

FILED

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

2006 JUN 12 PM 12: 21

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

**SECURITIES AND EXCHANGE
COMMISSION** *

Plaintiff

v.

EDWARD S. DIGGES, JR., et al.,

Defendants

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

* * * * *

**RESPONSE TO ORDER DIRECTING DEFENDANT
TO COMPLY WITH LOCAL RULE 2.03(d)**

Defendant Edward S. Digges, Jr. ("Digges"), pro se, submits his Response to the Court's Order of May 26, 2006 directing him to comply with Local Rule 2.03(d).

INTRODUCTION

Digges finds himself whip-sawed in this action. On one hand, he is currently without legal representation in this case and, because all of his and his wife's assets are frozen, cannot raise funds to retain counsel. On the other hand, his right to proceed pro se is threatened because an attorney who was prevented from representing him because of a potential conflict of interest, accepted service of the complaint solely as an accommodation to Plaintiff. Digges wants only to have his day in court, preferably by counsel if he is able to raise the necessary funds, but, if not, then pro se. For the reasons set forth below, he should be permitted to do so.

STATEMENT OF FACTS

Prior to the Complaint being filed in this action, Digges had retained the services of Gerard P. Martin, Esq. to represent him and some of the entities which are the subject of the

Complaint. Digges Declaration ¶ 2, Martin Declaration ¶1, attached hereto as Exhibits A and B, respectively. When the Complaint was filed, counsel for Plaintiff, Graham Loomis, Esquire (who had met with Mr. Martin earlier to discuss the substance of the SEC's allegations) asked Mr. Martin if he would accept service of the Complaint and other initial pleadings (e.g., summons, emergency application for TRO, proposed Order) on behalf of all defendants. After obtaining approval from Defendants, Mr. Martin agreed. Martin Declaration ¶2. Mr. Loomis thereafter drafted an "Acceptance of Service of Process" for Mr. Martin's signature, which stated, inter alia, "Gerard P. Martin represents that he has been retained as counsel for the Defendants in this matter and is authorized to accept service of the aforementioned pleadings, motion, brief and order on their behalf." See Exhibit C attached. Mr. Martin signed this pleading, and Mr. Loomis filed it with the Court on February 6, 2006 (Docket #9).

Because of a potential conflict of interest in representing both the defendant entities and Digges personally, Mr. Martin advised Digges he would represent only the entities and Digges would need to retain separate counsel. Martin Declaration ¶ 5, Digges Declaration ¶ 5.

On February 15, 2006, the Court entered an Order (with Digges' consent) that, inter alia, froze "all assets of, or under the control of" Digges as well as restraining Digges from, directly or indirectly, transferring, selling, or disposing of any assets "owned by, controlled by, or in [his] possession" (Docket # 15). As a result of that Order, Digges has been unable to raise funds to retain counsel to represent him in this action. He has thus proceeded in this action as a pro se litigant. Mr. Martin has undertaken no representation of any of the Defendants since the Complaint was filed. Digges Declaration ¶¶ 5-6. Martin Declaration at ¶ 6.

ARGUMENT

**DEFENDANT IS IN COMPLIANCE WITH LOCAL RULE 2.03 BY PROCEEDING
PRO SE BECAUSE HAS NEVER BEEN REPRESENTED BY COUNSEL IN THIS
ACTION, NOR IS HE ABLE TO RAISE MONEY TO RETAIN COUNSEL.**

Local Rule 2.03(a) states that “[e]very pleading or paper of any kind filed by an attorney in this Court . . . unless otherwise expressly stated therein, shall constitute a general appearance on behalf of the persons or parties for whom the pleading or paper was filed” (emphasis added). Local Rule 2.03(d) prohibits a party “for whom a general appearance of counsel has been made” from taking any steps in the action in proper person without prior leave of Court.

The Court quite correctly questions Digges’ right to proceed pro se based on the “Acceptance of Service of Process” filed by Plaintiff on February 6, 2006 (Docket # 9); however, as noted above, this pleading, drafted by Plaintiff’s counsel, was filed merely to confirm service of the Complaint and other initial pleadings, notwithstanding its language suggesting a more general appearance.¹ It is not, and was not intended to be, an entry of a general appearance by Mr. Martin on behalf of Digges. Digges Declaration at ¶4. Martin Declaration at ¶ 4.² Any inartful drafting of the “Acceptance of Service” that suggests otherwise should not prejudice Digges’ right to represent himself pro se in the actual absence of counsel. See e.g., Capital City Bank v. Hilson, 59 Fla. 215, 219, 51 So. 853, 855 (Fla. 1910), Thomas v. Lockheed Martin Information Systems, 155 F.Supp.2d 1316, 1326 (N.D.Fla.2001) (principle of *contra proferentem* requires that ambiguous terms in documents be construed against the drafter).

¹ Indeed, Mr. Martin is precluded from representing Digges individually in this matter because of the potential conflict of interest between such representation and his then representation of the Defendant entities.

² Counsel for Plaintiff, Mr. Loomis, has confirmed that the “Acceptance of Service of Process” was filed for this limited purpose. Digges Declaration at ¶ 4.

Mr. Martin's limited role was clearly understood by all parties, which explains why none of Plaintiff's pleadings in this matter have been served on Digges through Mr. Martin, but instead, have been served on Digges personally or through another attorney, Gregg L. Bernstein, Esquire, who has not entered his appearance in this action. See Docket ## 13, 34, 42. The fact that Mr. Martin has never represented Digges in this action and that Digges has at all times proceeded pro se is also confirmed by the following:

- In the certificate of service for Plaintiff's Notice of Filing Defendants' Consent and Proposed Judgment (Docket # 13), Plaintiff's counsel listed Mr. Martin only as "counsel for the Digges Entities" and listed another attorney, Gregg L. Bernstein, as "counsel for Edward S. Digges, Jr." However, because of the Order freezing all of Mr. Digges' assets, Mr. Bernstein has not yet been retained by Digges and has not entered his appearance in this matter. Digges Declaration ¶ 6;
- Plaintiff's Response to Digges' Motion to Set Aside Entry of Default (Docket # 34) was served by Plaintiff upon Digges personally with no copies being served on Mr. Martin or Mr. Bernstein (see Certificate of Service to Docket # 34); and
- Plaintiff's Response to Digges' Motion to Strike Plaintiff's Response to the Motion to Set Aside Default was also served on Digges personally with no copies being served on Mr. Martin or Mr. Bernstein (see Certificate of Service to Docket # 42).

It follows that because no "general appearance" of counsel for Digges has ever been filed on his behalf, Local Rule 2.03(d) was not violated when Digges, proceeding pro se, filed his Motion to Set Aside Entry of Default and supporting Memorandum (Docket ## 25, 26). As set forth in those papers, there is "a strong policy of determining cases on their merits" in this Circuit, and therefore defaults are viewed "with disfavor." Florida Physicians Insurance Company v. Ehlers, 8 F.3d 780, 783 (11th Cir. 1993). 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). In this case, the policy


in favor of setting aside entries of default can only be given force if Digges is permitted to seek that relief in the first place. Striking his Motion and Memorandum would effectively prevent Digges from seeking this relief, bar him from having his day in court, and represent an unnecessary triumph of form over substance. In the interests of justice, therefore, the Court should not strike those pleadings.

Digges also has a statutory right to represent himself in this action. See 28 U.S.C. § 1654 (parties may plead and conduct their own cases personally in federal courts). It would be manifestly unfair to deny Digges this right because of a purported legal representation that does not, in fact, exist. The unfairness would be magnified if the basis for this denial was a pleading filed by Digges' adversary simply to confirm service of the Complaint.

In sum, Mr. Martin has not and does not represent Digges in this action. No other attorney has entered an appearance on his behalf. Thus, Digges never had, and currently is without, legal representation in this case. If Digges cannot represent himself until circumstances ever allow him to retain counsel, he literally will be left defenseless in this action. He should, therefore, be allowed to proceed pro se.

CONCLUSION

Until Defendant can secure his own counsel in this action, the Court should permit him to proceed pro se, with regard to his previously-filed Motion to Set Aside Entry of Default and Motion to Strike.


Edward S. Digges, Jr.
1 Sandy Acres
Cambridge, MD 21613
pro se

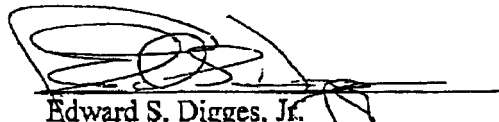
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of June 2006, a copy of Response to Order Directing Defendant to Comply with Local Rule 2.03(D) was sent via overnight mail to:

William P. Hicks, District Trial Counsel
M. Graham Loomis, Senior Trial Counsel
United States Securities and Exchange Commission
3475 Lenox Road
Suite 1000
Atlanta, Georgia 30326

Robert N. Gilbert
Carlton Fields, P.A.
222 Lakeview Avenue
P.O. Box 150
West Palm Beach, Florida 33402

Michael A. Shafir
Carlton Fields, P.A.
4000 International Place
100 S.E. Second Street
Miami, Florida 33131


Edward S. Digges, Jr.
Pro Se

FILED

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

2006 JUN 12 PM 12: 21

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

**SECURITIES AND EXCHANGE
COMMISSION**

*

Plaintiff

*

v.

*

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

*

EDWARD S. DIGGES, JR., et al.,

*

Defendants

*

* * * * *

DECLARATION OF EDWARD S. DIGGES, JR.

I, Edward S. Digges, Jr., submit this unsworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746.

1. I am a defendant in this action. I was also chief operating officer of Televest Group, LLC (“Televest”), one of the defendants in this case.

2. In the Fall of 2005, Televest retained the legal services of Gerard P. Martin, Esquire, in connection with an investigation being conducted by the Securities and Exchange Commission (“SEC”), which ultimately resulted in this lawsuit. In that regard, Mr. Martin had various discussions with SEC counsel prior to the commencement of this action.

3. In January 2006, Mr. Martin advised me that the SEC was about to file suit against me, Televest and related entities in the United States District Court for the Middle District of Florida. I authorized him to accept service of the Complaint and other initial pleadings on behalf of all defendants, including myself, as an accommodation to Plaintiff.

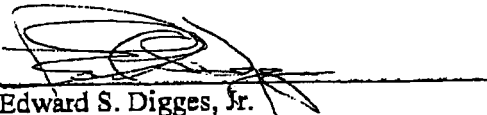
4. On February 6, 2006, counsel for Plaintiff, SEC, Graham Loomis, Esq., filed an "Acceptance of Service of Process." I have been advised that Mr. Loomis agrees that, in filing this pleading, it was his intention merely to record the fact that service of process of the Complaint and related papers had been completed, and not to generally enter Mr. Martin's appearance on my behalf in the case.

5. After the Complaint was filed, I discussed with Mr. Martin the question of legal representation of the various defendants. It was decided that, because of a potential conflict of interest, Mr. Martin could not represent both Televest and myself, personally, and that he could only potentially represent Televest and related entities.

6. At no time has Mr. Martin ever represented me individually in this case. Other than accepting service of the Complaint and other initial pleadings, Mr. Martin has performed no work for me regarding this action.

7. On February 15, 2006, the Court entered an Order freezing all of my personal bank accounts and funds, as well as prohibiting me from selling any assets. As a result, I have been unable to raise funds to retain my own counsel in this action. I have, therefore, been proceeding pro se in this matter.

I declare under the penalties of perjury that the foregoing is true and correct. Executed on June 9, 2006 in Cambridge, Maryland.


Edward S. Digges, Jr.

FILED

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**2006 JUN 12 PM 12: 21
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA**

**SECURITIES AND EXCHANGE
COMMISSION**

*

Plaintiff

*

v.

*

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

*

EDWARD S. DIGGES, JR., et al.,

*

Defendants

*

* * * * *

DECLARATION OF GERARD P. MARTIN

I, Gerard P. Martin, Esq. submit this unsworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746.

1. I am an attorney licensed to practice law in the State of Maryland. In the Fall of 2005, I was retained by Televest Group, LLC to represent it and related entities in connection with an SEC investigation of alleged securities laws violations.

2. Pursuant to that representation, I had various discussions with SEC counsel, M. Graham Loomis, Esq., prior to the commencement of this action. In January 2006, Mr. Loomis informed me that the SEC intended to file a Complaint against Televest, related entities, and Edward S. Digges, Jr. alleging various violations of federal securities laws. Mr. Loomis asked me if I would accept service of the Complaint and other initial pleadings on behalf of all defendants. After obtaining authorization from Televest and Mr. Digges to accept such service, I agreed to do so.

3. Mr. Loomis thereafter prepared a pleading entitled, "Acceptance of Service of Process," which he sent to me along with copies of the Complaint and other initial pleadings. I signed the "Acceptance of Service of Process" and returned it to Mr. Loomis. I did not file that paper, nor any other paper, with the Court in this matter.

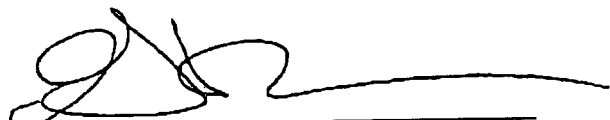
4. My sole reason for signing the "Acceptance of Service of Process" prepared by Mr. Loomis was to accommodate the SEC and save it and Mr. Loomis the time and expense involved with serving the Complaint and other initial pleadings on the multiple defendants.

5. At no time have I represented Mr. Digges in this action; rather, at the time I was hired for the SEC investigation, before any suit was filed by the SEC, Mr. Digges and I agreed that because of the high potential of a serious conflict of interest, I would represent the entities and Mr. Digges would obtain his own, separate counsel.

6. I did not intend for my signing of the "Acceptance of Service of Process" to be a general entry of appearance in this action on behalf of Mr. Digges or any other party. I do not represent any party in this matter. To that end, I have not filed any entry of appearance, or any other paper or pleading, with the Court on behalf of any party in this action, and have not been served by either this Court or any party with any of the pleadings filed in this case since the initial Complaint.

7. If the Court deems that I have somehow entered my appearance on behalf of Mr. Digges or any other party in this matter, I will seek permission to withdraw such appearance.

I declare under the penalties of perjury that the foregoing is true and correct. Executed on June __, 2006 in Baltimore, Maryland.


Gerard P. Martin

2/6

FILED

2006 JUN 12 PM 12: 22

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

EDWARD S. DIGGES; NEXSTAR
COMMUNICATIONS, LLC;
TMT EQUIPMENT COMPANY, LLC; TMT
MANAGEMENT GROUP, LLC; POSA, LLC;
POSA TMT, LLC; TELEVEST
COMMUNICATIONS, LLC; TELEVEST
GROUP, LLC; AND SPIN DRIFT, LLC,

Defendants.

CIVIL ACTION FILE
NO. 6:06-CV-137-ORL-
19-KRS

ACCEPTANCE OF SERVICE OF PROCESS ON BEHALF OF DEFENDANTS

On behalf of Defendants Edward S. Digges; Nexstar Communications, LLC; TMT
Equipment Company, LLC; TMT Management Group, LLC; POSA, LLC; POSA TMT, LLC;
Televest Communications, LLC; Televest Group, LLC; and Spin Drift, LLC (collectively
"Defendants"), Gerard P. Martin hereby accepts service of the following pursuant to Rule 4(e)(2)
of the Federal Rules of Civil Procedure, without waiving any defense available except to the
sufficiency of the service of process:

1. Complaint;
2. Summons;
3. Plaintiff's Emergency Application for Temporary Restraining Order and Other Equitable Relief;
4. Memorandum of Law in Support of Plaintiff's Emergency Application for Temporary Restraining Order and Other Equitable Relief and Supporting Exhibits 1-3;
5. Declaration of Neal A. Seiden and Supporting Exhibits A-J;
6. Plaintiff's Certificate Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure;
7. Proposed Order to Show Cause, Temporary Restraining Order, Order Appointing Receiver, Order Freezing Assets, Order Prohibiting Destruction of Documents and Order Expediting Discovery; and
8. February 3, 2006 Order.

Gerard P. Martin represents that he has been retained as counsel for Defendants in this matter and is authorized to accept service of the aforementioned pleadings, motion, brief and order on their behalf.

DATED: February 6, 2006

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'GPM', written over a horizontal line.

Gerald P. Martin
Rosenberg Martin Funk Greenberg, LLP
25 South Charles Street
Suite 2115
Baltimore, Maryland 21201-3322