

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

KIMBERLY BUTLER	:	
	:	
Plaintiff,	:	
	:	
	:	CIVIL ACTION
	:	
v.	:	NO. 97-8090
	:	
	:	
R. KALLER & SONS, INC.	:	
	:	
	:	
Defendant.	:	

GREEN, S.J.

MEMORANDUM -ORDER

Presently before the Court are (1) Plaintiff's unopposed Motion for Reinstatement of the Complaint and (2) Plaintiff's Motion for Default Judgment and Defendant's response thereto. For reasons outlined below, Plaintiff's unopposed motion to Reinstate the Complaint will be granted and Plaintiff's Motion for Default Judgement will be denied.

1. Motion to Reinstate the Complaint

Plaintiff filed a complaint on December 27, 1997, against Defendant R. Kaller & Sons, Inc., pursuant to 42 U.S.C. § 2000e *et. seq.* and the Pennsylvania Human Relations Act, 43 Pa.C.S.A. §955 *et. seq.* On September 16, 1998, upon review of the court docket in the above-captioned case, this Court found that the Plaintiff failed to file proof of service in accordance with Fed. R. Civ. P. 4 (l). Consequently, this Court dismissed the action pursuant to Fed. R. Civ. P. 4(m). In the order dismissing the

action, dated September 16, 1998, this Court granted the plaintiff ten days to show good cause why service was not made. If the plaintiff showed good cause why service had not been made, the Court would vacate the dismissal.

On September 23, 1998, the plaintiff moved to reinstate the complaint. On the same day, the plaintiff also filed and docketed an affidavit of personal service, evidencing that the complaint was served upon the Office Manager of R. Kaller & Sons, Inc. on February 20, 1998, a date falling within the 120-day service period required by Fed. R. Civ. P. 4(m). Since the affidavit of service was filed and docketed within ten days of the order dismissing the claim, and the defendant has not opposed the Motion to Reinstate the Complaint, this Court will grant plaintiff's Motion to Reinstate the Complaint.

2. Default Judgment

A motion for default judgment is addressed to the court's discretion, therefore, the movant is not entitled to default judgment as of right even when the nonmovant is technically in default. Spurio v. Choice Sec. Systems, Inc., 880 F. Supp. 402, 403 (E.D. Pa. 1995). In fact, courts look upon default judgments with disfavor because the interests of justice are best served by obtaining a decision on the merits. Id. Thus, when a court must decide whether to impose a default judgement, it should consider the following factors:

- (i) whether the plaintiff will be prejudiced if the default is denied or lifted; (ii) whether the default was a product of the defendant's culpable or inexcusable conduct; and (iii) whether the defendant has a meritorious defense.

Spurio v. Choice Sec. Systems Inc., 880 F. Supp. 402, 403 (E.D. Pa. 1995), citing,

U.S. v. \$55,518.85 in U.S. Currency, 728 F.2d 192,195 (3d Cir. 1984). After carefully weighing the factors outlined above, I will exercise my discretion to deny the plaintiff's motion for default judgment.

(i) Prejudice

A default judgment may be proper where the plaintiff's ability to litigate its claim is impaired in some material way. See Reilly v. Keystone Health Plan East, Inc., 1998 WL 422037 *1 (E.D. Pa. 1998). In the instant matter, the plaintiff's request for default judgment rests solely on the defendant's failure to answer the complaint within twenty days of service pursuant to Fed. R. Civ. P. 12 (a)(1)(A). Plaintiff's motion, however, fails to adequately describe the type of prejudice that would result from the defendant's default. Nevertheless, this court construes the plaintiff's opposition to the defendant's filing of an answer, approximately eleven months after the filing of the complaint, as an objection to the amount of time the defendant has taken away from the forward progression of this case.

Delay in realizing satisfaction on a claim, generally does not serve to establish the degree of prejudice sufficient to support an entry of a default judgment at an early stage of the proceedings. See Reilly v. Keystone Health Plan East, Inc., 1998 WL 422037 *1 (E.D. Pa. 1998), citing, Emasco Ins. Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987). Moreover, allowing the defendant to put the plaintiff to her proof does not materially impair the plaintiff's claim so as to constitute the kind of prejudice contemplated by the default judgment rule. See Duncan v. Speach 162 F.R.D. 43, 45(E.D. Pa. 1995). Based on the arguments presented, this court finds that plaintiff has not explained how defendant's actions have materially impaired her ability to litigate

these claims. Thus, the amount of actual prejudice associated with the delay in this case weighs in favor of denying the motion for default judgment.

(ii) Defendant's Culpable conduct:

To be culpable, the defendant's conduct must surpass mere negligence. See Reilly v. Keystone Health Plan East, Inc., 1998 WL 422037 *5 (E.D. Pa. 1998). In fact, the defendant's conduct must be willful, intentional or reckless. Id. Furthermore, in deciding the degree of culpability attributable to the defendant in a default judgment context, the court must consider "the extent to which the error is attributable to defendant's counsel." Momah v. Albert Einstein Med. Ctr., 161 F.R.D. 304, 308 (E.D. Pa. 1995).

In the instant matter, this Court cannot hold R. Kaller & Sons, Inc., responsible for possible miscommunications between the attorneys representing both parties. A March 9, 1998 letter, written by the defendant's former counsel, indicates that the parties agreed to grant the defendant an extension of time to file an answer. This thirty-day extension was to be placed in the form of a stipulation. According to the letter, plaintiff's counsel agreed to forward the stipulation to the defendant's counsel for signature and filing. Even though both parties acknowledge the agreement to extend the filing deadline, this stipulation was never filed with the court. In fact, the defendant contends that plaintiff's attorney never forwarded the stipulation for his signature. Additionally, the attorneys for both parties admit to discussions taking place after the March 9, 1998 letter, however, neither side informed this court of any agreements reached regarding time extensions.

Another factor contributing to delays in this case, involves the change in

defendant's legal representation. According to the record, entry of an appearance of counsel on behalf of the defendant did not occur until November 4, 1998. Defendant acknowledges, however, that legal counsel was involved in negotiations to extend the time for filing an answer in this case in March, 1998. At some point after the March 9, 1998 agreement, the defendant retained new counsel. The interim between periods of representation by former counsel and current counsel of record may have contributed to the delays associated with this case.

It is important to note, however, that replacement of the defendant's counsel is not the only factor contributing to delay in this case. The plaintiff also caused significant delay by failing to comply with Fed. R. Civ. P. 4(l). Since plaintiff failed to file notice of service of process, this Court dismissed the action. Dismissal of the action certainly contributed to the plaintiff's delay in realizing satisfaction of her claims. While Defendant R. Kaller & Sons, Inc. must take responsibility for failing to inform this court of its need for time to obtain new counsel, this failure, in addition to other factors contributing to delays, does not support a conclusion that defendant's willful and intentional actions rise to the level of culpability necessitating default judgment in this case.

(iii) Meritorious Defense

To satisfy the meritorious defense inquiry, the defendant must articulate a defense to the action which at least has merit on its face. See Reilly v. Keystone Health Plan East Inc., at *1. In determining whether a meritorious defense exists, the court may review allegations made in supporting documents submitted to the court. Reilly v. Keystone Health Plan East Inc., at *1(reviewing the allegations in the

defendant's proposed motion to dismiss to determine whether a meritorious defense existed). In the instant case, the defendant's memorandum in response to the motion for default judgment outlines a persuasive argument against entry of default judgment. Specifically, the defendant argues that default judgment cannot be granted because the case has been dismissed since September 16, 1998. Thus, the defendant concludes that plaintiff is not entitled to relief in the form of a default judgment because, as a matter of law, this case is already closed.

As stated earlier, the movant in this case is not entitled to default judgment as a matter of right. Furthermore, this Court has not discovered any case law supporting plaintiff's contention that default judgment is appropriately granted in a closed civil matter. Thus, this court concludes that the meritorious defense factor clearly militates against granting plaintiff's motion.

Conclusion

Since the plaintiff has supplied an affidavit of service indicating service of process upon Defendant Kaller & Sons, Inc., and the defendant does not oppose the motion, this Court will grant the motion to reinstate the complaint. After carefully weighing the interests of justice served by obtaining a decision on the merits, against the plaintiff's interests in obtaining a default judgment, this Court finds that an entry of default judgment under Fed. R. Civ. P. 55 is not warranted. Therefore, the motion for default judgement is denied. An appropriate order follows.

R. KALLER & SONS, INC. :
:
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Defendant. :
:

ORDER

AND NOW, on this 12th day of November, upon consideration of the Plaintiff's unopposed Motion for Reinstatement of Complaint, and Plaintiff's Motion for Default Judgment, and Defendant's response thereto, IT IS HEREBY ORDERED and DECREED that Plaintiff's Motion to Reinstate the Complaint is GRANTED and Plaintiff's Complaint is hereby REINSTATED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Default Judgment is DENIED.

BY THE COURT

CLIFFORD S. GREEN, S.J.