UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of ROSE WAY, INC., Debtor.	:	Case No. 89-1273-C H Chapter 7
THOMAS G. McCUSKEY, TRUSTEE OF THE BANKRUPTCY ESTATE OF ROSE WAY, INC., Plaintiff, v. ALPASE, INC., Defendant.	:	Adv. No. 90-48

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

On December 20, 1990, a hearing was held on the motion to set aside entry of default and judgment. The following attorneys appeared on behalf of their respective clients: Thomas E. Wolff for Plaintiff and David J. Lynch for Defendant. At the conclusion of said hearing, the Court took the matter under advisement and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). 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 OF FACT

1. Plaintiff filed its complaint on February 28, 1990, and served a summons and copy of the complaint on Defendant by mail service on March 14, 1990.

2. The summons and notice of pretrial conference dated March 6, 1990, set the pretrial conference date as May 1, 1990, and stated the time to submit a motion or answer to the complaint as 30 days after the date of issuance of the summons.

3. Defendant received the summons and complaint on or about March 19, 1990. At that time, Defendant was in the process of finalizing its financial reports for the fiscal year ended January 31, 1990. Fred Reisenauer, the corporate officer who received the summons and complaint, is also the corporate officer who is primarily responsible for preparation of the annual financial reports. As such, the months of February and March are an extremely busy time for Mr. Reisenauer. Mr. Reisenauer did not realize the significance of the summons and complaint, and due to the press of business was unable to give them the attention required. Mr. Reisenauer also had difficulty retaining Iowa counsel to represent defendant.

4. On April 11, 1990, Plaintiff filed a motion for

default judgment and a default judgment was entered April 25, 1990.

5. Defendant filed the motion to set aside entry default and judgment, and an answer to the complaint on November 1, 1990. The answer states 12 defenses, including an allegation that the tariff on which Plaintiff bases its claim is void pursuant to 49 C.F.R. § 1312.4(d).

DISCUSSION

Federal Rule of Bankruptcy Procedure 7055 incorporates Fed. R. Civ. P. 55. Federal rule of Civil Procedure 55(c) provides:

> (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).

Federal Rule of Civil Procedure 60(b) provides in relevant part:

> (b) On motion and upon such terms as are just, the court may relieve a party or parties' legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;...or (6) any other reason justifying relief from the operation of the judgment. 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 default judgment under Fed. R. Civ. P. 60(b): (1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious 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). Fed. R. Civ. P. 60(b) authorizes an extraordinary remedy that allows a court to preserve the delicate balance between the sanctity of final judgments and the incessant commands of a court's conscience that justice be done in light of all the facts. Hoover, 823 F.2d at p. 230 [citing Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509, 515 (8th Cir.), cert. den. 469 U.S. 1072 (1984)].

Concerning the first factor, prejudice means delay that would affect the discovery process, the availability of evidence, or the plaintiff's ability to recover on any judgment he may ultimately receive. See 999 v. Cox & Co., 574 F. Supp. 1026, 1030 (D. Mo. 1983). In the instant case, discovery is delayed but otherwise unaffected, there is no indication that evidence has been lost or destroyed and there is no impact on Plaintiff's ability to eventually collect on the judgment. Thus, there is no undue prejudice to Plaintiff.

Concerning the meritorious defense factor, 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. For purposes of this motion to set aside default judgment only, the Court finds Plaintiff's defense which alleges that the tariff on which Plaintiff bases its claim is void pursuant to 49 C.F.R. § 1312.4(d) is meritorious.

Concerning the excusable neglect factor, Fred Reisenauer, did not understand the legal significance of the summons and complaint, and the summons and complaint arrived when he was in the process of finalizing Defendant's financial reports for fiscal year ended January 31, 1990. The Court finds that this constitutes excusable neglect and the case should proceed on the merits.

ORDER

IT IS ACCORDINGLY ORDERED that the entry of default and order for judgment by reason of Defendant's default dated April 25, 1990 are set aside.

Dated this 3rd day of May, 1991.

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RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE