

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

FRATERNAL ORDER OF POLICE, : CIVIL ACTION  
AND JOHN WHALEN, SERGEANT :  
 :  
 :  
 v. :  
 :  
 :  
 THE CRUCIFUCKS, ALTERNATIVE :  
 TENTACLES RECORDS, ERIC R. BOUCHER :  
 and BORDERS BOOKS & MUSIC : NO. 96-2358

**MEMORANDUM AND ORDER**

HUTTON, J.

July 15, 1997

Presently before this Court are Defendants The Crucifucks, Alternative Tentacles Records and Eric R. Boucher's Motion to Set Aside the Entry of Default and Default Judgment entered against them on November 25, 1996, and the Plaintiffs' response thereto.

**I. BACKGROUND**

This action arises out of use of a poster created by plaintiffs as part of the packaging for a record by defendant, The Crucifucks, a now disbanded punk rock band. Alternative Tentacles Records is a small independent record label based in San Francisco which manufactured and sold the record. Defendant, Eric R. Boucher, is the owner of the record label. Defendant, Borders Books & Music, a Michigan corporation, operated a record store in Philadelphia which carried the record.

On March 29, 1996, defendant, Borders Books, filed a motion to dismiss, or in the alternative, for summary judgment. On

July 29, 1996, this Court granted defendant Borders Books' motion and dismissed the complaint with respect to Borders Books.

On September 19, 1996, the plaintiffs filed a motion for entry of default against defendants The Crucifucks, Alternative Tentacles Records and Eric Boucher. On November 26, 1996, this Court granted the motion and ordered the Clerk of Court enter default against said defendants.

This Court referred the matter to United States Magistrate Judge James R. Melinson for an evidentiary hearing to determine the amount of damages to be awarded to the plaintiffs. In February, 1997, the defendants were advised that plaintiffs had requested a damages hearing. On March 7, 1997, the defendants received a fax from this Court noticing said damages hearing. The damages hearing occurred on March 31, 1997. The defendants did not attend.

Thereafter, the defendants Alternative Tentacles Records and Eric Boucher, through their attorney Richard Stott, however, filed the instant motion to set aside default judgment on April 3, 1997. On April 4, 1997, Judge Melinson issued a Report and Recommendation, recommending that this Court award plaintiff FOP \$100,000 in compensatory damages, and \$1 million in punitive damages, and award plaintiff, John Whalen, \$100,000 in compensatory damages, and \$1 million in punitive damages. On April 23, 1997, the defendants filed a response in opposition to the approval and adoption of the Report and Recommendation. Defendant, The Crucifucks, joined in both the motion to set aside the default and

opposition to the Report and Recommendation. On July 10, 1997, this Court held a hearing regarding the motion to set aside the default judgment. All parties had a representative present during the hearing.

Richard F. Stott, Esquire, attorney for defendants Alternative Tentacles Records and Eric Boucher contended that they did not respond to the complaint or motion for default because of two reasons: (1) these defendants did not have the economic "wherewithal" to pursue this matter, and (2) these defendants knew that the plaintiffs claims were meritless, and believed that this would eventually occur to the plaintiffs and their counsel, "particularly after the 'deep pocket' Borders was out of the case." Mr. Stott further asserts that "it was only when the plaintiffs requested a damage hearing that the defendants finally concluded that they had to protect themselves." Also, he contends that the service of notice of the motion for default was defective. In sum, the defendants argue that the plaintiffs did not act as though they were seriously pursuing an action against them, lulling them into believing that the matter would go away. Further, they were convinced that the grounds that this Court relied upon to dismiss the complaint against defendant Borders Books, would constitute sufficient grounds to dismiss the remaining defendants.

The plaintiffs, through their attorneys James Beasley and Michael Smerconish, contended that the defendants' inaction in this matter was unreasonable as to justify denial of its motion to set aside the default judgment under either the good cause standard

under F.R.C.P. 55(c) or the excusable neglect standard under F.R.C.P. 60(b). The plaintiffs focus on the fact that the defendants never filed an answer to the complaint, never made any motions to the court before the motion to set aside the default, and did not show up to the damages hearing. Additionally, the plaintiffs assert that they properly served notice of their motion for default.

## II. DISCUSSION

### A. Standard for Vacating Default Judgment

Rule 60(b) of the Federal Rules of Civil Procedure states that:

On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding for . . . (1) mistake, inadvertence, surprise, or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b). The Third Circuit disfavors default judgments and encourages decisions on the merits, and leaves the decision to set aside the judgment to the sound discretion of the trial court. Harad v. Aetna Casualty and Surety Co., 839 F.2d 979, 982 (3d Cir. 1988); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 244 (3d Cir. 1951). The court's decision should not be disturbed on review unless there has been an abuse of such discretion. Tozer, 189 F.2d at 244.

In exercising this discretion the court should consider:

(1) whether vacating the default judgment will prejudice the plaintiff; (2) whether the defendant has a meritorious defense; and (3) whether the default was the result of the defendant's culpable conduct. Harad, 839 F.2d at 982; De Bueno v. Bueno Castro, 822 F.2d 416, 149-20 (3d Cir. 1987); Scarborough v. Eubanks, 747 F.2d 871, 875-78 (3d Cir. 1984); United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984); Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653, 656 (3d Cir. 1982). A standard of "liberality" rather than "strictness" should be used so that "any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits." Medunic v. Lederer, 533 F.2d 891, 893-94 (3d Cir. 1976)(quoting Tozer, 189 F.2d at 245-46). Also, "matters involving large sums should not be determined by default judgments if it can reasonably be avoided." Tozer, 189 F.2d at 245. Finally, what is or what is not "excusable neglect" should not be determined in a vacuum. Id. Instead, the court should evaluate each case according to its particular facts.

Applying this standard of "liberality," this Court finds that the defendants' failure to reply to the complaint under the circumstances involved in this matter constitutes "excusable neglect" under Rule 60(b)(1), or alternatively, "justif[ies] relief from the operation of the judgment" under Rule 60(b)(6).

**B. Three Factor Test for Vacating Default Judgment**

**1. Will Vacating the Default Judgment Prejudice the Plaintiff?**

The first question this Court must answer is whether vacating the default judgment would prejudice the plaintiffs. Factors which can be considered in determining the existence of prejudice include: (1) loss of available evidence; (2) increased potential for fraud; (3) substantial reliance on the judgment. Feliciano, 691 F.2d at 657. "Delay 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. at 656-57.

This Court finds that the plaintiffs have failed to offer any evidence that would justify denying defendants' motion to vacate the default judgments based on the potential for prejudice against the plaintiffs. The plaintiffs argue that they would be subjected to further litigation, with its inherent monetary and emotional costs. This argument, however, is unconvincing, because anytime a Court sets aside a default judgment, it necessarily subjects the parties to further litigation. The defendants, however, contend that the plaintiffs' complaint would be subject to dismissal utilizing the same reasons employed to dismiss defendant Borders Books: "You have found in the Borders claim there was no merits [sic] to any of their claims, that is what their reasonable expectation should be, therefore, how can they be prejudiced if that's all they ever get, nothing?" (Hrg. Tr. at 24.) The

plaintiffs have not refuted this contention. Consequently, if the plaintiffs have no viable case on the merits, they could not suffer any prejudice.

## **2. Will Defendants Have Meritorious Defenses?**

Next, this Court must determine whether the defendants have meritorious defenses. "A claim, or defense will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense." Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863, 869-70 (3d Cir. 1984); accord \$55,518.05 in U.S. Currency, 728 F.2d at 195; Feliciano, 728 F.2d at 657; Farnese v. Bagnasco, 687 F.2d at 764. It is sufficient that the proffered defense is not "facially unmeritorious." Emcasco Insurance Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987); Gross v. Stereo Component Systems, Inc., 700 F.2d 120, 123 (3d Cir. 1983). This Court finds that the defendants have presented defenses that have merit on their face. Defendants' counsel has indicated that it relies on the Court's reasoning in its Memorandum and Order of July 29, 1996, dismissing Borders Books, as their meritorious defense. The plaintiffs have not argued that the defendants do not have a meritorious defense. As such, this Court finds that the defendants may have meritorious defenses.

## **3. Was Defendants' Conduct Culpable?**

Finally, the Court must examine whether the defendants' conduct was culpable. Culpable conduct is dilatory behavior that

is willful or in bad faith. Gross, 700 F.2d at 123-24; Feliciano, 691 F.2d at 657. This Court finds that the defendants' conduct does not constitute dilatory behavior that is willful or in bad faith. First, defendants Alternative Tentacles Records and Eric R. Boucher retained counsel, Richard F. Stott, Esquire, in this matter. That indicates that the defendants did not try to simply ignore the action filed against them. They allowed their attorney to handle the matter.

With regard to why Mr. Stott did not respond to the complaint, he states that he felt that there was no merit to it. Also, he states that defendant Borders Books' argument in its brief to dismiss "was very strong." (Hrg Tr. at 11.) He further stated "I read it, I saw no reason to join in with it, particularly because Borders felt they needed to go alone on it." Id. Considering the claims to be meritless and the fact that the defendants did not possess the economic means to engage in litigation, Mr. Stott decided not to take any action because he did not "see them proceeding on the merits." Id. at 19. Mr. Stott asserts:

I really thought they were after Borders and particularly after your decision, your Honor, I could not see them pursuing what is clearly a meritless claim. I mean your decision takes every single point and tells what's wrong with it. They didn't make any attempt to amend it, they didn't make any attempt to correct the points you raised. I saw some thing that had no merit and I'm trying to save my clients money by essentially trying to avoid doing anything until we have to. . . . It's very difficult to justify saying, okay, yes, Borders wants out of the case, the Judge says

there's no merits here, but we still have to go and fight it. . . . This was not a strategy. This was not a disregard for this Court. This was not a thumbing of my nose at the plaintiffs. Essentially, the bottom line here is, your Honor, we tried to do what we thought was best as we went along. Maybe we were wrong in not dealing with the default at the time it was entered, but we have within six months . . . . And every step of the way the plaintiffs' reaction was such that I couldn't tell what they were doing.

Id. at 19-20. Additionally, Mr. Stott stated that he thought the plaintiffs were pursuing a judgment against them for purposes of perfecting their appeal of the Court's dismissal of defendant Borders Books. Mr. Stott asserts:

So in September when my clients received this request to enter default, the letter requesting the Court enter the default, it was clear on its face that there was something wrong with it. It appeared to us that they were claiming they had given us notice and we have never received this notice. And to be honest, your Honor, at the time my initial reaction was, well, they're doing this so that they could perfect their judgment, so they can obtain a final judgment and perfect their appeal.

Id. at 14. Additionally, Mr. Stott emphasizes the fact that the plaintiffs filed an appeal on August 13, 1996, after this Court issued its Memorandum and Opinion of July 29, 1996, and that in September, 1996, shortly before filing a petition for entry of default, the plaintiffs withdrew their appeal. Mr. Stott states that this "tells me they're trying to do something so they can make -- so they can get to perfect their appeal." Id. at 15. Mr. Stott further asserts:

Okay. Nothing happens for another two months, they don't pursue entry of judgment, of the default judgment. In November the Court enters the default judgment. I agree at that time, your Honor, I should have done something, but even then, I could not see where they were going with this. And my thought at the time was, okay, I'll talk to them, I'll make them an offer saying, look, you have a default judgment, we can agree on it, I won't set aside a judgment, if you want to perfect your appeal against Borders. December passes, January passes, nothing, no damage hearing setting, no requests, anything. I'm beginning to wander [sic] if they just let it go, they dropped it. In February, about mid-February, I get a call from your clerk, says that they requested a damage hearing. I tell your clerk okay, this is my thought. They want to do -- they want a judgment so they can take their appeal. I'm willing to give them a conditional stipulated judgment so they can take their appeal. Your clerk says okay. You know, we will give you some time to talk about it. I talked to Borders' attorney, he didn't have any problem with it, and the next -- and then about three or four weeks passes by and I get a notice of the damage hearing. I send a letter to Mr. Beasley making the offer, the same day Mr. Beasley rejects it . . .

Id. at 15-16. After Mr. Beasley rejected the offer, Mr. Stott states that he "immediately beg[an] the procedure to prepare [his] motion to set aside the default." Id. at 17.

Mr. Stott also stated that the amount of award suggested by the Magistrate Judge warrants setting aside the default judgment. "In this case we're talking about \$2.2 million. This is based upon a finding by the Magistrate of \$200,000 in actual damages and \$2 million in punitive damages, an outrageous amount in a free speech case to start with, and an outrageous amount in a default situation anyway." Id. at 24.

This Court finds that these actions, or inactions, by the defendants' counsel do not constitute dilatory behavior that is willful or in bad faith. Upon consideration of the perceived meritless claims in the complaint and his interest in conserving his clients' limited economic resources, Mr. Stott did not act to respond to the complaint and the petition for default because he thought that the plaintiffs were pursuing the claims strictly for appeal purposes. Instead of expending the costs of formally responding to these filings, Mr. Stott thought that he could work out a conditional stipulated judgment with the plaintiffs. In fact, he attempted to do this.

These contentions are unchallenged by plaintiffs' counsel, James E. Beasley, Esquire. Mr. Beasley never refuted Mr. Stotts' account of their substantial interactions throughout the progress of this litigation. No action on the part of Mr. Beasley clearly indicates his intention to seek judgment against the remaining defendants for reasons other than to perfect judgment for appeal. Although Mr. Stott could have handled matters differently, his actions do not constitute a deliberate disregard for the Court. The circumstances indicate that Mr. Stott tried to save his clients money by not taking steps that he thought would ultimately be unnecessary in light of the perceived meritlessness of the plaintiffs' claims. Once Mr. Stott realized that the plaintiffs were not seeking a judgment strictly for appeal purposes, Mr. Stott acted promptly to file a motion to set aside the default, made arrangements with local counsel, and prepared to travel from

California to this Court in Philadelphia to contest the default judgment. Under the totality of the circumstances, Mr. Stott's actions on behalf of his clients, do not constitute bad faith dilatory behavior, and justifies relief from the operation of the judgment. Consequently, this Court grants the defendants' motion to set aside the entry of default and default judgment.<sup>1</sup>

An appropriate Order follows.

---

1. Defendant, The Crucifucks, filed a notice to join defendants Alternative Tentacles Records and Eric R. Boucher's motion to set aside the default. Additionally, defendant, The Crucifucks, through their leader Doc Corbin Dart, submitted a statement to the Court during the hearing which made various objections to the plaintiffs' failure to serve notice of intention to take default, failure to serve notice of the default judgment when taken, and failure to give proper notice concerning the damages hearing.

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

FRATERNAL ORDER OF POLICE, : CIVIL ACTION  
AND JOHN WHALEN, SERGEANT :  
 :  
 :  
 v. :  
 :  
 :  
 THE CRUCIFUCKS, ALTERNATIVE :  
 TENTACLES RECORDS, ERIC R. BOUCHER :  
 and BORDERS BOOKS & MUSIC : NO. 96-2358

O R D E R

AND NOW, this 15th day of July, 1997, upon consideration of Defendants, The Crucifucks, Alternative Tentacles Records and Eric R. Boucher's Motion to Set Aside the Entry of Default and Default Judgment entered against them on November 26, 1996, Plaintiffs' opposition thereto, and a Hearing on July 10, 1997, IT IS HEREBY ORDERED that Defendants' Motion to Set Aside Entry of Default and Default Judgment is **GRANTED**.

IT IS FURTHER ORDERED that Defendants, The Crucifucks, Alternative Tentacles Records and Eric R. Boucher, shall have twenty (20) days from the date of this Order to file their response to the Plaintiffs' Complaint.

BY THE COURT:

---

HERBERT J. HUTTON, J.