

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

NET CONSTRUCTION, INC.	:	
	:	
Plaintiff	:	
	:	
v.	:	NO. 99CV-3371
	:	
	:	
C & C REHAB AND CONSTRUCTION, INC.	:	
	:	
Defendant	:	

EXPLANATION AND ORDER

Before me are the motions of the defendants C & C Rehab and Construction (“C & C”) to vacate this court’s Order of February 16, 2001 and to dismiss the claims of the plaintiff Net Construction (“Net”) under Federal Rule of Civil Procedure 12(b)(4), (5), or (6). I will deny C & C’s motion to vacate this court’s Order of February 16, 2001 and deny as moot its motion to dismiss Net’s claims.

I. Background

On July 1, 1999, Net, a Pennsylvania Corporation, commenced this action against C & C, a New Jersey Corporation.¹ Complaint ¶ 1-2. C & C served as the general contractor for the Chester Housing Authority during the construction of the William Penn Homes Project (“the project”). *Id.* at ¶ 3. On or about February 3, 1997 Net and C & C entered into a written

¹Jurisdiction is based on 28 U.S.C. § 1332.

agreement according to which Net would perform concrete site work services and installations on behalf of C&C for the project. Id. at ¶ 4. From February 3, 1997 through March 25, 1999, when C & C was removed from the project by a federally appointed receiver, Net performed installation of concrete site work services and installations pursuant to the parties' agreement and the instructions of C & C. Id. at ¶ 5.

Under the Contract for Construction ("the contract") between Net and C & C, Net was required to submit to C & C billing requisitions or estimates upon regular intervals for work performed by Net for C & C at the project site. Contract ¶ 10. The contract also required C & C to pay Net under each estimate within 60 days of the receipt of the requisitions without respect to the status of the Owner's payment to C & C. Id. All work performed by Net through December 31, 1998 has been accepted by the Owner or its representative. Compl. at ¶ 9.

Net first claims that C & C owes it a balance under the contract in the amount of \$147,447.69, which has been held without justification or cause in violation of the parties agreement. Id. at ¶ 10-11. Net claims, therefore, that C & C breached its representations in its contract with Net that it was financially solvent, had the ability to pay its debts as they matured, and had sufficient working capital to complete its payment to subcontractors. Id. at ¶ 12. As a result of this breach, Net also claims that it has incurred costs and expenses in excess of \$49,390.70. Net also advances claims against C & C, arising out of the contract, for failure to use reasonable care in planning the work Net was to perform at the project site in the amount of \$255,907.20, consequential damages in the form of lost profits and business opportunities in the amount of \$300,000, and violations of Pennsylvania's Contractor and Subcontractor Payment Act, 73 PA. CONS. STAT. ANN. § 501 et. seq. (West 2002), which authorizes recovery in the form

of penalties that are determined as a percentage of the balance owed to the subcontractor. Id. at ¶¶ 21-34.

This case has a complicated and lengthy procedural history. On September 8, 1999 default was entered against C & C for failure to appear, plead, or otherwise defend Net's Complaint. On September 13, 1999, C & C submitted an Answer and affirmative defenses to Net's Complaint. On September 16, 1999, attorney Joseph S. Caruso ("Caruso") was admitted pro hac vice on the motion of attorney Saul Steinberg. C & C, acting through its counsel Caruso, submitted a brief on November 23, 1999 in support of its motion to vacate the entry of default and to dismiss Net's claims against it pursuant to Federal Rules of Civil Procedure 12(b)(4), (5), and (6). On March, 17, 2000, however, the court vacated its Order granting C & C's motion for Caruso to appear in this matter pro hac vice because it had come to the court's attention that Caruso had been convicted of conspiracy to commit bribery. C & C was granted leave to have substitute counsel enter an appearance by April 3, 2000.

On May 12, 2000 Net entered into a Settlement Agreement with Montbatten Surety Co. ("Montbatten"), which was C & C's bonding company, to settle Net's claims against Montbatten brought by Net in the Court of Common Pleas of Philadelphia County. Among other things, the Settlement Agreement provided that Montbatten would pay Net \$207,000 of the amount due Net and owed by C & C for its contract balance, extra and additional work, and prejudgment interest. Settlement Agreement ¶ 2. Accordingly, Net released C & C from liability on Net's contract balance, extra and additional work, and Net's prejudgment interest thereon. Id. Significantly, however, "Net specifically reserve[d] the right to assert all other claims against C & C in the Federal Court Case or otherwise, including without limitation its claims for statutory

penalty and legal fees, lost productivity, overhead and escalation.” Id. at ¶ 5.

Nine months later, by letter dated February 15, 2001 C & C’s new counsel Steinberg, the same attorney who moved for Caruso’s pro hac vice admission, informed the court that C & C had authorized him to withdraw both its motion to vacate default entry and its motion to dismiss. On February 16, 2001, therefore, the court denied as moot C & C’s motions to vacate default entry and to dismiss.

Almost a year and a half later, on July 2, 2002, the court ordered Net to show cause why the case should not be dismissed and further ordered Net to file a motion for default judgment on or before July 26, 2002. Net filed its motion for default judgment on July 26, 2002, and on August 14, 2002 the court ordered Net to file a detailed affidavit in support of its motion for default judgment, itemizing the damages it seeks against C & C.

On August 26, 2002 C & C’s third counsel in this action, Charles K. Graber (“Graber”), entered his appearance on behalf of C & C, and Steinberg withdrew his representation of C & C. On August 29, 2002, C & C, acting through its counsel Graber, moved to vacate the court’s February 16, 2001 Order denying as moot C & C’s motions to vacate default entry and to dismiss Net’s claims. Also, C & C again moved to dismiss Net’s claims under Federal Rule of Civil Procedure 12 on the basis of a forum selection clause in the contract.²

²The forum selection clause provides that:

If any claims or disputes arise under the Subcontract regarding Scope of Work, resolution of same shall be governed by the Contract documents between Contractor and Owner. If the contract between the Contractor and Owner does not specify a forum for dispute resolution. [sic]. All claims and/or disputes shall be brought in Philadelphia Court of Common Pleas.

Contract ¶ 15.

Contract ¶ 15.

II. Discussion

C & C argues that this court should vacate its Order of February 16, 2001 under the authority of Federal Rule of Civil Procedure 60(b)(6) which provides in relevant part that:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(6).

The remedy provided by Rule 60(b)(6) is “extraordinary and special circumstances must justify granting relief under it.” Page v. Schweiker, 786 F.2d 150, 158 (3d Cir. 1986); see Marshall v. Board of Educ., 575 F.2d 417, 425 (3d Cir. 1978) (holding that changes in law are not extraordinary); Martinez v. McBean, 562 F.2d 908, 911 (holding that legal error, inconsistencies with legal precedent, and impatience with pro se plaintiff's lack of legal skill are not extraordinary); Mayberry v. Maroney, 558 F.2d 1159, 1163 (3d Cir. 1977) (holding that changed circumstances are not extraordinary); Stradley v. Cortez, 518 F.2d 488, 493 (3d Cir. 1975) (holding that an allegation that the jury did other than what it intended was not extraordinary).

In light of the circumstances at issue here, it is also noteworthy that “the broad powers granted by clause (6) are not for the purpose of relieving a party from the free, calculated, and deliberate choices he has made.” Mayfield v. Vanguard Sav. & Loan Ass'n, No. Civ.A.88-0410, 1989 WL 106986 at *2 (E.D. Pa. Sept. 8, 1989) (holding that the unrevealed and

inadequate representational activities of a former attorney are not extraordinary circumstances). A party to a lawsuit remains under a legal duty to protect his own interest. Id. (citing Ackerman v. United States, 340 U.S. 193, 198 (1950)). Responsibility for monitoring the status of a case, therefore, rests with the defendant corporation. Id. (citing Pryor v. U.S. Postal Service, 769 F.2d 281, 287 (5th Cir.1955)). Also, except in extraordinary circumstances, a represented party in a lawsuit is bound by the acts of its attorney. Id. at *3 (citing Link v. Wabash R.R. Co., 370 U.S. 626, 633-34, (1962)).³ Furthermore, ignorance or carelessness on the part of a litigant’s attorney is not sufficient grounds for relief under rule 60(b)(6). Id.; Hough v. Local 134 IBEW, 867 F.2d 1018, 1022 (7th Cir. 1988); Ben Sager Chemicals Int’l v. E. Targosz & Co., 560 F.2d 805, 809 (7th Cir. 1977); Hoffman v. Celebreeze, 405 F.2d 833, 835 (8th Cir. 1969).

C & C’s argument in support of its motion to vacate the court’s order of February 16, 2001 under the authority of 60(b)(6) builds upon its “reasonable belief” that its dispute with Net had been resolved pursuant to the settlement which took place on May 12, 2000 between Net and Montbatten. Def. Mem. of Law in Support of its Motion to Vacate at 4. According to C & C this explains, at least in part, why its president, Gregg J. Cooke, “neither authorized the withdrawal of C & C’s pending Motion to Vacate Default nor discussed the issue with counsel.” Id. Furthermore, even though C & C has not been able to obtain and review his files, this also explains why, according to C & C, its former counsel “does not recall sending the correspondence to the court or why it was sent.” Id. Basically, C & C argues that because its

³For example, under certain circumstances the gross negligence of an attorney has been recognized as grounds for granting relief from a judgment or order, but courts nevertheless require the presence of extraordinary circumstances. U.S. v. Serafini, 706 F. Supp. 354, 356 (M.D. Pa. 1989). C & C does not allege that any of its three attorneys were grossly negligent, nor does the court make such a determination here.

President Cooke and counsel Steinberg somehow “reasonably believed” that Net’s settlement with Montbatten also resolved Net’s dispute with C & C, it is entitled to relief from the Order of February 16, 2001 under the authority of rule 60(b)(6).

C & C’s own arguments, however, reflect the fact that it failed to monitor carefully Net’s action against it. On its face, the Settlement Agreement between Net and Montbatten specifically reserved Net’s rights to pursue at least some of its claims against C & C. Settlement Agreement ¶ 5. C & C’s assertions, therefore, fall well short of satisfying its burden to demonstrate the presence of “extraordinary and special circumstances” because failure to monitor carefully the status of litigation in which one is a party, whether through fault of the corporation or its attorney, is not sufficient ground for relief under rule 60(b)(6). Because C & C’s assertions fail to establish the presence of “extraordinary and special” circumstances justifying relief under Federal Rule of Civil Procedure 60(b)(6), I will deny its motion to vacate the Order of February 16, 2001. An appropriate Order will be entered.

ORDER

AND NOW, this _____ day of October 2002, I **DENY** the motion of the defendant C & C Rehab & Construction to vacate this court's Order of February 16, 2001 (Docket Entry # 22) and **DENY AS MOOT** its motion to dismiss the claims of the plaintiff Net Construction, Inc.(Docket Entry #23). I further **ORDER** that a hearing on Net's motion for default judgment will be held on October 23, 2002 at 4:00 pm in Courtroom 7-B.

ANITA B. BRODY, J.

Copies **FAXED** on _____ to:

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