UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

NEW ALMACS, INC. CASE NO. 95-63372

Debtor

IN RE:

OCEAN EQUITIES CORP. CASE NO. 95-63373
Chapter 11
Debtor (Jointly Administered)

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently under consideration by the Court is a motion filed on June 4, 1998, by the

United States of America, on behalf of the Internal Revenue Service ("IRS"), seeking vacatur of an Order of this Court, dated June 3, 1997 ("Order"). That Order granted the motion of New Almacs, Inc. ("Debtor") to reduce, expunge and disallow or otherwise modify the claims of various entities, including the IRS.

The Court heard oral argument at its regular motion term in Utica, New York, on June 30, 1998. The matter was adjourned on the consent of the parties to July 21, 1998, in an effort to resolve it without intervention by the Court. Following additional argument on July 21, 1998, the Court directed the parties to submit memoranda of law on the issue of the applicability of Rule 55(e) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated by reference in Rule 7055 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") and made applicable to contested matters pursuant to Fed.R.Bankr.P. 9014. The matter was submitted for decision on August 21, 1998.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (B) and (O).

FACTS AND ARGUMENTS

The Debtor filed a voluntary petition pursuant to chapter 11 of the Bankruptcy Code (11

U.S.C. §§ 101-1330) ("Code") on September 20, 1995.[1] At the time the case was commenced, the Debtor operated a chain of approximately 27 supermarkets in Rhode Island and southeastern Massachusetts.

On December 23, 1996, the Court confirmed a liquidating plan of the Debtor. By motion dated on or about April 2, 1997 ("Motion), the Debtor filed its objection to the proof of claim of the IRS, filed on December 18, 1995, and amended thereafter, on the grounds that the Debtor was unable to identify any basis for liability to the IRS.

The IRS acknowledges that it failed to respond to the Motion. However, pursuant to Fed.R.Civ.P. 55(e), it is the IRS' position that any judgment by default entered against the United States/IRS is void and should be vacated pursuant to Fed.R.Civ.P. § 60(b)(4) unless the Debtor is able to show that at the time of the Motion it provided "evidence satisfactory to the Court" which would entitle the Debtor to the relief granted. The IRS contends that the Debtor purchased assets of a corporation known as Almacs, Inc. ("Almacs") pursuant to an Asset Purchase Agreement dated September 16, 1994, and later amended on or about September 30, 1994, whereby Debtor agreed to assume the liabilities of Almacs. The IRS asserts that pursuant to Almacs' plan of reorganization, which became effective on or about November 18, 1994, the federal tax liabilities of Almacs were to be paid by the Debtor herein. *See* IRS Motion at ¶ 3. The IRS alleges that Almacs' confirmed plan provides that "at the option of New Almacs to be exercised on or before the Effective Date, either (a) each Holder of an Allowed Tax Claim shall either receive Cash from the Almacs' Reserve, in the full amount of such Allowed Tax Claim,

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[1] Ocean Equities Corporation, the Debtor's subsidiary, also filed a petition pursuant to chapter 11 on September 20, 1995.

on the later of the Initial Distribution Date and the date such Allowed Claim becomes due and payable, or (b) the Allowed Tax Claim shall be assumed by New Almacs in accordance with and subject to the limitations provided for in section 2.2(a) of the New Almacs Purchase Agreement . . . ." *See* IRS Supplemental Memorandum of Law, filed August 21, 1998, at 8 n.4, citing to Section 3.3 of Almacs' confirmed plan.

The Debtor makes the argument that Local Bankruptcy Rule ("LBR") 913.1(k), now designated as Local Rule 9013-4(a), modified Fed.R.Civ.P. 55(e) by treating certain types of motions as unopposed if the notice of motion includes the language specified in the rule and no opposition is timely filed prior to the return date. Citing to *Ouellette v. Heckler*, 102 F.R.D. 940 (D.Me. 1984), the Debtor contends that the IRS, by failing to file answering papers to the Motion, waived any objection it might have had to the disallowance of its claim.

The Debtor argues that even if the Court were to take the view that the Order was entered by default rather than by an intentional waiver of the IRS, the evidence offered at the time of the Motion was sufficient. In this regard, the Debtor asserts that the IRS failed to attach any documentation to its proof of claim and the Debtor was unable at the time of the Motion to determine a basis for any liability.

Finally, the Debtor asserts that the IRS has failed to establish excusable neglect in its prior failure to oppose the Motion and, therefore, is not entitled to relief pursuant to Fed.R.Civ.P. 55(c) and Fed.R.Civ.P. 60(b), referenced therein. *See* Debtor's Memorandum of Law, filed August 21, 1998, at 2 n.1.

DISCUSSION

On December 6, 1996, the Hon. Thomas J. McAvoy, Chief U.S. District Judge for the Northern District of New York, signed an administrative order supplementing LBR 913.1(k) to add, among other motions, a motion made pursuant to Code § 502(b) to disallow or modify claims. The local rule addressed in *Ouellette* provided that a party which fails to respond to a motion within ten days "shall be deemed to have waived objection." *Ouellette*, 102 F.R.D. at 943. LBR 913.1(k) provides that a motion which includes the "'default' statement" will be considered "unopposed" if there is no written opposition served and filed within three business days prior to the return date.[2] The clear intent of LBR 913.1(k) is that the failure to oppose one of the motions enumerated therein, including a motion pursuant to Code § 502(b), will result in a default. Indeed, the current version of the rule, LBR 9013-4, is captioned "Default Motion Practice." Accordingly, Fed.R.Civ.P. 55(e) is applicable to the matter herein in that it applies to judgments by default entered against the United States or one of its agencies, in this case, the IRS.[3]

Fed.R.Civ.P. 55(e) prohibits the entry of a judgment by default against the United States or an agency thereof when the claimant, in this case the Debtor, fails to establish its right to relief "by evidence satisfactory to the court." *See Alameda v Secretary of Health, Education and*

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[2] The "'default' statement" reads as follows: "Pursuant to FRBP 9014 and Local Bankruptcy Rule 913.1(c), if you intend to oppose the motion, you must serve on the movant's counsel and file with the clerk of the Bankruptcy court written opposition to the motion not later than three (3) business days prior to the return date of this motion. In the event no written opposition is served and filed, no hearing on the motion will be held before the Court on the return date, and the Court will consider the motion as unopposed."

[3] The IRS acknowledges that a nonappealable order that is entered as a result of a party's default in failing to respond to a motion is a "judgment by default" to which Fed.R.Civ.P. 55(e) applies. *See* IRS' Supplemental Memorandum of Law at 6.

Welfare, 622 F.2d 1044, 1048 (1st Cir. 1980). The Court of Appeals for the Second Circuit has indicated that it does not interpret Rule 55(e)

> to require an evidentiary hearing if one would ordinarily not have been held, nor to require the court to demand more or different evidence than it would ordinarily receive in order to make its decision. Indeed, it has been suggested in the context of this rule that "the quantum and quality of evidence that might satisfy a court can be less than that normally required."

Marziliano v. Heckler, 728 F.2d 151, 158 (2d Cir. 1984), quoting *Alameda*, 622 f.2d at 1048.

In this case, the Debtor sought to have the IRS' claim disallowed based on the fact that it was "unable to establish any basis in regard to [the] unsecured portion of [the] claim and no documentation has been attached to [the] claim." *See* Exhibit "A" attached to Debtor's Omnibus Motion Seeking to Reduce, Expunge and Disallow or otherwise Modify Claims, filed April 3, 1997. With respect to the priority claim of the IRS in the amount of $19,984.93, the Debtor stated that it was not an obligation of the Debtor. *See id.*

A properly executed and filed proof of claim constitutes prima facie evidence of the claim's amount and validity. *See* Fed.R.Bankr.P. 3001(f). Unless a party objects to the claim, it is "deemed allowed." *See* 11 U.S.C. § 502(a). If an objection is made, the objecting party has the burden of producing evidence "equivalent in probative value to that of the creditor to rebut the prima facie effect of the proof of claim. However, the burden of ultimate persuasion rests with the claimant." *In re VTN, Inc.*, 69 B.R. 1005, 1008 (Bankr. S.D. Fla. 1987) (citations omitted).

A review of the proof of claim filed by the IRS shows a total claim of $70,780.98, of which $50,796.05 was identified as representing a penalty on its unpaid priority claim of $19,984.93. The unsecured priority claim was identified as representing unemployment and

FICA taxes for tax periods between 12/31/91 and 12/31/94.[4] Based on the fact that the Debtor did not acquire Almacs' assets and assume certain obligations of Almacs until on or about November 18, 1994, it is evident that the tax liability, as listed by the IRS in its attachment to its proof of claim, was originally that of Almacs, not the Debtor. Therefore, the Debtor's assertion that it had no liability for the claim was reasonable and constituted rebuttal of the proof of claim filed by the IRS. The Debtor's evidence was sufficient for the Court to have granted Debtor's motion in the absence of any persuasive evidence to the contrary by the IRS. Therefore, the Court does not agree with the IRS that the judgment is void and that it should be granted relief from it pursuant to Fed.R.Civ.P. 60(b)(4). Furthermore, the IRS fails to assert any other basis under Fed.R.Civ.P. 60(b) for vacating the Court's Order.

The criteria that would relieve a party from an entry of default, namely, "whether the default was willful, whether the moving party has presented a meritorious defense, and whether setting aside the default would prejudice the party who secured the entry of default," *see Marziliano*, 728 F.2d at 156, are not appropriate under the circumstances now before this Court. In this case the Court is dealing with a default judgment and default judgments "are set aside only in accordance with the more stringent standard contemplated by Rule 60(b)." *Canfield v. VSH Restaurant Corp.*, 162 F.R.D. 431, 433 (N.D.N.Y. 1995). The fact that the IRS has come forward a year after the Order to present what it contends is a meritorious defense, namely that Almacs' plan of confirmation contained language whereby the Debtor agreed, pursuant to the New Almacs Purchase Agreement, to assume the allowed tax claim of the IRS, comes a "year and a day late

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[4] There is listed unemployment taxes of $100 due for the period ending 12/31/95 which was described as an "unassessed liability" of the Debtor.

and a dollar short." The IRS offers no explanation either for its failure to respond to the Debtor's Motion in May 1997 or for its delay of a year before seeking vacatur of the Court's Order. The fact that the Debtor may have the funds to pay the claim of the IRS does not alter the Court's conclusion.

Based on the foregoing, it is

ORDERED that the motion of the IRS seeking vacatur of the Court's Order, dated June 3, 1997, is denied.

Dated at Utica, New York

this 16th day October 1998

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge