Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
WESTSIDE SUBBASIN OF THE BITTERROOT RIVER BASIN (76HF)

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	CASE 76HF-61
IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE WESTSIDE SUBBASIN OF THE BITTERROOT RIVER DRAINAGE AREA, INCLUDING ALL TRIBUTARIES OF THE WESTSIDE SUBBASIN OF THE BITTERROOT RIVER IN RAVALLI COUNTY, MONTANA	76H-W-005529-00
	CASE 76HF-62
	76H-W-214742-00

FILED
MAR 06 2002
Montana Water Cour

CLAIMANT: Delia Kelly and Jack J. Kelly; Caprock, Inc.;
Arnold T. Polancheck and Janice C. Polancheck;
Lois E. Howard and Ivan E. Howard;

OBJECTOR: United States of America (Bureau of Indian Affairs);
United States of America (USDI-Fish and Wildlife Service);
Avista Corporation; Delia Kelly; Betty E. Garnett;
Garnett Ranch Company; Ivan Howard

ORDER GRANTING MOTION TO SET ASIDE DEFAULT AND REINSTATE INTEREST IN WATER RIGHT CLAIM

On January 22, 2001, the DeSmet Foundation, through counsel, filed Motions to Set Aside Default and Reinstate Interest in Water Right Claim for the above claims, supported by an affidavit of Jerome Borkoski.[1] On February 5, 2001, Jack and Delia Kelly, through counsel, filed an objection to the DeSmet Foundation's Motions. On March 12, 2001, DeSmet Foundation filed

[1] Although the DeSmet Foundation submitted separate motions for 76HF-61 and 62, the motions appear to be quite similar and the supporting affidavits appear to be identical.

a reply brief, supported by a second affidavit of Jerome Borkoski. On March 16, 2001, the Kellys filed an affidavit of Joe Thompson, in response to the second affidavit of Jerome Borkoski.

BACKGROUND

Water right claims 76H-W-005529-00 (in Case 76HF- 61) and 76H-W-214742-00 (in Case 76HF-62) were filed for irrigation use. Several parties claimed ownership interests in these water right claims including: Robert Reed, Mary K. Baker, John N. Baker, Gary Correll, Beth Correll, Patrick G. McNulty, Betty D. Reed, Caprock, Inc., Delia Kelly, and Jack J. Kelly. The claims received objections from various parties. The initial proceeding in these cases took place on February 16, 2000 in Hamilton, Montana. Robert Reed, Mary K. Baker, John N. Baker, Gary Correll, Beth Correll, Patrick G. McNulty, Betty D. Reed, and Caprock, Inc. failed to appear at this proceeding. As a result, the objectors moved for the default of these claimants and the Master set a Show Cause Hearing for June 22, 2000 in Hamilton, Montana. Robert Reed, Mary K. Baker, John N. Baker, Gary Correll, Beth Correll, Patrick G. McNulty, Betty D. Reed, and Caprock, Inc. again failed to appear. On June 27, 2000, the Master issued Court Minutes with a recommendation that the claims of these claimants be dismissed. On August 11, 2000, the Chief Water Judge issued orders dismissing the claims of Robert Reed, Mary K. Baker, John N. Baker, Gary Correll, Beth Correll, Patrick G. McNulty, Betty D. Reed, and Caprock, Inc.

On August 22, 2000, Caprock, Inc., through counsel, filed motions to set aside the default and reinstate interests in water right claims 76H-W-005529-00 and 76H-W-214742-00, on grounds that Caprock, Inc. may not have received notice, and the death of Caprock, Inc.'s president's son. On September 15, 2000, the Court granted Caprock, Inc.'s motions on the grounds that no party responded to the motions.

The DeSmet Foundation states that it is a successor in interest to a portion of the land previously owned by claimants John N. Baker and Mary K. Baker. The Foundation filed its motions to set aside default and reinstate claims on January 22, 2001. It submits in support of the motions an Affidavit of Jerome Borkoski, who is the president and sole officer and employee of the DeSmet Foundation. The Affidavit states that the DeSmet Foundation was not able to participate in the water right cases because Mr. Borkoski's wife was diagnosed with cancer in 1998, and Mr. Borkoski devoted substantial time and energy to caring for her until her death on December 17, 1999. In addition, Mr. Borkoski states that he has been in poor health himself, and has had to travel from Stevensville to Missoula three times a week for dialysis treatments. He states that "it is entirely possible that [he] received mail from the DNRC regarding these water rights, but [he] was not in a position to respond on behalf of the foundation because of my circumstances." January 19, 2001 Affidavit, ¶¶ 3-4.

The Kellys objected to the Foundation's motion on grounds that: (1) Mr. Borkoski should have received notice of the water rights case in 1998; (2) Mr. Borkoski has not presented potentially meritorious water right claims; and (3) the Kellys would be adversely affected if the default is set aside.

DISCUSSION

The parties both discussed in their briefs the standards to be applied in deciding whether to set aside the default in this case.

The Montana Supreme Court addressed the standards to be used by a trial court in analyzing a motion to set aside a default judgment, in State ex rel. Dept. of Environmental Quality v. Robinson, 290 Mont. 137, 143, 962 P.2d 1212 (1998):

> The standard for setting aside a default judgment and entry of default are well established. The court may set aside a default judgment based upon mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief. Rule 55(c) and 60(b)(1) and (6), M.R.Civ.P. An entry of default may be set aside "for good cause shown." Rule 55(c), M.R.Civ.P. To establish "good cause," the defendant must show that (1) he proceeded with diligence to set aside the default, (2) his neglect was excusable, (3) the judgment will be injurious to the defendant if allowed to stand, and (4) he has a meritorious defense to the plaintiff's cause of action. *In re Marriage of Martin*, 265 Mont. at 99, 874 P.2d at 1222 (citing *Blume v. Metropolitan Life Ins. Co.* (1990), 242 Mont. 465, 467, 791 P.2d 784, 786). The policy in this state is to favor a trial or decision on the merits; default judgments are not favored. *In re Marriage of Martin*, 265 Mont. at 99, 874 P.2d at 1222. However, the burden of proof rests with the defendant seeking to set aside the default. *In re Marriage of Martin*, 265 Mont. at 99, 874 P.2d at 1222.

The starting analysis is to determine whether good cause exists to set aside the default. The DEQ good cause test was fashioned for and is only applied in default judgment cases. See Blume v. Metropolitan Life Ins. Co., 242 Mont 465, 467, 791 P.2d 784 (1990). Specific to setting aside an entry of default, Cribb v. Matlock Communications, Inc., 236 Mont. 27, 768 P.2d 337, 339 (1989) states that "the good cause standard under Rule 55(c), M.R.Civ.P., should be applied more flexibly and leniently than the excusable neglect standard under Rule 60(b), M.R.Civ.P." Cribb at 30.

A judgment is the final determination of the rights of the parties in an action or proceeding and as used in the Montana Rules of Civil Procedure includes a decree and any order from which an appeal lies. Rule 54(a), M.R.Civ.P. Before a judgment can be entered, a Water Judge must first adopt the Master's findings and conclusions. Rule 53(e), M.R.Civ.P. Although that occurred in this case with the Court's August 11, 2000 Order Dismissing Water Right Claims, no entry of final judgment has taken place and no final decree has been issued for these water right claims. See generally Matter of Sage Creek Drainage Area, 234 Mont. 243, 763 P.2d 644 (1988).

Accordingly, the Court's August 11, 2000 Order is more than an entry of judgment but less than a final judgment. To some extent, it is still an interlocutory order. Generally, a court has plenary power over its interlocutory orders and may revise such orders when it is consonant with justice to do so. Smith v. Foss, 177 Mont. 443, 447, 582 P.2d 329 (1978), citing 7 Moore's Federal Practice, Para. 60.-20, p. 242.

Therefore, it is best to characterize the Court's August 11 Order as a default judgment and to apply the standards applicable to a default judgment as set forth in DEQ, but to temper those standards when it is consonant with justice to do so.

(1) Did the DeSmet Foundation proceed with diligence to set aside the default?

The Kellys assert that the DeSmet Foundation's motion was not diligently filed because it was filed almost five months after the Court's Order dismissing the Foundation's claims. The Kellys assert that the DeSmet Foundation should have known of the water rights case as early as 1994, because the DeSmet Foundation engaged an attorney at that time to stop the flow of vagrant flood waters or waste water onto the Foundation property. The Kellys also contend that the Foundation must have received notice of the case no later than February 4, 1998, when Julie McNichol, a Water Resource Specialist with the Department of Natural Resources and Conservation (DNRC), sent a letter to the Foundation asking the Foundation to fill out a water right transfer certificate, and attaching water right abstracts and a notice concerning adjudication proceedings in the area.

The Kellys cite to Schalk v. Bresnahan, 138 Mont. 129, 354 P.2d 735 (1960), and Foster Apiaries, Inc. v. Hubbard Apiaries, Inc., 193 Mont. 156, 630 P.2d 1213 (1981), in support of their assertion that the Foundation's motion is not timely. The Schalk case involved an attorney who forgot to respond to a summons and complaint on behalf of a client who had been personally served

because the attorney misplaced the documents and was involved in an important trial at the time. The default judgment was issued over fourteen months after the entry of default, and the request to set aside the default was filed nearly six months after entry of the default judgment. Schalk at 130. The Montana Supreme Court found that the request to set aside was filed too late, because "the only reason for failure to enter an appearance was forgetfulness because of other more important business." Id. at 132.

Similarly, in Foster, the defendant was properly served and had actual notice of the proceeding and had actual notice of the default judgment three months after it was entered. Yet, the defendant waited approximately nine months after default judgment was entered before moving to have the default vacated. Foster at 158. The defendant's reason for the delay was simply that "it did not know that further action was required of it by way of an appearance." Id. at 161.

Mr. Borkoski indicated that because no water right transfer certificates were filed with the DNRC, he may not have received notice of deadlines and hearings in the above cases. January 19, 2001 Affidavit of Jerome Borkoski, ¶ 6. Mr. Borkoski also stated that he contacted an attorney once he was told by a neighbor about the proceedings. January 19, 2001 Affidavit of Jerome Borkoski, ¶ 6. The February 4, 1998 letter from Julie McNichol of DNRC to the Foundation is not a notice from the Court of proceedings in the above water right cases, and does not serve as "actual notice" of the adjudication proceedings concerning these cases. Accordingly, the Foundation's motion to set aside is timely.

The Kellys also assert that the DeSmet Foundation should have known that its water rights were in jeopardy in the adjudication process because the Foundation hired an attorney in 1994 on a water-related matter. Specifically, the Foundation hired Harry Haines of Worden, Thane & Haines to send a letter to Joe Thompson, Delia Kelly's husband, to (1) request that the Kellys stop

discharging wastewater across the Foundation property; and (2) to seek resolution of a road easement issue.

The August 19, 1994 letter from Mr. Haines to Mr. Thompson does state that "[a]s a senior property water right owner, our client has standing to challenge over-appropriation by upstream junior water right owners." That sentence is the only reference in the letter to water rights. The Water Court Preliminary Decree in this subbasin was not issued until January 14, 1998. The 1994 efforts of the DeSmet Foundation through a letter by its counsel to stop the discharge of waste water or vagrant flood waters from its neighbor's property cannot be construed as a recognition that the Foundation's water rights were going to be included in a decree three years in the future or involved in a case before the Water Court about six years after the 1994 letter was drafted.

(2) Was the DeSmet Foundation's neglect excusable?

The Kellys contend that the family and health problems set forth in Mr. Borkoski's affidavit do not excuse the Foundation's failure to participate in the water rights cases.

The policy of most courts is one of liberality toward motions for relief from default entries and default judgments. Wright, Miller & Kane Federal Practice and Procedure: Civil 3d § 2693, p. 103 and § 2699, p.168. However, the Montana Supreme Court has held in several cases that evidence of office mismanagement, neglect, or inattentiveness on the part of high-level employees is not excusable neglect. Roberts v. Empire Fire & Marine Ins. Co., 278 Mont. 135, 139, 140, 923 P.2d 550 (1996). Inattention to incoming mail is insufficient proof of excusable neglect. Siewing v. Pierson Co., 226 Mont. 458, 461, 736 P.2d 120, 122 (1987); Griffin v. Scott, 218 Mont. 410, 412-13, 710 P.2d 1337, 1338 (1985). The Montana Supreme Court has also found that a moving party's contention that "personal problems drove all thought of lesser problems from his mind" was not

sufficient to establish excusable neglect, although the case does not explain what personal problems the party was having. Dudley v. Stiles, 142 Mont. 566, 386 P.2d 342 (1963).

Kellys cite Morris v. Frank Transportation Co., 184 Mont. 74, 601 P.2d 698 (1979). In Morris, the moving party stated that he "was ill and under a doctor's care, he left his business in the care of others resulting in his neglect of this lawsuit." Morris at 75. The Court found that excusable neglect was not shown, because "[t]here is nothing in the record to indicate that William Frank had specifically requested that some one else take the complaint to his attorney, nor that he was hospitalized or too sick to do it himself. Further, there was nothing to indicate that he was not properly served with the complaint...nor that he did not have notice of hearings..." Id. at 76.

The Morris case is distinguishable from the facts of this case. Mr. Borkoski has not simply attested that he was ill, but that he was caring for his wife who was dying of cancer, and that he was also ill, requiring time-consuming dialysis treatments three times a week, which left him physically weakened with his ability to conduct his business matters impaired. Further, it is not clear that the Foundation was properly served with notice of the case and of the hearings.

Kellys state that Mr. Borkoski is a "business man," and although they understand "how the death of Mr. Borkoski's wife could excuse the missing of a single filing date, Kellys are at a loss to understand how this event could expand to excuse a week, a month, a year or years of neglect." Kellys' Objection to Motion to Set Aside, p. 5. This Court disagrees that illness and the death of a spouse could only excuse the missing of a single filing date in all circumstances. Mr. Borkoski's affidavits do not set forth facts amounting to simple neglect of incoming mail, forgetfulness, or a single event of illness. The facts set forth in Mr. Borkoski's affidavits, regarding his spouse's illness and death, his own continuing illness, and possible lack of notice, establish excusable neglect on the part of the Foundation for its failure to participate in these water rights cases.

(3) Will the judgment be injurious to the DeSmet Foundation if allowed to stand?

Kellys' objection to the Foundation's motion argues that Kellys will be adversely impacted if the default is set aside, because Kellys have incurred attorneys fees and costs in participating in the adjudication and negotiating settlements with other parties. However, the inquiry as set forth in DEQ is not whether Kellys would be injured, but whether the judgment would be injurious to the DeSmet Foundation if allowed to stand. DEQ at 143.

The default judgment dismissing the Foundation's claims would be injurious to the Foundation. This element of the DEQ test is met.

(4) Has the DeSmet Foundation set forth potentially meritorious water right claims?

In DEQ, the Supreme Court held that when a court inquires into whether a party has offered a meritorious defense, it is not the court's function to determine factual issues or resolve the merits of the dispute, but instead is simply to determine whether the defendant has presented a prima facie defense. DEQ at 144, citing Blume v. Metropolitan Life Ins. Co., 242 Mont. 465, 470, 791 P.2d 784, 787 (1990). In Blume, the Court held that Metropolitan's proposed answer was sufficient to constitute a meritorious defense and that no affidavit of merit was required. Id. at 470.

When reviewing a motion to set aside the entry of default, it is not the court's function to determine factual issues or resolve the merits of the dispute, but instead the court is to simply determine whether the defaulting party has presented a prima facie defense. Resolution of doubt in finding a meritorious case should be resolved in favor of the defaulting party. Cribb at 31.

The Kellys place significant emphasis on Mr. Borkoski's attempts to stop the discharge of what Mr. Borkoski terms "vagrant flood waters" and Kellys term "waste waters" on the Foundation property. Mr. Borkoski states that these efforts were made to address problems with excess water upon the Foundation property, not to stop irrigation on the Foundation property.

Although the statements set forth in the Kellys' briefs and the Affidavit of Joe Thompson, if proven true, might potentially result in the dismissal of the Foundation's claims; pursuant to the standards in DEQ and Cribb the Court is not to determine factual issues or resolve the merits of the dispute at this stage, but simply to determine whether the facts as presented by the moving party state a prima facie case. Given these standards, the Statements of Claim and Mr. Borkoski's Affidavits are sufficient to establish a meritorious defense. Whether the defense ultimately proves to be compelling depends on the results of future proceedings.

Accordingly, it is

ORDERED that DeSmet Foundation's Motions to Set Aside Default are **GRANTED**.

ORDERED that the ownership interests of DeSmet Foundation in claims 76HF-W-005529-00 and 76H-W-214742-00 are **REINSTATED.**

ORDERED that DeSmet Foundation shall be added to the caption and service list for the above-entitled cases and shall receive notice of all future proceedings, and the Master shall set further proceedings as set forth in the Master's February 1, 2001 Court Minutes.

DATED this 5 day of March, 2002.

C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

I, Sherry Ford, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **ORDER GRANTING MOTION TO SET ASIDE DEFAULT AND REINSTATE INTEREST IN WATER RIGHT CLAIM** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

76HF-61
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DATED this 6th day of March, 2002..

Sherry Ford
Deputy Clerk