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.
_____/

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BRIEF IN RESPONSE TO MOTION TO DISMISS/SET ASIDE DEFAULT JUDGMENT

FACTS:

Plaintiff filed his adversary complaint against Defendants on January 2, 2017. Service was executed against Defendants on January 31, 2017 (see docket 12). The

clerk entered the Default against Defendants for failure to respond on March 8, 2017. On the same date, Plaintiff filed a motion for default judgment and same was entered by the Court on March 8, 2017. The only filings by Defendants' Counsel prior to the instant motion was a "notice of appearance" filed on March 10, 2017. Defendants took no other action in the matter.

Defendants then filed the instant motion on March 21, 2017, more than then days after entry of the Default Judgment.

LAW AND ARGUMENT

I. DEFENDANTS WERE PROPERLY SERVED UNDER F.R.BANK.P. 7004(b)(1) and 7004(b)(3) AND DEFENDANTS' ARGUMENTS VIOLATE F.R.BANK.P. 9011

F.R.Bank.P. Rule 7004 states:

"(a) SUMMONS; SERVICE; PROOF OF SERVICE.

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)–(j), (*l*), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under Rule 4(e)–(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(2) The clerk may sign, seal, and issue a summons electronically by putting an "s/" before the clerk's name and including the court's seal on the summons.

(b) SERVICE BY FIRST CLASS MAIL. Except as provided in subdivision (h), **in addition to the methods of service authorized by Rule 4(e)–(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid** as follows:

(1) **Upon an individual** other than an infant or incompetent, **by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession**.

…

(3) **Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment** or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

…"

Defendants' argument to the Court is that the matter should be dismissed pursuant to F.R.Civ.P. 12 for "lack of personal service, insufficient process, and insufficient service of process". Defendants rely upon F.R.Civ.P. 4(e) which require personal service or service in accordance with the Michigan Court Rules (more specifically, MCR 2.105).

Oddly enough, Defendants' even claim that: "The Federal Rule [sic] of Civil Procedure and the [sic] Bankruptcy Rule 7004, don't even mention service by mail". [See Defendants' Brief, page 3]. Defendants admit that both were served by regular mail.

Defendants' arguments under F.R.Civ.P. 4(h) and 4(e) are frivolous and without even a scintilla of merit. Defendants' Counsel clearly did not even bother to read F.R. Bank.P. 7004(b) which clearly and unequivocally states:

" … **in addition to** the methods of service authorized by Rule 4(e)-(j) F.R.Civ.P. service may be made within the United States by first class mail postage prepaid …"

F.R.Civ.P. 4(e)-(j) are not exclusive methods of service, as 7004 allows mailing. Defendants have acknowledged being served by mail.

This argument is spurious and without any legal support whatsoever.

II. DEFENDANT SHOWS NO GOOD CAUSE AND MERITORIOUS DEFENSE AND THE JUDGMENT SHOULD NOT BE SET ASIDE.

A. Defendants' Request for Relief under F.R.Civ.P. Rule 55 is untimely as the matter has proceeded to and had the entry of a Default Judgment.

Defendants while arguing first in the motion that the default judgment should be set aside pursuant to F.R.Civ.P. 55(b), now argue that subsection (c) is appropriate.

F.R.Civ.P. Rule 55(c) states:

"(c) SETTING ASIDE A DEFAULT OR A DEFAULT JUDGMENT. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b)."

Defaults are governed by F.R.Civ.P. 55(a) which states:

"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Federal Rule of Civil Procedure 55(b)(2) states that upon application by the party, the Court may enter a Judgment by Default. Rule 55(b)(2) further provides: "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make

an investigation of other matter, the court may conduct such hearings or order such references as it deems necessary and proper . . . ."

Rule 55(c) of the Federal Rules of Civil Procedure indicates that the Court may set aside a default judgment using the factors contained in Rule 60(b). The Sixth Circuit recently specified that Rule 55(c) "permits a court to set aside a default or default judgment for good cause, versus the application of Rule 60(b), which grants relief from final judgments." *Dassault Systemes, SA v. Childress*, 663 F.3d 832, 838-9 (6th Cir. 2011). In *Dassault*, the Sixth Circuit also provided that, "[u]nder either [Rule 55(c) or Rule 60(b)], our review invokes the well-established factors set forth in *United Coin Meter Co. v. Seaboard Coastline Railroad*, which assess whether[:]

1) the default was willful,
2) a set-aside would prejudice plaintiff,
3) and the alleged defense was meritorious."

(the *"United Coin* factors") *Id*. (internal citations omitted). The Sixth Circuit noted that "[a]lthough the [*United Coin* factors] are the same [under either rule], the standard for applying them to a motion to set aside a final default judgment under Rule 60(b) is more demanding than their application in the context of a motion to set aside an entry of default under Rule 55(c)." *Id*., citing *O.J. Distrib., Inc. v. Hornell Brewing Co*., 340 F.3d 345, 352 (6th Cir. 2003).

Defendants simply took no action to preserve their rights and the responsibility to file an answer or otherwise affirmatively respond within thirty days of the issuance of the summons, as is required.

It should be noted further that Defendants now state that F.R.Civ.P. 55(c) provides a basis for this Court to set aside a default judgment. Once again, Defendants misread

and misrepresent to this Court, as F.R.Civ.P. 55(c) provides this Court with the authority to set aside a **default**, not a default judgment.

While providing the Court with a plethora of excuses why an answer was not filed, Defendants have admitted no 'extension' was given an the only filing was an "appearance".

B. **DEFENDANTS HAVE FAILED TO SHOW SUFFICIENT BASIS FOR RELIEF UNDER F.R.CIV.P 60(B)**

The Sixth Circuit has held that relief under Rule 60(b) "is circumscribed by public policy favoring finality of judgment and termination of litigation." *Info-Hold, Inc. v. Sound Merch., Inc*., 538 F.3d 448, 454 (6th Cir. 2008) (internal citations omitted); *see also Dassault* 663 F.3d at 839 (6th Cir. 2011). Additionally, the party seeking such relief from a final judgment "bears the burden of establishing the grounds for such relief by clear and convincing evidence." *Info-Hold, Inc*. 538 F.3d at 454 (internal citations omitted).

Defendants' position with respect to their "meritorious defenses" is that somehow Debtor paid $96,000.00 "upfront money" to "initiate the agreement". However, Defendants' testimony, as well as the Debtors have both been taken and both have testified there is no written agreement. Further, the payments were made (as testified by Debtor) to purchase pinball cabinets and parts, and Defendants delivered 6 cabinets total (at an approximate value of $600 per cabinet).

Upon review of a motion to vacate a default judgment, the court should consider (1) whether the proponent's culpable conduct led to the default, (2) whether the proponent has a meritorious claim or defense, and (3) whether the opposing party would be prejudiced. *Weiss v. St. Paul Fire Marine Ins. Co.*, 283 F.3d 790, 794 (6th Cir.

2002); *United Coin Meter Co., Inc. v. Seaboard Coastline Rail-road*, 705 F.2d 839, 845 (6th Cir. 1983).

The culpable conduct prong should be examined first, and when relief is sought under Fed.R.Civ.P. 60(b)(1), as it is here, the proponent must demonstrate that its default was the product of mistake, inadvertence, surprise, or excusable neglect. *Manufacturers' Indus. Relations Ass'n v. East Akron Casting Co.*, 58 F.3d 204, 209-10 (6th Cir. 1995) (quoting *Waifer-song, Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992)). Only if the proponent satisfies this prong should the remaining two factors be examined; otherwise the motion to set aside the default judgment should be denied. *Id.*

Defendants have failed to demonstrate anything to this Court that shows mistake, inadvertence, surprise, or excusable neglect. Defendants were properly served, the Summons clearly indicated that a response was due not later than 30 days after the issue date of the summons. Defendants' Counsel received no extension or any other dispensation of time allotment to extend Defendants' responsibilities. Defendants' claim that the filing of the **appearance** two days after the default was entered is due diligence. However, Defendants did not file the instant motion until 13 days after the Judgment was entered, after the Judgment became final.

i. Defendants' lack of due diligence is further demonstrated by Defendants' failure to file a motion to extend time pursuant to F.R.Civ.P. Rule 6(b)

In addition to the lack of diligence and lack of excusable neglect by Defendants, the Court must look at F.R.Civ.P. Rule 6(b) which provides that:

"(b) EXTENDING TIME.

(1) *In General.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) **with or without motion** or notice if the court acts, or **if a request is made**, **before the original time or its extension expires**; or

(B) **on motion made after the time has expired if the party failed to act because of excusable neglect**."

[emphasis added]

Clearly Defendants' Counsel was aware his time had expired and he had not properly responded to the Complaint, only merely filing an "appearance". Defendants' Counsel further admits to having received the summons & complaint from his Clients before the expiration of the time. If the case is as complicated as Defendants' Counsel purports it to be, then barring the granting of an extension by Plaintiff's Counsel, Defendant's Counsel had an obligation to file a motion to extend the time to answer. This could have easily been performed under F.R.Civ.P. 6(b)(1)(B) even if the time expired and Defendants could show that they failed to act because of excusable neglect.

Defendants did nothing. In fact, Defendants did not act until after the time to appeal the Judgment expired. Defendants clearly had the option to have the time to answer extended prior to the expiration of the thirty days, and an opportunity to file a motion to extend the time after expiration of the thirty days. Neither was done.

Additionally, Defendants never requested any concurrence from Plaintiff's Counsel regarding a F.R.Civ.P. 6(b) motion for extension of time. No such motion was ever filed, either before or after the expiration of the time to answer.

ii. **Defendants' request for relief under F.R.Civ.P. 60(b)(4) is without any merit and violates Bank.R.Civ.P. 9011.**

Defendants' request for relief under F.R.Civ.P. 60(b)(4) is utterly without any basis, as service of process was proper (See Plaintiff's argument I, *infra*). "A judgment is void under 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, ...'" *Antoine v. Atlas Turner, Inc*., 66 F.3d 105, 108 (6th Cir. 1995) (quoting In re Edwards, 962 F.2d 641, 644 (7th Cir. 1992)). This clearly does not apply here. Defendants would have this Court completely ignore Bank.R.Civ.P. 7004 which unequivocally provides for service by regular mail. Defendants make no argument for reversal of Bank.R.Civ.P. 7004, or cite any authority why same is inapplicable here.

iii. **Defendants are not entitled to relief under F.R.Civ.P. 60(b)(6).**

Likewise, the request for relief under F.R.Civ.P. 60(b)(6) is misplaced. With regards to Rule 60(b)(6), the Sixth Circuit has held that "[r]elief from a judgment pursuant to Rule 60(b)(6) 'is appropriate to accomplish justice in an extraordinary situation . . . .'" Id. (quoting *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir.1985)). Defendants fail to state a sufficient reason to meet this demanding standard, so they are not entitled to relief on this alternative ground under Rule 60(b). This court has held that 60(b)(6) is to be used "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Hopper v. Euclid Manor Nursing Home,* 867 F.2d 291, 294 (6th Cir. 1989). Rule 60(b)(6) specifically states that the grounds under 60(b)(6) are "other" reasons justifying relief. This can mean nothing less than reasons not stated in 60(b)(1) and the other exceptions.

Defendants' Counsel was dilatory. He did not follow the prescribed rules for responding to the Complaint. Nor did he seek an extension of time to answer. The most effort that was put into the matter was to file an "appearance" when no extension was granted.

C. DEFENDANTS HAVE FAILED TO SHOW ANY MERITORIOUS DEFENSE

Defendants in the unsigned affidavit admit to being served in accordance with Bank.R.Civ.P. 7004.

Further, Defendants (and Debtor) have already testified there was no "agreement" between them, and no documentation exists.

Paragraphs 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 19, and 20 fail to raise any meritorious defense.

Paragraph 4 is wholly inapposite with Defendants' testimony (and Debtors, and the records showing the payment by Debtor for the CNC machine). Defendants have previously testified that Debtor purchased the CNC machine.

Paragraph 5 contradicts Defendants 2004(b) testimony (and the testimony of Debtor) that no agreement exists. Parenthetically, none has ever been produced by Debtor or Defendants.

Paragraph 15 is a self-serving factually-devoid statement.

Paragraph 16 states irrelevant facts. Defendants put the CNC machine into their name and had Debtor pay for it.

Paragraph 18 again is self-serving and contradicts Defendants' prior testimony and Debtors – that no agreement existed. Further Debtor has testified previously that Defendants owe him money for cabinets and other pinball parts which were never

delivered. Defendants have also testified that they have only delivered a limited amount of parts and cabinets to Defendants, certainly not $112,000 worth.

Defendants have no meritorious defense. This is yet another tactic of Defendants who assisted Debtor in perpetrating a fraud of large proportion – to defraud numerous persons of money to allow Debtor and Defendant to obtain money by false pretenses, represent a product for sale which could never be made, and line their own pockets.

RELIEF REQUESTED

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 and the hearing for same to be paid prior to the default judgment being set aside. Plaintiff's Counsel anticipates the total time expended to approach 15 hours and would ask that relief be only granted to Defendants (if the Court is so inclined) upon payment of Counsel for Trustee's fees in the amount of $4,500.00.

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