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GLOBAL CELLULAR ORDER DENYING STAYMOBILE'S MOTION TO RETROACTIVELY EXTEND THE DEADLINE FOR ITS RESPONSES AND OBJECTIONS

Kelly Lee Ellerbee
Fulton County Superior Court Judge

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IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

GLOBAL CELLULAR, INC.,

Plaintiff,

v.

STAYMOBILE VENTURE, LLC,

Defendant.

CIVIL ACTION FILE NO.

2020CV331811

**ORDER DENYING STAYMOBILE'S MOTION TO RETROACTIVELY
EXTEND THE DEADLINE FOR ITS RESPONSES AND OBJECTIONS TO
PLAINTIFF'S REQUESTS FOR PRODUCTION THROUGH
SEPTEMBER 4, 2020**

The above styled matter is before the Court on Staymobile's Motion to Retroactively Extend the Deadline for its Responses and Objections to Plaintiff's Requests for Production through September 4, 2020, filed September 8, 2020 ("Motion"). Having reviewed the record and considered the arguments and submissions of counsel, the Court enters the following order.

1. Standard of Review

O.C.G.A. § 9-11-6(b) provides in pertinent part,

When by this chapter or by a notice given thereunder . . . an act is required . . . to be done at or within a specified time . . . the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the

specified period, permit the act to be done where the failure to act was the result of excusable neglect

A trial court granting a retroactive extension based upon grounds of excusable neglect under this provision, has “wide discretionary authority,” but where the neglect must be established as a matter of fact, the Court’s finding must be supported by evidence. King v. Green, 189 Ga. App. 105, 106 (1988).

2. Background

It is undisputed, pursuant to the mutual agreement of counsel, Defendant Staymobile Venture, LLC was due to serve its responses to Plaintiff Global Cellular, Inc.’s First Requests for Production of Documents (“RFP Responses”) no later than August 12, 2020. Defendant timely filed responses to Plaintiff’s interrogatories that were also due August 12, 2020. A Rule 5.2 Certificate, signed by defense counsel, reflecting service of those interrogatory responses, with no mention of the RFP Responses, was filed that same day (“Rule 5.2 Certificate”). The following day, an assistant working for defense counsel provided Plaintiff’s counsel with the interrogatory responses and Rule 5.2 Certificate via email which also made no mention of the RFP Responses (August 13, 2020 Email”). (Gunter Aff. ¶ 12; Ex. F). Three attorneys on the defense team were copied with this email. (Id.; Ex. F).

Defendant claims it prepared RFP Responses that were also ready to be served on August 12, 2020; however, “due to an administrative error [in the office of defense counsel]. . . the person responsible for serving discovery was under the

misimpression they were only supposed to serve the interrogatory responses.” (Motion, pp. 4-5). Defendant contends its counsel erroneously assumed the RFP Responses were timely served and did not learn otherwise until it received a letter from Plaintiff’s counsel, dated August 31, 2020, inquiring about the missing responses. (Motion, p. 5; Gunter Aff., ¶ 14; Ex. G). Defendant served the RFP Responses on September 4, 2020. (Gunter Aff., ¶ 15). This Motion was filed four days later.

3. Analysis and Conclusions

The Motion seeks to retroactively extend the deadline for Defendant to serve its RFP Responses from August 12, 2020 to September 4, 2020. It relies upon general discovery provisions. O.C.G.A. §§ 9-11-26(d) (trial court has general power to determine the sequencing and timing of discovery) and O.C.G.A. § 9-11-34(d) (a “court may allow a shorter or longer time” than the 30-day statutory deadline for responses to requests for the production of documents).¹ In seeking this retroactive extension, Defendant also relies on upon the substantial authority provided a trial court overseeing discovery. See generally, Miller v. Lynch, 351 Ga. App. 361, 367 (2019) (“Trial courts have broad discretion to control discovery . . .”).

The Court agrees with Plaintiff that the Motion is better adjudged under

¹ Defendant also cites O.C.G.A. § 9-11-26(c)(2) for the proposition that a trial court may order discovery “be had on specified terms and conditions” However, O.C.G.A. § 9-11-26(c) addresses motions for protective orders, and the Court finds it inapplicable.

O.C.G.A. § 9-11-6(b), cited above, which specifically empowers a court, upon motion made after the expiration of a deadline and upon a showing of excusable neglect, to permit an act that would otherwise be untimely.²

In King, the trial court erred when it granted a retroactive extension pursuant to O.C.G.A. § 9-11-6(b) by making a fact-based determination of excusable neglect without supporting evidence. “[W]hile O.C.G.A. § 9-11-6(b) gives the trial court wide discretionary authority to enlarge the time within which an act may be done, the discretion to be exercised is a judicial discretion, not an unrestrained one.” Id. at 106.

Attached to the Motion are various unauthenticated email and text exchanges whereby defense counsel attempts to demonstrate their efforts to timely prepare and serve the RFP Responses. (Motion, Ex. 4-5).³ Defendant argues these unauthenticated attachments to the Motion constitute evidence. (Reply, pp. 3-4). The Court disagrees. See generally Goodson v. Pointer, 318 Ga. App. 308, n. 5 (2012) (unauthenticated document attached as exhibit to motion was not proper evidence) citing White v. City of Atlanta, 248 Ga. App. 75, n. 3 (2001) (unauthenticated attachments to brief were not competent evidence) and Moore v.

² Regardless of whether the matter is governed by the general discovery provisions of the Civil Practice Act and powers afforded a trial court in monitoring discovery or the specific provision of the Civil Practice Act regarding retroactive extensions of time, the request still rests within the discretion of the Court.

³ The Court has reviewed the unredacted copies of Exhibits 4 and 5 that were provided for *in camera* inspection.

Goldome Credit Corp., 187 Ga. App. 594, 596 (1988) (unsworn allegations made in pleadings that have not been admitted by opposing party do not constitute evidence).

Even if the Court were to consider the unauthenticated statements in and exhibits attached to the Motion, they do not establish excusable neglect. Specifically, they do not satisfactorily explain the “administrative error” that resulted in the failure to serve the RFP Responses or why the failure was not discovered sooner in light of the Rule 5.2 Certificate signed by defense counsel and the August 13, 2020 Email received by defense counsel.

For these reasons, it is hereby ordered and adjudged that the Motion is **DENIED.**

SO ORDERED this 30th day of September, 2020.



HONORABLE KELLY LEE ELLERBE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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Attorneys for Plaintiff	Attorneys for Defendant
<p>Jared C. Miller Justin P. Gunter PARKER, HUDSON, RAINER & DOBBS LLP 303 Peachtree Street NE Suite 3600 Atlanta, Georgia 30308 Tel: 404-523-5300 Fax: 404-522-8409 jmiller@phrd.com jgunter@phrd.com</p>	<p>John D. Bennett Brenton S. Bean FREEMAN MATHIS & GARY LLP 100 Galleria Parkway Suite 1600 Atlanta, Georgia 30339 Tel: 770-818-0000 Fax: 770-937-9960 jbennett@fmglaw.com bbean@fmglaw.com</p> <p>Jeffrey A. Long* BRAY & LONG, PLLC 2820 Selwyn Avenue Suite 400 Charlotte, North Carolina 28209 Tel: 704-523-7777 Fax: 704-523-7780 jlong@braylong.com</p> <p><i>*Admitted pro hac vice</i></p>