

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

CAROLYN M. WILE : CIVIL ACTION  
: :  
v. : :  
: :  
GREEN TREE SERVICING, LLC., : :  
et al. : NO. 04-2866

MEMORANDUM

Bartle, J.

July 28, 2005

Before the court is the motion of plaintiff for reconsideration of our Order of May 10, 2005 in which we dismissed this action against defendant Accelerated Mortgage Company ("Accelerated") for plaintiff's failure to prosecute. Accelerated has not filed a response to plaintiff's motion.

Plaintiff initiated this action against two defendants, Green Tree Servicing, LLC ("Green Tree") and Accelerated. On November 18, 2004, this court granted the motion of Green Tree to dismiss. Plaintiff filed a motion for reconsideration on November 29, 2005, which we subsequently denied. On February 7, 2005, plaintiff filed a notice of appeal to the Court of Appeals for the Third Circuit.

At the time of Green Tree's motion to dismiss, Accelerated had not been served because plaintiff's counsel apparently had provided the U.S. Marshal with the wrong address. The address provided differed from the address set forth in the complaint. By Order dated November 19, 2004 we directed

plaintiff's counsel to arrange for service of process on Accelerated or plaintiff's claim against it would be dismissed for lack of prosecution.

On December 21, 2004, a summons was returned apparently executed by someone at Accelerated, and its answer to the complaint was due on January 10, 2005. We note that plaintiff's counsel instructed the U.S. Marshal to serve the complaint at the same address where service had been previously attempted. When no answer had been filed by April 18, 2005, we mailed a letter to plaintiff's counsel advising him of his right to request the entry of a default in accordance with Rule 55 of the Federal Rules of Civil Procedure. We further informed him that if the request for default was not filed by April 29, 2005 the court could enter an order dismissing the case against Accelerated for lack of prosecution. This letter was filed on April 19, 2005, and a notice of its filing was sent to plaintiff's counsel by electronic mailing. On May 10, 2005, after receiving no word from plaintiff's counsel, we entered an Order dismissing the case as to Accelerated.

Plaintiff's counsel now asks this court either to vacate the Order or enter a default judgment against Accelerated. He first argues that this court lacked jurisdiction to enter the Order dismissing the case against Accelerated. He contends that his appeal of our Order dismissing the case against Green Tree divested us of jurisdiction to enter any further orders in this case.

Plaintiff's counsel is mistaken in his assertion that his appeal divested us of jurisdiction over the case. Our Order dated November 18, 2004 by which we dismissed this action as to Green Tree was not a final, appealable order. See Carter v. City of Philadelphia, 181 F.3d 339, 343 (3d Cir. 1999); Fed. R. Civ. P. 54(b). It was interlocutory in nature because Accelerated remained as a defendant in the case, and we had not issued a certification for an appeal pursuant to Fed. R. Civ. P. 54(b). Thus, we retained jurisdiction to adjudicate the remaining claims against Accelerated.

Plaintiff's counsel alternatively seeks relief from our May 10, 2005 Order on the ground that he does not "recall" receiving notice of his right to request an entry of default or risk the dismissal of his client's case against Accelerated for lack of prosecution. That he doesn't "recall" receiving the April 18, 2005 notification is not the same as his not receiving it. In addition to our mailing him the letter, it was filed on April 19, 2005. The docket indicates that a notice was sent by electronic mail to the email address of plaintiff's counsel informing him that the letter had been docketed. The electronic mailing also quoted the text of the letter. We are satisfied that plaintiff's counsel received multiple notices of the possibility of dismissal.

In any event, lack of notice would not render our dismissal void. See Link v. Wabash R.R. Co., 370 U.S. 626, 632-33 (1962); Adams v. Tr. of the N.J. Brewery Employees' Pension

Trust Fund, 29 F.3d 863, 871-72 (3d Cir. 1994). Not every order entered without notice offends due process. Link, 370 U.S. at 632; Adams, 29 F.3d at 871. Even without notification by us, plaintiff's counsel should have been aware of the possibility of dismissal for failure to prosecute. No appearance of counsel was entered on behalf of Accelerated and it had failed to file an answer despite the passage of approximately four months. See Adams, 29 F.3d at 871.

Nonetheless, in the interest of justice and because the motion for reconsideration is unopposed, we will vacate the dismissal. Accelerated shall have 15 days from the date of this Order to file and serve an answer or other response to the complaint. If no answer is filed and served within 15 days and plaintiff does not file and serve a default within 10 days thereafter, this action against Accelerated will be dismissed with prejudice for failure to prosecute.

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ORDER

AND NOW, this 28th day of July, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of plaintiff Carolyn M. Wile for reconsideration (Doc. #23) is GRANTED;

(2) the court's Order of May 10, 2005 is VACATED (Doc. #22);

(3) defendant Accelerated Mortgage Company shall file and serve an answer or other response to the complaint within fifteen (15) days of the date of this Order; and

(4) if Accelerated Mortgage Company fails to answer or respond to the complaint within the fifteen (15) days and plaintiff fails to file and serve a default within ten (10) days thereafter, the court will dismiss this action with prejudice for lack of prosecution.

BY THE COURT:

/s/ Harvey Bartle III

J.