

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
BAY CITY

IN RE: Kevin W. Kulek

Chapter 7 Petition
16-21030-dob
Honorable Daniel Opperman

_____/

RANDALL L. FRANK, TRUSTEE,
Plaintiff,

Adversary Case Number
17-02002-dob
Honorable Daniel Opperman

V

PAUL B. MALETICH
VIRTUAPIN CABINETS, INC.,
Defendants.

_____/

Keith M. Nathanson, P41633
Special Litigation Counsel to Randall L. Frank, Trustee
Attorney for Plaintiff
Keith M. Nathanson, PLLC
2745 Pontiac Lake Road
Waterford, MI 48328
(248) 436-4833
kn@nathanson-law.com

Peter J. Philpott, P48078
Attorney for Defendants
503 South Saginaw Street, Suite 1415
Flint, MI 48502
(810) 234-1300

_____ /

ANSWER TO MOTION TO DISMISS/SET ASIDE DEFAULT JUDGMENT

NOW COMES Plaintiff, Randall L. Frank, Trustee, by and through his attorney,
Keith M. Nathanson, and for his answer to Defendants' Motion to Dismiss/Set Aside
Default Judgment, states as follows:

1. Plaintiff admits that Defendants were properly served on January 31, 2017.
2. Plaintiff denies the allegations contained in paragraph two, for the reason they are not true, and further states that Bank.R.Civ.P. 7004 clearly and unequivocally provides for service by first class mail for both an individual and a corporation and this allegation is a blatant misrepresentation of the requirements for service of process in an adversary complaint.
3. Plaintiff denies the allegations contained in paragraph three, for the reason they are not true and state that service of process was properly effectuated under Bank.R.Civ.P 7004(b)(1) and (b)(3).
4. Plaintiff neither admits nor denies the contents of paragraph four, as same is not an allegation which requires a response in the context of a motion, and further what Defendants "seek" is irrelevant.
5. Plaintiff neither admits nor denies the allegations contained in paragraph five, Plaintiff being without specific information about Defendants actions with their Counsel, and further state that any such action or inaction and the timing of same in no way alters the requirements of Bank.R.Civ.P. 7012(a), nor did Defendants at any time file a motion under F.R.Civ.P. 6(b) to extend the time to answer.
6. Plaintiff, in response to paragraph six, states that his Counsel did not receive any call on February 23, 2017, and that at no time did Plaintiff or his Counsel grant any extensions to the requirements of Bank.R.Civ.P. 7012(a), and further state that a phone call or a desire for an extension alters the requirements of

Bank.R.Civ.P. 7012(a), nor does a phone call or a “desire” meet the requirements of F.R.Civ.P. 6(b) to extend time.

7. Plaintiff, in response to paragraph seven, states that his Counsel did receive an unintelligible message with a bad phone number that asked for a return call but did not specify details and further states that at no time did Plaintiff or his Counsel grant any extensions to the requirements of Bank.R.Civ.P. 7012(a), and further state that a phone call or a desire for an extension alters the requirements of Bank.R.Civ.P. 7012(a) and the requirements to file an answer, nor does it qualify as a motion pursuant to F.R.Civ.P. 6(b).
8. Plaintiff, in response to paragraph eight, states that his Counsel did not receive any call on March 7, 2017, and that at no time did Plaintiff or his Counsel grant any extensions to the requirements of Bank.R.Civ.P. 7012(a), and further states that Bank.R.Civ.P. 7012(a) does not provide any extensions for having a “sick child”, nor does F.R.Civ.P. 6(b) provide an automatic extension with the filing of a proper motion.
9. Plaintiff, in response to paragraph nine, states that his Counsel does have a voice mail system, and that no extensions were ever given for response to the Complaint.
10. Plaintiff, in response to paragraph ten, states that the filing of an appearance is not an answer as required under the purview of Bank.R.Civ.P. 7012(a), and further states that at all relevant times, Plaintiff and his Counsel fully complied with F.R.Civ.P., Bank.R.Civ.P., and the L.B.R. EDM, and that further any and all filings by Plaintiff’s Counsel were readily available on PACER/ECF.

11. Plaintiff, in response to paragraph eleven, states that a request for clerk's entry of default was filed in the instant matter, as is appropriate when no answer has been filed in accordance with Bank.R.Civ.P 7012(a).
12. Plaintiff, in response to paragraph twelve, admits that an email was sent seeking a stipulated order setting aside the default judgment, and that Plaintiff's Counsel responded that he was not authorized to grant such relief, and states that same is irrelevant to the instant motion.
13. Plaintiff, in response to paragraph thirteen, denies the allegations contained in paragraph thirteen, and states that Defendants helped Debtor perpetrate the fraud that the Predator pinball machine was licensed, including posts by Defendants on newsgroups and pinball sites that they would not be producing cabinets for a project that was not licensed; having Debtor transfer money to Defendants in amounts less than \$10,000.00 per transfer with multiple checks written on the same day.
14. Plaintiff, in response to paragraph fourteen, denies the allegations contained in paragraph fourteen, for the reason they are not true, and further states that Bank.R.Civ.P. 7012(a) does not provide for "more time to formulate a sufficient answer" and that further, this adversary proceeding is simply about the fraudulent transfer of money by Debtor to Defendants to hide assets and money, and obtain money for pinball cabinets and parts which were not provided, including false invoices sent to Debtor on PayPal for which merchandise was not delivered.

15. Plaintiff, in response to paragraph fifteen, state that F.R.Civ.P. 55(b) is wholly inapplicable to setting aside a default judgment, and further none of the actions allegedly taken by Defendants' Counsel operate as an extension to answer or otherwise modify B.R.Civ.P. or Fed.R.Civ.P.

16. Plaintiff, in response to paragraph sixteen, states that there is no "FRCP 60(1)", "FRCP 60(4)" or "FRCP 60(6)" and therefore any request for relief is inappropriate.

WHEREFORE Plaintiff moves this Honorable Court to deny the motion of Defendants, or in the alternative, if the Court should grant relief from the Default Judgment, to do so only upon terms that are just, to include payment of Counsel for Trustee's fees necessitated by the lack of diligence of Defendant, inclusive of the time for the necessity of having to respond to this motion.

/s/ Keith M. Nathanson

Keith M. Nathanson, P41633

Special Litigation Counsel to Randall L. Frank, Trustee
Attorney for Plaintiff

Keith M. Nathanson, PLLC

2745 Pontiac Lake Road

Waterford, MI 48328

(248) 436-4833

kn@nathanson-law.com