IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN RE:	Chapter 11
	Case No. 25-10356 (PMB)
AFH AIR PROS, LLC, et al.,1	(Jointly Administered)
Debtors.	

CREDITOR JACK DENTON'S MOTION FOR RELIEF FROM THE STAY PURSUANT TO 11 U.S.C. § 362 AND RULES 4001 AND 9014 OF THE BANKRUPTCY RULES

COMES NOW, Jack Denton (hereinafter Mr. Denton), by and through his attorney, Kit Bradshaw, of the firm Earl & Earl, PLLC, and respectfully submits his Motion for Relief from the Stay Pursuant to 11 U.S.C. § 362 and USCR Bankruptcy R. 4001 and 9014, and avers as follows:

1. This Motion is brought pursuant to 11 U.S.C. § 362 and USCR Bankruptcy R. 4001 and 9014.

1 The last four digits of AFH Air Pros, LLC's tax identification numbers are 1228. Due to the large number of debtor entities in these chapter 11 cases, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the claims and noticing agent at https://www.veritaglobal.net/AirPros. The mailing address for the debtor entities for purposes of these chapter 11 cases is: 150 S. Pine Island Road, Suite 200, Plantation, Florida 33324.

25103562504140000000000013

2. Debtor is not an infant, incompetent person, and is not in any United States military service, because the Debtors are limited liability companies and not natural persons.

BACKGROUND FACTS

3. On or about June of 2020, Mr. Denton hired Debtor Air Pros One Source, LLC (hereinafter Debtor) in Colorado Springs, Colorado to repair his boiler at his home.

4. The boiler provided all of Mr. Denton's heat and hot water in his home.

5. At the time Mr. Denton hired Debtor, Mr. Denton was over 70 years old and lived alone at his home.

6. In June 2020, Mr. Denton hired Debtor to repair a boiler. Mr. Denton paid $2,600.00 Debtor for the contracted service.

7. A month passed with unsuccessful repairs, but Mr. Denton agreed to pay an additional $9,000.00 for major repairs in approximately September 2020.

8. Unfortunately, Mr. Denton was patient but suffered all winter with no hot water or heat despite the signed contracts and false promises, the $11,600.00 in payments for services, and dozens of phone calls to the service department.

9. In February of 2021, Mr. Denton's pipes froze, as his boiler remained unrepaired, and he was still living without heat and hot water. The frozen pipes resulted in bursting with substantial water damage.

10. Through the summer and fall of 2021, sparse, sporadic and unsuccessful work would continue with Debtor.

11. As one year approached on the $9,000.00 loan obligation agreed upon, the finance company forgave the loan as the lender was never able to reach Debtor, One Source, which had not continued or successfully completed any work on the boiler.

12. In January of 2022, a Debtor employee was sent out to remove the failed equipment, which then resulted in a damaging gas leak.

13. In the Spring of 2022, Mr. Denton then discovered that Debtor had not obtained a permit for the boiler, which had not been installed correctly.

14. In Spring of 2022, newly appointed manager, Sean Farris of Debtor contacted Mr. Denton in Spring of 2022, stating every issue would be corrected.

15. Debtor enticed Mr. Denton to dismiss his Pikes Peak Building Department complaint in exchange for a $3,000.00 refund and a promise to repair all of the damages caused by Debtor's failure to provide the heat and hot water that Mr. Denton hired Debtor to provide.

16. Debtor refunded the $3,000.00, but never repaired the damages caused by its negligence to Mr. Denton's home.

17. Mr. Denton filed suit on March 17, 2023 and timely and properly served Debtor's registered agent.

18. Debtor failed to file an answer or otherwise defend Mr. Denton's lawsuit, and on October 10, 2023, obtained a default judgment for $861,576.49, inclusive of prejudgment interest and $882.00 in costs. (Attached as Exhibit 1.)

19. Debtor filed a motion to set aside the default judgment, which was denied and even appealed to the Colorado Court of Appeals which affirmed the Trial Court's judgment and orders. (Attached as Exhibit 2.)

20. Debtor had an insurance policy in place at the time of Mr. Denton's injury through USIC, which upon information and belief, is sufficient to cover Mr. Denton's judgment and all of his damages.

LAW AND ANALYSIS

11 U.S.C. §362(d) provides that a upon the request of a party and after a hearing, the Court has broad discretion to modify the automatic stay. *In re Cueva*, 371 F.3d 232, 236 (5th Circuit 2004). Section 362(d) gives the Court discretion to remove the stay should the debtor not have equity in the estate property and it is not necessary for an effective reorganization. 11 U.S.C. § 362(d)(2).

The filing of a petition for bankruptcy creates an estate of the debtor's property and an automatic stay that prohibits all creditors from taking any action to collect against the debtor. 11 U.S.C. § 362. 11 U.S.C. § 541. The bankruptcy estate includes all legal or equitable interests in property. 11 U.S.C. § 541(a)(1). Courts generally agree that an insurance policy itself is property of the estate; however, the proceeds of a liability policy is a more complicated issue. *In re Sfuzzi*, 191 B.R. 664, 666 (N.D. Texas 1996). The Fifth Circuit has precedent that deals with the proceeds of liability insurance policies that are explored below.

In re Edgeworth, 993 F.2d 51 (5th Cir. 1993), the Court held that liability insurance proceeds are not a part of the bankruptcy estate, under § 541. In *Edgeworth,* the movant sought to file a malpractice claim against the debtor after movant's mother died while under the care of movant. *Id.* at 53. The debtor had received a discharge under § 524. *Id.* The bankruptcy court and district court enjoined movant from filing a state action because they reasoned that the malpractice claim was discharged under sections 727 and 524. *Id.*

The Fifth Circuit held that a discharge under section 524 does not preclude a suit to recover from an insurer. *Id.* The Court found that most courts have held that the scope of a section 524 injunction does not affect the liability of liability insurers. *Id.* The Court reasoned that expanding the scope of the injunction to cover liability insurance providers would dilute the effect of section 524(a)(2), and that

"the 'fresh-start' policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured." *Id.* at 54.

In contrast, the Fifth Circuit held in *Homsy v. Floyd (In re Vitek, Inc.)*, 51 F.3d 530 (5th Circuit 1995), that liability insurance proceeds can be assets of the estate. In *Vitek*, the directors of the corporation were sued by over 400 plaintiffs for alleged defective prostheses manufactured by Vitek. *Id.* at 351. As a result, Vitek filed for chapter 7 bankruptcy. *Id.* The bankruptcy trustee petitioned the bankruptcy court for authority to enter into a compromise settlement with Vitek's insurance carriers, which would protect the carriers from liability for third-party lawsuits with the carriers paying their limits into the bankruptcy estate. *Id.* The directors, Homsys, argued that the settlements would leave them exposed to third-party liability and denying them defense and liability insurance coverage under the policies, despite them being named coinsureds. *Id.* The bankruptcy court rejected this argument stating that the Homsys had no property interests in the policies. *Id.* the Fifth Circuit reversed. *Id.*

The main issue presented to the Fifth Circuit was when one of two or more coinsureds files for bankruptcy, what part of the proceeds of a liability policy that covers the non-filing coinsureds should enrich the bankruptcy estate. *Id.* at 533. The Court found that section 541(a)(1) is sufficiently broad enough to cover all kinds of

property, including the debtor's interest in liability insurance. *Id.* The Court held that an insurer can settle with one insured while leaving the coinsured completely exposed, thus making the proceeds of the liability policies property of the estate. *Id.* at 537-38. However, the Court did carve out an exception to allow the coinsureds to file an insurance bad faith and fair dealing claim against their insurance carriers. *Id.*

There seems to be a split in the authorities within the Fifth Circuit with these two cases. *Vitek* did not overrule *Edgewater*, which is still good and binding in the Circuit. The facts of this case are much simpler. Here, *Vitek* is easily distinguished by the fact that Mr. Denton's claim is not a mass tort. Nor is Mr. Denton arguing that he is seeking damages against any coinsured that is not a part of this bankruptcy action, although he reserves the right to do so. The facts in Mr. Denton's claim are already judicially proven by the default judgment and cannot be reargued because the doctrine of *res judicata* applies. Mr. Denton's claim with current interest is $961,251.49, calculated through the date of filing by Debtor.

There is no agreement between the Trustee and Debtor's insurance carrier to settle Mr. Denton's claim. This is a single claim that is personal to only Mr. Denton, as he is left with a home that is partially torn apart and filled with mold, all caused by Debtor. Mr. Denton does not have the resources to mitigate the mold and restore his home to before Debtor's negligence destroyed it. Upon information and belief,

Mr. Denton's claim will be fully covered by the insurance policy and will not affect any other creditor.

WHEREFORE, Mr. Denton prays that this court grants this motion and enters an order for relief from the stay to pursue a direct action against Debtor's liability insurance company for payment of the insurance policy to Mr. Denton.

Respectfully submitted this 14th day of April 2025

/s/ *Kit Barron Bradshaw*
Kit Barron Bradshaw, Esq.
Ga Bar #075450
Of Counsel: Earl & Earl PLLC
4565 Hilton Pkwy, Ste. 228
Colorado Springs, CO 80907
Office Ph. 719-900-2500
K.bradshaw@EarlandEarl.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 14, 2025, he caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Georgia to all parties entitled to receive such filings.

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Mr. Denton's claim will be fully covered by the insurance policy and will not affect any other creditor.

WHEREFORE, Mr. Denton prays that this court grants this motion and enters an order for relief from the stay to pursue a direct action against Debtor's liability insurance company for payment of the insurance policy to Mr. Denton.

Respectfully submitted this 14th day of April 2025

/s/ *Kit Barron Bradshaw*
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Of Counsel: Earl & Earl PLLC
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 14, 2025, he caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Georgia to all parties entitled to receive such filings.

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Exhibit 1

DISTRICT COURT, COUNTY OF EL PASO, STATE OF COLORADO 270 S. TEJON STREET COLORADO SPRINGS, CO 80903	GRANTED BY COURT 10/10/2023 DATE FILED October 10, 2023 11:11 AM CASE NUMBER: 2023CV30514 DAVID LEE SHAKES District Court Judge
Plaintiff(s): **JACK DENTON, Individual** v. **Defendant(s): AIR PROS ONE SOURCE LLC., a Colorado Limited Liability Company**	▲ COURT USE ONLY ▲
	Case Number: 2023CV30514 Div.: 4 Courtroom

PROPOSED ORDER: ENTRY OF JUDGMENT

THIS MATTER coming on to be heard upon the Plaintiff's Motion for Entry of Default Judgment and the Court having received evidence at the Damages Hearing on September 21, 2023:

FINDS that venue has been considered and is proper and that this Court has jurisdiction over the parties.

FINDS that the allegations in the Complaint are admitted.

FINDS that the Default Judgment is proper and should be approved.

FINDS that Plaintiff is entitled to economic damages in the amount of $390,307.00, as supported by the testimony of Plaintiff and the exhibits presented to the Court.

FINDS that Plaintiff is entitled to noneconomic damages, pursuant to C.R.S. § 13-20-801 *et seq.*

FINDS the noneconomic damages are capped at $279,370.00, pursuant to C.R.S. § 13-20-806(4).

FINDS that Plaintiff is entitled to prejudgment interest, pursuant to C.R.S. § 5-12-102(4)(b), as follows:

From Date to Date	Total Interest	Total
6-15-2020 to 6-14-2021	$53,574.16	$723,251.16
6-15-2021 to 6-14-2022	$57,860.09	$781,111.25
6-15-2022 to 6-14-2023	$62,488.90	$843,600.15
6-14-2023 to 9-21-2023	$17,976.34	$861,576.49

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff, Jack Denton is entitled to Judgement of $861,576.49 inclusive of prejudgment interest.

- Any other Orders deemed appropriate: _____

DONE AND SIGNED this _____ day of _____, 2023.

BY THE COURT:

_____
JUDGE SHAKES

DISTRICT COURT, COUNTY OF EL PASO, STATE OF COLORADO 270 S. TEJON STREET COLORADO SPRINGS, CO 80903	GRANTED BY COURT 10/10/2023 DATE FILED October 10, 2023 11:11 AM CASE NUMBER: 2023CV30514 DAVID LEE SHAKES District Court Judge
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PROPOSED ORDER: PLAINTIFF'S BILL OF COSTS

THIS MATTER coming on to be heard upon the Plaintiff's Bill of Costs and finds Plaintiff is the prevailing party and entitled to his reasonable costs of litigation, pursuant to C.R.C.P. 54(d). Pursuant to C.R.S. § 13-16-122, recoverable costs may include:

FINDS that the Default Judgment is proper and should be approved.

FINDS that Plaintiff is entitled to Bill of Costs in the Amount of $882.00.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED.

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///

///

- Any other Orders deemed appropriate: _____

DONE AND SIGNED this _____ day of _____, 2023.

BY THE COURT:

_____
JUDGE SHAKES

23CA2051 Denton v Air Pros One 02-06-2025

COLORADO COURT OF APPEALS

DATE FILED
February 6, 2025
CASE NUMBER: 2023CA2051

Court of Appeals No. 23CA2051
El Paso County District Court No. 23CV30514
Honorable David Shakes, Judge

Jack Denton,

Plaintiff-Appellee,

v.

Air Pros One Source, LLC, a Colorado limited liability company,

Defendant-Appellant.

ORDER AFFIRMED

Division V
Opinion by JUDGE FREYRE
Schock and Sullivan, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 6, 2025

Earl & Earl, PLLC, Collin J. Earl, Ryan T. Earl, Brian E. Hefner, Colorado Springs, Colorado, for Plaintiff-Appellee

Dinsmore & Shohl LLP, Michael A. Paul, Kevin D. Poyner, Jeana M. Mason, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Air Pros One Source, LLC (Air Pros), appeals the district court's order denying its motion to set aside the default judgment entered in favor of plaintiff, Jack Denton. We affirm.

I. Background

¶ 2 In June 2020, Denton hired Air Pros to repair a boiler in his home. Denton paid Air Pros $2,600. By September 2020, the boiler had not been fixed, and Denton spent the winter of 2020-2021 with no hot water or heat.

¶ 3 In February 2021, Denton's pipes froze, resulting in water and mold damage to the home. Throughout the summer and fall, Air Pros continued to work on Denton's boiler sporadically, but the problems were not resolved, and Denton spent another winter without heat or hot water.

¶ 4 In January 2022, Denton filed a complaint against Air Pros with the Pikes Peak Building Department detailing his repair issues. An Air Pros representative promised Denton that all problems would be fixed. Repair work started, but Air Pros terminated its employee before the work was completed.

¶ 5 In May 2022, Air Pros sent Denton a signed settlement agreement offering to refund $3,000, to replace the carpet, and to

replace the wood floors if Denton dismissed the building department complaint. Denton emailed his acceptance of the offer, but he never signed the agreement. Air Pros refunded the $3,000 but never replaced the carpet or wood floors.

¶ 6 In March 2023, Denton filed this action for injunctive relief, specific performance, and negligence, and he sought damages for loss of enjoyment resulting from the lack of heat or hot water after the pipes burst in February 2021. Denton properly served Air Pros with the complaint.

¶ 7 After receiving the complaint, Air Pros' registered agent sent it to the company's national insurance manager with instructions to forward the complaint to Air Pros' insurance carriers, Clear Blue and Nationwide. Air Pros' legal counsel was never informed of the complaint, due to an unsent email, while Air Pros' national insurance manager believed that the claim was being handled by counsel. Consequently, when the national insurance manager learned the claims had been denied, she never informed legal counsel of the denial, and Air Pros never responded to the complaint.

¶ 8 On May 30, 2023, Denton filed a motion for entry of default on damages pursuant to C.R.C.P. 55(b). The district court granted the motion and set a damages hearing. The court held a damages hearing on September 21, 2023, and entered judgment for Denton on October 10, 2023, in the amount of $861,576.49.

¶ 9 Air Pros learned of the judgment the following day when it received judgment-debtor interrogatories. When Air Pros did not respond to the interrogatories, Denton filed a contempt motion on October 27, and the court set a contempt hearing for January 4, 2024.[1]

¶ 10 On November 28, Air Pros appealed the court's judgment in this court and simultaneously filed a motion to set aside the default judgment in the district court. It requested a stay of the appeal and a limited remand for ruling on its motion. This court granted the stay request and remanded the case for a ruling on the motion to set aside the default judgment.

¶ 11 In the motion to set aside the default judgment, Air Pros argued that it would have answered the complaint but for excusable

[1] The court never ruled on the contempt motion and focused only on the motion to set aside the default judgment.

neglect. Air Pros asserted that it forwarded the complaint to its insurance carriers and that an internal miscommunication resulted in legal counsel never receiving a copy. Consequently, Air Pros assumed legal counsel knew of the insurance claim denials and was handling the lawsuit. In its prehearing brief, Air Pros alternatively argued that Denton failed to comply with the notice provisions of the Colorado Construction Defect Action Reform Act (CDARA) so it did not file an answer to the complaint.

¶ 12 Before the hearing, the district court ordered the parties to address two issues: (1) whether refusing to set aside the default judgment would be a misapplication of the law; and (2) whether the judgment was divisible, i.e., whether a portion of the damages could be reopened, recalculated, or set aside due to mistakes in the judgment.

¶ 13 The parties filed prehearing briefs and agreed that the district court had jurisdiction to adjudicate the contempt citation, but they contested whether sufficient evidence existed to set aside the

default judgment. They further agreed that the court could alter or amend the judgment under C.R.C.P. 60(b).[2]

¶ 14 Air Pros called two of its employees to testify at the hearing; Roscoe Brister, director of special projects and registered agent, and Therese Deutsch, national insurance manager. Brister testified that he received the complaint and forwarded it to "all the relevant folks in [Air Pros]," instructing them on how to proceed and which legal counsel to contact. None of those individuals contacted Air Pros' counsel because they believed the complaint was being handled by Air Pros' insurance carriers. Further, Brister testified that Air Pros never received a notice of claim as required under CDARA. Air Pros argued that it did not file an answer because it believed the case was going to be stayed since Denton had failed to file the notice of claim under CDARA. Deutsch testified that when she received the complaint, she forwarded it to Air Pros' insurance broker to file claims with the insurance carriers. She believed the insurance carriers were handling the claim, and she never followed

[2] Denton also argued that the court could amend the judgment under C.R.C.P. 59(a) and 60(a).

up with the insurance carriers to see if local counsel had been hired to defend the complaint.

¶ 15 On April 10, 2024, the district court issued an order denying the motion to set aside the default judgment. The court found that Air Pros failed to meet its burden to show, by clear and convincing evidence, that it acted with excusable neglect. The court found that after Air Pros' agent for service of process forwarded the complaint to the national insurance manager and one carrier denied coverage, a series of miscommunications and failures to follow up resulted in Air Pros not filing an answer to the complaint. It also found that Air Pros produced no evidence that these miscommunications resulted from any unforeseen circumstances that would amount to excusable neglect, under *Goodman Associates, LLC v. WP Mountain Properties, LLC*, 222 P.3d 310, 319 (Colo. 2010).

¶ 16 Additionally, the court rejected Air Pros' argument that it did not file an answer because Denton failed to comply with CDARA's notice requirements. It found the witness's testimony concerning CDARA not credible and inconsistent with Air Pros' miscommunication argument.

¶ 17 The district court considered and rejected Air Pros' three meritorious defense arguments. It first found that although Denton accepted the offer in the settlement agreement, the settlement agreement itself provided no defense because Air Pros failed to perform its obligations under the agreement.

¶ 18 It next found that Denton's failure to file CDARA notices did not provide a defense because the hearing evidence showed that Air Pros was aware of the problems in the work it performed or failed to perform well before the lawsuit was filed. As examples, the court cited the communications between Denton and Air Pros, the experts Air Pros sent to inspect the damage and to rectify the mold issue, the complaint filed by Denton with the building department, and a December 21, 2022, email Denton sent outlining the problems. It found that the email alone satisfied the notice requirements of section 13-20-803.5(11), C.R.S. 2024.

¶ 19 Finally, the court rejected Air Pros' statute of limitations defense. It noted that work began in June 2020 but was never completed. Instead, Air Pros continually performed defective work over the next several years and had not completed the work at the time Denton filed the complaint. It found that Air Pros had not

made a convincing argument that the limitations period began to run in 2020.

¶ 20 The district court acknowledged that Air Pros was correct that "there may be damages that were awarded to Plaintiff incorrectly." It considered this fact in its analysis of the equities, which it found favored Denton. It noted that Air Pros had known of the mold problems since the inspection by its experts and that this problem had never been remediated. It further noted that Air Pros continued to use the settlement agreement as a defense to this action and the complaint to the building department despite having never completed its obligations under the agreement. And it noted that the property was a residence, not a commercial property for which loss of use damages could be more easily calculated. Even considering Air Pros' prompt motion to set aside the default judgment and the errors in the damages calculations, the court concluded they did not outweigh the equitable considerations in favor of Denton. It then denied the motion.

¶ 21 On appeal, Air Pros contends that the district court erroneously (1) held it to a heightened burden of proof on each of the *Goodman* factors; (2) misinterpreted provisions of CDARA,

including the application of a mandatory automatic stay that rendered the judgment void; (3) made findings of fact contrary to the weight of evidence; (4) failed to consider meritorious defenses and equitable considerations; (5) failed to consider inadvertence as a basis for setting aside the judgment; and (6) failed to consider or correct the improper and excessive damages awarded. We discern no abuse of discretion in the district court's finding that Air Pros failed to establish excusable neglect by clear and convincing evidence because the record shows the court carefully considered and weighed each of the *Goodman* factors in reaching its decision. Moreover, applying the doctrine of judicial restraint and the rule recognized in *McMichael v. Encompass PAHS Rehabilitation Hospital, LLC*, 2023 CO 2, ¶ 13, that a court may deny a motion to set aside a default judgment if the moving party fails to establish any one of the *Goodman* factors, we do not address Air Pros' remaining arguments concerning meritorious defenses and equitable considerations. Moreover, we reject Air Pros' inadvertence and void judgment arguments. Finally, while we agree the court acknowledged probable mistakes in the damages calculations, the

court's order shows that it considered these mistakes in evaluating the equities of the parties and discern no basis for reversal.

II. Excusable Neglect

A. Standard of Review and Applicable Law

¶ 22 We review the district court's denial of relief under Rule 60(b) for an abuse of discretion. *Goodman Assocs., LLC*, 222 P.3d at 314. "Abuse of discretion exists where a decision is manifestly arbitrary, unreasonable, or unfair." *Id.* A court also abuses its discretion if its decision is based on a misapplication of the law. *Ferraro v. Frias Drywall, LLC*, 2019 COA 123, ¶ 10.

¶ 23 "To set aside a judgment under C.R.C.P. 60(b), the movant bears the burden of establishing by clear and convincing evidence that the motion should be granted." *Goodman Assocs., LLC*, 222 P.3d at 315. Clear and convincing evidence is evidence that is highly probable and free from serious or substantial doubt. *L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 39. At its core, the decision whether to set aside a default judgment is an equitable decision designed to balance the finality of judgments and the need to provide relief in the interests of justice in exceptional circumstances. *Goodman Assocs., LLC*, 222 P.3d at 319.

¶ 24 Courts consider three factors when determining whether to relieve a party from default judgment under C.R.C.P. 60(b):

"(1) whether the neglect that resulted in the entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious claim or defense; and (3) whether relief from the challenged order would be consistent with considerations of equity." *McMichael*, ¶ 13 (quoting *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112, 1116 (Colo. 1986)). "[E]ach factor must be weighed and considered together as a part of the question whether excusable neglect exists to satisfy C.R.C.P. 60(b)(1)." *Goodman Assocs., LLC*, 222 P.3d at 320. A court's consideration of these factors must be guided by the general rule that motions to set aside default judgments "should be liberally construed in favor of the movant, especially where the motion has been promptly made." *Craig v. Rider*, 651 P.2d 397, 402 (Colo. 1982); *see also Goodman Assocs., LLC*, 222 P.3d at 320. While the mere existence of a meritorious defense does not, by itself, justify vacating a judgment, the nature of a defense "may shed light on the existence and degree of neglect, and possibly on the equitable considerations." *Goodman Assocs., LLC*, 222 P.3d at 320 (citation omitted). A district court may deny a

motion to set aside a default judgment if the moving party fails to establish any one of these factors. *McMichael*, ¶ 13; *Goodman Assocs., LLC*, 222 P.3d at 321; *Buckmiller*, 727 P.2d at 1116.

¶ 25 "A party's conduct constitutes excusable neglect when the surrounding circumstances would cause a reasonably careful person similarly to neglect a duty." *McMichael*, ¶ 14 (quoting *In re Weisbard*, 25 P.3d 24, 26 (Colo. 2001)). "[N]egligence" or "[c]ommon carelessness" does not constitute "excusable neglect." *Id.* (quoting *Weisbard*, 25 P.3d at 26). Excusable neglect involves "unforeseen circumstances which would cause a reasonably prudent person to overlook a required act in the performance of some responsibility." *Goodman Assocs., LLC*, 222 P.3d at 319 (quoting *Colo. Dep't of Pub. Health & Env't v. Caulk*, 969 P.2d 804, 809 (Colo. App. 1998)). As relevant here, poor office procedures do not justify the failure to respond to a complaint. *Id.* at 321.

B. Analysis

¶ 26 The district court relied on two cases, *Lopez v. Reserve Insurance Co.*, 525 P.2d 1204 (Colo. App. 1974) (not published pursuant to C.A.R. 35(f)), and *Plaisted v. Colorado Springs School*

District No. 11, 702 P.2d 761 (Colo. App. 1985), to find no excusable neglect.

¶ 27 In *Lopez*, the defendant never filed an answer to the complaint or otherwise appeared, and the court entered a default judgment against him. 525 P.2d at 1205. He filed a motion to set aside the default judgment and asserted excusable neglect. *Id.* His motion claimed that he believed that his codefendant would respond and defend the action for all of the defendants. *Id.* The district court denied the motion. *Id.* A division of this court held that a defendant's reliance on the belief that another party has the legal responsibility to appear and defend an action against him does not excuse his noncompliance with the rules of civil procedure requiring a timely response. *Id.* at 1205-06.

¶ 28 In *Plaisted*, a school board secretary accepted service of a complaint and summons and delivered them to a second secretary in the school board office. 702 P.2d at 762. The second secretary called the school district's insurance carrier to inform it that a lawsuit had been filed. *Id.* She then mailed copies of the summons and the complaint to the school district's attorney and to the insurer. *Id.* However, the documents were not received by either

party. *Id.* After a default judgment entered against the school district, the school district filed a motion to set aside the judgment. *Id.* The district court denied the motion and found there was no excusable neglect. *Id.* A division of this court held that the loss of the summons and complaint in the mail did not constitute excusable neglect because the second secretary did not follow up with the school district's attorney and insurance carrier to ensure their receipt of the documents. *Id.* at 763.

¶ 29 We agree with the district court that the facts here are similar to those in the two cases on which it relied. As in *Lopez*, Air Pros received the complaint and believed that its insurance carriers were handling a response to it. When a party has been properly served, reliance on another party does not excuse the served party's lack of compliance with the rules of civil procedure. *Lopez*, 525 P.2d at 1205-06.

¶ 30 Moreover, like the secretary in *Plaisted*, the district court found that Air Pros failed to follow up with legal counsel and the insurance companies. "'[E]xcusable neglect' occurs when there has been a failure to take proper steps at the proper time, not in consequence of carelessness, but as the result of some unavoidable

hindrance or accident." *Farmers Ins. Grp. v. Dist. Ct.*, 507 P.2d 865, 867 (Colo. 1973). Air Pros presented no evidence of an unavoidable hindrance or accident that affected its ability to respond to the complaint, and to the extent it claims it was not required to do so, we reject that claim. The record shows that Air Pros' service agent received the complaint and forwarded it to the appropriate people with instructions on which legal counsel to contact. Those individuals failed to comply with the agent's instructions and instead assumed the insurance attorneys were handling the matter, without ever contacting the attorneys to learn the status of the lawsuit. These poor office procedures do not justify failing to respond to the complaint. *See Goodman Assocs., LLC*, 222 P.3d at 322. Rather, Air Pros' failures to follow up with its insurance carriers constitute negligence and common carelessness that is insufficient to establish excusable neglect. *See id.* Accordingly, we discern no abuse of discretion in the court's finding that Air Pros failed to establish excusable neglect by clear and convincing evidence. Further, we are not convinced that the district court imposed a heightened burden of proof. The court cited the proper

burden of proof in its order and used it in analyzing the *Goodman* factors.

¶ 31 We are also unpersuaded that *J.B. v. MKBS, LLC*, 2024 COA 117, requires us to reverse the district court's order. As Air Pros noted in its notice of supplemental authority, this case properly states the standards relevant to motions to set aside default judgment, standards we have articulated above. *Id.* at ¶¶ 50-70. The fact that the *J.B.* division found no abuse of discretion and affirmed the district's decision to set aside the default judgment does not require a conclusion that a district court who denies a motion to set aside a default judgment abuses its discretion in doing so. In our view, this case simply illustrates the district court's broad discretion in applying the *Goodman* factors.

¶ 32 Finally, in deciding to resolve this case based on the excusable neglect factor, we acknowledge a tension between our ability to do so under longstanding supreme court cases, *McMichael*, ¶ 13, and *Goodman*'s language requiring a weighing of all the factors. But even assuming, without deciding that Air Pros sufficiently alleged meritorious defenses, they do not justify vacating a judgment, but instead may shed light on the other factors. *See Goodman Assocs.,*

LLC, 222 P.3d at 320. Indeed, the record shows the district court considered and weighed Air Pros' employees' contradictory testimony that internal miscommunications caused the failure to respond, but also that Denton's failure to comply with CDARA's notice requirement caused the failure to respond. Because the record supports the court's findings, we conclude that Air Pros failed to establish excusable neglect by clear and convincing evidence, affirm the judgment on this basis, and do not address the remaining *Goodman* factors. *See McMichael*, ¶ 13; *Buckmiller*, 727 P.2d at 1116; *see also People v. Curtis*, 2014 COA 100, ¶ 12 ("[T]he cardinal principle of judicial restraint [is] if it is not necessary to decide more, it is necessary not to decide more." (quoting *PDK Lab'ies Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment))).

III. Inadvertence and Void Judgment

¶ 33 Air Pros contends the district court erred by not ruling on its alternative "inadvertence" argument, under Rule 60(b)(1), and its void judgment argument predicated on Denton's failure to comply with CDARA's notice requirements before judgment entered.

¶ 34 Concerning inadvertence, Air Pros concedes on appeal that the same facts forming the basis of its excusable neglect argument constitute the basis for its inadvertence argument. While we recognize that the terms in Rule 60(b)(1) are not synonymous, *Goodman Assocs., LLC*, 222 P.3d at 318, Air Pros did not develop its argument by explaining the difference between excusable neglect and inadvertence and relied on a decades-old out-of-state case discussing inadvertence but finding it was insufficient to reverse the denial of the motion to set aside the default judgment. Because we do not address undeveloped arguments, we discern no error by the district court. *Am. Fam. Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co.*, 2015 COA 135, ¶ 42.

¶ 35 Air Pros premises its void judgment claim on Denton's failure to comply with the notice provisions of CDARA and the automatic stay that enters pending a claimant's completion of CDARA's requirements. § 13-20-803.5. It reasons that actions taken in violation of an automatic stay are void. We disagree for two reasons. First, as noted above, a meritorious defense does not automatically justify vacating a default judgment but rather is one factor that informs the court's excusable neglect finding under

C.R.C.P. 60(b). The district court found that Air Pros knew of the damages caused by its defective work more than seventy-five days before Denton filed his lawsuit, thereby rejecting the notice argument under CDARA, and the record supports this finding. Second, as discussed, the record shows the court considered meritorious defenses, including the CDARA argument, in reaching its excusable neglect finding. Therefore, the district court's excusable neglect finding necessarily includes a finding that the judgment is not void. Because we affirm that finding, we reject Air Pros' void judgment argument.

IV. Damages Calculation

¶ 36 Air Pros next contends that the district court failed to consider whether the judgment should be set aside, reopened, or corrected based on potential mistakes in the damages calculation. We disagree because the court considered these potential mistakes in its analysis of the equities. Indeed, the court's order states, "In considering the equitable factors in this case the court has considered the relatively prompt response of Defendant in seeking to set aside the judgment and the alleged incorrectness of some of Plaintiff's damages calculations. However, these considerations do

not outweigh the equitable considerations in favor of Plaintiff." Accordingly, we discern no legal basis to reverse the damages awarded.

V. Attorney Fees

¶ 37 Denton requests an award of attorney fees and double costs pursuant to C.A.R. 39.1 and C.A.R. 38(b). He asserts that Air Pros' arguments are frivolous and without merit. An appeal can be frivolous in two ways: frivolous as filed or frivolous as argued. *See Castillo v. Koppes-Conway*, 148 P.3d 289, 292 (Colo. App. 2006). An appeal may be frivolous as filed where the "judgment by the tribunal below was so plainly correct and the legal authority contrary to appellant's position so clear that there is really no appealable issue." *Campaign Integrity Watchdog v. Coloradans for a Better Future*, 2016 COA 56M, ¶ 33 (citation omitted). An appeal may be frivolous as argued where "the appellant commits misconduct in arguing the appeal," *id.* (citation omitted), and "fail[s] to set forth . . . a coherent assertion of error, supported by legal authority," *Castillo*, 148 P.3d at 292.

¶ 38 We conclude that Air Pros' appeal is neither frivolous as filed nor frivolous as argued. Its brief argued the tension in the case law

noted above and cited legal authority to support its arguments. Accordingly, we deny Denton's request for appellate attorney fees and costs.

VI. Disposition

¶ 39 The order is affirmed.

JUDGE SCHOCK and JUDGE SULLIVAN concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

***Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through the Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at https://www.cobar.org/Appellate*

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN RE:	Chapter 11
	Case No. 25-10356 (PMB)
AFH AIR PROS, LLC, et al.,1	(Jointly Administered)
Debtors.	

PROPOSED ORDER: CREDITOR JACK DENTON'S MOTION FOR RELIEF FROM THE STAY PURSUANT TO 11 U.S.C. § 362 AND RULES 4001 AND 9014 OF THE BANKRUPTCY RULES

HAVING COME before this Court on Creditor Jack Denton's Motion for Relief from the Stay, the Court hereby Grants Creditor Jack Denton's Motion and is Granted Relief from the Stay to pursue a direct action against Debtor's liability insurance policy for collection of his damages, pursuant to 11 U.S.C. § 362, and Rules 4001 and 9014 of the Bankruptcy Rules.

IT IS HEREBY ADJUDGED AND ORDERED, that the Stay is lifted as to Creditor Jack Denton to pursue a direct action against Debtor's liability insurance policy.

1 The last four digits of AFH Air Pros, LLC's tax identification numbers are 1228. Due to the large number of debtor entities in these chapter 11 cases, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the claims and noticing agent at https://www.veritaglobal.net/AirPros. The mailing address for the debtor entities for purposes of these chapter 11 cases is: 150 S. Pine Island Road, Suite 200, Plantation, Florida 33324.

Dated this _____ day of _____, 2025

_____
Hon. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN RE:	**Chapter 11**
	Case No. 25-10356 (PMB)
AFH AIR PROS, LLC, et al.,[1]	**(Jointly Administered)**
Debtors.	

NOTICE OF HEARING

PLEASE TAKE NOTICE that Jack Denton has filed a Motion for Relief from the Automatic Stay and related papers with the Court seeking an Order Granting Relief from the Automatic Stay.

PLEASE TAKE FURTHER NOTICE that the Court will hold a hearing on the Motion for Relief from the Automatic Stay at 1:00 P.M., on May 12, 2025 in Courtroom 1202, United States Courthouse, 75 Ted Turner Drive SW, Atlanta, GA 30303, which may be attended in person or via the Court's Virtual Hearing Room. You may join the Virtual Hearing Room through the "Dial-in and Virtual Bankruptcy Hearing Information" link at the top of the homepage of the Court's website, https://www.ganb.uscourts.gov/ or the link on the judge's webpage, which can also be found on the Court's website. Please also review the "Hearing Information" tab on the judge's webpage for further information about the hearing. You should be prepared to appear at the hearing

[1] 1 The last four digits of AFH Air Pros, LLC's tax identification numbers are 1228. Due to the large number of debtor entities in these chapter 11 cases, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the claims and noticing agent at https://www.veritaglobal.net/AirPros. The mailing address for the debtor entities for purposes of these chapter 11 cases is: 150 S. Pine Island Road, Suite 200, Plantation, Florida 33324.

via video, but you may leave your camera in the off position until the Court instructs otherwise. Unrepresented persons who do not have video capability may use the telephonic dialin information on the judge's webpage. Your rights may be affected by the Court's ruling on these pleadings. You should read these pleadings carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.) If you do not want the Court to grant the relief sought in these pleadings or if you want the Court to consider your views, then you and/or your attorney must attend the hearing. You may also file a written response to the pleadings with the Clerk at the address stated below, but you are not required to do so. If you file a written response, you must attach a certificate stating when, how and on whom (including addresses) you served the response. Mail or deliver your response so that it is received by the Clerk before the hearing. The address of the Clerk's Office is Clerk, U.S. Bankruptcy Court, 75 Ted Turner Drive SW, Room 1340, Atlanta, GA 30303. You must also mail a copy of your response to the undersigned at the address stated below.

If a hearing on the Motion cannot be held within thirty (30) days, Movant waives the requirement for holding a preliminary hearing within thirty days of filing the Motion and agrees to a hearing on the earliest possible date. Movant consents to the automatic stay remaining in effect until the Court orders otherwise.

Respectfully submitted, this 14th day of April, 2025.

EARL & EARL, PLLC

/s/ Kit Barron Bradshaw, Esq.

Kit Barron Bradshaw, Esq. Ga Bar #075450
4565 Hilton Parkway, Ste. 228
Colorado Springs, CO 80907
Telephone: (719) 900-2500
k.bradshaw@earlandearl.com
COUNSEL TO JACK DENTON

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 14, 2025, he caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Georgia to all parties entitled to receive such filings.

EARL & EARL, PLLC

/s/ Kit Barron Bradshaw, Esq.

Kit Barron Bradshaw, Esq. Ga Bar #075450
4565 Hilton Parkway, Ste. 228
Colorado Springs, CO 80907
Telephone: (719) 900-2500
k.bradshaw@earlandearl.com

COUNSEL TO JACK DENTON