

Denlin Computer Resources, Inc.,

Plaintiff

v.

**DECISION AND ORDER**

AHJ Marketing, Inc., and  
Randall C. Akers,

Defendants

This matter is before the Court on Defendants' Motion to Set Aside Clerk's Entry of Default and Allow Answers and Defendant's Motion to Dismiss.<sup>1</sup> The Court has reviewed the parties' memoranda and supporting documents.

Defendants' Motion to Set Aside Clerk's Entry of Default and Allow Answers

Plaintiff commenced this action by serving the Complaint upon Defendants on October 12, 2007.<sup>2</sup> Pursuant to M.R. Civ. P. 12(a), Defendants were required to serve an answer to the Complaint on or before November 1, 2007. On November 8, 2007, Defendants served and filed with the Court their answers to the Complaint. On the same day, Plaintiff requested the entry of a default based on Defendants' failure to serve and file the answer within the 20 days required by M.R. Civ. P. 12(a). The clerk entered the default on November 20, 2007. Defendants subsequently filed their motion seeking to set aside the default.

Preliminarily, Defendants argue that the clerk lacked the authority to enter the default. M.R. Civ. P. 55, which sets forth the default procedure, provides, "[w]hen a party against whom a

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<sup>1</sup> The Motion to Dismiss was filed on behalf of Defendant Randall Akers.

<sup>2</sup> Defendant Randall Akers challenges the sufficiency of service upon him. Defendant's challenge is the subject of Defendant's Motion to Dismiss.

judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default". M.R. Civ. P. 55(a). Defendants maintain that because they filed their answers to the Complaint on the same day that Plaintiff requested the default, and twelve days before default was entered, Defendants plead and defended the matter "as provided by these rules". Defendants argue, therefore, that the clerk should not have entered the default.

Although Defendants filed answers to the Complaint, they did not do so "as provided by these rules" (i.e., the Maine Rules of Civil Procedure). M.R. Civ. P. 12(a) provides in pertinent part, "[a] defendant shall serve that defendant's answer within 20 days after the service of the summons and complaint upon that defendant ...". The plain, unambiguous language of the Rule requires the answer to be served within 20 days of service. Defendants agree that they did not serve and file their answers within 20 days of service. Consequently, Defendants did not serve and file their answers to Plaintiff's Complaint as provided by the rules. The clerk was, therefore, authorized to enter the default as requested.

Defendants request that the Court set aside the default in accordance with M.R. Civ. P. 55(c), which allows the Court to set aside a default for "good cause shown". "To meet the 'good cause' standard of Rule 55(c) a party must show 'both a good excuse for his untimeliness in pleading ... and the existence of a meritorious defense'". *Hammond v. Thomas Realty Associates*, 617 A.2d 562, 563-64 (Me. 1992) (citing, *Design Build of Maine v. Paul*, 601 A.2d 1089, 1091 (Me. 1992)). Defendants assert that the late filing of the answer was due to "a simple oversight in the administrative office of AHJ". (*Defendants' Motion to Set aside Clerk's Entry of Default*, p. 6).

While Defendants' assertion is not supported by any record evidence,<sup>3</sup> the fact that Defendants filed their answers within a relatively short period of time (i.e., 5 business days) after the date by which the answers should have been filed is consistent with the fact that the failure to file was the result of inadvertence rather than an intentional disregard of the judicial process. The promptness with which Defendants acted upon recognition of the issue is underscored by the fact that they filed the answers on the same day that Plaintiff requested the default, and nearly two weeks before the entry of the default. Because the Court is convinced that Defendants' failure to comply

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<sup>3</sup> In support of their motion, Defendants filed the affidavit of Sandy Bilodeau, the business manager of Defendant AHJ Marketing. The affidavit does not include an explanation for the failure to file and serve Defendants' answers to Plaintiff's Complaint within 20 days of service.

with M.R. Civ. P. 12(a) was not a deliberate attempt to frustrate the judicial process, under the circumstances of this case, the Court concludes that Defendants had a good excuse for their failure to file and serve the answers within 20 days of the service of the summons and complaint.

The Court also concludes that Defendants have demonstrated a meritorious defense to Plaintiff's claim. According to the business manager for Defendant AHJ Marketing, Inc., the services for which Plaintiff seeks to recover were substandard causing Defendants to seek alternative services. (*Affidavit of Sandy A. Bilodeau*, p. 2). If Defendants convince a fact-finder that Ms. Bilodeau's assertions are accurate, Defendants could successfully defend Plaintiff's claim.

Plaintiff also argues that the Court should not allow Defendants' answers to Plaintiff's Complaint because Defendants have not satisfied the requirements of M.R. Civ. P. 6(b). Plaintiff correctly notes that M.R. Civ. P. 6(b) provides that when a motion for enlargement of time is filed after the expiration of the time period, the Court can enlarge the time if the failure to act was the result of excusable neglect. Plaintiff argues that Defendants' failure to file the answers as required by the rules was not the result of excusable neglect and, therefore, the answers should not be allowed.

The Court questions whether the Law Court would require a defaulted party to prove *both* good cause pursuant to M.R. Civ. P. 55(c) *and* excusable neglect. The Law Court has consistently noted that the good cause standard is different from the excusable neglect standard which the Court is to apply when it considers a motion seeking relief from a default judgment. *Butler v. D/Wave Seafood, et al.*, 2002 ME 41, ¶17, 791 A.2d 928, 932 (Me. 2002); *Theriacault v. Gauthier*, 634 A.2d 1255, 1256-57 (Me. 1993); *Michaud v. Mutual Fire, Marine & Inland Insurance Company*, 505 A.2d 786, 790 (Me. 1986). Because in most, if not all, of the cases in which a default has been entered, the defaulted party must file an answer if the default is lifted, the Law Court would have had no reason to distinguish between the standards if a defaulted party is required to satisfy both standards. In other words, if the excusable neglect standard, the acknowledged stricter test, is to govern whether a defaulted party can file an answer to the Complaint, analysis of and application of the good cause standard would be unnecessary and irrelevant. Simply stated, the Court does not believe that the Law Court intended for the good cause analysis under Rule 55(c) to be a mere academic exercise. *Dyer, Goodall and Federle, LLC v. Proctor*, 2007 ME 145, upon which Plaintiff relies, can be distinguished because in that case, the Court did not conclude that the defendant had demonstrated

good cause pursuant to M.R. Civ. P. 55(c)<sup>4</sup>. In short, implicit in a court's conclusion that a defaulted party satisfies the good cause requirement of M.R. Civ. P. 55(c) is the recognition that the party will be permitted to plead to and defend the action.

### Defendant's Motion to Dismiss

Defendant Randall Akers moves to dismiss the Complaint alleging an insufficiency of service of process. Specifically, Defendant Akers argues that service was insufficient because the summons and Complaint were served upon the business manager of Defendant AHJ Marketing, Inc. (Sandy Bilodeau), and were not served upon him personally as required by M.R. Civ. P. 4(d). The Rule authorizes alternative service "at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein ...". M.R. Civ. P. 4(d)(1). Here, there is no evidence of record to establish that Ms. Bilodeau was served at or was residing at Defendant Akers' residence. Accordingly, the Court agrees that the service of process upon Defendant was insufficient.

### Conclusion

Based on the foregoing analysis, the Court orders:

1. Defendants' Motion to Set Aside Default is granted.
2. Defendants' Motion to Allow Answers is granted.
3. Defendant Akers' Motion to Dismiss is granted. Defendant Akers is dismissed as a party without prejudice. Plaintiff is hereby given leave to file the return of service upon Defendant Akers on or before March 28, 2008.<sup>5</sup>


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<sup>4</sup> In *Dyer, Goodall and Federle, LLC v. Proctor*, 2007 ME 145, ¶ 22, the Law Court observed that "[t]he facts of this case would not support a finding of 'good cause' if Proctor's appeal is construed in the same manner as a motion to set aside a default pursuant to M.R. Civ. P. 55(c)." The conditional language (i.e., *if Proctor's appeal is construed ...*) used by the Law Court suggests that the defendant had not filed a motion to set aside the default.

<sup>5</sup> Given the fact that the case has been pending since October 2007, and given that the Court has conducted the initial Case Management Conference, the Court anticipates that Plaintiff will be able to arrange for service through Defendants' counsel. Consequently, the Court does not believe that Plaintiff's need to serve Defendant Akers will delay the trial of the case.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 3/6/08

  
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Justice  
Maine Business and Consumer Docket