

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

UNITED STATES OF AMERICA

PLAINTIFF

V.

CIVIL ACTION NO: 4:05cv33TSL-AGN

IKE BROWN, ET. AL.

DEFENDANTS

DEFENDANT NOXUBEE COUNTY ELECTION  
COMMISSION'S MOTION TO VACATE DEFAULT JUDGMENT

Comes now defendant Noxubee County Election Commission, by and through counsel of record, pursuant to Fed. R. Civ. P. 60(b), for good cause shown and moves the Court for the entry of an order to vacate the default judgment and states:

1. Plaintiff's complaint was filed on February 17, 2005. A copy of the summons for the Noxubee County Election Commission (NCEC) was not served upon either of the 5 election commissioners, but was served upon Freda Phillips, deputy clerk in the Circuit Clerk's office on June 13, 2005, according to the process receipt and return.

2. On July 15, 2005, plaintiff filed its motion for default judgment against defendant NCEC. However, plaintiff failed to comply with Fed. R. Civ. P. 55(b). The entry of default must be established by affidavit and the clerk must be satisfied that the defaulting party has failed to plead, appear or otherwise defend. The clerk's entry of default is a procedural prerequisite for the entry of judgment upon default. New York Life Ins. Co. v. Brown, 84 F. 3d 137, 141 (5<sup>th</sup> Cir. 1996). There are two stages in a default proceeding -- the establishment of the default itself, followed by

the entry of a default judgment. In Re Catt, 368 F. 3d 789, 793 (7<sup>th</sup> Cir. 2004).

3. On July 19, 2005, prior to the entry of the default judgment, defendant NCEC, filed its answer and affirmative defenses to the plaintiff's complaint. Defendant NCEC's filing of a responsive pleading is an appearance. Sun Bank of Ocala v. Pelican Homestead & Savings Ass'n, 874 F. 2d 274, 276 (5<sup>th</sup> Cir. 1989); Rogers v. Hartford Life & Accident Ins. Co., 167 F. 3d 933, 936-37 (5<sup>th</sup> Cir. 1999) (noting that the Fifth Circuit does not construe "appeared" as requiring the filing of a responsive papers or actual in-court actions).

4. On July 19, 2005, apparently without knowledge that defendant NCEC had answered, the Court entered a default judgment.

5. The decision to vacate a default judgment is within the sound discretion of the trial court. Provident Life and Ins. Com v. Goel, 274, F. 3d 984, 997 (5<sup>th</sup> Cir. 2001).

6. No actual prejudice or harm has resulted or will result to plaintiff if the court set aside the default judgment. Although late, defendant NCEC did appear and this Court should give the defendant NCEC the benefit of doubt and allow the case to proceed to the merits. Defendant NCEC has a colorable defense to the plaintiff's claim. Defendant NCEC's basis and reasoning to vacate the default judgment under Fed. R. Civ. P 60(b) are legitimate because Rule 55(b) was not compiled with and at the time that default judgment was entered on July 19, 2005, defendant NCEC had made an appearance.

WHEREFORE, PREMISES CONSIDERED, defendant NCEC moves the Court for the entry of an order (a) vacating the default judgment, and (b) granting any other relief equitable and/or appropriate.

SO MOVED, this the 11<sup>th</sup> day of August, 2005.

NOXUBEE COUNTY ELECTION COMMISSION,  
Defendant

s/Ellis Turnage  
ELLIS TURNAGE

Attorney for Defendant Noxubee  
County Election Commission

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CERTIFICATE OF SERVICE

I, Ellis Turnage, Attorney for defendant Noxubee County Election Commission, do hereby certify that I electronically filed this motion to vacate default judgment with the Clerk of the Court using the ECF system which sent notification of such filing to the following: Hon. Christopher Coates, and Hon. Wilbur O. Colom. I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants.

Hon. Dunn Lampton  
U.S. ATTORNEY'S OFFICE  
188 E. Capitol Street, Suite 500  
Jackson, Mississippi 39201

THIS, the 11<sup>th</sup> day of August, 2005.

s/Ellis Turnage  
ELLIS TURNAGE