

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

FRANK FIORE, : CIVIL ACTION  
 : NO. 98-517  
Plaintiff, :  
 :  
v. :  
 :  
GIANT FOOD STORES, INC., :  
 :  
Defendant. :

ORDER-MEMORANDUM

**AND NOW**, this **15th** day of **April, 1998**, upon consideration of plaintiff's motion for reconsideration (docket entry no. 5) and brief of defendant in opposition to motion for reconsideration (docket entry no. 6), it is **ORDERED** that the motion is **DENIED**. The Court's Order is based upon the following reasoning:

1. On January 29, 1998, this action was removed from the Court of Common Pleas of Philadelphia County.

2. On February 3, 1998, defendant filed a motion to dismiss the complaint together with a legal brief in support of its contentions.

3. On February 25, 1998, based on the failure of defendant to respond to the motion to dismiss, the Court granted the motion as uncontested pursuant to Local Rule of Civil Procedure 7.1(c),<sup>1</sup> and dismissed the action.

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<sup>1</sup> Local Rule of Civil Procedure 7.1(c) provides, in relevant part, that:

In the absence of a timely response, the motion may be granted as uncontested except that a summary judgment motion, to which there has been no timely response shall be governed by Fed.R.Civ.P. 56(c).

L.R.Civ.P. 7.1(c).

4. Local Rule 7.1(c) authorizes the court to grant motions, other than motions for summary judgment, as uncontested if the opposing party has failed to file a timely response. The validity of this rule has been approved by the Third Circuit. See Sawka v. Healtheast, Inc., 989 F.2d 138, 139-40 (3d Cir. 1993)(approving of former Local Rule 20(c) which contained same language as current Local Rule 7.1(c)). Therefore, the Court was authorized to dismiss the plaintiff's case as uncontested.

5. On March 27, 1998, plaintiff moved for reconsideration of the Court's Order of February 25, 1998 dismissing his case under Local Rule of Civil Procedure 7.1(g).<sup>2</sup> Local Rule 7.1(g) provides that motions for reconsideration shall be served and filed within ten (10) days from the entry of the order concerned. See L.R.Civ.Pro. 7.1(g). Because the instant motion was not filed until thirty (30) days after the entry of the Order dismissing the case, plaintiff's motion for reconsideration is untimely.

6. In the interest of justice, however, the Court will construe plaintiff's motion as one for relief of judgment under Federal Rule of Civil Procedure 60(b). Specifically, the Court will consider whether the Order of February 25, 1998 should be vacated due to counsel's "mistake, inadvertence, surprise or

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<sup>2</sup> Local Rule 7.1(g) provides:  
Motions for reconsideration or reargument shall be served and filed within ten (10) days after the entry of the judgment, order, or decree concerned.  
Loc.R.Civ.P. 7.1(g).

excusable neglect." Fed.R.Civ.P. 60(b)(1).<sup>3</sup> Motions seeking relief from judgment may be filed not more than one year after the judgment challenged was entered. Fed.R.Civ.P. 60(b). Therefore, under this standard, the plaintiff's motion for relief from judgment is timely.

7. Counsel for plaintiff claims that she did not file a timely response because she never received a copy of the motion to dismiss filed by defendant's counsel. Defendant's counsel disagrees averring that plaintiff's counsel was mailed a copy on February 5, 1998 and points to a certificate of service filed with the motion in support of this contention. Neither the plaintiff nor the defendant has filed affidavits or offered any evidence in support of their respective positions.

8. Whether or not plaintiff's counsel received the motion would be relevant in determining whether the Court's Order should be vacated because of counsel's "mistake, inadvertence, surprise or excusable neglect." Therefore, the Court will analyze whether the counsel's claim that she never received a copy of the motion is supported by sufficient evidence.

9. Once a certificate of service is filed averring that a pleading has been served upon opposing counsel by placing the

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<sup>3</sup> Federal Rule of Civil Procedure 60(b)(1) provides:  
On 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, inadvertence, surprise, or excusable neglect . . .  
Fed.R.Civ.P. 60(b)(1).

same in the U.S. mail, a presumption of regularity arises that the addressee received the pleading. See Frederick v. T.U.C.S. Cleaning Service, 1991 WL 161419 (E.D.Pa. 1991)(presumption that properly stamped and addressed document placed in mail is received by addressee). The presumption is rebuttable. To overcome it, a party challenging the regularity of mail service has the burden to come forth with evidence, including affidavits, that calls into question the validity of the service. Id. Ordinarily, conclusory statements to the effect that "I never got the pleading" will not overcome this presumption of regularity. In re Rosage, 189 B.R. 73, 79 (W.D.Pa. 1995)(citing In re Eagle Bus Manufacturing, Inc, 62 F.3d 730, 735 (5th Cir. 1995).

10. Given that plaintiff's counsel's assertion is only supported by her unsworn protestations, the Court finds that plaintiff has failed to overcome the presumption that she received the motion that the defendant placed in the U.S. mail.

11. However, even assuming plaintiff's counsel never received the motion to dismiss as she now claims, two other factors counsel against a finding that relief from judgment is appropriate in this case. One, the record shows that counsel was served by the Clerk with a copy of the Court's Order dismissing plaintiff's case on February 26, 1998. (See docket entry no. 3). Despite being on notice of the dismissal, plaintiff's counsel did not seek "reconsideration" (or, as the Court has construed it, relief from the Order) for more than thirty (30) days. In failing to act promptly, counsel displayed a lack of diligence

inconsistent with excusable neglect. Two, even the belated attempt to obtain "reconsideration" more than thirty (30) days later is unaccompanied by any claims that plaintiff has any meritorious defenses to the motion to dismiss. Rather, all that is averred by counsel is that if the claim is revived, "[new] counsel will have the opportunity to pursue an "ERIS" (sic) claim." (Docket entry no. 5). Therefore, it would be futile to allow plaintiff to enter a defense to the motion to dismiss.

12. In summary, the finality of judgments serves the important public purpose of promoting confidence in the courts. Therefore, judgments once validly entered should not be lightly disturbed. In this case plaintiff offered no basis why the Order dismissing plaintiff's case fits within one of the narrow categories identified in Rule 60(b) which would exempt the instant claim from the operation of this important rule of judicial administration.

**AND IT IS SO ORDERED.**

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**EDUARDO C. ROBRENO, J.**