

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 4:05-cv-33 (TSL/JMR)
)	
)	
IKE BROWN, individually, and in his)	
official capacities as Chairman of Noxubee)	
County Democratic Executive Committee)	
and Superintendent of Democratic Primary)	
Elections; NOXUBEE COUNTY)	
DEMOCRATIC EXECUTIVE)	
COMMITTEE; CARL MICKENS,)	
individually, and in his official capacities)	
as the Circuit Clerk of Noxubee County,)	
Superintendent of Elections, Administrator)	
of absentee ballots and Registrar of voters;)	
the NOXUBEE COUNTY ELECTION)	
COMMISSION; NOXUBEE COUNTY,)	
MISSISSIPPI; and those acting in concert,)	
)	
Defendants.)	
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**MEMORANDUM OF THE UNITED STATES IN SUPPORT OF THE RESPONSE
OPPOSING DEFENDANTS IKE BROWN’S AND NOXUBEE COUNTY
DEMOCRATIC EXECUTIVE COMMITTEE’S MOTION TO SET ASIDE
ENTRY OF DEFAULT**

PROCEDURAL HISTORY

The United States made a Motion for Default Judgment under Fed. R. Civ. P. 55(b)(2) against the Defendants Ike Brown, the Noxubee County Democratic Executive Committee, and the Noxubee County Election Commission. The Clerk of Court, pursuant to Fed. R. Civ. P. 55(a), entered a default against the Defendants for failure to

“plead or otherwise defend” in accordance with the Federal Rules of Civil Procedure. Pursuant to Fed. R. Civ. P. 55(c), Defendants Ike Brown and the Noxubee County Democratic Executive Committee have petitioned the Court to set aside the Clerk’s entry of default.

ARGUMENT

A. The Defendants’ Failure to Respond to the First Amended Complaint is, by Itself, Sufficient to Warrant Upholding the Entry of Default

Under Fed. R. Civ. P. 55(c), a court may set aside an entry of default “[f]or good cause shown.” Courts may consider a number of factors when determining whether to set aside an entry of default for good cause. Matter of Dierschke, 975 F.2d 181, 184-85 (5th Cir. 1992). However, when the court finds that a defendant has intentionally failed to fulfill his or her obligation with regard to responsive pleadings, “there need be no other finding.” Id.; c.f. Id. at 184 (noting that courts “apply essentially the same standard to motions to set aside a default and a judgment by default” though the former is more easily granted than the latter). In Dierschke, the Fifth Circuit affirmed the lower court’s decision to uphold the entry of default after the defendant failed, for a two-month period, to answer the plaintiffs’ complaint. Id. at 184-85. And in the case of Bonanza International, Inc. v. Corceller, 480 F.2d 613, 613 (5th Cir. 1973) (per curiam), the Fifth Circuit upheld a district court’s decision to enter a default judgment after the defendant failed, over a ten-month period, to answer the plaintiff’s complaint. Before summarily affirming the district court, the Fifth Circuit noted, as a general matter, that the defendant had also disobeyed district court orders. Id.

Defendants have far exceeded the amount of time the Dierschke court deemed so egregious as to justify the district court upholding the entry of default. The Defendants' behavior is, in fact, analogous to the dilatory actions of the defendant in Bonanza International, not only because the Defendants have also failed, over a ten-month period, to respond to the United States' First Amended Complaint, but because the Defendants in the instant case have also disobeyed orders of this Court. Those orders include: (1) the Court's January 25, 2006 order requiring the Defendants to pay a \$500 sanction to the United States for failure to file legally sufficient initial disclosures; and (2) the Court's May 10, 2006 order allowing Defendants until May 22, 2006 to comply with the Court's order requiring expert opinion disclosure. To this day, the Defendants have not complied with either of these orders.

Furthermore, it is documented that Defendants, in fact, received the complaint by way of the Court's ECF system, yet declined to answer it. This clearly demonstrates the Defendants intentionally failed to respond to the First Amended Complaint.¹ In accord with the Fifth Circuit's Dierschke and Bonanza International decisions, the Defendants have, by consistently engaging in dilatory and contumelious tactics, acted in such a way as to soundly justify denial of their Motion to Set Aside the Entry of Default.

B. The Reasons Articulated in the Defendants' Motion to Set Aside Entry of Default do not Constitute "Good Cause" to Set Aside the Clerk's Entry of Default

Even if the Court, in its discretion, should consider the Defendants' excuses for failure to answer as a "means of identifying circumstances which warrant the finding of 'good cause' to set aside the default," Dierschke, 975 F.2d at 184, none of the reasons

¹ This failure on the part of the Defendants is discussed more thoroughly below.

proffered by the Defendants is sufficiently convincing to overturn, for good cause, the Clerk's entry of default.

The Defendants assert only two reasons for their failure, over a ten-month period, to respond to the United States' First Amended Complaint. First, they claim that due to a failure of the Court's ECF system, they never received service of the First Amended Complaint and the supporting Memorandum. Defs.' Aff. In Support of Mot. To Set Aside Entry of Default ¶¶ 2 and 3. Second, Defendants claim that their blunder is due to the failure of opposing counsel to remind them of their obligation to punctually respond to pleadings. *Id.* ¶ 4. Essentially, the Defendants attempt to hold this Court and the United States responsible for their actions, yet provide no legal authority to support their arguments.

1. The Defendants' First Excuse for Failing to Respond to the First Amended Complaint Ignores the Rules of this Court Pertaining to Electronic Case Filing and are Insufficient to Overcome the Presumption of Regularity Associated with the ECF System.

Though Defendants claim, as they have unsuccessfully in a prior motion before this Court,² that their failure to respond to Plaintiff's First Amended Complaint is the fault of the Court's ECF system, the records of this Court provide evidence to the contrary. A notice sent by this Court, and attached as Exhibit A, demonstrates that Wilbur Colom, attorney for the Defendants, received notice and the regular email containing a link to a PDF file housing the Plaintiff's First Amended Complaint.³ Moreover, the Court records demonstrate that this email went to a second individual at

² See Defs.' Mot. For Reconsid. [of the imposition of sanctions] (Feb. 6, 2006).

³ The Court's ECF system also documented the fact that on August 16, 2005, Defendants received the order from Judge Nichols allowing leave for the United States to file the Amended Complaint. Exhibit C.

the Colom Law Firm with an email address of kwinter@colom.com. Exhibit A hereto. Similarly, the records of this Court provide evidence that Wilbur Colom also received notice sent by this Court of the Memorandum supporting the First Amended Complaint, attached as Exhibit B hereto. This notice was the regular email containing a link to a PDF file housing the Memorandum with this Court. Court Clerk J.T. Noblin also sent a letter to Defendants' counsel explaining that the notifications of electronic filing had, in fact, been delivered to counsel and had not been returned as undeliverable (Letter from Noblin to Pleasants of 04/17/06).

It is important to note that the Defendants offer no evidence of any technical failure in the ECF system. Indeed, the United States was able to access copies of the pleadings through the same email that was sent to both the United States and attorneys for Defendants.

The Federal Rules of Civil Procedure relating to electronic case filing provide no authority to support the Motion to Set Aside Entry of Default. To the contrary, after subscribing to the ECF system, an attorney assents to the rules of this Court. Under the federal rules, "If authorized by local rule, a party may make service [of an amended complaint] under this subparagraph (D) through the court's transmission facilities." Fed. R. Civ. P. 5(b)(2)(D). Further, the very form utilized by the Defendants' attorney to register with the Southern District's ECF system states "an attorney's registration will constitute a waiver of conventional service of documents, [and] the attorney agrees to accept service of notice on behalf of the client of the electronic filing by hand, facsimile or authorized e-mail." U.S. Dist. Ct. R. S.D. Miss., Form 1.

Service is considered complete upon transmission of the notice email. As evidenced by Exhibits A and B hereto, "The system will generate a 'Notice of Electronic Filing' when any document is filed. This notice represents service of the document on parties who are registered participants with the system." U.S. Dist. Ct. R. S.D. Miss., ECF Procedures, Section 4(A)(1). The communication by this Court confirms the Defendants received such notice. Further, "service by electronic mail will constitute service pursuant to Fed. R. Civ. P. 5(b)(2)(D)[.]" U.S. Dist. Ct. R. S.D. Miss., ECF Procedures, Section 4(A)(4).

Reported cases where an attorney claims not to have received notice pursuant to a district court's ECF system are predictably rare. In Fox v. American Airlines, Inc., 389 F.3d 1291, 1294 (D.C. Cir. 2004), the United States Court of Appeals for the District of Columbia held that blaming a Court's ECF system for lack of knowledge was without merit. In the words of that court, the arguments of the Defendants in the instant case

offer nothing but an updated version of the classic 'my dog ate my homework' line. They claim that, as the result of a malfunction in the district court's CM/ECF electronic case filing system, their counsel never received an e-mail notifying him of American's motion to dismiss their amended complaint. Imperfect technology may make a better scapegoat than the family dog in today's world, but not so here. Their counsel's effort at explanation, even taken at face value, is plainly unacceptable. Regardless whether he received the e-mail notice, he remained obligated to monitor the court's docket.

Id. at 1294; see also In re Mayhew, 223 B.R. 849, 856 (D.R.I. 1998) (holding in the 60(b) context that it is the attorney's duty to monitor the docket and that "an attorney may not simply sit back and rely on the court to keep him or her up to date; allowing attorneys to do so would not only invite abuses, but would remove the burden of vigilance from the advocates hired to pursue a client's interest.").

In their motion, the Defendants take no personal responsibility for failing, over a ten-month period, to check the docket of the court. In McMillan v. District of Columbia, 233 F.R.D. 179 (D.D.C. 2005), similar circumstances led the District Court to dismiss a case. The court stated, “Had the plaintiff’s counsel checked the docket regularly, even sparingly, he would have discovered the District’s motion to dismiss the complaint and, subsequently, the order to show cause issued by the court.” McMillan, 233 F.R.D. at 182. In the instant case, the same principal is analogous: “Had the [Defendants’] counsel checked the docket regularly, even sparingly, he would have discovered” the United States’ First Amended Complaint and would have had ample opportunity to respond to it. This Court has made as much impliedly clear when it denied Defendant’s February 6, 2006 Motion for Reconsideration of the imposition of sanctions in which the Defendants presented the same excuse they offer the Court today.

This Court’s ECF system and orders of this Court deserve a presumption of regularity. The Defendants have offered no evidence to challenge that presumption, nor any explanation for their failure to check the Court’s docket regularly. Consequently, their argument that the Court is somehow responsible for their failure to respond to the First Amended Complaint is without merit.

2. The Defendants’ Second Excuse for Failing to Respond to the First Amended Complaint is a Meritless Attempt to Blame the United States for their Lack of Diligence in Responding to Communications from this Court

The only other excuse offered by Defendants for failing to respond to the Plaintiff’s First Amended Complaint is the allegation that the United States never notified them of their obligation to respond punctually to the complaint. However, the United States has no obligation to monitor the Defendants’ diligence in reading communications

from this Court. Instead, the United States is, like all parties, entitled to presume that litigants will vigilantly monitor and read emails from this Court and act accordingly and responsibly.

C. Conclusion

The Fifth Circuit has made clear, as evidenced by the Dierschke and Bonanza International decisions, that the Defendants' failure to respond to the United States' First Amended Complaint for over ten months warrants upholding the Clerk's entry of default. The gravity of the Defendants' actions is further exacerbated by their failure to comply with the orders of this Court. And even if the Court decides to weigh the reasons proffered by the Defendants for their behavior, they are insufficient to warrant vacating the Clerk's entry of default. Absent an evidentiary showing that a technical defect in the Court's ECF system existed, inexcusable neglect by the Defendants is the most likely cause of the failure to respond to the First Amended Complaint. And contrary to the Defendants' argument that the United States holds some duty to remind them of their obligation to respond promptly to communications from this Court, as a matter of course, the responsibility for such failures is the Defendants.'

Therefore, the United States respectfully submits that the Motion to Set Aside Entry of Judgment should be denied for the reasons delineated above and in Plaintiffs' Motion for Default Judgment.

WHEREFORE, the United States asks this Court for an Order to DENY the Motion to Set Aside Entry of Default.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2006 I electronically filed the foregoing Memorandum Of The United States Opposing Defendants Ike Brown's And Noxubee County Democratic Executive Committee's Motion to Set Aside Entry of Default using the ECF system which sent notification of such filing to Wilbur O. Colom, Esq. of the Colom Law Firm, LLC, 200 Sixth Street, North, Suite 102, Columbus, Mississippi, 39701, Ellis Turnage, Esq., Post Office Box 216, 108 North Pearman Avenue, Cleveland, Mississippi, 38732, and, Christopher D. Hemphill, Esq., Dunn, Webb and Hemphill, P.A., 214 Fifth Street South, Columbus, Mississippi, 39701.

s/Joshua L. Rogers

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