IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

DEMETRIC RICE, Plaintiff, vs. MARK IV AUTOMOTIVE, Defendant.		No. 01-1255

ORDER DENYING DEFENDANT'S MOTION
TO SET ASIDE ENTRY OF DEFAULT

On August 22, 2001, Plaintiff Demetric Rice, *pro se*, filed a discrimination complaint under Title VII, 42 U.S.C. § 2000e-5, against his former employer Mark IV Automotive. Plaintiff was allowed to proceed *in forma pauperis* in an order entered on August 29, 2001. Defendant was served with process on September 6, 2001, but failed to answer or otherwise make an appearance in the action within twenty days as required by Fed. R. Civ. P. 12(a). On February 4, 2002, Plaintiff filed a document which was construed as a request for entry of default. The court denied the request because Plaintiff had failed to serve a copy of the document on Defendant as required by a prior order of the court. See Order 2/8/02. A copy of this order was mailed to Defendant by the court clerk's office. On February 27, 2002, Plaintiff filed another request for entry of default and motion for default judgment. That document contained a certificate indicating service upon Defendant. Defendant did not file a response to Plaintiff's request. The clerk of the court entered default against Defendant on March 1, 2002.

On March 8, 2002, the court granted Plaintiff's motion for default judgment on the ground that Defendant had failed to respond to the complaint in compliance with the Federal

Rules of Civil Procedure and had been declared to be in default. The matter was referred to U.S. Magistrate Judge J. Daniel Breen for a report and recommendation on Plaintiff's damages. A hearing on Plaintiff's damages was held on April 5, 2002, at which Plaintiff and a witness for Plaintiff appeared and testified before Magistrate Judge Breen. On April 9, 2002, Magistrate Judge Breen issued his report and recommendation that Plaintiff be awarded $50,000 in damages. On April 17, 2002, defense counsel filed a notice of appearance, and, on April 18, 2002, Defendant filed a motion to set aside the default judgment.[1]

Pursuant to Fed. R. Civ. P. 55(c), a judgment of default may be set aside for the reasons listed in Fed. R. Civ. P. Rule 60(b). The grounds for setting aside a default judgment, as enumerated in Fed. R. Civ. P. 60(b), are:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

This circuit has recognized a distinction between the appropriate standard for setting aside a default and the standard for setting aside a default judgment. The Sixth Circuit Court of Appeals observed in INVST Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 398 (6th Cir.1987)(quoting Jackson v. Beech, 636 F.2d 831, 835 (D.C. Cir.1980)), "[a]default can be set aside under Rule 55(c) for 'good cause shown,' but a default that has become final as a judgment can be set aside only under the stricter rule 60(b) standards for setting aside final, appealable orders." A district court must consider three elements in determining motions to set aside under either rule:

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[1] On April 19, 2002, Defendant filed objections to the report and recommendation of Magistrate Judge Breen. Plaintiff has also filed an objection to the report and recommendation. The court will address the objections in another order.

> (a) whether the plaintiff will be prejudiced; (b) whether the defendant had a meritorious defense; and (c) whether culpable conduct of the defendant led to the default.

United Coin Meter Co. v. Seaboard Coastal Line R.R., 705 F.2d 839, 845, (6th Cir.1983) (Rule 60(b)).

In Weiss v.St. Paul Fire & Marine Ins. Co., 283 F.3d 790 (6th Cir. 2002), the Court of Appeals explained that:

> In Waifersong[, Ltd. Inc. v. Classic Music Vending, 976 F.2d 290 (6th Cir.1992)], we made it clear that a party seeking to vacate a default judgment under Rule 60(b)(1) must demonstrate first and foremost that the default did not result from his culpable conduct. That burden may be carried, we said, only by meeting the requirements of Rule 60(b)(1), that is, by "demonstrat[ing] that his default was the product of mistake, inadvertence, surprise, or excusable neglect." Waifersong, 976 F.2d at 292. **Only if the moving party makes this showing may the district court proceed to consider the other United Coin Meter factors.** Id.

Id. at 794 (emphasis added). In Weiss, the defendant "demonstrated that its default was not the result of culpable conduct, but of mistake or, at worst, excusable neglect." Id. at 795.

> St. Paul's counsel did not simply ignore the pleading deadlines, but repeatedly checked with the office of the district court clerk to determine whether service had been effected upon St. Paul and mistakenly relied upon the information obtained from the clerk. Neither St. Paul nor its counsel was willful in failing to respond timely, and the failure to file an answer timely resulted from an honest mistake.

Id. Furthermore, the motion to set aside the default judgment was filed less than thirty days after the date the answer to the complaint was due. Id.

To be treated as culpable, the conduct of a defendant must display "either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings." Shepard Claims Serv., Inc. v. William Darrah & Assoc., 796 F.2d 190, 194 (6th Cir. 1986). See also Ellingsworth v. Chrysler, 665 F.2d 180 (7th Cir.1981) (Culpable conduct is "willful misconduct, carelessness or negligence" and distinguishable from "honest mistake").

Defendant does not deny that it was served with a copy of the complaint or that it is bound by the actions of Steve Kerns, Defendant's corporate vice president for human

resources, and Jim Boleware, Defendant's human resources manager at the Lexington, Tennessee, facility. Instead, Defendant argues that the "mistaken decisions based upon incomplete information" made by "Defendant's non-legal personnel" was not culpable conduct or a "willful attempt to show disrespect for the court's proceeding." See Defendant's Memorandum at p. 7. Defendant attempts to rely on "a series of breakdowns in communications, confusion, and mistaken assumptions" as to why it failed to answer or other respond to Plaintiff's complaint. See Defendant's Memorandum at p.2. In essence, it appears that various employees of Defendant all thought that someone else was handling the complaint, so nothing was done. Incredibly, when Kerns and Boleware reviewed the copy of the order denying Plaintiff's motion for entry of default in January 2002, they "concluded that this matter was closed based upon the court's denial of plaintiff's motion." Defendant's Memorandum at p. 4. They reached this conclusion despite the fact that there was nothing in the order that indicated that the matter was closed, merely that Plaintiff's motion had been denied. It was not until March 1, 2002, upon receipt of Plaintiff's second request for entry of default, that Kerns and Boleware decided to seek the advice of an attorney. Id. Even then, a notice of appearance was not filed until April 17, 2002, approximately six weeks later.

In his affidavit, Boleware admits to receiving a copy of the complaint, a notice of the scheduling conference,[2] a copy of the order denying Plaintiff's first request for entry of default, and a copy of Plaintiff's second request for entry of default. Defendant's Exhibit 3. Kerns acknowledges receiving a fax of the notice of the scheduling conference and order denying Plaintiff's request for entry of default in "late January or early February" 2002. Defendant's Exhibit 2. Any one of these documents was sufficient to put Defendant on notice that it was being sued. Moreover, Defendant has attached copies of its correspondence with the E.E.O.C. concerning Plaintiff's charge of discrimination. Defendant's Collective

[2] The docket sheet reflects a letter dated January 16, 2002, setting a scheduling conference for February 28, 2002.

Exhibit D. The E.E.O.C. correspondence, combined with the legal documents received by Defendant, was further evidence of an on-going suit.

Defendant notes that it did not receive copies of all the documents filed in this action. Defendant's Memorandum at p. 1 n. 1 & p. 7. Defendant is directed to Fed. R. Civ. P. 5(a) which provides, in relevant part,

> No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

Rule 55(b)(2) provides that notice of a motion for a default judgment shall be given to the party against whom judgment is sought if the party has made an appearance. Here, Defendant was in default and had not made an appearance; thus, service was not required. Defendant cannot complain that it did not receive all the documents filed in the action when it did not respond to those documents, including the complaint, that it did receive.

Defendant did not fail to respond to the complaint because of circumstances outside of its control. Instead, two of Defendant's employees, a corporate vice president and a human resources manager, admittedly reviewed the documents that they had received and made a conscious decision not to involve an attorney because they "believed this case to be over." Defendant is bound by the actions of its vice president and manager no less than it would be bound by the actions of its attorney. See Pioneer Investment Serv. Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993) (In deciding whether a defendant is entitled to relief from judgment under Rule 60(b)(6), the court must look to the neglect of defendants themselves as well as on the neglect of their attorney.) At a minimum, Defendant showed "reckless disregard for the effect of its conduct on [the judicial] proceedings." Shepard Claims Serv., 796 F.2d at 194. Therefore, Defendant cannot show that its conduct was not culpable. Consequently, the court need not consider whether Plaintiff would be prejudiced by the setting aside of the default judgment or whether Defendant has a meritorious defense. See Weiss, 283 F.3d at 794.

Defendant has failed to establish grounds for setting aside a default judgment as provided in Fed. R. Civ. P. 60(b). Specifically, Defendant has not shown that its failure to respond to the complaint was the result of mistake, inadvertence, surprise, or excusable neglect. See Fed. R. Civ. P. 60(b)(1). Consequently, Defendant's motion to set aside entry of default is DENIED.

IT IS SO ORDERED.

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JAMES D. TODD
UNITED STATES DISTRICT JUDGE

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DATE