

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

DATA COMM COMMUNICATIONS, INC., et al. : CIVIL ACTION
v. :
THE CARAMON GROUP, INC., et al. : NO. 97-0735

MEMORANDUM AND ORDER

HUTTON, J.

July 23, 1997

Presently before this Court is the Motion of Defendants The Caramon Group, Inc., Marvin Waldman, and Henriette Alban to Set Aside the Default (Docket No. 24) and the plaintiffs' response thereto.

I. BACKGROUND

In 1995, the plaintiff, Data Comm Communications, Inc. ("Data Comm"), incorporated in the Commonwealth of Pennsylvania for the purposes of obtaining funding to bid on and procure Federal Communication Commission licenses for personal communications systems. (Compl. at ¶ 14.) Specifically, Data Comm and its principals, plaintiffs, Eric Perry and Louis Silver, were interested in obtaining funds to bid for 10 MHz personal communications licenses at an August 26, 1996 FCC auction. (Id. at ¶ 15.) To finance the \$16 million needed to bid for the licenses, the plaintiffs approached defendant, The Caramon Group ("Caramon"). (Id. at ¶¶ 16-18.) The plaintiffs allege that after defendant

Caramon and some of the other defendants¹ reviewed their financial plan, defendant Caramon agreed to finance the project, on the condition that the plaintiffs put up \$50,000. (Id. at ¶¶ 19-25.) The plaintiffs maintain that although they reached an agreement with the defendants and paid them \$50,000, the defendants did not provide them with the \$16 million dollar loan. (Id. at ¶¶ 25-28.) Furthermore, the plaintiffs allege that the defendants failed to return and reimburse the plaintiffs' \$50,000 investment and other fees paid by them. (Id. at ¶ 28.)

On January 31, 1997, the plaintiffs filed suit in this Court alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, civil conspiracy, tortious interference with prospective economic advantage, breach of implied covenant of good faith and fair dealing, and fraud. On April 16, 1997, default was entered against defendants Caramon, Waldman, and Alban for failure to plead or otherwise defend. Shortly thereafter, defendants Caramon, Waldman, and Alban filed the instant motion seeking to set aside the default.

¹/ The other defendants in this action include Marvin Waldman, Caramon's chief executive officer, Henriette Alban, Caramon's vice president and operating officer, The Remington Group and Andrew Bogdanoff, its chief executive officer and principal, Lloyd Scott & Company and Lloyd Bashkin, its president, and Steve Teitleman, an employee of Caramon. On April 17, 1997, the plaintiffs voluntarily dismissed defendants Lloyd Bashkin and Lloyd Scott & Company from this action.

II. DISCUSSION

A. Standard for Setting Aside an Entry of Default

The Federal Rules of Civil Procedure provide that "[w]hen a party against whom a judgment of affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Fed. R. Civ. P. 55(a). A court, however, may set aside an entry of default if the defendant demonstrates good cause. Fed. R. Civ. P. 55(c). The United States Court of Appeals for the Third Circuit disfavors defaults and encourages decisions on the merits, leaving the decision to set aside the default to the sound discretion of the trial court. Harad v. Aetna Cas. & Sur. Co., 839 F.2d 979, 982 (3d Cir. 1988); see Trustees of Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Nordic Indus., Inc., No. CIV.A.96-5151, 1997 WL 83742, at *2 (E.D. Pa. Feb. 14, 1997) (citations omitted). In exercising this discretion a 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 v. Charles A. Krause Milling Co., 189 F.2d 242, 245-46 (3d Cir. 1951); accord Nordic Indus., 1997 WL 83742, at *2 (citing Feliciano, 691 F.2d at 656. Also, "matters involving large sums should not be determined by default judgments if it can reasonably be avoided." Tozer, 189 F.2d at 245.

B. Analysis of Factors for Setting Aside Default

1. Will Vacating the Default Judgment Prejudice the Plaintiffs?

The first question this Court must answer is whether setting aside the default 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 entry of default. 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 . . . entered at an early stage of the proceeding." Id. at 656-57.

In this case, the defendants argue that the plaintiffs will not be prejudiced if the Court sets aside the default, because the plaintiffs will not lose any rights, and must only prove the claims set forth in their complaint. (Defs.' Mot. at ¶ 14.) The plaintiffs, on the other hand, assert that a delay will impede discovery and the plaintiffs' abilities to resolve their claims.

(Pls.' Resp. at 4.) This Court, however, finds that the plaintiffs' claims are not impaired by setting aside the default. The plaintiffs maintain the ability to effectively litigate this case, and other than a brief delay, the plaintiffs have not suffered any harm due to the defendants' failure to respond to their complaint. Accordingly, the Court concludes that the plaintiffs will not suffer prejudice in the event that it vacates the default judgment against the defendants.

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 Cas. 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 Ins. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987); Gross v. Stereo Component Sys., Inc., 700 F.2d 120, 123 (3d Cir. 1983).

In this case, the defendants argue that their defenses are meritorious because the plaintiffs only plead one breach of contract allegation, and thus fail to plead a pattern of racketeering activity or time period sufficient to necessary to maintain a civil RICO suit. (Pls.' Mot. at ¶ 11.) The defendants

also assert that once the RICO claims are dismissed, the plaintiffs' state law claims must be dismissed for lack of subject matter jurisdiction. (Id. at ¶ 13.) The plaintiffs disagree with these assertions and maintain that their claim is based on more than one allegation that the defendants breach of contract. (Defs.' Resp. at 4.) Furthermore, the plaintiffs contend that the breach and the defendants representations are sufficient to prove fraud and violations of RICO. (Id.)

This Court finds that the defendants have presented defenses that are facially meritorious defenses. The defenses that the plaintiffs fail to plead a pattern of racketeering activity, and that the Court will lack subject matter jurisdiction over the suit if the RICO claims are dismissed are satisfactory 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. In this case, the defendants maintain that their default was not willful, because they were searching for local counsel who was willing to litigate a RICO suit. (Defs,' Mot. at ¶ 4.) They note that "[e]ven though, to the Defendants, the lawsuit involved nothing more than an alleged breach of contract, the RICO allegations caused many attorneys to disclaim interest. Those that were interested wanted large up-front retainers that

were beyond Defendants' financial resources."² (Id.) The plaintiffs, on the other hand, maintain that the defendants' conduct was designed to delay the litigation, and that any of the three attorneys they hired could have requested an extension to answer or respond to the complaint. (Pls.' Mem. at 1-3.)

After reviewing the record, this Court finds that any delay in legal proceedings was not caused by willful or bad faith behavior. While one of the defendants through their attorneys should have requested an extension to answer or respond to the complaint, their failure to respond was not motivated by a desire to manipulate or delay the proceedings. Therefore, this Court finds that the defendants are not culpable for their conduct.

^{2/} To support their position, the defendants attach the following verified statement:

[S]ubsequent to receiving a copy of the Plaintiff's [sic] Complaint, Defendants Alban and Waldman requested an Extension of Time because they were leaving for Europe. They further spoke to their private counsel, an attorney admitted to the Maryland Bar in an area where they live and where the Caramon Group, Inc. was based, who advised them that he was unwilling to handle a RICO case in the Eastern District of Pennsylvania; that they requested their attorney to supply names of attorneys in the Philadelphia area and that they contacted those attorneys, as well as other attorneys, whose names were given them by others; that, most of the attorneys were unwilling to take the defense of a RICO case and those that were interested wanted immediate up-front retainers in amounts beyond Defendants' financial ability; that they contacted the Lawyer Referral Service of the Philadelphia Bar Association in an effort to secure the names of additional attorneys and contacted those attorneys until they found an attorney who was willing to represent them under financial terms that were within their means; that at no time have they undertaken any strategy to delay adjudication of this lawsuit, on the contrary, they very much seek to clear their names of the charges of racketeering and extortion filed against them by the Plaintiffs.

(V.S. of Henriette Alban of 4/25/97 at 1.)

Accordingly, this Court concludes that the defendants satisfy the three factor test under the Third Circuit's "liberality" standard. Consequently, the defaults entered against defendants Caramon, Waldman, and Alban are vacated.

An appropriate Order follows.

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

DATA COMM COMMUNICATIONS, INC., et al. : CIVIL ACTION
v. :
THE CARAMON GROUP, INC., et al. : NO. 97-0735

O R D E R

AND NOW, this 23rd day of July, 1997, upon consideration of the Motion of Defendants The Caramon Group, Inc., Marvin Waldman, and Henriette Alban to Set Aside the Default (Docket No. 24), IT IS HEREBY ORDERED that the Defendants' Motion is **GRANTED**.

BY THE COURT:

HERBERT J. HUTTON, J.