

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN

KEVIN W. KULEK,
Debtor,

BK CASE NO. 16-21030
ADV. CASE NO. 17-02002

JUDGE: OPPERMAN

RANDALL L. FRANK,
Plaintiff,
V

PAUL B. MALETICH,
VIRTUAPIN CABINETS, INC.

Defendants.

KEITH M. NATHANSON (P41633)
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**DEFENDANTS', MALETICH AND VIRTUAPIN CABINETS, INC.'S, MOTION TO
DISMISS/SET ASIDE DEFAULT JUDGMENT**

NOW COMES Defendants, Maletich and Virtuapin Cabinets, Inc., by and through their attorney, Peter J. Philpott, and says the following for their motion to set aside default judgment:

1. Defendants were allegedly served with the summons and complaint on or about January 31, 2017, by United States first class mail postage prepaid. (See Brief Exhibit 1, Certificate of Service of Summons and Complaint.)
2. Service of Process requires a Summons and Complaint to be served on an individual by personal service or certified mail return receipt requested. Additionally, service of

process on a corporation requires personal service on an officer of said corporation or service by certified mail return receipt requested on the resident agent of said corporation.

3. In this matter service of process was insufficient and requires this matter be dismissed pursuant to FRCP 12(b)(2)(4)&(5).

4. Should this Court deem service of process sufficient Defendants seek to have the Default Judgment set aside

5. Defendants were referred to this office on or about February 21, 2017, wherein an appointment with the clients was set up within the next couple days.

6. Because of the short time remaining to file and answer and before even receiving the retainer this writer called Plaintiff's attorney's office to seek an extension of a mere 14 days to file an answer. The first call would have been made approximately on February 23, 2017.

7. Having not received a return phone this writer called Plaintiff's attorney's office twice and left messages with Plaintiff's attorney and his assistant requesting an extension to file answer, this writer expressed the urgency in which a return phone was necessary.

8. On March 7, 2017, as this writer was home with a sick child, I had my assistant called requesting an extension, again leaving a message. (See Brief Exhibit 2, Affidavit of Lindsay Wisker, legal assistant.)

9. Each call to Plaintiff's attorney's office was answered by an automated answering in which you could only leave a message. No return phone call was ever made.

10. On March 8, 2017, having not received a call back, this writer thought wise to at least file an Appearance in this matter. It was then discovered that a Default Judgment was already entered in this matter.

11. It appears that the Request for Entry of Default was filed by Plaintiff on the day following the 30th day to file an Answer.

12. On March 8, 2017, an email was sent to Plaintiff's attorney's office seeking a Stipulation to Set Aside Default, and inquired about Plaintiff's attorney's office receiving any of our messages. Concurrence in the stipulation was rejected on March 9, 2017.

13. At all times, Defendants intended to defend this matter as Defendant's were actually defrauded by Debtor, Kevin W. Kulek. (See Brief Exhibit 3, Affidavit of Meritorious Defenses.)

14. Due to the complex allegations of fraud and the unfamiliarity of the entirety of the case this writer was going to need more time to formulate a sufficient answer rather than just filing blanket denials in an Answer that would have to be amended in the future.

15. Defendants request the Default Judgment be set aside pursuant to FRCP Rule 55(b), as Defendants timely retained counsel, and immediately sought an extension of time to file an Answer on multiple occasions within the time for filing an Answer, a Defendants have meritorious defenses to the Complaint.

16. Defendants also seek to have the Default Judgment set aside through FRCP 60(1)(4)&(6).

Dated: March 8, 2017

/s/Peter J. Philpott
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