of its registered agent David Magarin, Sr. at 853 Poncho Lane, Haslet, Texas 76052. The certified mail service was returned to the Clermont County Common Pleas Court Clerk's Office as "unclaimed" on January 16, 2015.[2] Ordinary mail service was then sent to the same address on January 26, 2015 and was never returned to the clerk's office.

TQL filed a motion for default judgment on March 23, 2015. The motion for default judgment included the affidavit of Marc Bostwick, an operational sales manager at TQL, who attests that, during the transit of a load of granite from Texas to Florida, the carrier was involved in an accident and the load of granite spilled onto the road and broke, resulting in a total loss of the load of granite.[3] The affidavit states that Lone Star agreed to transport the granite on May 21, 2014 but does not state the date of the accident.[4] Bostwick further attests that under the Broker/Carrier Agreement, Lone Star

[1] Complaint at ¶¶ 4-23.
[2] Certified Mail Return, filed January 16, 2015.
[3] Motion for Default Judgment, Exhibit 1 at ¶¶ 1 and 5.
[4] Id. at ¶ 5.

is responsible for the loss and damage to the granite.[5] Bostwick's affidavit goes on to state that TQL paid its customer $58,237.60 for the product on May 21, 2014 and that the principal balance still due to TQL from Lone Star is $50,447.60 plus interest.[6] A "Standard Form for Presentation of Loss and Damage Claim" was submitted by TQL along with the Bostwick affidavit which shows the following calculation:

Labor Charges	$ 3,410.00
Product Loss	$58,237.60
Less Payment	-$ 2,000.00
Minus Open Invoices	-$ 9,000.00
Total Amount Due	$ 50,447.60

The court granted default judgment on March 26, 2015.[7] On April 2, 2015, Lone Star filed the present motion to set aside the default judgment.

At the evidentiary hearing on the motion, Lone Star presented the testimony of its president, David Magarin, who testified that the Poncho Lane address was the correct address for Lone Star at all times relevant to the present motion. However, he testified that he was never served with the complaint and summons in the present case. He did recall receiving a notice from the mail carrier that there was a piece of certified mail for him at the post office but, by the time he went there to claim it, the letter had already been returned to the sender. Magarin testified that Lone Star's office is open five days a week but that he often travels out of town on business. He testified that he did not receive any other mail which included the complaint and summons and that the first mail from the court he received was the motion for default judgment. He stated that he called an attorney several days later.

[5] Id. at ¶ 5.
[6] Id. at ¶¶ 6-7.
[7] Entry Granting Default Judgment, filed March 26, 2015.

David Magarin testified that the load of granite at issue was picked up on May 22, 2014[8], which is after the date Bostwick states in his affidavit that he paid the customer for the damaged granite. He stated that he never received a copy of the loss and damage claim form and that the labor charges contained therein had never been invoiced to his company. He testified that he does not believe that TQL paid the customer $58,000 for the damaged granite.

In his testimony, Magarin acknowledged that the Broker/Carrier agreement requires that the load being carried cannot be damaged in transit. He also acknowledged that granite fell off the truck and broke. He attempted to testify that he believes only part of the granite fell off the truck but he was not present at the accident scene and therefore did not have personal knowledge of this fact. Magarin testified that he is contesting the amount owed to TQL because he does not know what the customer charged TQL for the granite, but he also acknowledged that Lone Star did not send an investigator to the accident scene to evaluate the damage.

On cross examination, the defendant was shown an invoice from May 30, 2014 for the lost load which, before tax, amounted to $58,237.60.[9] Magarin testified that he has no other figure to dispute that being the amount charged for the granite.

LEGAL ANALYSIS

Pursuant to Civil Rule 60(B):

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final

[8] Defendant's Exhibit B.
[9] Plaintiff's Exhibit 1.

> judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation."

The court is faced with competing interests when ruling on a Civ.R. 60(B) motion. " 'On one hand is the principle of finality of judgment and the non-moving party's right to have his judgment enforced. On the other hand is the principle that cases should be decided on their merits and the right of all parties to be heard.' "[10]

"In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must establish that [it] has a meritorious defense or claim to present if relief is granted; that [it] is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and that the motion is made within a reasonable time."[11] "These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met."[12] "Civ.R. 60(B) is remedial and should be liberally construed so the ends of justice may be served."[13]

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[10] *Claycraft Motors, L.L.C. v. Bulldog Auto Sales, Inc.*, 5th Dist. Fairfield No. 13-CA-70, 2014-Ohio-2086, ¶ 18, quoting *Robinson v. Miller Hamilton Venture, LLC*, 12th Dist. Butler No. CA2010-09-226, 2011-Ohio-3017.
[11] *Washington Mutual Bank v. Christy*, 12th Dist. Butler No. CA2003-03-075, 2004-Ohio-92, ¶ 8, citing *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), at paragraph two of the syllabus.
[12] *Banfield v. Brodell*, 7th Dist. Mahoning No. 06-MA-8, 2006-Ohio-5267, at ¶ 10, citing *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994).
[13] Id., citing *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996).

There can be no question that the defendant's motion was timely made. Default judgment was granted on March 26, 2015 and the motion for relief from judgment was filed approximately seven days later. As a result, the prong of the *GTE* test requiring that the motion be made within a reasonable time has been met.

The next consideration is whether the defendant has established a meritorious defense or claim. David Magarin testified that he is contesting the amount owed. However, he had no articulable reason to question the amount TQL paid to the customer for the damaged granite other than that he has not been presented with proof of payment of that amount by TQL. The same can be said for the approximately three thousand dollars charged for labor fees. Magarin's testimony as to this amount was simply that he was never provided with an invoice for the labor charges or provided with an explanation as to how they were calculated.

"Neither a general denial in an answer nor a conclusory statement that the movant has a meritorious claim or defense to present is sufficient to satisfy the first prong of the *GTE* test."[14] "Rather 'the movant must allege supporting operative facts with enough specificity to allow the court to decide that the movant has a defense he could have successfully argued at trial.' "[15] "This standard does not impute an evidentiary burden upon the movant beyond requiring that the material submitted sets forth operative facts of the defense."[16] A "Civ.R. 60(B) movant must do more than make bare allegations that it is entitled to relief and [has] a meritorious defense to present."[17]

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[14] *Miller v. Susa Partnership, L.P.*, 10th Dist. Franklin No. 07AP-702, 2008-Ohio-1111, ¶ 16, citing *Newark Orthopedics, Inc. v. Brock*, 92 Ohio App.3d 117, 122, 634 N.E.2d 278 (10th Dist.1994).
[15] Id., citing *Mattingly v. Deveaux*, 10th Dist. No. 03AP-793, 2004-Ohio-2506, ¶ 10, citing *Elyria Twp. Bd. of Trustees v. Kerstetter*, 91 Ohio App.3d 559, 632 N.E.2d 1376 (9th Dist.1993).
[16] Id., citing *Billiter v. Winship*, 10th Dist. Franklin No. 93AP-176, 1993 WL 387079 (Sept. 28, 1993).
[17] Id. at ¶ 19, citing *Bright v. Family Medicine Found, Inc.*, 10th Dist. No. 05AP-835, 2005-Ohio-5037, ¶ 22.

" 'Ultimately, 'a proffered defense is meritorious if it is not a sham and when, if true, it states a defense in part, or in whole, to the claims for relief set forth in the complaint.' "[18]

A movant is not required to contest liability in order to satisfy the requirement of a meritorious defense.[19] Instead, it is sufficient to present operative facts and allegations that the movant can defend the action as to the amount of damages.[20] For example, a court found a sufficient meritorious defense as to damages where the evidence showed that the defendant may have only stolen $20.00 or $40.00 from the plaintiff's home but the damages awarded pursuant to the default judgment motion were $35,000.00.[21] The appellate court noted that "[c]onsidering the disparity between the damages awarded and those supported by the proofs, the trial court did not abuse its discretion in finding that [the defendants] had a meritorious defense to present at trial."[22]

The defendant in a case involving the recoupment of legal fees denied that the amount of fees charged by the plaintiff-attorney reflected the reasonable value of his legal services.[23] The court found this allegation to be sufficient to constitute a meritorious defense as to the amount of the damages.[24]

In another case, the defendant testified that she agreed to make restitution as part of her criminal plea but that the defendant continually increased the amount he claimed he was owed in the civil action.[25] The defendant argued that the plaintiff was attempting to satisfy all of his personal debts by embellishing the defendant's

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[18] *Citizens Bank Co. v. Keffer*, 4th Dist. Washington No. 12CA17, 2013-Ohio-245, ¶ 13, quoting *Byers v. Dearth*, 4th Dist. Ross No. 09CA3117, 2010-Ohio-1988, ¶ 12, quoting *Syphard v. Vrable*, 141 Ohio App.3d 460, 463, 2001-Ohio-3229, 751 N.E.2d 564 (7th Dist.2001).
[19] *Miller*, supra, 2008-Ohio-1111 at ¶¶ 20-21.
[20] Id. at ¶ 21.
[21] *DeFazio v. Galewood*, 9th Dist. Summit No. 12452, 1986 WL 9344, *2.
[22] Id.
[23] *Fouts v. Weiss-Carson*, 77 Ohio App.3d 563, 565, 602 N.E.2d 1231 (11th Dist.1991).
[24] Id.
[25] *Syphard*, supra, 141 Ohio App.3d at 463.

misconduct.[26] The appellate court found that defendant had demonstrated a meritorious defense and noted that "a dispute concerning the proper amount owed to the plaintiff directly affects the validity of the judgment."[27]

In a case arising out of a motor vehicle accident, the defendant moved to vacate default judgment, arguing that she had a meritorious defense as to the amount of damages.[28] The defendant testified that she had unsuccessfully attempted to get documentation from the plaintiff regarding lost wages and noted that the plaintiff's medical bills only totaled $300.00 but that the lost wages claim was for 170 days off of work.[29] The defendant also testified that she did not observe the plaintiff to be in any distress after the accident and that the plaintiff refused treatment and transportation to an emergency room.[30] The court found that the defendant had presented sufficient facts to show that a meritorious defense could be asserted.[31]

In a case involving the delivery of oil, the defendants alleged among other things that they paid for fuel that was not delivered and that the plaintiff failed to credit their account for amounts which were provided for in the contract between the parties.[32] The court found that the defendants had raised a meritorious defense attacking the validity of the amount of the judgment rendered against them.[33]

The case at bar differs from many of the cases discussed above in that there are no operative facts set forth in this case which would demonstrate that the defendant could allege a meritorious defense to the amount of damages. The president of the

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[26] Id. at 464.
[27] Id., citing *Mazepa v. Krueger*, 8th Dist. Cuyahoga No. 70472, 1997 WL 1090422 (May 15, 1997).
[28] *Oberkonz v. Gosha*, 10th Dist. Franklin No. 02AP-237, 2002-Ohio-5572, ¶ 13.
[29] Id. at ¶ 14.
[30] Id. at ¶ 15.
[31] Id. at ¶ 17.
[32] *Lykins Oil Co. v. Pritchard*, 169 Ohio App.3d 194, 2006-Ohio-5262, 862 N.E.2d 192, ¶ 17 (1st Dist.).
[33] Id. at ¶ 18.

defendant-company testified that he did not believe that TQL paid the amount claimed. However, he could offer no testimony to rebut Marc Bostwick's affidavit that said amount was paid and he also had nothing to rebut the fact that there is an invoice for the granite in that exact amount.[34] The fact that the date of payment was incorrectly set forth in Bostwick's affidavit does not call into question the amount of damages to which the plaintiff is entitled. David Magarin attempted to testify as to his belief that the entire load of granite was not damaged but he had no personal knowledge as to that fact and no evidence to present from any witness with personal knowledge which would support that contention.

Similarly, Magarin could offer no testimony to rebut the inclusion of labor charges in the amount due and owing on Lone Star's account. He testified that TQL never provided him with an explanation as to how those charges were calculated but he did not offer testimony that he had reason to believe that amount was not paid by TQL or was unreasonable in light of the accident and resulting damage that occurred.

This court acknowledges that cases should be decided on their merits whenever practicable. However, the requirements of Civ.R. 60(B) and the *GTE* test must have some force and meaning. If every defendant could obtain relief from judgment by simply testifying to an unsupported opinion that the amount of damages is too high, there could never be a truly reliable final judgment. In the case at bar, the defendant has presented no *operative facts* which, if believed by a trier of fact, could constitute a meritorious defense to the plaintiff's claim for damages. As such, the meritorious defense prong of the *GTE* test has not been met in the present case.

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[34] Plaintiff's Exhibit 1.

As noted above, the requirements of the *GTE* test are independent and set forth in the conjunctive. If one requirement of the test is not fulfilled, relief from judgment cannot be granted. Therefore, the defendant's motion must be denied based on the court's finding that the defendant has failed to present a meritorious defense.

The court would note that, even if the defendant had presented a meritorious defense, which it has not, it has not satisfied Civ.R. 60(B)(1) or (5) and relief would therefore be denied on that basis.

Civ.R. 60(B)(1) applies when there is mistake, inadvertence, surprise or excusable neglect.

When determining whether neglect is "excusable" a court "must consider all of the surrounding facts and circumstances."[35] The term "excusable neglect" is an elusive concept in the law that the Ohio Supreme Court has defined in the negative, stating that " 'the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.'"[36] "The Supreme Court has also stated that "the concept of 'excusable neglect' must be construed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally construed, while bearing in mind that Civ.R. 60(B) constitutes an attempt to 'strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done."[37]

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[35] *Bank of Am., N.A. v. Malone*, 10th Dist. Franklin Nos. 11AP-860 and 11AP-1085, 2012-Ohio-3585, ¶ 8, citing *Winona Holdings, Inc. v. Duffey*, 10th Dist. Franklin No. 10AP–1006, 2011–Ohio–3163, ¶ 12.
[36] Id., quoting *Kay*, supra, 76 Ohio St.3d at 20.
[37] Id., quoting *Colley v. Bazell*, 64 Ohio St.2d 243, 248, 416 N.E.2d 605 (1980).

" * * * [A] majority of the cases finding excusable neglect also have found unusual or special circumstances that justified the neglect of the party or attorney."[38] Looking at Black's Law Dictionary, one court noted the following distinction:

> " '[E]xcusable neglect' [means] * * * 'a failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.' * * * In contrast, mere 'neglect' means 'to omit, fail, or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention in the doing or omission of a given act. And it may mean a designed refusal, indifference, or unwillingness to perform one's duty.' "[39]

Another court has held that "excusable neglect is not present if the party could have prevented the circumstances from occurring."[40]

"Civ.R. 60(B)(5) applies only when a more specific provision does not apply."[41]

"When a hearing is held on a motion to vacate, a reviewing court must examine the evidence introduced at the hearing in addition to the evidentiary materials submitted with the motion itself."[42] "Ultimately * * * the determination of whether relief from judgment should be granted is addressed to the sound discretion of the trial court * * *."[43]

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[38] *PHH Mtge. Corp. v. Northrup*, 4th Dist. Pickaway No. 11CA6, 2011-Ohio-6814, ¶ 16, quoting *Vanest v. Pillsbury Co.*, 124 Ohio App.3d 525, 706 N.E.2d 825 (4th Dist.1997).
[39] Id. at ¶ 17, quoting *Vanest*, supra, at fn. 8 and fn. 13, quoting Black's Law Dictionary (6 Ed.1990) 566.
[40] *Malone*, supra, ¶ 8, citing *Porter, Wright, Morris & Arthur, LLP v. Frutta Del Mondo, Ltd.*, 10th Dist. Franklin No. 08AP–69, 2008–Ohio–3567, ¶ 22.
[41] *Chase Home Fin. LLC v. Middleton*, 5th Dist. Fairfield No. 12-CA-10, 2012-Ohio-5547, ¶ 26, citing *Caruso–Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 66, 448 N.E.2d 1365 (1983).
[42] *Rafalski v. Oates*, 17 Ohio App.3d 65, 66, 477 N.E.2d 1212, 1214 (8th Dist.1984), citing *Bates & Springer, Inc. v. Stallworth*, 56 Ohio App.2d 223, 382 N.E.2d 1179 (8th Dist.1978).
[43] *Classic Oldsmobile, Inc. v. 21st Century Painting, Inc.*, 11th Dist. Trumbull No. 98-L-040, 1999 WL 545750, *3 (Feb. 12, 1999), citing, *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987).

"Service of process must be made in a manner reasonably calculated to apprise interested parties of the action and to afford them an opportunity to respond."[44] "Civ.R. 4.6(D) provides that if certified mail is returned with an endorsement showing that the envelope was 'unclaimed,' the serving party can request that the complaint be served by ordinary mail service."[45] "Under that scenario, service is deemed complete 'when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery.'"[46]

"When a party challenges the existence or sufficiency of service of process, the court is " 'guided by the premise that service is proper where the civil rules on service are followed, unless sufficient evidence exists to rebut this principle.' "[47] " 'In determining whether a defendant has sufficiently rebutted the presumption of valid service, a trial court may assess the credibility and competency of the submitted evidence demonstrating non-service.' "[48] Generally, "when service 'is made at an address reasonably calculated to reach the defendant, a sworn statement by a defendant that he or she never was served with the complaint at least warrants the trial court's conducting a hearing to determine the validity of defendant's assertions.' "[49] If service on the parties is not proper, a default judgment is void.[50]

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[44] *Tractor Servs. & Supply, Inc. v. Bill Newell Excavating*, 5th Dist. Fairfield No. 06-CA-48, 2007-Ohio-5255, ¶ 12, citing *Akron-Canton Regional Airport Auth. v. Swinehart*, 62 Ohio St.2d 403, 406, 406 N.E.2d 811 (1980), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950).
[45] Id. at ¶ 13, citing Civ.R. 4.6(D).
[46] Id., quoting *Cavalry Investments v. Clevenger*, 6th Dist. Lucas No. L-05-1103, 2005-Ohio-7003, ¶ 11.
[47] *Green v. Huntley*, 10th Dist. Franklin No. 09AP-652, 2010-Ohio-1024, ¶ 13, quoting *Bowling v. Grange Mut. Cas. Co.*, 10th Dist. Franklin No. 05AP-51, 2005-Ohio-5924, ¶ 27, quoting *Neiswinter v. Nationwide Mut. Fire Ins. Co.*, 9th Dist. Summit No. 21691, 2004-Ohio-3943, ¶ 4.
[48] Id., quoting *Bowling* at ¶ 33.
[49] Id. at ¶ 14, quoting *Gupta v. Edgecombe*, 10th Dist. Franklin No. 03AP-807, 2004-Ohio-3227, ¶ 13, quoting *Wilson's Auto Serv., Inc. v. O'Brien*, 10th Dist. Franklin No. 92AP-1406 (March 4, 1993).
[50] See, e.g., *McCullough Builders, Inc. v. Waterfield Financial Corp.*, 11th Dist. Lake No. 2001-L-142, 2003-Ohio-1583, ¶ 14, citing *Thomas v. Corrigan*, 135 Ohio App.3d 340, 343, 733 N.E.2d 1213 (11th Dist.1999).

In the case at bar, the defendant testified that he did not receive a copy of the complaint and summons. However, he also testified that the Lone Star office is open five days a week and that he often travels out of town for business reasons.

The certified mail service was returned as unclaimed so there was no service by certified mail in this case. However, the ordinary mail service was mailed to the defendant-company's correct address and was never returned to the clerk's office. This creates a rebuttable presumption of service in this case. The court finds that David Magarin's testimony does not rebut this presumption of service. Magarin testified that he did not personally see a copy of the complaint and summons. However, he cannot testify with personal knowledge that a copy was never received by the company in his absence. There was no testimony as to the policies and procedures at Lone Star regarding the mail when Magarin is out of town on business nor was there testimony from any employee(s) who would be responsible for processing and/or directing mail that is received in Magarin's absence. David Magarin did not offer credible testimony that Lone Star did not receive a copy of the ordinary mail service of the complaint and summons.

As a result, the court finds that the evidence demonstrates that the defendant was properly served with the complaint and summons in this case via ordinary mail service. Therefore, the judgment is not void and the defendant has not established that it meets the requirements of Civ.R. 60(B)(1) or (5).

CONCLUSION

The defendant's motion to set aside default judgment is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: 1-6-15

Judge Jerry R. McBride

NOTICE TO CLERK:

The Clerk is hereby directed to serve upon all parties not in default for failure to appear notice of this judgment and the date of its entry upon the journal. Within three days of entering this judgment upon the journal, the Clerk shall serve the parties in a manner prescribed by Civ.R.5(B) and note the service in the appearance docket.

Judge Jerry R. McBride