

**FOURTH DIVISION
DILLARD, C. J.,
DOYLE, P. J., AND BETHEL, J.**

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September 25, 2018

**NOT TO BE OFFICIALLY
REPORTED**

In the Court of Appeals of Georgia

A18A1001. BOWEN et al. v. SAVOY.

BETHEL, Judge.

Eleanor M. Bowen and Margaret M. Innocenti (Appellants) appeal the trial court's order denying their motion to set aside default in an action filed against them by their sister, Priscilla A. Savoy. Appellants argue that the trial court erred in finding that they did not have a meritorious defense or a reasonable excuse for failing to timely answer the complaint. Because the trial court's finding that Appellants lacked a reasonable excuse for their late answer was not an abuse of discretion, we affirm.

Savoy brought suit against her three sisters, Bowen, Innocenti, and Suzanne E. Douglas¹ alleging that they colluded to transfer funds from their infirm mother's

¹ The complaint against Douglas was dismissed for lack of personal jurisdiction.

accounts for their own use, thus diminishing the value of their mother's estate upon her death. Appellants were served with the summons and complaint on June 20 and 22, 2016. Appellants filed a motion to dismiss the complaint for lack of jurisdiction² but otherwise failed to file an answer, as counsel believed one was not required due to the pending motion. Following the trial court's hearing on Appellants' motion to dismiss, Appellants filed their answer on February 21, 2017. However, less than a week later, Savoy moved for default judgment, which the trial court entered on August 23, 2017. The next day, Appellants filed their motion to set aside default, which the trial court denied following a hearing. This appeal followed.

² The motion included supporting affidavits from Bowen denying many of the factual allegations in the complaint.

Under OCGA § 9-11-55 (b),³ a prejudgment default may be opened on one of three grounds if four conditions are met. The three grounds are: (1) providential cause, (2) excusable neglect, and (3) proper case; the four conditions are: (1) showing made under oath, (2) offer to plead *instanter*, (3) announcement of ready to proceed with trial, and (4) setting up a meritorious defense. The question of whether to open a default on one of the three grounds noted above rests within the discretion of the trial judge.

K-Mart Corp. v. Hackett, 237 Ga. App. 127, 128 (1) (514 SE2d 884) (1999) (citation omitted). Compliance with the four conditions is a condition precedent; in its absence, the trial court has no discretion to open default. *See Butterworth v. Safelite Glass Corp.*, 287 Ga. App. 848, 850 (1) (652 SE2d 877) (2007).

³ OCGA § 9-11-55 (b) provides:

At any time before final judgment, the court, in its discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of required pleadings or for excusable neglect or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened, on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead *instanter*, and shall announce ready to proceed with the trial.

“The rule permitting opening of default is remedial in nature and should be liberally applied, for default judgment is a drastic sanction that should be invoked only in extreme situations. Whenever possible cases should be decided on their merits for default judgment is not favored in law.” *Kaylor v. Atwell*, 251 Ga. App. 270, 271 (1) (553 SE2d 868) (2001) (footnote omitted). “The sole function of an appellate court reviewing a trial court’s denial of a motion to open default is to determine whether all the conditions set forth in OCGA § 9-11-55 have been met and, if so, whether the trial court abused its discretion based on the facts peculiar to each case.” *K-Mart Corp.*, 237 Ga. App. at 128 (1) (citation omitted).

Here, the trial court found that the Appellants had failed to raise a meritorious defense, which is a condition precedent to opening default under OCGA § 9-11-56 (b), and that they failed to provide a reasonable explanation for their failure to timely answer the complaint. While we are sympathetic to defense counsel’s mistake, we cannot say that the trial court abused its discretion in finding this explanation unreasonable and thus concluding that the case was not a proper one for the opening of default. *See Samadi v. Fed. Home Loan Mortg. Corp.*, 344 Ga. App. 111, 117 (1) (b) (809 SE2d 69) (2017) (“the fact that a defendant has a meritorious defense to an

action is not in itself a ground for opening default. (citation and punctuation omitted)).

[A]lthough the ‘proper case’ ground is the broadest of the three set out in OCGA § 9-11-55 (b), it is not so broad as to authorize the opening of a default for any reason whatsoever. Its purpose is to permit the reaching out in every conceivable case where injustice might result if the default were not opened. Whatever that injustice might be, it may be avoided and the default opened under the ‘proper case’ analysis only where a reasonable explanation for the failure to timely answer exists. Requiring a reasonable excuse or explanation for opening the default on this ground is necessary, otherwise the trial court would not be acting within its discretion as required by OCGA § 9-11-55 (b). As we have explained, judicial discretion is that discretion bound with the rule of reason and law.

BellSouth Telecomm., Inc. v. Future Commc’n, Inc., 293 Ga. App. 247, 250 (2) (666 SE2d 699) (2008) (citations, punctuation, and emphasis omitted). “[T]his Court’s review of a trial court’s determination of reasonableness of such an explanation is exceedingly deferential.” *Strader v. Palladian Enter., LLC*, 312 Ga. App. 646, 650 (719 SE2d 541) (2011).

Here, Appellants failed to answer the complaint because their counsel believed it was not required, as he had filed a motion to dismiss for lack of personal

jurisdiction. This is not the law in Georgia. *See* OCGA § 9-11-12 (a) & (j) (providing that an answer must be filed 30 days after service of the summons and complaint, unless otherwise provided by statute, and for the stay of *discovery* for a certain period following the filing of a motion to dismiss); *Turner v. State*, 213 Ga. App. 309, 310 (3) (444 SE2d 372) (1994) (rejecting defendant’s argument that he was entitled to file an answer after the denial of his motion to dismiss).⁴ Under these circumstances, we conclude that the trial court did not abuse its broad discretion in rejecting Appellants’ explanation as unreasonable.

Judgment affirmed. Dillard, C. J., and Doyle, P. J., concur.

⁴ *But see Trammel v. Bradberry*, 256 Ga. App. 412, 426 (9) (568 SE2d 715) (2002) (physical precedent only) (defendant’s motion to dismiss constituted an answer where motion admitted all facts pled in the complaint and raised his sole defense). On appeal, Appellants do not argue that their motion to dismiss constituted an answer.