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

GE MEDICAL SYSTEMS INFORMATION TECHNOLOGIES, INC.	:	CIVIL ACTION
v.	:	NO. 04-CV-2775
ANSAR, INC., et al.	:	

SURRICK, J. **DECEMBER 23, 2004**

MEMORANDUM & ORDER

Presently before the Court is the Defendants Ansar, Inc. and Ansar Group, Inc.'s ("Ansar") Motion to Set Aside Default Judgment pursuant to Federal Rules of Civil Procedure 55(c) and 60(b). (Doc. No. 7.) For the following reasons, Ansar's Motion will be granted.

I. BACKGROUND

This case arises from a contract dispute between Plaintiff and Defendants over unpaid merchandise. The Complaint alleges that Defendant, a Pennsylvania corporation, ordered and received numerous items of medical equipment from Plaintiff, a Wisconsin corporation, during 2001 and 2002. (Compl. ¶¶ 1-2, 4-5, Ex. A.) Plaintiff asserts that Defendants owe $257,898.37 for the equipment,[1] and that Defendants have failed or refused to pay the outstanding balance despite Plaintiff's demand. (*Id.* ¶ 8.)

On June 24, 2004, Plaintiff filed a Complaint to recover the outstanding debt, with interest. (Doc. No. 1.) Plaintiff retained B & R Services for Professionals, Inc. ("B & R"), to

[1] This amount includes debts owed to three companies, General Electric Information Technologies, Critikon, and Marquette Services. (Compl. Ex. A.) According to a demand letter attached to the Complaint, General Electric Information Technologies purchased Critikon and Marquette Services and consolidated the claims in calculating Defendants' debt.

serve Defendants.[2] According to Michael Gallagher, a process server with B & R, service was made on Defendants at 4:16 p.m. on July 2, 2004, at their offices in Philadelphia, Pennsylvania. (Gallagher Aff. at unnumbered 1.) Gallagher asserts that he delivered the summons and a copy of the Complaint to an individual named "Rachelle" at Ansar's offices. (*Id.*) He described Rachelle as a white woman between the ages of thirty-six (36) and fifty (50), approximately five to five-and-a-half feet tall, and weighing between 131 to 160 pounds. Gallagher stated that Rachelle was an agent or person in charge of Defendants' office at the time of delivery. (*Id.*)

No answer or motion to dismiss the Complaint was filed by Defendants within the required twenty (20) day period.[3] On July 22, 2004, Plaintiff submitted a praecipe for entry of default judgment against Plaintiff in the amount of $285,818.17. (Doc. No. 3.) Default judgment was entered by the Clerk on July 23, 2004. On August 12, 2004, Defendants' Motion to Set Aside Default Judgment was filed, asserting that Defendants were never properly served with the summons and Complaint. (Doc. No. 7 ¶ 3.) According to Robert G. Welch, Ansar's managing director, Edna Ingram, the company's receptionist, and Florence Denzer, the company's bookkeeper, Ansar's office closed at 4:00 p.m. on Friday, July 2, 2004, in anticipation of the July 4th holiday. (Welch Aff. at unnumbered 1; Ingram Aff. at unnumbered 1; Denzer Aff. at unnumbered 1.) Ingram avers that she was in her office, which is located directly across from the office entrance at closing time, and that no one by the name of Michael Gallagher was in the office at that time. (Ingram Aff. at unnumbered 1.) Welch states that he was in the office after

[2] Plaintiff apparently did not attempt to send a waiver of service to Defendants under Federal Rule of Civil Procedure 4(d).

[3] Under Federal Rule of Civil Procedure 12(a)(1), a defendant must answer a complaint or move to dismiss the action within twenty days of proper service. Fed. R. Civ. P. 12(a)(1)(A).

closing, and that no one named Michael Gallagher was in the office at that time. (Welch Aff. at unnumbered 1.) In addition, all three affiants assert that no one by the name of Rachelle worked for Ansar on July 2, 2004, and no one who matches her description has ever worked for Defendants. (Welch Aff. at unnumbered 1; Ingram Aff. at unnumbered 1; Denzer Aff. at unnumbered 1.) Based on these affidavits, Plaintiff argues that the default judgment should be set aside under Federal Rules of Civil Procedure 55(c) and 60(b) because service was improper.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 55(c) provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c). Rule 60(b) states that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, advertence, surprise, or excusable neglect . . . ." Fed. R. Civ. P. 60(b)(1). "'The Court has broad discretion in deciding whether to set aside a default judgment.'" *A & A Mach. Moving, Inc. v. Am. Wrecking Corp.*, No. Civ. 03-5971, 2004 WL 350179, at *2 (E.D. Pa. Feb. 25, 2004) (quoting *Natasha C. v. Visionquest, Ltd.*, No. Civ. 03-1903, 2003 WL 21999591, at *1 (E.D. Pa. Aug. 25, 2003)); *see also United States v. $55,518.05 in U.S. Currency*, 728 F.2d 192, 194 (3d Cir. 1984) ("A decision to set aside a default entry pursuant to Fed. R. Civ. P. 55(c) . . . is left primarily to the discretion of the district court."). The Third Circuit has explicitly stated that it "does not favor entry of defaults or default judgments," and requires that "doubtful cases . . . be resolved in favor of the party moving to set aside the default judgment 'so that cases may be decided on their merits.'" *$55,518.05 in U.S. Currency*, 728 F.2d at 194-95 (quoting *Tozer v.*

Charles A. Krause Milling Co., 189 F.2d 242, 245 (3d Cir. 1951)). Rule 55(c) motions are therefore generally construed in favor of the moving party. *A & A Mach. Moving, Inc.*, 2004 WL 350179, at *2 (citing *Am. Telecom, Inc. v. First Nat'l Communs. Network, Inc.*, No. Civ. 99-3795, 2000 WL 714685, at *1 (E.D. Pa. June 2, 2000)). Moreover, "matters involving large sums should not be determined by default judgment if it can reasonably be avoided." *Tozer*, 189 F.2d at 245; *see also A & A Mach. Moving, Inc.*, 2004 WL 3501769, at *2 (same).

The Third Circuit has also stated that a court must consider four factors in deciding whether to set aside a default judgment. *Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71, 73-74 (3d Cir. 1987). These factors are: (1) whether the plaintiff will be prejudiced if the default judgment is set aside; (2) whether the default was the product of defendant's culpable conduct; (3) whether the defendant has a meritorious defense; and (4) whether alternative sanctions would be effective. *Id.* We will consider each factor in determining whether Defendants' Motion should be granted.

III. DISCUSSION

A. Prejudice to the Plaintiff

The first factor to consider is whether setting aside the default judgment would prejudice Plaintiff. *Emcasco Ins. Co.*, 834 F.2d at 73. Prejudice exists when "plaintiff's claim would be materially impaired because of the loss of evidence, an increased potential for fraud or collusion, substantial reliance on the entry of default, or other substantial factors." *Dizzley v. Friends Rehab. Program*, 202 F.R.D. 146, 147-48 (E.D. Pa. 2001); *see also Feliciano v. Reliant Tooling Co.*, 691 F.2d 653, 657 (3d Cir. 1982) (listing similar reasons for finding prejudice). Expenses that will be incurred in litigating the matter or the possible delay in Plaintiff obtaining recovery

are not the kind of prejudice that supports the opening of a default judgement. *See Feliciano*, 691 F.2d at 656-57 ("[R]ealizing satisfaction on a claim rarely serves to establish the degree of prejudice sufficient to prevent the opening a default judgment entered at an early stage of the proceeding."); *Choice Hotels Int'l, Inc. v. Pennave Assocs., Inc.*, 192 F.R.D. 171, 174 (E.D. Pa. 2000) ("The fact that a plaintiff will have to litigate an action on the merits rather than proceed by default does not constitute prejudice." (citing *Duncan v. Speach*, 162 F.R.D. 43, 45 (E.D. Pa. 1995)); *see also* 8 Charles Alan Wright et al., Federal Practice and Procedure § 2699 (2d ed. 1994) ("[T]he fact that reopening the judgment would delay plaintiff's possible recovery has not, in itself, been deemed to bar relief. Something more must be shown.").

Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Set Aside Default Judgment, which consists of seven lines and cites no authority, does not assert that Plaintiff would suffer any prejudice if we were to grant the Motion. Under the circumstances, we conclude that Plaintiff will suffer no prejudice if the default judgment was set aside.

B. Culpable Conduct

The second factor to consider is whether Defendants' failure to file a timely response was the result of culpable conduct. *Emcasco Ins. Co.*, 834 F.2d at 73. "To be 'culpable,' the conduct leading to the entry of default must have been willful, intentional, reckless or in bad faith. More than mere negligence is required." *Momah v. Albert Einstein Med. Ctr.*, 161 F.R.D. 304, 308 (E.D. Pa. 1995); *see also Gross v. Stereo Component Sys., Inc.*, 700 F.2d 120, 123-24 (3d Cir. 1983) ("[C]ulpable conduct means actions taken wilfully or in bad faith.").

Defendants argue they never received proper notice because service was defective. (Doc. No. 7.) Courts have recognized that improper notice is sufficient grounds to set aside a

default judgment. *See, e.g.*, *Gold Kist, Inc. v. Laurinburg Oil Co.*, 756 F.2d 14, 19 (3d Cir. 1985) ("A default judgment entered when there has been no proper service of the complaint is, *a fortiori*, void, and should be set aside."); *see also* 8 Charles Alan Wright et al. § 2695 (stating that "when defendant presents evidence that he received no actual notice of the suit in time to answer, the court is likely to grant relief" from default). If service was improper, Defendants could not have acted willfully, intentionally, recklessly, or in bad faith in failing to file a timely response to Plaintiff's Complaint.

Under Federal Rule of Civil Procedure 4(h), corporations may be validly served by either (1) "delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process," or (2) pursuant to state law under Federal Rule of Civil Procedure 4(e)(1). Fed. R. Civ. P. 4(h)(1). Under Pennsylvania law, service on a corporation may be made upon any of the following persons:

> (1) an executive officer, partner or trustee of the corporation or similar entity, or
>
> (2) the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity, or
>
> (3) an agent authorized by the corporation or similar entity in writing to receive service of process for it.

Pa. R. Civ. P. 424. The party making service has the burden of proving that it was proper. *Grant Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir. 1993).

Here, the process server asserts that at 4:16 p.m. on July 2, 2004, he served process on an individual named Rachelle at Defendants' offices. (Gallagher Aff. at unnumbered 1.) He states that she was "an agent or person in charge of office [sic] or usual place of business." (*Id.*)

According to Ansar's managing director, receptionist, and bookkeeper, however, Ansar's offices had closed at 4:00 p.m. on July 2, 2004, and no employee named Rachelle worked at Ansar at that time. (Welch Aff. at unnumbered 1; Ingram Aff. at unnumbered 1; Denzer Aff. at unnumbered 1.) In addition, all three affiants swear that no one matching the description of the person identified by the process server has worked for Defendants for at least the last two years.[4] (Welch Aff. at unnumbered 1; Ingram Aff. at unnumbered 1; Denzer Aff. at unnumbered 1.) Thus, there appears to be a significant dispute as to whether a person named Rachelle actually received service on the day in question.

Even if an individual named Rachelle worked for Ansar at the relevant time, however, there is no evidence that she is a person qualified to receive service under either federal or Pennsylvania law. As previously mentioned, the Federal Rules of Civil Procedure permit service upon a corporate officer, managing or general agent, or to any other agent authorized by appointment or law to receive service. Fed. R. Civ. P. 4(h)(1). There is no indication that Defendants employed a person named Rachelle in any of these capacities.[5] Plaintiff appears to be asserting that service was proper because Rachelle was a "manager, clerk or other person for the time being in charge of any regular place of business or activity." *See* Pa. R. Civ. P. 424(2). Under Pennsylvania law, a person in charge must be someone who has "a sufficient connection

[4] Plaintiff asserts in response that Robert Welch, Ansar's managing director, did in fact have an employee named Rachelle, and that there is no way that the process server "would simply invent" the details contained in his affidavit. (Doc. No. 8.) Plaintiff provides no evidentiary support for this claim.

[5] Likewise, there is no assertion that a Rachelle was an executive officer, partner, or authorized agent for Defendants authorized to receive service of process under the Pennsylvania Rules of Civil Procedure. Pa. R. Civ. P. 424(1), (3).

between the person served and the defendant to demonstrate that service was reasonably calculated to give the defendant notice of the action against it." *Cintas Corp. v. Lee's Cleaning Servs., Inc.*, 700 A.2d 915, 920 (Pa. 1997); *see also Grant Entm't Group, Inc.*, 988 F.2d at 485-86 (holding that a receptionist in a building where the defendants were tenants and who was not employed by the defendants did not qualify as a person in charge). Plaintiff has provided no evidence, other than the bald statement of the process server, that Rachelle was a person in charge of the office. The Affidavit of Service contains no information regarding Rachelle's position, authority, or control over Defendants' place of business. Furthermore, Defendants have sworn that their offices were closed prior to the time that Plaintiff's process server allegedly made service. (Welch Aff. at unnumbered 1; Ingram Aff. at unnumbered 1; Denzer Aff. at unnumbered 1.) As the record presently stands, Plaintiff has failed to carry its burden of establishing that service was proper. Accordingly, Defendants' failure to timely answer Plaintiff's Complaint cannot be considered "willful, intentional, reckless or in bad faith." *Momah*, 161 F.R.D. at 308.

C. Meritorious Defense

The third factor to consider is whether Defendants have a meritorious defense to Plaintiff's Complaint. *Emcasco Ins. Co.*, 834 F.2d at 73. "Generally, a federal court will grant a motion under Rule 55(c) only after some showing is made that if relief is granted the outcome of the suit may be different than if the entry of default or the default judgment is allowed to stand . . . ." 8 Charles Alan Wright et al. § 2697. "The showing of a meritorious defense is accomplished when allegations of defendant's answer, if established at trial, would constitute a complete defense to the action." *$55,518.05 in U.S. Currency*, 728 F.2d at 195. It is not necessary for a

party to establish beyond all doubt that it will prevail at trial on the defense, but rather that the proffered defense is not "'factually unmeritorious.'" *Emcasco Ins. Co.*, 834 F.2d at 74 (quoting *Gross*, 700 F.2d at 123).

Here, Plaintiff alleges that Defendants have failed to remit payment for approximately $250,000 worth of medical equipment. (Compl. ¶¶ 4, 8.) In reply, Defendants assert that the goods in question were defective, and that this qualifies as a defense to Plaintiff's collection efforts. (Doc. No. 7 ¶ 6.) Under Pennsylvania law, if a merchant delivers goods that "fail in any respect to conform" to the requirements of the contract, the buyer may, at his option, reject the nonconforming goods. 18 Pa. Cons. Stat. § 2601 (2002). If the goods are rejected by providing timely notice to the seller, *id.* § 2602(a), "the buyer has no further obligations with regard to goods rightfully rejected," including payment for the nonconforming goods. *Id.* § 2602(b). Defendants have therefore alleged a potential defense to their failure to pay Plaintiff.

Plaintiff asserts that "[D]efendants have not raised any dispute in the numerous letters and phone calls made to them by plaintiff . . . and plaintiff's counsel" regarding the allegedly defective medical equipment. (Doc. No. 8 at unnumbered 1.) Failure to provide notice of rejection of the goods because of their defects would obviously defeat Defendants' asserted defense. *See Yates v. Clifford Motors, Inc.*, 423 A.2d 1262, 1269 (Pa. Super. Ct. 1980) (holding that rejection "'is ineffective unless the buyer seasonably notifies the seller'" (quoting U.C.C. § 2-602(1))); *see also id.* ("A party gives notice [of rejection] . . . 'by taking such steps as may be reasonably required to inform the other in ordinary course.'" (quoting U.C.C. § 1-201(26))). However, Plaintiff has submitted no affidavits or made any specific factual allegations to support its assertion that Defendants failed to provide notice of rejection.

Several decisions in this district have required that the defendant must assert "specific facts" to support the existence of a prima facie meritorious defense. *See, e.g.*, *Natasha C.*, 2003 WL 21999591, at *4; *Kauffman v. Cal Spas*, 37 F. Supp. 2d 402, 407 (E.D. Pa. 1999); *see also $55,518.05 in U.S. Currency*, 728 F.2d at 195-97 (holding that the district court did not abuse its discretion in determining that defendant did not allege specific facts to support his proffered defense). We note, however, that the Supreme Court has concluded that there are serious procedural due process problems with requiring a defendant to establish the existence of a meritorious defense when the defendant had not received proper notice of the lawsuit's existence.[6] In *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), the Court unanimously reversed a state court decision that declined to set aside a default judgment. The state court held that in order to have a default judgment set aside, the defendant had to show he had a meritorious defense because, without such a defense, the same judgment would again be entered on retrial, and the defendant therefore would suffer no prejudice from the default judgment. *Id.* at 85. The Court held that this reasoning was "untenable." *Id.* "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is

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[6] One leading treatise on federal procedure notes:

> A defendant is not required to make a showing of a meritorious defense in cases in which the defendant was not served with process. Due process requires that a defendant receive adequate notice of a lawsuit. When a defendant has not been served with notice reasonably calculated to apprise him or her of the pendency of the action and afford him or her a reasonable opportunity to present objections, the defendant has a constitutional right to set a default judgment aside. This right may not be conditioned on a requirement that the defendant show a meritorious defense.

10 James Wm. Moore, Moore's Federal Practice § 55.50 (3d ed. 2000).

notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.'" *Id.* at 84 (quoting *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314 (1950)). The Court stated that had the defendant had proper notice of the lawsuit, he might have taken other actions, such as selling assets to pay the outstanding debt or agreeing to a settlement with plaintiffs. *Id.* at 85. The Court concluded that defendant was harmed by plaintiff's failure to provide proper notice of the pending lawsuit, violating the Constitution's guarantee of procedural due process. *Id.* at 85-86. Similarly, in this case, Defendants allege that they never received proper notice of Plaintiff's suit against them. (Doc. No. 7.) Significant procedural due process concerns may be raised if we were to deny Defendants' Motion simply because they did not provide specific factual allegations in support of their proffered defense. We will therefore assume that Defendants' "bare allegation" asserts a meritorious defense. *See Wohl v. Wilkoski*, Nos. 87-1445, 89-2557, 1989 WL 64426, at *3 (E.D. Pa. June 14, 1989) (assuming that defendants' "bare allegations" were sufficient to assert a meritorious defense).

D. Alternative Sanctions

The fourth and final factor we must consider is whether alternative sanctions would be effective. *Emcasco Ins. Co.*, 834 F.2d at 73. A district court may consider alternative sanctions against the defaulting party when determining whether it should set aside a default judgment. *Natasha C.*, 2003 WL 21999591, at *6. However, as several courts have noted, "[p]unitive sanctions are inappropriate absent evidence of bad faith or willful misconduct . . . ." *A & A Mach. Moving, Inc.*, 2004 WL 350179, at *4; *Royal Ins. Co. of N. Am. v. Packaging Coordinators, Inc.*, No. Civ. 00-CV-3231, 2000 WL 1586081, at *3 (E.D. Pa. Oct. 24, 2000).

Since it appears that service was not valid and there is no evidence to support a finding that Defendants acted in bad faith or were guilty of willful misconduct, alternative sanctions would be inappropriate.

IV. CONCLUSION

This is a doubtful case involving a large sum of money. Default judgment is not favored. Accordingly, we will grant Defendants' Motion and set aside the entry of default judgment.

An appropriate Order follows.

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GE MEDICAL SYSTEMS INFORMATION TECHNOLOGIES, INC.	:	CIVIL ACTION
v.	:	
ANSAR, INC., et al.	:	NO. 04-CV-2775

ORDER

AND NOW, this 23rd day of December, 2004, upon consideration of Defendants Ansar, Inc. and Ansar Group, Inc.'s Motion to Set Aside Default Judgment pursuant to Federal Rules of Civil Procedure 55(c) and 60(b) (Doc. No. 7, No. 04-CV-2775), it is hereby ORDERED that:

1. Defendants' Motion is GRANTED;

2. The default judgment (Doc. No. 5) is SET ASIDE, pursuant to Federal Rules of Civil Procedure 55(c) and 60(b); and

3. Defendants are ORDERED to file an answer or motion to dismiss within twenty (20) days.

IT IS SO ORDERED.

BY THE COURT:

_____
R. Barclay Surrick, Judge