UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

RUSSELL T. ARCHER, JR.
MARLENA L. ARCHER

CASE NO. 9l-0309l

Debtors

PAUL J. GOULD,

Plaintiff

vs.

ADV. PRO. NO. 92-600l5A

RUSSELL T. ARCHER, JR.
MARLENA L. ARCHER,

Defendants

APPEARANCES:

JAMES F. SELBACH, ESQ.
Attorney for Plaintiff
ll5 East Jefferson Street
Syracuse, New York l3202

HAROLD P. GOLDBERG, ESQ.
Attorney for Defendants
l408 W. Genesee Street
Syracuse, New York l3202

STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

Russell T. Archer, Jr. and Marlena L. Archer ("Debtors") have moved this Court for an Order pursuant to Rules 55, 60(b)(l) and 60(b)(6) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.") for an order setting aside and reopening a default judgment entered against the Debtors in the within adversary proceeding.

The motion was heard at a term of this Court held at Syracuse, New York on April 28, l992. Paul J. Gould, ("Gould") the plaintiff and judgment creditor, appeared in opposition to the motion. Following oral argument, the matter was submitted for decision.

JURISDICTIONAL STATEMENT

The Court has jurisdiction of the parties and this core proceeding pursuant to 28 U.S.C. §§1334(b), l57(a)(b)(l) and (2)(I).

FACTS

On or about November 4, l99l, Debtors filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code (ll U.S.C. §§101-1330) ("Code") and listed Gould therein as a creditor. At the time of the filing of their petition, Debtors were represented by Roy S. Sanders, Esq. of Syracuse, New York ("Sanders").

On or about January 3l, l992, Gould commenced this adversary proceeding against the Debtors seeking to deny the dischargeability of the debt, admittedly due and owing to him, pursuant to Code §523(a)(2)(A) and further seeking a denial of Debtors' discharge pursuant to Code §727(a)(2)(B) and (a)(4)(A).

A Summons and Notice of Pre-trial Conference issued on February 3, l992, together with the Complaint were served on the Debtors and Sanders by mail on February 6, l992. An answer to the Complaint was required to be served within thirty days of the issuance of the summons pursuant to Rule 70l2 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.").

No answer was served within the thirty days, however on March 6, l992, the Debtor Marlena L. Archer phoned the office of James Selbach, Esq., Gould's attorney and indicated that she had received the Summons, that she didn't know what to do, and that she wanted a chance to answer it.

On March l6, l992, Gould filed a motion seeking a default judgment, which motion came before this Court on March 3l, l992 for argument. On the return date, Selbach appeared in support of the motion; also appearing at that time was Harold P. Goldberg, Esq. ("Goldberg") who indicated that he would be substituted for Sanders as Debtors' attorney.[1] After hearing argument, the Court granted Gould's motion, an Order was entered on March 3l, l992 pursuant to

[1] Goldberg filed an Answer on behalf of Debtors on March 26, l992 having served same on Selbach on March 24, l992. On March 28, l992, Selbach returned the Answer to Goldberg as untimely.

Fed.R.Bankr.P. 7055 granting judgment to Gould by default, and a Judgment was subsequently entered on April 29, l992.

On April 8, l992, Goldberg filed a Consent to Change of Attorneys generally in the Chapter 7 case designating himself as substituted attorney of record.

ARGUMENTS

The Debtors assert that they had a meritorious defense to the claims of Gould and, in fact, the Debtor Marlena L. Archer alleges that she was not even a party to the contract between Gould and Debtor Russell T. Archer, Jr. Furthermore, Debtors assert a counterclaim against Gould for defective workmanship.

Debtors admit service of the Summons and Complaint, but contend that at no time were they advised by Sanders that if no written answer was submitted, they would be subject to entry of a default judgment. Debtors allege that Sanders did advise them, in writing, of pre-trial conferences in both this adversary proceeding and another adversary proceeding commenced against them by Upstate Federal Credit Union. Sanders did not, however, advise them he was obligated to defend both proceedings on their behalf or that he could not withdraw as their counsel absent a motion pursuant to the Local Rules of Practice of this Court. Debtors assert that Sanders asked them for a retainer of $750 in connection with the adversary proceeding and indicated that the total fee could be in the vicinity of $l,500, a fee they contend they could not afford.

Debtors argue that they did contact Selbach's office by phone in an effort to represent themselves and that at no time did they intend to wilfully disobey the Summons.

Finally, Debtors assert that this Court should not have granted a judgment by default without conducting a hearing and making an investigation into the truth of the matters set forth in the complaint.

Gould argues that the only basis upon which this Court may vacate the default judgment is excusable neglect, and that in this Circuit, attorney negligence does not constitute excusable neglect. Further, Gould asserts that

Debtors' motion is procedurally in error in that it seeks relief under both Fed.R.Civ.P. 60(b)(l) and 60(b)(6). Gould argues that excusable neglect is properly asserted under Fed.R.Civ.P. 60(b)(l), and, therefore, Debtors cannot rely on 60(b)(6).

DISCUSSION

Debtors' contention that the Court should not have granted a default judgment pursuant to Fed.R.Civ.P. 55, which is applicable here by virtue of Fed.R.Bankr.P. 7055, in the absence of a hearing to establish the truth of the allegations set forth in the Complaint, as well as the fixing of damages, is without merit.

Fed.R.Bankr.P. 7055, by reference to Fed.R.Civ.P. 55(b)(2), clearly grants this Court the discretion to hold or dispense with a hearing as a condition to the entry of a default judgment. See In re Stuart, 88 B.R. 247, 248 (9th Cir. BAP l988); In re GTG Enterprises, Inc., 4 BCD 885 (Bankr. S.D.N.Y. l978).

For the same reason there is no support for Debtors' contention that the default judgment entered herein is defective because it failed to recite findings of fact.

There is also no issue here that service of the Summons and Complaint was improper due to the lack of an affidavit of non-military service. The cases cited by the Debtors in support of, the foregoing contentions are either miscited or are factually dissimilar.

The Court turns then to what it senses to be the true issue presented by Debtors' motion, whether they have established excusable neglect.

The controlling case in this Circuit on the issue of attorney error insofar as it constitutes excusable neglect is Nemaizer v. Baker, 793 F.2d 58 (2d Cir. l986). In that case, the Second Circuit observed,

> Relief from counsel's error is normally sought pursuant to 60(b)(l) on the theory that such error constitutes mistake, inadvertence or excusable neglect. But we have consistently declined to relieve a client under subsection (l) of the "burdens of a final judgment entered against him due to the mistake or omission of his attorney by reason of the latter's ignorance of the

> law or other rules of the court, or his inability to efficiently manage his caseload." United States v. Ciranni, 535 F.2d. 736, 739 (2d Cir. l976); United States v. Erdoss, 440 F.2d l22l (2d Cir.) cert. denied sub nom Horvath v. United States, 404 U.S. 849, 92 S.Ct. 83, 30 L.Ed.2d 88 (l97l); Schwarz v. United States, 384 F.2d 833 (2d. Cir. l967). This is because a person who selects counsel cannot thereafter avoid the consequences of the agent's acts or omissions.

Id. at page 62. It should be noted, however, that Nemaizer v. Baker, supra, 793 F.2d 58, did not involve conduct on the part of an attorney that resulted in the entry of a default judgment against his clients.

However, with the teachings of Nemaizer v. Baker, supra, 793 F.2d 58 in hand, the Court also considers the position of the Second Circuit in Wagstaff-El v. Carlton Press Co., 9l3 F.2d 56 (2d Cir. l990), cert. denied ____ U.S. ____, 111 S.Ct. l332, ____L.Ed.2d. ____ (l99l). There the Second Circuit was faced with an appeal from the order of the district court, which had vacated a default judgment and granted summary judgment in the defaulting party's favor. Focusing on Fed.R.Civ.P. 60(b)(l), the Court, citing criteria utilized by other courts, concluded that default judgment may be vacated where the movant can establish 1) that the default was not wilful, 2) movant has a meritorious defense, and 3) the non-defaulting party will suffer little or no prejudice if the judgment is vacated. Id. at 57. Again, the facts in Wagstaff-El v. Carlton Press Co. , supra, do not mirror those herein because there, the defendant, Carlton, simply did not employ counsel to prepare and serve an answer to Wagstaff-El's initial complaint. Agreeing with the district court that Carlton's default was wilful, the Second Circuit concluded that the remaining factors favored the defaulting Carlton. It concluded that Wagstaff-El's damage claim was "preposterous" and as to liability, his claims were "facially invalid or utterly unsupported". The Court concluded that "[a]llowing the default judgment to stand would, therefore, have constituted a serious miscarriage of justice." Id.

At least one other circuit has held a somewhat more liberal view of attorney misconduct than the language of Nemaizer v. Baker supra, suggests, concluding that a "clear line" must be drawn between the fault of counsel and the fault of a party in considering whether or not to open a default judgment. See Augusta Fiberglass Coatings v. Fodor Contracting, 843 F.2d 808, 8ll (4th Cir. l988); United States v. Moradi, 673 F.2d 725 (4th Cir. l982). Contra In re

Knight, 833 F.2d l5l5, l5l6 (llth Cir. l987).

It should also be noted that Wagstaff-El v. Carlton Press Co., supra, 9l2 F.2d at 57 does not stand alone within this Circuit as requiring a court to consider the three factor criteria set forth therein when considering vacatur of a default judgment. See Davis v. Musler, 7l3 F.2d 907, 9l5 (l983), as well as In re Rumsely Sheet Metal, Inc., 95 B.R. 302, 304 (Bankr. W.D.N.Y. l989).

Application of these factors herein leads this Court to conclude that Debtors must be relieved of the consequences of the default Judgment entered by this Court on April 29, l992, as well as the Order granting same, entered on March 3l, l992.

Following the teachings of the Circuit in Nemaizer v. Baker, supra 793 F.2d 62, that a client may not be relieved of the negligence of his counsel, the Court concludes that the default here was wilful. Sanders simply did not answer Gould's Complaint and while he may have intended to withdraw as Debtors' counsel, he had failed to do so prior to the expiration of Debtors' time to answer. Conversely, Debtors themselves attempted to answer Gould's Complaint, albeit that a phone call to Gould's attorney's office several days beyond the last day to respond does not constitute an answer. In addition, upon realizing the dire consequences of their failure to answer, Debtors apparently retained Goldberg to appear upon the return day of Gould's motion for default judgment, even though at that point Sanders was still Debtors' attorney of record.

Considering the second factor, however, it would appear that Debtors have a meritorious defense to Gould's cause of action. See S.E.C. v. Hasho, l34 F.R.D. 74, 76 (S.D.N.Y. l99l); Tecnart Industria E Comercio v. Nora Fasteners Co., l07 F.R.D. 283, 285.

While admitting that they failed to list a debt due and owing to their daughter, Debtors contend that the omission was the result of advice given them by Sanders. Additionally, Debtors contend the Debtor Marlena L. Archer never executed the contract upon which Gould bases his cause of action pursuant to Code §523(a)(2(A), that Gould was fully aware that the Debtor Russell T. Archer, Jr. was unemployed at the time the contract was entered into and in spite of that fact, proceeded with the work in the absence of the $20,000 down payment required by the contract, and that Debtors believe they have a valid counterclaim based

upon Gould's failure to perform the work in a workmanlike manner.

Lastly, Gould has failed to assert any facts from which this court might conclude that a vacating of the default judgment will prejudice him. Delay alone does not constitute prejudice. Absent some showing that delay results in a loss of evidence, prevention or difficulty of discovery or opportunity for fraud, it will not be considered in denying vacatur of a judgment. See Davis v. Musler, supra, 7l3 F.2d 907, 9l6 (2d Cir. l983).

Here the Order granting Gould a default judgment was entered on March 3l, l992, Debtors filed this motion on April 9, l992, and in fact, it was argued on April 28, l992, one day prior to actual entry of the Judgment.

Based upon the foregoing, it is

ORDERED,that Debtors' motion pursuant to Fed.R.Civ.P. 55(c) and 60(b)(l) applicable herein pursuant to Fed.R.Bankr.P. 7055 and 9024, is granted; and it is further

ORDERED, that Debtors shall serve and file an Answer to the complaint herein within ten (l0) days of the entry of this Order, or in the alternative, the parties may stipulate within ten (l0) days of the entry of this Order that Debtors' Answer previously served and filed on or about March 26, l992, shall constitute Debtor's answer, and it is finally

ORDERED, that in the event Gould shall prevail after a trial on the merits in this adversary proceeding, Debtors shall pay as costs, upon the conclusion of this adversary proceeding, the reasonable attorney's fees incurred by Gould in connection with the defense of this motion, not to exceed $250.00.

Dated at Utica, New York
this day of July l992

STEPHEN D. GERLING
U.S. Bankruptcy Judge