

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 17162

CONSERVATION STATION, INC.,
Plaintiff,

v.

MATTHEW BOLESKY and
CONSERVATION TECHNOLOGY &
SOLUTIONS, LLC,

Defendants.

**ORDER AND OPINION ON
DEFENDANT’S MOTION TO SET
ASIDE DEFAULT JUDGMENT AND
MOTION TO DISMISS**

1. **THIS MATTER** is before the Court following the filing on 12 January 2023 by Defendant Matthew Bolesky *pro se* (“Bolesky”) of: (a) Defendants’ (sic) Matthew Bolesky Motion to Set Aside Void or Nulify (sic) Default Judgment (the “Motion to Set Aside”) (ECF No. 80 [“Mot. Set Aside”]); and (b) Defendants’ (sic) Matthew Bolesky Motion to Dismiss (the “Motion to Dismiss”) (ECF No. 81). With the motions filed on 12 January 2023, Bolesky filed two identical copies of Defendants’ (sic) Matthew Bolesky Memorandum in Support of Their (sic) Motion to Dismiss.¹

2. Plaintiff timely responded to both the Motion to Set Aside and the Motion to Dismiss with one brief. (ECF No. 84.) Bolesky failed to timely file a reply brief.

¹ (*See* Defendants’ (sic) Matthew Bolesky Memorandum in Support of Their (sic) Motion to Dismiss (ECF Nos. 80.2, 81.1) and Defendants’ (sic) Matthew Bolesky Amended and Supplemental (sic) to Support Defendant’s Motion to Void Judgment and Motion to Dismiss (ECF No. 82).)

3. As a result, the motions have been fully briefed and the Court in its discretion decides the motions without a hearing as permitted by North Carolina Business Court Rule 7.4.²

4. For the reasons set forth herein, the Court **DENIES** the Motion to Set Aside and **DENIES** as moot the Motion to Dismiss.

*Revolution Law Group, by C. Scott Meyers, Esq. for Plaintiff
Conservation Station, Inc.*

Matthew Bolesky, pro se, for Defendant Matthew Bolesky.

Robinson, Judge.

5. Plaintiff initiated this action on 30 December 2021 with the filing of Plaintiff's Complaint. (ECF No. 3.) Bolesky was served with the summons and complaint on 6 January 2022. (See Mot. Entry Default ¶ 2, ECF No. 23.) On 18 January 2022, Bolesky, acting *pro se* on behalf of himself and purporting to act on behalf of Conservation Technology & Solutions, LLC, filed Defendants' Motion to Dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1), (b)(2), (b)(4), (b)(6), and (b)(7) of the North Carolina Rules of Civil Procedure ("Rule(s)"). (ECF No. 34.)

6. Bolesky's 18 January 2022 motion to dismiss came on for hearing on 25 April 2022 in Wake County Superior Court, the Honorable William Pittman, Superior Court Judge presiding. Following a hearing on the motion to dismiss, Judge Pittman

² Neither party requested a hearing. See BCR 7.4 ("Special considerations thought by counsel sufficient to warrant a hearing or oral argument may be brought to the Court's attention in the motion or response.").

denied the motion by written order dated 25 April 2022 and filed on 28 April 2022. (ECF No. 48; *see also* ECF No. 23, ¶ 5.)³

7. By operation of Rule 12(a)(1)(a), upon entry of Judge Pittman's order of 25 April 2022, Bolesky had 20 days (until 18 May 2022) to file an Answer to the Complaint. Bolesky failed to timely file a response.

8. On 6 May 2022, Defendant Current Lighting Solutions, LLC filed its Notice of Designation of this action to the North Carolina Business Court. (ECF No. 4.) As a result, on 9 May 2022, this matter was designated to the Business Court by the Chief Justice of the North Carolina Supreme Court, (ECF No. 1), and assigned to the undersigned by order of the Chief Judge of the Business Court. (Assignment Or., ECF No. 2.)

9. Approximately two months later, on 1 July 2022, Plaintiff filed its Motion for Entry of Default, (ECF No. 23), seeking entry of default against Bolesky. A copy of the Motion for Entry of Default was served on Bolesky by U.S. Mail. (Mot. Entry Default 3.)

10. On 21 July 2022, the deadline for Bolesky to respond to the Motion for Entry of Default, the Court entered an order directing Plaintiff to provide the Court with information regarding Bolesky's involvement in this action. (Or. Pl.'s Mot. Entry Default Against Def., ECF No. 32.) In response to the Court's 21 July 2022 order, Plaintiff that same day filed Plaintiff's Statement Regarding Defendant Matthew

³ On the same date, Judge Pittman granted Plaintiff's separately filed Motion to Strike, finding that Bolesky, a non-lawyer, could not represent Defendant Conservation Technology & Solutions, LLC. (*See* Order of (sic) Granting Plaintiff's Motion to Strike, ECF No. 49.)

Bolesky's Involvement, (ECF No. 51), which provided detailed information about the procedural history of this case as it relates to Bolesky and his involvement before and after Judge Pittman entered the order denying Bolesky's motion to dismiss.

11. Based on the materials of record, including Plaintiff's 21 July 2022 filing, the Court determined that the record provided undisputed evidence that, at least as of 1 July 2022, Bolesky was put on notice that his motion to dismiss was denied, and on 5 July 2022 Bolesky was orally advised of the same during a telephonic case management conference. Bolesky was further advised that Plaintiff had filed its Motion for Entry of Default. (Or. Pl.'s Mot. Entry Default ¶ 8, ECF No. 53 ["Or. Entering Default"].) Additionally, on 5 July 2022, Plaintiff's counsel both mailed and emailed to Bolesky copies of pertinent court filings including the Motion for Entry of Default seeking entry of default against Bolesky.

12. Notwithstanding being provided by Plaintiff's counsel with information regarding the date of entry by Judge Pittman of the order denying Bolesky's motion to dismiss, which triggered Bolesky's obligation to timely respond to Plaintiff's Complaint, Bolesky took no action. As a result, on 26 July 2022, more than 20 days after Bolesky was advised of Plaintiff's motion for entry of default, which indisputably put Bolesky on notice of the consequences of his failure to timely respond, the Court entered default against Bolesky as to the Complaint. (Or. Entering Default ¶ 9.)

13. Bolesky seeks by the motions presently before the Court to obtain an order setting aside the default entered by the Court against him on 26 July 2022⁴ and an

⁴ The language used by Bolesky in the Motion to Set Aside is confusing in that it uses in the title to the motion the term "default judgment." As Plaintiff points out in its response brief,

order dismissing the Complaint pursuant to Rule 12(b)(6). Bolesky contends that his failure to timely and properly respond to Plaintiff's Complaint was a result of excusable neglect.

14. With respect to Bolesky's contention that he should be relieved of the consequences of his failure to timely respond to the Complaint, he provides only the following explanation:

I would assert that my excusable neglect is a result of my excusable ignorance of the law and deadlines for filings as a Pro Se litigant. This is absolutely attributable to my inability to afford legal representation in this on-going litigation with Michaud [his former spouse] and now with Conservation Station Inc. which is a proxy or extension of Michaud. Litigation has been on-going for nearly 7 years and has put me on the verge of bankruptcy. What I am asking is this Court to consider setting aside the default judgment and the actual merits of the Original Claim and consider the facts in my supplemental filing Motion to Dismiss the original claim, which has been done with all other Defendants with the exception of Bolesky and CTS, the only two unrepresented parties in this litigation.

(Mot. Set Aside 1-2.)

15. Under settled North Carolina law, a defendant seeking to set aside an entry of default is required to show good cause. *Luke v. Omega Consulting Group, LC*, 194 N.C. App. 745, 748 (2009). The determination of good cause rests in the sound discretion of the trial court. *Id.*

16. Bolesky has failed to demonstrate good cause. As noted by Plaintiff in its response to the Motion to Set Aside, while the good cause standard is less stringent than the excusable neglect standard applicable to setting aside a default judgment,

the Court has not entered a default judgment against Bolesky. Therefore, the Court interprets the Motion to Set Aside to seek an order setting aside the entry of default ordered by the Court on 26 July 2022.

the Court should focus on “[t]he degree of attention or inattention shown by the defendant” because it is a “compelling factor[.]”⁵ *Id.* at 749.

17. The record before the Court demonstrates no good reason for Bolesky’s failure to timely respond to the Complaint following Judge Pittman’s order filed 28 April 2022. Even though this Court diligently attempted to satisfy itself that Bolesky had been kept abreast of the litigation, and even though Bolesky apparently was involved in several aspects of this case (including specifically being advised on 5 July 2022 that a motion for entry of default had been filed against him), Bolesky took no action in response to the motion. The Court finds unconvincing Bolesky’s explanation that he did not attend to his obligations as a *pro se* party because he was on the verge of bankruptcy—such a condition is not an excuse for failure to comply with governing rules. Simply put, Bolesky was bound, as a *pro se* litigant, to be aware of and abide by the Rules of Civil Procedure and to comply with filing deadlines. Bolesky failed to do so.

18. Because the Court has determined in its discretion that Bolesky has failed to demonstrate good cause, the Motion to Set Aside must be, and is, **DENIED**.

19. With respect to the separately filed Motion to Dismiss pursuant to Rule 12(b)(6), Bolesky’s filing is procedurally improper. Bolesky has already filed a motion to dismiss pursuant to Rule 12(b)(6) and the Court has already denied that motion.

20. Specifically, in the Court’s order filed 28 April 2022, Judge Pittman denied Bolesky’s motion to dismiss brought forward by Bolesky on 25 April 2022 pursuant

⁵ The Court notes that Bolesky argues he has satisfied the excusable neglect standard—a higher standard than required under controlling law. Simply put, he has not.

to numerous provisions of Rule 12(b), including (b)(6). Because another Superior Court Judge has previously considered and determined Bolesky's request for dismissal for the claimed failure of Plaintiff to state valid claims, this Court may not revisit or second guess that ruling. *State v. Woolridge*, 357 N.C. 544, 549 (2003) ("Ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." (citation omitted)).

21. Additionally, because the Court has denied Bolesky's Motion to Set Aside, the Court lacks authority to consider the relief sought by Bolesky in his dismissal motion. As a result, the Court **DENIES** the Motion to Dismiss as moot.⁶

22. **THEREFORE**, for the reasons set forth herein, the Court rules as follows:

- a. Bolesky's Motion to Set Aside is **DENIED**; and
- b. Bolesky's Motion to Dismiss is **DENIED** as moot.

SO ORDERED, this the 17th day of February, 2023.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases

⁶ The Court notes, however, that it will be required to determine the legal sufficiency and validity of Plaintiff's causes of action contained in the Complaint if Plaintiff later seeks a default judgment against Bolesky, something Plaintiff has not yet pursued. *See Pee Dee Elec. Mbrship. Corp v. King*, 2018 NCBC LEXIS 22, at *11-12 (N.C. Super. Ct. Mar. 15, 2018) (citing *Brown v. Cavit Scis., Inc.*, 230 N.C. App. 460, 467 (2013)).