

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD J. SREIN, Individually :
and as Beneficiary and Plan : CIVIL ACTION
Administrator of the R.J. SREIN :
CORPORATION PROFIT SHARING PLAN :
AND MONEY PURCHASE PENSION PLAN :
 :
 :
v. :
 :
 :
CHARLOTTE SILVERMAN and CATHRYN :
HARTT SILVERMAN : NO. 00-1479

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

April 11, 2001

On March 21, 2000, plaintiff Ronald J. Srein ("Srein"), filing this action against defendants Charlotte Silverman ("Silverman") and Cathryn Hartt Silverman ("Hartt-Silverman"),¹ alleged breach of contract, negligence, fraud, conversion, conspiracy, ERISA violations, RICO violations, gross negligence, breach of duty, and unfair trade practices arising out of their involvement in FINDCO, Inc. ("FINDCO"), a fraudulent viatical insurance operation. The factual allegations, legal causes of action and damages plead by Srein in this action are the same as those in a previous action entitled Srein v. FINDCO, Inc., Civil Action No. 97-3802, U.S.D.C., E.D. Pa. ("Srein I"). In Srein I, only Craig L. Silverman and FINDCO were named as defendants. On

¹ Craig L. Silverman and FINDCO, Inc. were also named as defendants in this action but were dismissed on the basis of res judicata by Order dated November 17, 2000.

May 8, 2000, the court entered a default judgment in that action, in favor of Srein, in the amount of \$1,664,074.01.²

Also on May 8, 2000, a default was entered in this action because neither Silverman nor Hartt-Silverman had moved, answered, or otherwise plead. Srein then filed an application for the entry of default judgment in the amount of \$1,664,074.01 plus interest and court costs; a hearing was scheduled for November 17, 2000. On November 16, 2000, Silverman and Hartt-Silverman moved to set aside the entry of default. No default judgment has been entered in this action.

DISCUSSION

A. Legal Standard

Fed. R. Civ. P. 55(c) provides: "For 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)."

The court must consider: "(1) whether lifting the default would prejudice the plaintiff;(2) whether the defendant has 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). A default is not

² After a hearing on damages, Srein was awarded the amount of \$1,445,980.32 in compensatory damages, treble damages and prejudgment interest, and \$218,093.69 for counsel fees and costs.

favored, and doubt should be resolved in favor of setting aside the default and reaching a decision on the merits. Gross v. Stereo Component Sys., Inc., 700 F.2d 120, 122 (3d Cir. 1983). A default is more readily set aside than a default judgment. See Mike Rosen & Assoc. v. Omega Builders, Ltd., 940 F. Supp. 115, 120-121 (E.D. Pa. 1996).

B. Prejudice to Plaintiff

Prejudice can be shown through loss or destruction of evidence, increased potential for fraud and collusion, or substantial reliance upon the entry of default. See Atlas Communications, Ltd. v. Waddill, No. Civ. 97-1373, 1997 WL 700492 at *2 (E.D. Pa. Oct. 31, 1997) (Shapiro, J.); Mike Rosen, 940 F. Supp. at 118. Srein argues that he will be prejudiced because setting aside the default will allow Silverman and Hartt-Silverman "to continue to loot the assets of FINDCO and continue to spend the assets they diverted from FINDCO and investors like Srein." Pl. Opp. to Def. Mot. at 8.

At the November 17, 2000 hearing, this court informed Silverman and Hartt-Silverman that an order setting aside the default would be contingent on agreement by Silverman and Hartt-Silverman to withhold transferring assets until final judgment in this action. In addition, Srein's judgment against FINDCO and Craig Silverman in Srein I, alleviates the potential for Silverman and Hartt-Silverman "to continue to loot the assets of

FINDCO."³ With Silverman's and Hartt-Silverman's agreement not to transfer assets, and the judgment obtained by Srein in Srein I, prejudice to Srein if the default were set aside has not been demonstrated.

C. Defendants' Culpable Conduct

Defendants' conduct is not culpable if caused by mistake or excusable neglect. See Feliciano v. Reliant Tooling Co., 691 F.2d 653, 656 (3d Cir. 1982); Atlas Communications, 1997 WL 700492, at *2. Mere negligence is insufficient to constitute culpable conduct; willfulness or bad faith is required. Mike Rosen, 940 F. Supp. at 118; Atlas Communications, 1997 WL 700492, at *2.

Silverman claims her failure to answer is due to improper service of the complaint. A default "entered when there has been no proper service of the complaint is, a fortiori, void, and should be set aside." Gold Kist, Inc. v. Laurinburg Oil Co., Inc., 756 F.2d 14, 19 (3d Cir. 1985).

Federal Rule of Civil Procedure 4(e)(2) provides for service of original process:

by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing

³ At the November 17, 2000 hearing, this court noted that plaintiff could file a motion to enjoin all defendants from transferring assets. No motion has been filed.

therein or delivering a copy of the summons and of the complaint to an agent authorized by appointment of by law to receive service of process.

The Return of Service Affidavit for Silverman states that the summons was served on "ANNA FAGAN (CO-RESIDENT)." Def. Mot. to Set Aside at Exhibit C. Silverman denies Anna Fagan has ever been a resident of her home. Def. Mot. to Set Aside at Exhibit D. When service is made by leaving copies of the summons and complaint at defendant's home with some person of suitable age and discretion, the person with whom the papers are left must actually be a resident of defendant's home, and not merely present at the time of service. See Lachick v. McMonagle, No. Civ. 97-7369, 1998 WL 800325 at *1 (E.D. Pa. Nov. 16, 1998)(Broderick, J.). Service on Silverman might be improper.

It is averred that Silverman's poor health over the past three years has affected her memory. Def. Mot. to Set Aside at Exhibits D. Silverman has no recollection of personally receiving any documents relating to this action or being given any documents by Anna Fagan. Def. Mot. to Set Aside at Exhibit D. Because there is doubt that Silverman was properly served, and her failure to respond was not willful, Silverman's conduct is sufficiently excusable to vacate a default not yet reduced to judgment.

Hartt-Silverman claims that she mistakenly relied on her

husband's assurances that his lawyers would resolve this matter.⁴ Def. Mot. to Set Aside at Exhibit G. Hartt-Silverman asserts that Mr. Silverman assured her that he had taken care of the lawsuit. Id. When confronted, Mr. Silverman ignored Hartt-Silverman's requests for written confirmation that the issue was resolved. Id. Despite her numerous attempts to contact Mr. Silverman's attorney to inquire into this matter, Hartt-Silverman did not become aware that this claim was still active until November 6, 2000, when she promptly retained counsel. Id.

While Hartt-Silverman's trust in Mr. Silverman appears to have been misplaced, her failure to file a timely response was not willful or in bad faith. Hartt-Silverman's actions are sufficiently excusable to vacate a default not yet reduced to judgment.

D. Meritorious Defense

A meritorious defense is one which, if established at trial, would completely bar plaintiff's recovery. See United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984). A complete defense is required because it would be pointless to set aside the default if the defendants could not demonstrate the possibility of winning. Id.

Silverman and Hartt-Silverman offer two interrelated

⁴ Hartt-Silverman's husband, Craig Silverman, was formerly a named defendant in this action.

defenses: (1) this court lacks personal jurisdiction over them because they have almost no contact with Pennsylvania; and (2) they had no involvement in the operation of FINDCO and no business dealings with Srein. Def. Mot. to Set Aside at 10-11. Whether the court has personal jurisdiction over the defendants is largely dependent on the defendants' level of involvement with FINDCO. Defendants will be successful at trial if they can demonstrate that they were not involved with the fraudulent activities of FINDCO. Although Srein has presented evidence to the contrary, Silverman and Hartt-Silverman need not show that they will prevail; they only need to assert a defense that is not "facially unmeritorious." Dixon v. Philadelphia Housing Auth., 185 F.R.D. 207, 209 (E.D. Pa. 1999). Defendants have advanced a defense which, if successful, would bar Srein from recovering at trial.

E. Effectiveness of Alternative Sanctions

"[T]he Third Circuit has made clear that courts should try to find some alternative to the sanction imposed by an entry of default and the subsequent default judgment." Charowsky v. Kurtz, No. Civ. 98-5589, 1999 WL 1038334 at *3 (E.D. Pa. Nov. 8, 1999). Because the defendants have demonstrated that the default should be set aside, there is no need to consider alternative sanctions.

Conclusion

The defendants have satisfied the criteria for setting aside an entry of default. Defendants' motion will be granted.

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Plaintiffs :
v. :
CHARLOTTE SILVERMAN and CATHRYN :
HARTT SILVERMAN, :
Defendants :

ORDER

AND NOW, this 11th day of April, 2001, upon consideration of defendants' motion to set aside the entry of default, and plaintiff's opposition thereto, it is **ORDERED** that defendants' motion to set aside entry of default is **GRANTED**, contingent on their agreement not to transfer assets until final judgment.

Norma L. Shapiro, S.J.