UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
	:	
ROSE WAY, INC.,	:	
	:	Case No. 89-1273-C H
Debtor.	:	Chapter 7
THOMAS G. McCUSKEY, Trustee of the Bankruptcy Estate of Rose Way, Inc.,	:	Adv. No. 90-156
Plaintiff,	:	
v.	:	
ALLIED TUBE & CONDUIT CORPORATION,	:	
Defendant.	:	

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ORDER--MOTION TO SET ASIDE ENTRY OF DEFAULT AND JUDGMENT

On October 31, 1990, Defendant's Motion to Set Aside Entry of Default and Judgment was heard by telephonic hearing. Thomas E. Wolf, Snelling, Christensen & Briant, P.A., appeared for Plaintiff, and James M. Holcomb, Bradshaw, Fowler, Procter and Fairgrave, Attorneys at Law, and William J. Augello, Augello, Pezold & Hirschmann, P.C., appeared for Defendant.

Defendant moves the Court for an order setting aside the entry of default and the judgment by default. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(E). The Court, upon review of the pleadings and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P.

7052.

FINDINGS

1. Rose Way, Inc. is a debtor under Chapter 7 of the Bankruptcy Code.

2. Plaintiff, Thomas G. McCuskey, is the Trustee of the bankruptcy estate of Rose Way, Inc.

3. Plaintiff filed his complaint on July 23, 1990. Plaintiff alleged that Debtor rendered transportation services to Defendant; applicable tariff rates were filed with the Interstate Commerce Commission; corrected freight bills for shipments were presented to Defendant; Defendant has failed to make payment on the net amounts due as computed pursuant to the correct freight bills; and Plaintiff prays for judgment against Defendant in the amount of $13,321.71, plus interest and costs.

4. Summons was issued on July 30, 1990.

5. A copy of the summons and complaint was served on Defendant by first class mail on August 8, 1990.

6. Order for Default Judgment and Judgment by Default were filed on September 11, 1990.

7. Defendant filed its answer and jury demand on September 11, 1990.

8. Defendant filed its motion to set aside entry of default and judgment on September 21, 1990.

9. The summons and complaint were served by United States mail upon Defendant's registered agent, Corporation

Trust Company, with a letter dated August 8, 1990. Said registered agent received the summons and complaint on August 16, 1990.

10. The Summons and Notice of Pretrial Conference in an Adversary Proceeding states in the first paragraph as follows:

> You are summoned and required to submit a motion or answer to the complaint which is attached to this summons to the Clerk of the Bankruptcy Court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the complaint within 35 days.

Said summons further states in bold print in the last paragraph of the summons as follows:

> If you fail to respond to this summons, your failure will be deemed to be your consent to entry of a judgment by the bankruptcy court and judgment by default may be taken against you for the relief demanded in the complaint.

11. Corporation Trust Company forwarded the summons and complaint to Defendant by overnight delivery service, and Defendant received the same on August 17, 1990.

12. Corporation Trust Company indicated to Defendant that the time for responsive pleading was 30 days after service, rather than 30 days after issuance of the summons and complaint.

13. Defendant then sought and retained New York counsel

and the documents were received by New York counsel on August 31, 1990. New York counsel drafted a proposed answer and sent it to local counsel on September 7, 1990. Local counsel received the summons, complaint and proposed answer on September 10, 1990. Local counsel modified the answer and filed the same on September 11, 1990.

14. Defendant, in its answer, has denied the material allegations of the complaint and alleged multiple affirmative defenses.

15. Defendant has submitted its facts regarding this matter by affidavit of its counsel.

16. At no time did counsel for defendant file a motion for enlargement of time within which to move or plead to the complaint.

DISCUSSION

Fed.R.Bankr.P. 7055 incorporates Fed.R.Civ.P. 55. Fed.R. Civ.P. 55 provides in pertinent part:

> (c) For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Fed.R.Civ.P. 60(b).

Fed.R.Civ.P. 60(b) provides in pertinent part:

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, or order, or proceeding for the following reasons:

> (1) mistake, inadvertance, surprise, or excusable neglect... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Three factors should be evaluated in considering a motion to set aside a default judgment under Fed.R.Civ.P. 60(b):

> (1) whether the plaintiff will be prejudiced,
>
> (2) whether the defendant has a meritorous defense, and
>
> (3) whether culpable conduct of the defendant led to the default.

Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984); Hoover v. Valley West Des Moines, 823 F.2d 227, 230 (8th Cir. 1987).

Defendant filed the motion ten days after the entry of default and judgment. The motion was therefore timely under Fed.R.Civ.P. 60(b).

Applying the above factors to the instant case, the Court finds that Plaintiff is not prejudiced. Prejudice to the Plaintiff is to be measured by the Plaintiff's ability to pursue its claim. Prejudice, in this reference, means delay that would affect the discovery process, the availability of evidence, or the Plaintiff's ability to recover on any ultimate judgment he may receive. 999 v. Cox & Co., 574 F.Supp. 1026, 1030 (E.D. Mo. 1983). There is no such prejudice in the present case.

The second factor to be considered is the existence of a meritorious defense to the Plaintiff's complaint. A defense is meritorious if assuming the alleged facts to be true, they would preclude the court from entering an adjudication in favor of the Plaintiff. Matter of Bussick, 719 F.2d 922, 925 (7th Cir. 1982). For purposes of Defendant's motion to set aside default and judgment only, the Court finds that Defendant has alleged defenses and assuming the alleged facts to be true for purposes of this motion, the Court would be precluded from entering a judgment in favor of the Plaintiff.

The third factor to consider is the conduct of the Defendant. In the instant case, Defendant has acted swiftly to correct the situation that has resulted in entry of default against it. Defendant's answer was filed the same day as the default judgment was entered. The case is similar to Matter of Bussick, 719 F.2d 1922 (7th Cir. 1983), and the Court finds excusable neglect.

ORDER

IT IS ACCORDINGLY ORDERED that Defendant's motion to set aside entry of default and judgment is granted and entry of default and judgment shall be set aside.

Dated this 26th day of December, 1990.

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Russell J. Hill
U.S. Bankruptcy Judge