

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

JEANNE BURKEY : CIVIL ACTION
 :
 v. :
 :
 MARY A. BURKEY :
 : No. 97-1362

O R D E R - M E M O R A N D U M

AND NOW, this 25th day of June, 1997, upon hearing and conference, the motion of defendant Mary A. Burkey to open default, Fed. R. Civ. P. 55(c), 60(b), is denied.

Filed on February 24, 1997, the complaint was duly served on March 7, 1997. On April 4, 1997, plaintiff moved for a default for failure to plead or otherwise defend, and on that date the default was entered. On April 22, 1997, an order was entered scheduling a hearing to assess damages on May 28, 1997. On that day, defendant appeared through counsel and filed the motion to open the order of default.

An entry of default may be opened or set aside if good cause can be demonstrated or for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b). Defendant asserts that the default was taken only 28 days after service of the complaint and that plaintiff was required by Fed. R. Civ. P. 55(b)(2) to give notice to defendant's insurance adjuster. However, that Rule applies only where an appearance has been entered. Fed. R. Civ. P. 55(b)(2). In this case, defendant first appeared by filing the motion to open the default on the date of the assessment of damages hearing, May 28, 1997 - some 82 days

after service of the complaint and 54 days after entry of the default. Defendant has not proffered any explanation for those delays or for not contacting the court before the time of the assessment hearing. For these reasons, the court will not exercise its discretion to grant the equitable relief requested.

The parties, who agreed that the damages are arbitrable, are directed to submit that issue to arbitration by the week of August 11, 1997. The arbitration clerk will notify counsel as to the specific day.

Edmund V. Ludwig, S.J.