

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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BROKERAGE CONCEPTS, INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 99-5214
	:	
THE NELSON MEDICAL GROUP,	:	
	:	
Defendant.	:	

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MEMORANDUM

R.F. KELLY, J.

MARCH 15, 2000

Plaintiff, Brokerage Concepts, Inc. ("Plaintiff"), brought this lawsuit on October 21, 1999 against Defendant, The Nelson Medical Group ("Defendant"), for breach of contract and, in the alternative, quantum meruit. On January 24, 2000, this Court granted Plaintiff's Motion for Default which was filed on January 21, 2000. Presently before the Court is Defendant's Motion to Set Aside Judgment pursuant to Federal Rules 55(c) and 60(b). FED. R. CIV. P. 55(c); 60(b). For the reasons which follow, the Motion to Set Aside Judgment is granted.

**I. BACKGROUND.**

On December 10, 1999, the instant lawsuit was served on Defendant. On December 17, 1999, Gregory Nelson, M.D. ("Nelson"), the Defendant's President, contacted and met with an attorney previously retained by Defendant. At that meeting, the attorney declined representation due to the likelihood that he would be called as a witness in this case. Nelson then contacted

and interviewed other counsel from December 17, 1999 through January 10, 2000. In addition, he was out of town on a business trip during the first week of January, 2000. He ultimately retained defense counsel on January 14, 2000. From January 14, 2000 through January 21, 2000, the date when Plaintiff's Motion for Default was filed, defense counsel reviewed the file and investigated Plaintiff's claims.

On January 24, 2000, this Court, by Order, granted Plaintiff's Motion for Default. On February 4, 2000, defense counsel filed a Motion to Dismiss for lack of subject matter jurisdiction. Defense counsel first learned of this Court's entry of Default Judgment against his client on February 8, 2000. The Motion to Set Aside Judgment was thereafter filed on February 16, 2000.

## **II. DISCUSSION.**

Plaintiff's Motion to Set Aside Default is made pursuant to Federal Rule 55(c) which allows, "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." FED. R. CIV. P. 55(c). The decision of whether to set aside the default and reach a decision on the merits is within the discretion of the trial court. See United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 194 (3d Cir. 1984)(citations omitted). Defaults are generally not

avored, and "doubt[s] should be resolved in favor of setting aside the default and reaching a decision on the merits." Atlas Communications, Ltd. v. Waddill, No. CIV.A.97-1373, 1997 WL 700492, at \*1 (E.D. Pa. Oct. 31, 1997)(citing Gross v. Stereo Component Sys., Inc., 700 F.2d 120, 122 (3d Cir. 1983)(citing Farnese v. Bagnasco, 687 F.2d 761, 764 (3d Cir. 1982))). Thus, Rule 55(c) motions are generally construed in favor of the movant. See Momah v. Albert Einstein Med. Ctr., 161 F.R.D. 304, 307 (E.D. Pa. 1995)(citing Hamilton v. Edell, 67 F.R.D. 18, 20 (E.D. Pa. 1975)).

Four factors must be considered by a court ruling on a motion to set aside default judgment under Rule 60(b)(1): (1) whether the plaintiff will be prejudiced; (2) whether the default was the result of the defendant's culpable or excusable conduct; (3) whether the defendant has a prima facie meritorious defense; and (4) whether alternative sanctions would be effective. Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987); see also \$55,518.05 in U.S. Currency, 728 F.2d at 195 (citations omitted). Each factor is examined hereafter.

1. Prejudice to Plaintiff.

The first factor for the Court to consider in ruling on the motion to set aside the default judgment is whether the Plaintiff will be prejudiced by the failure to set aside the default. The United States Court of Appeals for the Third

Circuit ("Third Circuit"), in analyzing this factor, "has considered the loss of available evidence, the increased potential for fraud or collusion, and the plaintiff's substantial reliance on the default." Choice Hotels Int'l, Inc. v. Pennave Assocs., Inc., No. CIV.A.98-4111, 2000 WL 133954, at \*3 (E.D. Pa. Feb. 4, 2000)(citing Feliciano v. Reliant Tooling Co., 691 F.2d 653, 657 (3d Cir. 1982) and Hartsoe v. Kmart Retail Distrib. Ctr., Nos. CIV.A.99-429 and 99-461, 2000 WL 21263, at \*3 (E.D. Pa. Jan. 13, 2000)).

Here, Plaintiff claims that "[i]f Defendant's Motion is granted, [Plaintiff] will be prejudiced at least to the extent that it will be required to further litigate its claim." (Pl.'s Reply to Mot. Set Aside J. at 6.) However, "[t]he fact that a plaintiff will have to litigate an action on the merits rather than proceed by default does not constitute prejudice." Choice Hotels, 2000 WL 133954, at \*3 (citing Duncan v. Speech, 162 F.R.D. 43, 45 (E.D. Pa. 1995)). Thus, I find that Plaintiff will not be prejudiced by litigating the merits of its claims.

## 2. Defendant's Conduct.

The second area of inquiry is whether Defendant's failure to timely answer the Complaint was the result of culpable conduct or if Defendant's actions were done wilfully or in bad faith. Gross, 700 F.2d at 123-24 (citing Feliciano, 691 F.2d at 657). Defendant requests that the judgment be set aside for its

mistake or excusable neglect under Federal Rule 60(b)(1). FED. R. CIV. P. 60(b)(1). The meaning of excusable neglect in the context of various Federal Rules, including Rule 60(b), was analyzed by the United States Supreme Court in Pioneer Inv. Servs., Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380 (1993). According to the Pioneer Court, a determination of excusable neglect is "at bottom an equitable one," therefore this Court must "tak[e] account of all relevant circumstances surrounding [Defendant's act or] omission." Scott v. United States Evtl. Protection Agency, 185 F.R.D. 202, 206 (E.D. Pa. 1999)(quoting Pioneer, 507 U.S. at 395)). The relevant circumstances include "(1) the danger of prejudice to the non-movant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was in reasonable control of the movant, and (4) whether the movant acted in good faith." Id.

According to Nelson, his actions which constitute excusable neglect include the exigencies of running the Defendant company, the Christmas and New Year's holidays, the administrative work involved with year-end financial deadlines and his business trip during the first week of January. Plaintiffs contend that Defendant's justification for its failure to respond to litigation on account of competing business concerns is frivolous, and cite a case from another district

which held that a defendant's preoccupation with other business affairs did not justify its failure to respond to litigation within eleven months. In the instant case, however, Defendant's first responsive pleading was filed within two months of service of the Complaint. Furthermore, there is no indication of any willfulness or bad faith by Nelson. In fact, Nelson continuously sought representation for Defendant. Thus, Nelson's actions do not rise to the level of unexcusable neglect since there is no evidence of "flagrant bad faith" by Nelson. Emcasco Ins. Co., 834 F.2d at 75.

The Court notes that Defendant's attorneys should have paid more attention to the timing of their response. Despite this Court's holding that Nelson lacked bad faith, defense counsel's statement in Defendant's Reply that "[w]hen counsel was hired, counsel mistakenly believed that service in this case had been effected on Defendant on or about October 21, 1999 and not December 10, 1999, and that Plaintiff's need to resolve this matter was not as urgent," (Br. in Supp. of Def.'s Mot. Set Aside J. at 2,) reflects both lack of knowledge and disregard for the time requirements of the Federal Rules of Civil Procedure. Indeed, if service had been effected in October, 1999, prompt action by defense counsel in January, 2000 was even more urgently

required.<sup>1</sup> The Supreme Court has stated that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." Pioneer, 507 U.S. at 392.

Nonetheless, defense counsel states that he was unaware of Plaintiff's Motion for Default prior to February 8, 2000. Although the Third Circuit has stated that "a client cannot always avoid the consequences of the acts or omissions of its counsel," Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984)(citation omitted), none of the evidence provided indicates that defense counsel acted in "flagrant bad faith" or "callous disregard" of their responsibilities to Defendant. Id. (quoting National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976)). Thus, this Court finds that the conduct of both the Defendant and defense counsel falls within the parameters of excusable neglect.

### 3. Defendant's Meritorious Defense.

The third factor this Court must examine is whether Defendant has set forth a meritorious defense to the allegations in Plaintiff's Complaint. A meritorious defense is one which, "if established at trial, would constitute a complete defense [to the action]." See \$55,518.05 in U.S. Currency, 728 F.2d at 195;

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<sup>1</sup>The statutory time period for filing Defendant's Answer to Plaintiff's Complaint expired prior to the date defense counsel was retained.

Choice Hotels Int'l, Inc. v. Pennave Assocs., Inc., No. CIV.A.98-4111, 2000 WL 230359, at \*1 (E.D. Pa. Feb. 23, 2000). "The Defendant's answer and pleadings must contain specific facts that would allow [it] to advance a complete defense." Choice Hotels, 2000 WL 230359, at \*1 (quoting Momah, 161 F.R.D. at 307). Defendant never filed an answer to the Complaint, but the allegations in Defendant's motion to set aside the default will be considered. See Kauffman v. Cal Spas, 37 F. Supp.2d 402, 405 n.1 (E.D. Pa. 1999)(citations omitted).

Plaintiff alleges breach of contract and, in the alternative, quantum meruit. Defendant states it "anticipates that . . . it will allege that [the parties] were mistaken in their belief as to the meaning of the documents purporting to be the agreement between [them] and that the purported agreement did not accurately reflect the parties' intent under the doctrine of mutual mistake." (Br. in Supp. of Def.'s Mot. Set Aside J. at 5-6.) Defendant has alleged specific facts which, if Defendant can prove the parties were mutually mistaken in their belief as to the agreement between them, Defendant may prevail at trial. Thus, Defendant sets forth a meritorious defense to Plaintiff's breach of contract action.

4. Alternative Sanctions.

The Third Circuit requires that the last factor for consideration is the effectiveness of alternative sanctions where

defendants do not set forth evidence of a meritorious defense. Emcasco, 834 F.2d at 73. Because Defendant has set forth a meritorious defense, there is no need to examine the effectiveness of alternative sanctions.

### **III. CONCLUSION.**

"The liberal standard of the Third Circuit instructs that in close cases I use my discretion to allow the parties to proceed with litigation on the merits." Choice Hotels, 2000 WL 230359, at \*1. Therefore, because Defendant's actions are excusable, Defendant has set forth a meritorious defense, and there is a strong preference for deciding cases on the merits rather than by default, the default judgment entered against Defendant on February 24, 1999 will be set aside.

An Order follows.

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Defendant.	:	

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**ORDER**

AND NOW, this 15th day of March, 2000, upon consideration of Defendant's Motion to Set Aside Default Judgment, and Plaintiff's Response thereto, it is hereby ORDERED that Defendant's Motion is GRANTED.

BY THE COURT:

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Robert F. Kelly, J.