

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

MUMPS AUDIOFAX, INC. : CIVIL ACTION  
:   
v. :   
: No. 01-CV-3962  
McBRIDE & ASSOCIATES, INC. :

M E M O R A N D U M

Ludwig, J.

November 13, 2001

This is an action for breach of contract and "theft/conversion," in which defendant McBride and Associates, Inc. moves to vacate a default entered September 7<sup>th</sup>, 2001. Jurisdiction is diversity, 28 U.S.C. § 1332, and federal law governs this procedural motion. Under Fed. R. Civ. P. 55(c): "For good cause shown the court may set aside an entry of default...." The decision is one "left primarily to the discretion of the district court," but being in the nature of a forfeiture, entries of default or default judgment are not favored. United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 194 (3d Cir. 1984). Three factors are to be considered: "(1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; (3) whether the default was the result of the defendant's culpable conduct." Id. at 195.<sup>1</sup> Given this analysis, defendant's motion to set aside default will be

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<sup>1</sup>\$55,518.05 in U.S. Currency covers both motions to set aside default and motions for default judgment, and its three factors have been reiterated recently as to default judgment motions. Chamberlain v. Giampapa, 210 F.3d 154, 164 (3d

granted. See, e.g., WMI Investors, Inc. v. Wastemasters, Inc., No. CIV.A.98-3187, 1999 WL 199735, at \*2 (E.D.Pa Apr. 8, 1999) (applying the three factors from \$55,518.05 in U.S. Currency in granting a motion to set aside default).

a. Prejudice

In its legal sense, no prejudice will result from setting aside this default. The default was entered approximately 25 days after the complaint was received by defendant, so there has been little delay.<sup>2</sup> The motion to set aside the default was filed 25 days after the default was entered.

b. Existence of a meritorious defense.

A meritorious defense exists when "the defendant has alleged facts which, if established at trial, would constitute a [complete] defense to the cause of action." Central W. Rental Co. v. Horizon Leasing, 967 F.2d 832, 836 (3d Cir. 1992) (citing \$55,518.05 in U.S. Currency, 728 F.2d at 195). A defendant's answer should "allege

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Cir. 2000).

<sup>2</sup>In any event, delay alone is seldom enough to establish requisite prejudice. "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 earlier stage of the proceeding." EMCASO Insurance Comp. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987) (citing Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653 (3d Cir. 1982)) (no prejudice where motion to set aside default judgment was filed two weeks after entry of default judgment and loss of evidence or hindered ability to pursue the claim was not alleged).

specific facts beyond [a] general denial," and cannot be "couched solely in conclusory language...." \$55,518.05 in U.S. Currency, 728 F.2d at 195-96.

Defendant's affidavit satisfactorily alleges a meritorious defense. Specifically, it avers that plaintiff violated its contract to deliver software products and was non-responsive to requests for service. Affidavit in Support of Motion to Set Aside Entry of Default ¶ 7(c)-(d). According to defendant, a "pass-through contractor," its client also expressed dissatisfaction and, as a result, withheld payments to defendant. Id. at ¶ 7(e).

Plaintiff responds that defendant's factual claims lack evidentiary support - and has presented e-mail and spreadsheet evidence that defendant's client made some, if not all, of the payments that defendant claims were withheld. Plaintiff's Response at 2-3. At this early stage, however, the issue is not evidentiary. "[W]e do not purport to use summary judgment standards" in determining "facial meritoriousness." Adams v. Trustees of N.J. Brewery Trust Fund, 29 F.3d 863, 876 (3d Cir. 1994) (quoting Poulis v. State Farm Fire and Casualty Comp., 747 F.2d 863, 869 (3d Cir. 1984)). It is not incumbent on a movant to do more than set forth in its papers a specific meritorious defense.<sup>3</sup>

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<sup>3</sup>Plaintiff requests that defendant "fully respond to discovery before the court considers any favorable ruling." Plaintiff's Response at 5. This request is rejected.

c. Defendant's culpable conduct

Defendant should have acted in a more timely fashion once it became aware of this lawsuit, and its excuses for not doing so, such as pursuing settlement and obtaining local counsel, are less than satisfactory.<sup>4</sup> Still, there is no evidence that defendant, in defaulting, acted in bad faith or was other than misguided and negligent.

Defendant's culpability is not serious enough to warrant the severe penalty of refusing to set aside the default, which would bring the likelihood of a default judgment.<sup>5</sup> Poulis, 747 F.2d at 870 (characterizing "the sanction of...default [judgment]" as "extreme").

Plaintiff also asks that, if default is set aside, defendant be required to post security in the amount (\$374,992.10) to cover what it has "admitted retaining" on the contracts in question. Plaintiff's Response at 6. In support, plaintiff cites some of

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<sup>4</sup>Defendant is based in New Mexico.

<sup>5</sup>See, e.g., EMCASCO Insurance Company v. Sambrick, 834 F.2d 71, 75 (3d Cir. 1987). While this case involved a default judgment, rather than simply a default, the situations are closely analogous. In EMCASCO, defendant did not file an answer for more than six weeks after it was due and nothing on the record suggested "that this neglect was excusable." Id. Still, the Court of Appeals, noting the absence of "flagrant bad faith" or "deliberate trial strategy," set aside the default judgment. Id. (quoting National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976); Zawadski De Bueno v. Bueno Castro, 822 F.2d 416, 421 (3d Cir. 1987)).

the "relatively few cases" where such a requirement has been imposed as a condition of opening default *judgments*. Id. While bond or other security is an "extraordinary condition" for opening a default judgment, it appears to be an unprecedented requirement for setting aside a default - where judgment has not been entered against defendant. Wokan v. Alladin International, Inc., 485 F.2d 1232, 1235 (3d Cir. 1973). Accordingly, the request will be denied.

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Edmund V. Ludwig, J.

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ORDER

And now, this     day of November, 2001, the following is ordered:

1. Defendant's motion to set aside default is granted.
2. Plaintiff's motion for default judgment is denied as moot.

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Edmund V. Ludwig, J.