

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE: ) Chapter 13 Case  
) Number 90-11663  
JEAN WILLIAMSON JOHNSON )  
)  
Debtor ) FILED  
\_\_\_\_\_ ) at 11 O'clock & 10 min. A.M.  
) Date: 11-11-91  
CHARLES H. PENN, M.D. )  
)  
Plaintiff )  
)  
vs. ) Adversary Proceeding  
) Number 91-1068  
JEAN WILLIAMSON JOHNSON )  
)  
Defendant )

**ORDER**

Charles H. Penn, M.D. seeks entry of default based upon the failure of the debtor/defendant, Jean Williamson Johnson, to file a timely response. Ms. Johnson disputes the default and alternatively requests that default be set aside and her responsive pleadings allowed. This adversary proceeding was filed August 20, 1991. The summons and notice of trial was issued by the clerk of this court on August 26, 1991. The summons provided:

YOU [defendant] 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, .

(emphasis added).

Bankruptcy Rule 7004(b) permits service

[b]y first class mail postage prepaid . . . (a) [u]pon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing copies of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may

designate in writing filed with the court and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

Bankruptcy Rule 7004(f) provides in part:

[I]f service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons.

The return of service filed by plaintiff's counsel reflects service by regular first class United States mail postage prepaid on August 29, 1991 upon the defendant and defendant's counsel. At hearing defendant's counsel contended that she (counsel) did not receive the summons and complaint until September 11, 1991. No representations were made as to when defendant received the summons and complaint. An application for entry of default was filed October 8, 1991. On October 11, 1991 the defendant filed her answer and on October 15, 1991 filed a "Motion to Allow Late Filing of Answer to Application for Default." An amended application for entry of default was filed on October 11, 1991. Defendant failed to timely file her answer. She is in default.

Pursuant to Bankruptcy Rule 7055, applying Federal Rule of Civil Procedure (FRCP) 55(c) to adversary proceedings, for good cause shown I may set aside an entry of default. The determination as to whether good cause exists lies with the discretion of the trial court. United States v. One Parcel of Real Property, 763 F.2d 181, 183 (5th Cir. 1985); Coon v. Grenier, 867 F.2d 73, 75 (1st Cir. 1989). FRCP 55(c) does not define "good cause." In determining whether "good cause" exists, courts generally consider three factors: 1) whether default was willful; 2) whether the adverse party will be prejudiced if entry of default is set aside; and 3) whether the defaulting party asserts a meritorious defense. See e.g., One Parcel of Real Property, supra; Grenier, supra; Meehan v. Snow, 652 F.2d 274 (2d Cir. 1981); Rasmussen v. W. E. Hutton & Co., 68 F.R.D. 231 (N.D. Ga. 1975). See also E.E.O.C. v. Mike Smith Pontiac GMC Inc. 896 F.2d 524, 528 (11th Cir. 1990) (applying the above three factors to the more stringent "excusable neglect" standard for setting aside a default judgment). "Good

cause" is applied as a liberal standard for setting aside entry of default "in keeping . . . with the philosophy that actions should ordinarily be resolved on their merits." Grenier, supra, at 76. All doubt should be resolved in favor of the defaulting party. Id.

Applying the above factors to this case, defendant has established good cause for setting aside the entry of default. Counsel for defendant was under an erroneous impression as to when the 30-day period within which the defendant must respond to plaintiff's complaint began to run. Because defendant's untimely

response to plaintiff's complaint was due to a good faith procedural error by defendant's counsel, the default was not willful. Cf. 999 v. Cox & Co., 574 F.Supp. 1026 (E.D. Mo. 1983). Although setting aside default will unavoidably cause plaintiff minimal prejudice in that he will have to prepare for trial, that alone is insufficient to deny relief from default, see Fine Shoe Co. v. Buckray, Inc., 131 F.R.D. 58 (S.D. N.Y. 1990), and plaintiff has made no other showing of how proceeding to trial will prejudice him. Finally, defendant has asserted facts which, if proven at trial, would constitute a meritorious defense to plaintiff's complaint. Grenier, supra, at 77 (holding defendant need not establish likelihood of success, only a cognizable defense). Accordingly, entry of default should be set aside.

However, by defendant failing to timely file a responsive pleading, the plaintiff has incurred additional expenses of counsel in seeking the entry of default and appearing at this proceeding in opposition to the defendant's motion to open default. The plaintiff should not bear the expense of the defendant's failure to comply with the summons. Plaintiff has incurred reasonable attorney's fees in the amount of Two Hundred and No/100 (\$200.00) Dollars directly attributable to the application for entry of default and this hearing.

It is therefore ORDERED that default in this adversary proceeding is set aside and the answer of the defendant Jean

Williamson Johnson is allowed conditioned upon the defendant paying to plaintiff's counsel the sum of Two Hundred and No/100 (\$200.00) Dollars within ten (10) days of the date of this order. In the event that the defendant fails to pay the sum indicated, upon the filing of an affidavit by plaintiff's counsel, defendant's answer shall be stricken and default judgment as prayed for in the complaint will be entered without further hearing.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 11th day of November, 1991.