

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

RICHARD CHAROWSKY	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 98-5589
DAVID KURTZ, WARDEN	:	
Defendant	:	

MEMORANDUM AND ORDER

YOHN, J. November , 1999

In the fall of 1998, plaintiff Richard Charowsky commenced a pro se civil rights action against defendant David Kurtz, the Warden of the Schuylkill County Prison (the “SCP”), where Charowsky is an inmate. *See* Complaint at 1. The basis of the suit was Charowsky’s claim that, while in the SCP, he was ordered to clean out a cell filled with human feces and that, as a result, he contracted hepatitis C. *See id.* at 2. After Kurtz failed to waive service of the complaint by mail, the U.S. Marshals personally served Kurtz with Charowsky’s complaint on January 28, 1999. *See* Return of Service Executed on Jan. 28, 1999 (Doc. No. 8, filed Feb. 20, 1999). Because Kurtz had failed to appear, plead, or otherwise defend this action, on April 20, 1999, the Clerk of the Court entered a default. *See* Aff. for Entry of Default (Doc. No. 11, filed Apr. 20, 1999). Charowsky then filed a motion for entry of a default judgment, which I denied on June 2, 1999, in order to hold a trial on damages. *See* Mot. for Default J. (Doc. No. 12, filed Apr. 28, 1999); June 1, 1999, Order (Doc. No. 13, filed June 2, 1999). Immediately thereafter, the Assistant Solicitor for Schuylkill County filed a motion to set aside the default on behalf of the

defendant, claiming that the County Solicitor's Office was not aware of the existence of the suit until it received notice of the upcoming damages trial. *See* Mem. of Law in Supp. of Def.'s Mot. to Set Aside Entry of Default under FRCP 55(c) (Doc. No. 15, filed June 11, 1999) ["Def.'s Mem."] at 1.

Two of the factors to be considered in ruling on a motion to set aside a default weigh in favor of the defendant: there are no more than conclusory allegations that the plaintiff will suffer any prejudice if I grant this motion, and there are no allegations whatsoever as to whether the default was the result of culpable conduct on the part of the defendant. *See* Mot. to Dismiss Mem. of Law (Doc. No. 16, filed June 16, 1999) ["Pl.'s Mot."] (considered as Resp. to Def.'s Mot. per June 17, 1999, Order (Doc. No. 18, filed June 18, 1999)); Pl.'s Mem. of Law in Opp'n to Def.'s Motion to Set Aside Default under Fed. R. Civ. P. 55(c) (Doc. No. 19, filed July 28, 1999) ["Pl.'s Mem."] (considered as Supplemental Resp. to Def.'s Mot. per June 17, 1999, Order (Doc. No. 18, filed June 18, 1999)) at 1. Another of the factors, however, favors the plaintiff: the defendant has not presented prima facie evidence of a meritorious defense. *See* Def.'s Mem. Because the defendant has failed to present prima facie evidence of a meritorious defense, I will conditionally deny the defendant's motion to set aside default, subject to reconsideration if, within thirty days of the date hereof, he presents facts constituting prima facie evidence of a meritorious defense, as well as facts explaining why his failure to forward the complaint to his attorneys was not culpable conduct.

Discussion

The defendant asks the court to set aside the default entered against him by the Clerk of the Court on April 20, 1999. A district court may, at its discretion, set aside an entry of default “[f]or good cause shown.”¹ *Fed. R. Civ. P. 55(c)*; see *United States v. \$55,518.05 in U.S. Currency*, 728 F.2d 192, 194-95 (3d Cir. 1984). Typically, courts disfavor the default process because obtaining a decision on the merits best serves the interests of justice. See *Gross v. Stereo Component Sys., Inc.*, 700 F.2d 120, 122 (3d Cir. 1983). In exercising its discretion to set aside a default, a district court must consider the following factors: “(1) whether lifting the default would prejudice the plaintiff; (2) whether the defendant has a *prima facie* meritorious defense; (3) whether the defaulting defendant's conduct is excusable or culpable; and (4) the effectiveness of alternative sanctions.” *Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71, 73 (3d Cir. 1987).

A. Prejudice to the Plaintiff

Other than claiming in a conclusory fashion that Kurtz’s delay prejudiced him, see Pl.’s Mot. at 1-2; Pl.’s Mem. at 1, Charowsky has made no allegations that setting aside the default would cause him to suffer any prejudice. The plaintiff has not, for example, claimed that the delay would result in the “loss of available evidence [or the] increased potential for fraud or collusion,” nor has he claimed “substantial reliance upon the judgment.” *Feliciano v. Reliant*

¹Federal Rule of Civil Procedure 55(c) reads as follows: “For 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).”

Tooling Co., 691 F.2d 653, 657 (3d Cir. 1982). The simple fact that Charowsky’s recovery on his claim will be delayed by the setting aside of the default is not sufficient to demonstrate “prejudice.” *See id.* at 656-57. The lone burden that lifting the default would impose on plaintiff is the burden of proving his case. Thus, the lack of prejudice to the plaintiff favors granting the defendant’s motion to set aside the default.

B. Defendant’s Culpable Conduct

To be “culpable,” the conduct leading to the entry of default must have been willful or in bad faith. *See Hritz v. Woma Corp.*, 732 F.2d 1178, 1182 (3d Cir. 1984). In a case concerning the opening of a default judgment instead of the setting aside of an entry of default, the Third Circuit gave further meaning to the “willful” or “in bad faith” standard:

Appropriate application of the culpable conduct standard requires that as a threshold matter more than mere negligence be demonstrated. Certainly “willfulness” and “bad faith” include acts intentionally designed to avoid compliance with court notices. The case law, however, is bereft of precedent limiting the availability of default judgment to this narrow band of “knowing” disregard for court-mandated procedures. Reckless disregard for repeated communications from plaintiffs and the court, combined with the failure to investigate the source of a serious injury, can satisfy the culpable conduct standard.

Hritz, 732 F.2d at 1183.

In an effort to show culpable conduct, Charowsky claims that Kurtz had no “legitimate reason for failing to respond to Plaintiff’s Complaint” for such a long time. Pl.’s Mem. at 3. Charowsky is correct in this assertion. Kurtz argues that his failure to respond should be ignored because his attorneys did not know about the complaint until June, 1999. *See* Def.’s Mem. at 1, 4. Whether and when the defendant’s lawyers knew about the plaintiff’s complaint is irrelevant:

the Federal Rules of Civil Procedure require service on a defendant, not his counsel. *See Fed. R. Civ. P. 4*. Thus, Kurtz's purported reason for not responding is not legitimate. Kurtz was clearly negligent in failing to respond. Kurtz's conduct may also have risen to the level of being willful or in bad faith. Because Kurtz has offered no allegations explaining his failure to forward the complaint to his attorneys, it is unclear whether his conduct was culpable.

C. Meritorious Defense

A defendant establishes a meritorious defense when the defendant's allegations, if established at trial, would constitute a complete defense. *See Hritz*, 732 F.2d at 1181. The defendant in this case argues that the court should assume the existence of a meritorious defense. *See Def.'s Mem.* at 2 (citing *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969)). The state of the law in the Third Circuit neither requires nor allows such an assumption to be made. Indeed, district courts in the Third Circuit are instructed to inquire whether a defendant has a meritorious defense, not merely to assume the existence of one. *See Emcasco Ins. Co.*, 834 F.2d at 73. In the context of a motion to set aside a default judgment under Federal Rule of Civil Procedure 55(c), the Third Circuit has even gone so far as to refer to the presentation of prima facie evidence of a meritorious defense as a "threshold issue." *Hritz*, 732 F.2d at 1181. The fact that Kurtz has not advanced any evidence of any defense to the plaintiff's complaint, much less prima facie evidence of a meritorious defense, strongly favors denying Kurtz's motion to set aside the default.

D. Alternative Sanctions

In *Emcasco Ins. Co.*, the Third Circuit made clear that courts should try to find some alternative to the sanction imposed by an entry of default and the subsequent default judgment. *See* 834 F.2d at 75. In this case, the failure on the part of the plaintiff to allege any prejudice argues for setting aside the default, but the failure of the defendant to present prima facie evidence of a meritorious defense argues for letting the default stand. Recently, Judges Shapiro and Van Antwerpen considered a similar set of conflicting factors. *See Atlas Communications, Ltd. v. Waddill*, No. Civ. A. 97-1373, 1997 WL 700492 (E.D. Pa. Oct. 31, 1997); *Mike Rosen & Assocs., P.C. v. Omega Builders, Ltd.*, 940 F. Supp. 115 (E.D. Pa. 1996). They noted that “courts in this circuit seem unwilling to deny the motion to set aside entry of default solely on the basis that no meritorious defense exists.” *Atlas Communications, Ltd.*, 1997 WL 700492, at *4 (quoting *Mike Rosen & Assocs.*, 940 F. Supp. at 121). Consequently, they refused to deny out of hand the motions to set aside default pending before them simply because the moving parties failed to present prima facie evidence of meritorious defenses. *See Atlas Communications, Ltd.*, 1997 WL 700492, at *4; *Mike Rosen & Assocs.*, 940 F. Supp. at 121. Instead, they applied an alternative sanction: they conditioned the granting of the motions to set aside default on the subsequent submission of prima facie evidence of meritorious defenses. *See Atlas Communications, Ltd.*, 1997 WL 700492, at *4; *Mike Rosen & Assocs.*, 940 F. Supp. at 121. I will apply a similar alternative sanction and will conditionally deny Kurtz’s motion to set aside the default, subject to reconsideration if, within thirty days of the date hereof, he presents (1) facts constituting prima facie evidence of a meritorious defense and (2) facts explaining why his failure to forward the complaint to his attorneys was not culpable conduct.

Conclusion

Charowsky has not presented the court with allegations of culpable conduct on the part of Kurtz or of prejudice that he will suffer due to the granting of Kurtz's motion to set aside the default. Because Kurtz has not presented the court with prima facie evidence of a meritorious defense, though, the court will conditionally deny Kurtz's motion, subject to reconsideration if, within thirty days of the date hereof, he presents (1) facts constituting prima facie evidence of a meritorious defense and (2) facts explaining why his failure to forward the complaint to his attorneys was not culpable conduct. An appropriate order follows.

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ORDER

AND NOW, this day of November, 1999, upon consideration of defendant David Kurtz's Mot. to Set Aside Default under FRCP 55(c) (Doc. No. 15), plaintiff Richard Charowsky's Mot. to Dismiss Mem. of Law (Doc. No. 16), and plaintiff Richard Charowsky's Mem. of Law in Opp'n to Def.'s Mot. to Set Aside Entry of Default under Fed. R. Civ. P. 55(c) (Doc. No. 19), IT IS HEREBY ORDERED and DECREED that the Motion to Set Aside Default under FRCP 55(c) is DENIED, SUBJECT TO RECONSIDERATION if, within thirty days of the date hereof, defendant David Kurtz presents (1) facts constituting prima facie evidence of a meritorious defense and (2) facts explaining why his failure to forward the complaint to his attorneys was not culpable conduct.

William H. Yohn, Jr.