

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF FLORIDA
ORLANDO DIVISION

SECURITIES AND EXCHANGE *
COMMISSION *

v. *

EDWARD S. DIGGES, JR., ET AL. *

CIVIL ACTION FILE NO:
6:06-cv-137-Orl-19 KRS

FILED
8/25/06
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

* * * * *

DEFENDANT, EDWARD S. DIGGES, JR.'S, PRO SE
MOTION TO SET ASIDE ENTRY OF DEFAULT

Defendant, Edward S. Digges, Jr., proceeding pro se, pursuant to Federal Rule Civil Procedure 55(c) and this Court's Order, dated June 27, 2006 (Doc. No. 61), resubmits his Motion to Set Aside Entry of Default, and in support thereof, states as follows:

I. Factual & Procedural Background

On February 2, 2006, Plaintiff, Securities and Exchange Commission ("SEC"), filed a four-count Complaint (the "SEC Action") against this Defendant and various entities alleging violations of the Securities Act; specifically, violation of 15 U.S.C. §§ 77(e)(a) and 77(e)(c) regarding the sale of unregistered securities (Count I); violations of 15 U.S.C. §77(q)(a) alleging a scheme to defraud in the sale of securities (Count II); violations of 15 U.S.C. §78(j)(b) and Rule 10b-5, alleging a scheme to defraud through allege misstatements and other conduct in the sale of securities (Count III); and aiding and abetting violations of the Securities and Exchange Act (Count IV).

In essence, the Complaint alleges that the Defendant and others participated in the alleged fraudulent sale of purported unregistered "securities" through the sale of credit card terminals to purchasers, who in turn, leased the terminals back to an entity that placed the terminals in retail

establishments for registering sales of products and services. The terminals were sold for a fixed price and then leased back from the purchaser at a monthly lease price for a term of years. The business plan developed by Defendant and others was to use the income generated from the subsequent leases to the retail establishment (a % of each store's sales registered through the terminals) to pay the monthly lease payments to purchasers. See Motion Exhibit 1, Affidavit of Edward S. Digges, Jr., attached hereto and incorporated herein by this reference.

In conjunction with the filing of the Complaint, Plaintiff also moved for the entry of an injunction freezing all of the Defendant's assets and appointing a Receiver to take control of the entity defendants. In order to avoid a protracted hearing, the Defendant consented to this injunction on February 15, 2006. Exhibit 1.¹

Since the entry of the Injunction, Defendant has been without funds to meet basic living expenses as well as retain counsel to represent him in this action. The Defendant attempted to negotiate with the SEC and the Receiver for the release of funds to allow him to pay for these expenses, including attorney's fees; however, those negotiations have been unsuccessful. Plaintiff and the Receiver have insisted that Defendant turn over all of his assets, including real and personal property and funds in bank accounts, which he either owns or his wife owns, and permit their sale with the proceeds to be distributed to the Receiver as he sees fit. The inability to have any funds available has continued to consume Defendant and his family who have

¹ On March 7, 2006, the Receiver filed a separate, related action, Silver, et al. v. Digges, et al. (the "Receiver Action"), Case No. 6:06-cv-290-Orl-PCF-DAB, against this Defendant and others "to marshal the assets of the Receiver Estate for the benefit of all investors." Amended Complaint at par. 1. On April 28, 2006, the Receiver filed an Amended Complaint naming additional defendants. The factual predicate for this action is based on the same allegations in the instant action. The Receiver Action further alleges that Defendant diverted funds obtained from investors for his own use and the use of various family members. A Case Management Order recently was submitted to the Court with regard to the Receiver Action and a Preliminary Pretrial and Scheduling Conference is set for August 28. No trial date has been set, nor any exchange of information pursuant to Rule 26.

struggled to meet their basic needs, much less devote any attention to this litigation or the Receiver Action. Exhibit 1.

On March 30, 2006, Plaintiff moved for the entry of default pursuant to Fed. R. Civ. Proc. 55(a) based upon Defendant's failure to plead to the Complaint. Defendant did not receive a copy of this motion, but learned about it for the first time on April 4, 2006 when an attorney whom Defendant had been consulting with in negotiating with Plaintiff received a copy. Exhibit 1.

On April 6, 2006, Defendant wrote to the Clerk of the Court advising the Clerk that Defendant was without funds to retain counsel to advise him as to how to proceed with regard to responding to the Complaint. The day before, on April 5, 2006, the Clerk had entered the requested default against all Defendants. Defendant learned that the Clerk had entered the default on April 14. Exhibit 1.

Six days later, on April 20, 2006, the Defendant filed a pro se motion to set aside the entry of default (Doc. Nos. 25 & 26), and a few days later, filed an Answer to the Complaint (Doc. No.27). On May 26, 2006, the court responded by ordering Defendant to show cause why the motion and answer should not be rejected because of a failure to comply with Local Rule 2.03(d), which provides, in part, that, "Any party for whom a general appearance of counsel has been made shall not thereafter take any step or be heard in the case in proper person, absent prior leave of Court" Local Rule 2.03(d). The Court noted that the file reflected that an "acceptance of service of process" had been filed by Plaintiff, which stated that an attorney, Gerard Martin, Esq., had been retained by Defendant (Doc. No. 9, February 6, 2006). The Court stated that, "Such filing constitutes a general appearance by counsel for Defendant Edward S. Digges, Jr." (Doc. #43).

On June 9, Defendant responded to the Court's Show Cause Order, noting that he felt somewhat whip-sawed inasmuch as the Injunction prevented him from having funds available to retain counsel, yet he was prevented from proceeding in proper person because of Mr. Martin's earlier general appearance. The Court later issued an Order on June 27, which was filed on July 3 (doc. #61), finding that the "Acceptance of Service of Process" constituted a general appearance by Mr. Martin, and therefore, Defendant's Motion to Set Aside the Default Judgment and Answer to the Complaint were in violation of Local Rule 2.03(d). Accordingly, these papers were "stricken from the record" by the Court "with leave to reassert upon compliance with the Local Rules of Court."

Thereafter, on July 6, 2006, Mr. Martin filed a Motion to Withdraw his appearance on behalf of Defendant (Doc. No. 64). On July 25, the Court denied the Motion without prejudice, noting that Mr. Martin would not be permitted to withdraw until he provided the Court with an address to receive service of papers and a telephone number to contact him, if necessary. Mr. Martin renewed his motion to withdraw with the requested information on August 7, 2006 (Doc. No. 68), and on August 14, the motion was granted (Doc. No. 69). The Order was mailed to Defendant who received it on August 19. Exhibit 1.

As demonstrated more fully below, good cause exists to set aside the entry of default and permit the Defendant to defend himself in this litigation in proper person, or until he can raise funds to retain counsel. Given the confusion as to whether Defendant had counsel in this matter, his failure to timely answer was not culpable on his part, nor will the setting aside of the entry of default prejudice the Plaintiff inasmuch as there has been little discovery conducted to date and no trial date set. Further, Defendant has meritorious defenses to the allegations in the Complaint,

which he desires to pursue. Thus, for these, and other reasons described below, Defendant prays the court set aside the entry of default and accept the Defendant's Answer.

II. Argument

Federal Rule of Civil Procedure 55(c) permits a court to set aside an entry of default "for good cause shown." In this Circuit, "there is a strong policy of determining cases on their merits, and we therefore view defaults with disfavor." Florida Physicians Insurance Company v. Ehlers, 8 F.3d 780, 783 (11th Cir. 1993). "Under modern procedure, defaults are not favored by the law and any doubts usually will be resolved in favor of the defaulting party." Charlton L. Davis & Co. v. Fedder Data Center, Inc., 556 F.2d 308 (5th Cir. 1977); especially in cases involving material issues of fact, those in which substantial amounts of money are involved, or where injunctive relief is requested. Wright & Miller, 10A Federal Practice & Procedure, sec. 2681; 2693.

In determining whether the defendant has established "good cause," only a "bare minimum" is needed to obtain relief under Rule 55(c) from the entry of default, Jones v. Harrell, 858 F.2d 667, 669 (11th Cir. 1988), which is to be contrasted with the more stringent standard for setting aside a default judgment under Federal Rule Civil Procedure 60(b). E.E.O.C. v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524, 527-28 (11th Cir. 1990) ("The importance of distinguishing between an entry of default and a default judgment lies in the standard to be applied in determining whether or not to set aside the default. The excusable neglect standard that courts apply in setting aside a default judgment is more rigorous than the good cause standard that is utilized in setting aside an entry of default.")²

² In this regard, Plaintiff erroneously equated the good cause standard with the "excusable neglect" standard for setting aside a default judgment under Rule 60(b) in its opposition to Defendant's original Motion to Set Aside Default Judgment by relying on the same misapplication of the appropriate standards by the Court in Woodbury v. Sears, Roebuck & Co., 152 F.R.D. 229, 236 (M.D. Fl. 1993).

In determining whether the minimal standard of good cause is met, courts have looked at a number of factors:

“Good cause” [under Rule 55(c)] is a mutable standard, varying from situation to situation. It is also a liberal one-but not so elastic as to be devoid of substance. . . . We recognize that “good cause” is not susceptible to a precise formula, but some general guidelines are commonly applied. . . . Courts have considered whether the default was **culpable or willful**, whether setting it aside would **prejudice the adversary**, and whether the defaulting party presents a **meritorious defense**. . . . We note, however, that these factors are not “talismanic,” and that courts have examined other factors including whether the **public interest** was implicated, whether there was **significant financial loss** to the defaulting party, and whether the defaulting party **acted promptly** to correct the default.

Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion, 88 F.3d 948, 951-52 (11th Cir. 1996) (emphasis added) (citations omitted).

In the instant case, any one of these factors would support a finding of good cause to set aside the entry of default.³ First, Defendant’s failure to plead was neither culpable nor willful. Defendant has been unable to retain counsel or pay for basic living expenses for himself and his family as a result of the entry of the injunction. Defendant has been preoccupied with providing for his family and has been unable to completely focus his attention on this action, nor the related Receiver Action.⁴ Despite numerous requests, Plaintiff has refused to provide any opportunity to Defendant to obtain funds to retain counsel to represent him in this matter. If Plaintiff continues to refuse to afford any relief to Defendant, he will have no alternative but to proceed pro se, which he is prepared to do if necessary in order to present his defenses.

Further, even if Defendant had timely filed his answer, it would have been rejected by the Court pursuant to Local Rule 2.03(d) because of prior counsel’s general appearance. Indeed,

³ In its opposition to Defendant’s First Motion to Set Aside, Plaintiff suggests that all of the factors must be established before an entry of default may be set aside. This is incorrect. As noted by the Eleventh Circuit in Compania Interamericana, a court can consider any or all of the factors in exercising its discretion to find good cause.

⁴ Defendant was able to timely file a pro se answer to the Receiver Action, confirming that he has not neglected these proceedings, intends to abide by the rules of this Court, and earnestly desires to contest the allegations in both Complaints.

upon receiving notice from the Clerk that the default had been entered, Defendant quickly moved to set aside the entry of default by filing a motion and answer in proper person despite prior counsel's general appearance. The fact that Defendant acted in a timely manner to set aside the entry of default, and has continued to respond promptly to the Court's subsequent Orders regarding this issue, is another factor indicating good cause to grant the requested relief.

Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion, *supra*. See Currie v. Wood, 112 F.R.D. 408 (D.N.C. 1986) (18-day delay between entry of judgment and motion to set aside); Bedard v. Consolidated Mutual Insurance Co., 313 F. Supp. 1020 (D. P.R. 1970) (same).⁵

Second, there will be no prejudice to Plaintiff if the entry of default is set aside and this case is allowed to proceed. There has been no discovery exchanged since the action was first filed with the exception of a few depositions, nor has a motions deadline or trial date been set. The absence of prejudice weighs heavily in a court's decision to grant the requested relief, and the fact that plaintiff may be required to try the case on the merits if the entry of default is denied, alone, is not sufficient prejudice. Walter E. Heller Western, Inc. v. Seaport Enterprises, Inc., 99 F.R.D. 36 (D.Or. 1983); Nash v. Signore, 90 F.R.D. 93 (D. Pa. 1981). Nor is the delay in plaintiff realizing a potential judgment. Simmons v. Ohio Civil Service Employees Association, 210 F.R.D. 207(D.Ohio 2002); Berthelsen v. Kane, 907 F.2d 617 (6th Cir. 1990); Newhouse v. Probert, 608 F.Supp. 978, 984 (D.Mich. 1985) ("a mere delay in satisfying plaintiff's claim, if he should ultimately succeed at trial, is not sufficient prejudice to require

⁵ Plaintiff's reliance on the decision in United States v. Nalls, 177 F.R.D. 696 (S.D. Fl. 1997), in its earlier opposition to support its argument that Defendant's conduct was "willful" is misplaced. In Nalls, the court denied Defendant's motion to set aside a default judgment, noting that Defendant had not submitted any affidavit explaining his failure to plead or the basis of his defense; had ignored prior orders of the court and had not responded to the Request for entry of Default; and had failed to respond to discovery requests.

denial of a motion to set aside a default judgment”). Setting aside the entry of default would be consistent with the Court’s strong policy in deciding cases on the merits.

Third, the Defendant has meritorious defenses to the allegations in the complaint. As set forth in Defendant’s Declaration, Exhibit 1, Defendant denies that he engaged in any “Ponzi scheme” or misappropriated terminal purchase funds. Plaintiff’s Complaint reflects a fundamental misunderstanding of the nature of the business plan developed and implemented by the entities named in the Complaint. The plan did not envision the use of individuals’ funds to make lease payments or repurchase terminals, but instead, the business model called for these payments to be made from monies earned from the use of the terminals in various retail establishments where the terminals were placed by a separate business. Exhibit 1. Defendant did not believe these terminal sales constituted a security as alleged in the Complaint.⁶

Defendant also disputes the allegation that he made misstatements to the purchasers of the terminals. Defendant had very limited involvement in the preparation of promotional materials that may have been distributed to these individuals, nor was he part of any sales presentation to a potential purchaser. The Complaint accurately states that the venture began operating at a deficit; however, as indicated above, this was not the original plan, and further, Defendant used money from the sale of real estate that was owned by his family and unrelated to the business venture to temporarily fund the lease payments to terminal purchasers. *Id.* Nor did Defendant “misappropriate” any funds received from purchasers of the terminals. The monies received by Defendant or members of his family were all legitimate payments for either

⁶ Issues of scienter and intent are based on the Defendant’s state of mind, and in this regard, a decision on the merits cannot be obtained without exploring the Defendant’s intent and determining his motives and actions during the period alleged in the Complaint through the sale of these devices. Plaintiff has argued that scienter has been established based on the dissemination of known falsehoods or omissions; however, the participation by Defendant in these misstatements is a matter in dispute. Exhibit 1.

services rendered on behalf of the venture; repayment of capital used to plan and initiate the venture; or repayment of loans made to the venture.

Based on these factual disputes, Plaintiff's allegations should be tested by the trier of fact after the completion of discovery rather than in summary fashion. Simmons v. Ohio Civil Service Employees Association, 210 F.R.D. 207, 2009 (D.Ohio 2002) ("In determining whether a defendant has a meritorious defense, 'likelihood of success is not the measure, but rather whether the facts alleged by the defendant would constitute a meritorious defense if true.'") (citations omitted). Accordingly, the entry of default should be set aside and Defendant permitted to answer the Complaint.

III. Conclusion

For the foregoing reasons, and for good cause shown, the Defendant prays that the court set aside the entry of default and permit Defendant to answer the Complaint.



Edward S. Diggès, Jr.
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pro se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, a copy of the foregoing motion to set aside default judgment was sent via overnight mail to the following:

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