

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

HEIDI HAUSMANN,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 00-CV-351
WILHELM ROSCHER,	:	
Defendant.	:	

MEMORANDUM

Green, S. J.

February , 2001

Presently before the court are Plaintiff's Application for Default Judgment and Defendant's Response, Defendant's Motion to Set Aside Default and Plaintiff's Response and Plaintiff's Petition for Cost and Fees. For the reasons set forth below, Defendant's Motion to Set Aside Default will be granted and Plaintiff's Petition for Costs and Fees will be denied. Accordingly, Plaintiff's Application for Default Judgment will be dismissed as moot.

I. FACTUAL AND PROCEDURAL HISTORY

On or about November 15, 1995, Plaintiff, Heidi Hausmann, rented a house in Barto, Pennsylvania from Defendant, Wilhelm Roscher. (Compl. ¶ 8.) During her tenancy, Plaintiff alleges that Defendant sexually harassed her, discriminated against her by reason of her disability (bipolar disorder and associated panic disorder) and retaliated against her for opposing and/or refusing to accede to Defendant's acts of discrimination all in violation of the Fair Housing Act, 42 U.S.C. § 3601 et seq., the Pennsylvania Human Relations Act, 43 P.S. § 955 and Pennsylvania common law. (Compl. ¶ 6.)

Plaintiff filed the instant complaint on January 19, 2000 asserting the aforementioned claims. By Order of this court, Plaintiff was given an extension of time to complete service of process upon Defendant. (Order, May 17, 2000.) Plaintiff was authorized to make service of

process by publication in the Philadelphia Inquirer and the Legal Intelligencer. (Order, May 17, 2000.) On June 16, 2000, Plaintiff published a notice of the lawsuit in the Philadelphia Inquirer and the Legal Intelligencer, as well as the Reading Times and the Reading Eagle. (See Pl.'s Request to Enter Default, Ex. A.)

At Plaintiff's request, the Clerk of the Court entered a default against Defendant on July 13, 2000 for failure to appear, plead or otherwise defend the allegations in Plaintiff's Complaint. On July 14, 2000, Defendant filed a pro se request for an extension of time to obtain legal counsel and respond to Plaintiff's allegations. Defendant's request was granted. (Order, July 26, 2000.) Also on July 14, 2000, Plaintiff filed an application for judgment by default. Defendant's counsel entered his appearance on July 31, 2000 and responded to Plaintiff's application for judgment. Defendant's counsel also filed a motion to set aside the default. Plaintiff filed an answer to Defendant's motion and a petition for attorney's fees and costs. A hearing on Defendant's Motion to Set Aside Default was held on September 14, 2000.

II. DISCUSSION

A. Defendant's Motion to Set Aside Default

A district court may set aside an entry of default if good cause is shown. Fed. R. Civ. P. 55(c). The decision of whether or not to set aside the entry of default is in 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). Generally, courts look upon the default procedure with disfavor, because there is a preference toward resolving cases on the merits. See Farnese v. Bagnasco, 687 F.2d 761, 764 (3d Cir. 1982) (citations omitted). In ruling on a motion to set aside a default, the court must consider the following factors: "(1) whether setting aside the default would prejudice the plaintiff; (2) whether

the defendant has asserted a prima facie meritorious defense; (3) whether the defaulting defendant's conduct is excusable or culpable; and (4) the effectiveness of alternative sanctions." Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987) (citations omitted).

1. Prejudice

Prejudice to a plaintiff occurs when a plaintiff's ability to litigate the claim has been impaired. See Emcasco Ins. Co., 834 F.2d at 74. "[D]elay in realizing satisfaction on a claim rarely serves to establish the degree of prejudice sufficient to prevent the opening [of] a default judgment entered at an early stage of the proceeding." Id. (quoting Feliciano v. Reliant Tooling Co., 691 F.2d 653, 656-57 (3d Cir. 1982)).

In the present case, Defendant argues that his delay in responding to the Complaint does not constitute prejudice to Plaintiff. Plaintiff, in turn, contends that she has been prejudiced by Defendant's delay, because she has incurred substantial expense attempting to effectuate service upon Defendant. Although Plaintiff may have incurred an expense in attempting to serve Defendant, Plaintiff has failed to show that her ability to pursue the claim has been impaired. The incurring of substantial expense alone does not constitute prejudice. Accordingly, Plaintiff will suffer no prejudice if the entry of default is set aside.

2. Meritorious defense

A defendant establishes a meritorious defense when the defendant's allegations, if established at trial, would constitute a complete defense. Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984). A proffered defense is sufficient if it is not "facially unmeritorious." See Emcasco Ins. Co., 834 F.2d at 74. To satisfy this element, a defendant must allege specific facts that constitute a complete defense. See \$55,518.05 in U.S. Currency, 728 F.2d at 194-96.

Defendant has yet to file an answer in this case. In his motion to set aside the default, Defendant argues that he has set forth a meritorious defense by alleging a nondiscriminatory reason—Plaintiff’s nonpayment of rent—for denying housing to Plaintiff. Plaintiff contends that Defendant’s assertion is unsupported by the facts and, even if true, does not provide a complete defense to Plaintiff’s claims. However, at the hearing on September 14, 2000, Defendant also stated that he did not assault or sexually harass Plaintiff, nor did he evict Plaintiff in retaliation of her allegedly protesting his actions. Thus, viewing all of the evidence presented, Defendant has asserted a prima facie meritorious defense, that if proven at trial, would bar Plaintiff’s recovery.

3. Culpable Conduct

A default will not be set aside if the defendant in failing to respond to the pleadings had exhibited some degree of culpable conduct. See Emcasco, 834 F.2d at 75. “[C]ulpable conduct means actions taken willfully or in bad faith.” Gross v. Stereo Component Sys., Inc., 700 F.2d 120, 123-124 (3d Cir. 1983). Culpable conduct by the defendant requires a showing of more than mere negligence. See Hritz, 732 F.2d at 1183.

In the present matter, Defendant argues that there is no evidence that his failure to respond to the Complaint was willful, intentional, reckless or in bad faith. Defendant contends that he did not receive the initial notice of the lawsuit, because he was out of the United States until after February 14, 2000. (See Def.’s Ex.s D1, D2, D10.) In support of his argument, Defendant offered the affidavit of Anne Stewart Coldren (“Coldren”), which states that Defendant and Coldren were in Australia from February 2 to February 21, 2000.¹ (See Coldren’s

¹Coldren further states she and Defendant were in North Carolina, South Carolina and Florida between April 6, 2000 and April 14, 2000. (See Coldren’s Aff. at ¶ 7.)

Aff. at ¶ 6.) Coldren also states that Defendant spends six days a week at her residence. (See Coldren's Aff. at ¶ 3.) In addition, Defendant argues that he did not see the notice of lawsuit that was published in the aforementioned newspapers on June 16, 2000.

Plaintiff argues that Defendant's arguments are factually insupportable because, after February 14, 2000, four separate efforts were made to serve Defendant personally at his residence, and seven separate mailings were sent to Defendant. (See Pl.'s Ex.s A, D, E.) Plaintiff also contends that a partial signature resembling Defendant's signature was made on one of the certified mail envelopes containing the notice of lawsuit. (See Pl's Ex.s F, G.)

Upon reviewing the record, I find that Defendant has presented sufficient evidence that he was not present at his residence when service was attempted. Furthermore, the evidence does not establish that the partial signature on the certified mail envelope was Defendant's signature. Accordingly, while Defendant's conduct might be characterized as neglectful, I find no basis for concluding that Defendant acted willfully, intentionally or in bad faith.

4. Alternative Sanctions

A default "should be a sanction of 'last, not first, resort'." Emcasco Ins. Co., 834 F.2d at 75. The Third Circuit has stated that courts should try to find some alternative to the sanction imposed by an entry of default and the subsequent default judgment. See id. In the present matter, Plaintiff seeks to impose the alternative sanction of costs and fees incurred from attempting to effectuate service upon Defendant. In the absence of any willfulness or bad faith on behalf of Defendant, however, I find that punitive damages and/or compensatory damages would be inappropriate. Therefore, the default will be set aside and no sanction will be imposed on Defendant.

B. Plaintiff's Petition for Costs and Fees

Fed. R. Civ. P. 4(d)(2) states in relevant part:

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the cost subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

Plaintiff filed a petition for costs and fees that she incurred as a result of attempting to effectuate service of process upon Defendant, and filing the instant petition. Plaintiff submitted an itemized list of costs and attorneys fees totaling \$2,534.03. (See Pl.'s Ex.s B, C, D.) Upon reviewing the petition, I find that \$2,534.03 in costs and fees is an accurate representation of the cost and fees Plaintiff incurred in attempting to serve Defendant. However, for reasons already discussed, Defendant has shown good cause and, when notified, has abided with the Federal Rules of Civil Procedure. Therefore, any costs and fees Plaintiff incurred in effecting service of process upon Defendant shall not be assessed against Defendant at this time. Plaintiff's petition will therefore be denied.

III. CONCLUSION

For the foregoing reasons, I conclude that Defendant has shown good cause for setting aside the entry of default and denying Plaintiff's Petition for Costs and Fees. Therefore, Defendant's Motion to Set Aside Default will be granted and Plaintiff's Petition for Costs and Fees will be denied. Accordingly, Plaintiff's Application for Default Judgment will be dismissed as moot. Defendant will be given twenty (20) days from the date of the accompanying Order to file an answer to Plaintiff's Complaint.

An appropriate Order follows.

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

HEIDI HAUSMANN	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 00-CV-351
WILHELM ROSCHER,	:	
Defendant.	:	

ORDER

AND NOW, this day of February, 2001, upon consideration of Plaintiff's Application for Default Judgment, Defendant's Motion to Set Aside Default and Plaintiff's Petition for Cost and Fees, **IT IS HEREBY ORDERED** that:

1. Defendant's Motion to Set Aside Default is **GRANTED**, and Defendant shall file an answer to the Complaint on or before February , 2001;
2. Plaintiff's Petition for Cost and Fees is **DENIED**; and
3. Plaintiff's Application for Default Judgment is **DISMISSED** as moot.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.