

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

ROCKWELL TRANSPORTATION	:	CIVIL ACTION
SERVICES, INC., ROCKWELL	:	
FREIGHT FORWARDING, INC.,	:	
ROCKWELL MANAGEMENT AND	:	
CONSULTANTS, INC., and	:	
ROCKWELL INTERMODAL, INC.	:	
	:	
v.	:	
	:	
INTERNATIONAL PRINTING AND	:	
ENVELOPE COMPANY, INC.	:	NO. 02-724

MEMORANDUM ORDER

Presently before the court is defendant's motion to set aside entry of default and plaintiffs' cross-motion for entry of default judgment in this breach of contract case. Plaintiffs allege that defendant breached a contractual obligation to pay invoices tendered between July 30 and December 1, 2001.

On March 1, 2002, plaintiffs served process on defendant at its office in Blairstown, New Jersey. The complaint was promptly forwarded to defendant's counsel, George F. Sweeny. Mr. Sweeny is not admitted to practice in Pennsylvania and sought a recommendation for counsel from an attorney who was then representing defendant in other proceedings. When the time to respond to the complaint expired and no motion for an extension of time had been filed, the Clerk entered a default at plaintiffs' request.

The criteria for determining whether to set aside a default judgment or an entry of default are the same, but are applied more liberally to an entry of default. See Duncan v. Speach, 162 F.R.D. 43, 44 (E.D. Pa. 1995). See also United States v. Real Property and All Furnishings Known as Bridewell's Grocery and Video, 195 F.3d 819, 820 (6th Cir. 1999); American Alliance Ins. Co. v. Eagle Ins. Co., 92 F.3d 57, 59 (2d Cir. 1996); Keegel v. Key West & Caribbean Trading Co., 627 F.2d 372, 375 n.5 (D.C. Cir. 1980). A court may set aside the entry of default for "good cause shown." Fed. R. Civ. P. 55(c). In determining whether there is good cause to vacate an entry of default, a court considers whether the plaintiff will be prejudiced, whether the fault was the result of the defendant's culpable conduct and whether the defendant has a meritorious defense. See United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 194-95 (3d Cir. 1984); Dizzley v. Friends Rehabilitation Program, Inc., 202 F.R.D. 146, 147 (E.D. Pa. 2000).

A plaintiff is prejudiced where the loss of relevant evidence or some other occurrence impairs his ability to pursue the claim. See Feliciano v. Reliant Tooling Co., 691 F.2d 653, 656-657 (3d Cir. 1982). Delay in realizing satisfaction on a claim rarely establishes the degree of prejudice sufficient to preclude the setting aside of a default which is invariably

entered at an early stage of the proceedings. Id.; Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 246 (3d Cir. 1951). That a plaintiff will have to litigate an action on the merits rather than proceed by default does not constitute prejudice. Choice Hotels Int'l, Inc. v. Pennave Assoc's, Inc., 192 F.R.D. 171, 174 (E.D. Pa. 2000). Plaintiff has demonstrated no prejudice which would result were the court to set aside the entry of default.

"Culpable conduct" means actions taken willfully or in bad faith. Gross v. Stereo Component Systems, Inc., 700 F.2d 120, 123 (3d Cir. 1983); Choice Hotels, 192 F.R.D. at 174. While intentional or reckless disregard of communications from the plaintiff or the court can satisfy the culpable conduct standard, "more than mere negligence must be demonstrated." Hritz v. Woma Corp., 732 F.2d 1178, 1183 (3d Cir. 1984). See also Cassell v. Philadelphia Maintenance Co., 198 F.R.D. 67, 69 (E.D. Pa. 2000); Foy v. Dicks, 146 F.R.D. 113, 117 (E.D. Pa. 1993). A court considers the extent to which the error is attributable to the defendant and the extent to which it is attributable to defense counsel. See Momah v. Albert Einstein Medical Ctr., 161 F.R.D. 304, 308 (E.D. Pa. 1995); Interior Finish Contractors Assoc. v. Drywall Finishers Local Union No. 1955, 625 F. Supp. 1233, 1239 (E.D. Pa. 1985). The party who seeks to set aside the entry of default must act with reasonable promptness. See

Consolidated Masonry and Fireproofing, Inc. v. Wagman Construction Corp., 383 F.2d 249, 251 (4th Cir. 1969) ("Generally a default should be set aside where the moving party acts with reasonable promptness and alleges a meritorious defense").

It is counsel who is largely responsible for the entry of default. Defendant promptly forwarded a copy of the complaint to Mr. Sweeny who failed to ensure a timely response or the filing of a motion for an extension of time. There is no showing that this failure was wilful or in bad faith. The cause appears to have been simple negligence. Defendant was reasonably prompt in taking action within one month after the entry of default. See Wainwright's Vacations, LLC v. Pan Am. Airways Corp., 130 F. Supp. 2d 712, 718 (D. Md. 2001).

A "meritorious defense" is one which "if established at trial, would completely bar plaintiffs' recovery." Momah, 161 F.R.D. at 307. A defendant, however, must present specific facts to show that it can make out such a defense. See Jones v. Phipps, 39 F.3d 158, 165 (7th Cir. 1994) ("meritorious defense" must be "supported by a developed legal and factual basis"); \$55,518.05 in U.S. Currency, 728 F.2d at 195 (defendant must set forth "specific facts beyond simple denials or conclusory statements"); Momah, 161 F.R.D. at 307 (defendant must "raise specific facts beyond a general denial" to show it "can make out a complete defense"); Ferraro v. Kuznetz, 131 F.R.D. 414, 419

(S.D.N.Y. 1990) ("defendant must present some factual basis for the supposedly meritorious defense").

Defendant's president has submitted an affidavit in which he avers that plaintiffs double-billed and over-billed defendant, failed to provide bills of lading with each invoice as required by the parties' agreement and breached the agreement itself by failing to deliver goods in a timely manner. Plaintiffs suggest that the present motion was not made in good faith and that if there was any merit to the double-billing defense, defendant would state exactly which invoices were double-billed.

The defaulting party is not required "to prove beyond a shadow of a doubt that they will win at trial, but merely to show that they have a defense to the action which at least has merit on its face." Emcasso Ins. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987); Dizzley, 202 F.R.D. at 148. Defendant has made averments of fact which would show that plaintiffs failed to satisfy conditions precedent to defendant's obligation to make payment and also that it did not owe plaintiffs the amounts for which it was billed. This is sufficient to demonstrate a meritorious defense for purposes of setting aside the entry of default. This, of course, does not mean that defendant would be relieved of responsibility for any averments which have been made in bad faith. Defendant is still subject to the requirements of Fed. R. Civ. P. 11(b).

ACCORDINGLY, this day of May, 2002, upon consideration of defendant's Motion to Set Aside Entry of Default (Doc. #4) and plaintiffs' cross-Motion for Entry of Default Judgment (Doc. #5), **IT IS HEREBY ORDERED** that plaintiffs' cross-Motion is **DENIED**, defendant's Motion is **GRANTED** and the Clerk shall strike the entry of default herein after which defendant shall have twenty days in which to file a responsive pleading.

BY THE COURT:

JAY C. WALDMAN, J.