

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS COLABELLA and THERESA
COLABELLA d/b/a LOUIS A.
COLABELLA, INC. and POSTAL
CONNECTIONS,

Defendants.

Case No. 3:14-cv-00113-SLG

**ORDER RE MOTION TO VACATE DEFAULT JUDGMENT AND MOTION TO SET
ASIDE DEFAULT JUDGMENT**

At Docket 25 is Defendants' Motion to Vacate Default Judgment. The Government filed an opposition to the motion at Docket 30 and Defendant Louis Colabella filed a reply affidavit at Docket 31. Defendants also filed a Motion to Set Aside Default Judgment at Docket 32. The Government responded to that motion solely to assert that the motion "appears to be a duplicitous pleading" and referred the Court to its opposition to the Motion to Vacate.¹ Defendants are self-represented.² Oral argument was not requested on either motion and was not necessary to the Court's decision.

¹ Docket 34 (Opp'n) at 2.

² It is not entirely clear to the Court which Defendants are bringing each motion but the Government appears to interpret both of the motions to have been brought by all Defendants and the Court will construe them likewise.

BACKGROUND

On June 12, 2014, the Government brought this action on behalf of the United States Department of Homeland Security, U.S. Customs and Border Protection (CBP), seeking to recover a civil penalty that CBP alleged it issued to Defendants on March 23, 2011.³ The Government alleged that CBP officers in Anchorage examined a shipment from China destined for one of the Defendants. The Government also alleged that “[t]he CBP officers determined that the shipment infringed upon a trademark,” seized the shipment, and administratively forfeited the merchandise.⁴ The Summons and Complaint were served on Theresa Colabella on June 23, 2014, by U.S. certified mail, and on Louis Colabella’s lawyer by U.S. certified mail on August 14, 2014.⁵

On September 17, 2014, the Clerk of Court entered defaults against Defendants Louis Colabella and Theresa Colabella pursuant to Rule 55 of the Federal Rules of Civil Procedure.⁶ On September 26, 2014, default judgments were entered against Louis Colabella for a total amount of \$132,643.58 plus post-judgment interest and against

³ Docket 1 (Compl.) at 2-3. The Government also sought interest, penalty charges, and costs. Docket 1 (Compl.) at 4.

⁴ Docket 1 (Compl.) at 2-3.

⁵ See Docket 4 (Decl. of Service) at ¶ 2 and Docket 9 (Decl. of Service) at ¶ 2. Defendants do not dispute that they were each served with the Summons and Complaint. See Docket 25-2 (Summons and Complaint) at 2-8; see also Docket 26 (Aff. of Louis Colabella) at ¶ 4 (“This lawsuit was commenced by the service of a summons and complaint upon myself, my wife and my business.”).

⁶ Dockets 14 and 15, respectively.

Theresa Colabella for the slightly different amount of \$132,634.54 plus post-judgment interest.⁷

DISCUSSION

“A default judgment ‘is a drastic step appropriate only in extreme circumstances; a case should whenever possible be decided on the merits.’”⁸ Rule 55(c) of the Federal Rules of Civil Procedure provides that a court may set aside a default judgment under Rule 60(b). Rule 60(b) provides that:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

“Rule 60(b) is remedial and must be liberally applied.”⁹ Defendants do not specify under which prong they are moving but, based on their assertions, the Court will consider the motion to be brought pursuant to Rule 60(b)(1)’s “excusable neglect” prong.

⁷ See Dockets 22 and 23, respectively.

⁸ *U.S. v. Aguilar*, 782 F.3d 1101, 1106 (9th Cir. 2015) (quoting *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984)).

⁹ *Aguilar*, 782 F.3d at 1106.

The Ninth Circuit has held that “[w]here a defendant seeks relief under Rule 60(b)(1) based upon ‘excusable neglect,’ the court applies the same three factors governing the inquiry into ‘good cause’ under Rule 55(c).”¹⁰ These factors, termed the *Falk* factors, are “(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default.”¹¹ A court may deny relief if any of the three factors is true.¹²

The Government “does not contend that it would be significantly prejudiced by vacating the default judgment.”¹³ Accordingly, the Court will consider only whether Defendants may have a meritorious defense and whether their conduct was culpable. Mr. Colabella asserts that he “meets all three prongs in the standard to vacate a default.”¹⁴

a. Meritorious Defense

Louis Colabella’s affidavit in support of his Motion to Vacate asserts that he “had no knowledge of the merchandise.”¹⁵ Mr. Colabella also asserts that the cases cited by the Government support his claim of a meritorious defense.¹⁶ He states that he did “not

¹⁰ *Brandt v. American Bankers Ins. Co. of Florida*, 653 F.3d 1108, 1111 (9th Cir. 2011).

¹¹ *Id.* (quoting *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984)).

¹² *Brandt*, 653 F.3d at 1111.

¹³ Docket 30 (Opp’n) at 4.

¹⁴ Docket 31 (Reply Aff.) at ¶ 2.

¹⁵ Docket 26 (Aff. of Louis Colabella) at ¶ 5.

¹⁶ Docket 31 (Reply Aff.) at ¶ 2.

know the shipper, and upon further investigation the shippers information turned out to be fraudulent and I was not given an opportunity to reject the shipment”¹⁷

The Government asserts that Defendants’ only defense – lack of knowledge – is unsupported and not meritorious.¹⁸ The Government cites to *United States v. Real Property Located at 3846 Nisenan Lane* to argue that “Defendants’ mere assertion that they lacked knowledge of the illegal activity is insufficient to create a genuine issue of material fact.”¹⁹ However, that case did not involve a default judgment or a mailed package that never arrived at its intended destination. Moreover, the claimant in that case had made admissions under oath during a plea colloquy as to her knowledge that the illegal property – marijuana in that case – was being grown and stored on her property.²⁰ Accordingly, the Court finds that the Colabellas may have a meritorious defense.²¹

b. Culpable Conduct

The Ninth Circuit has held that a defendant’s conduct is culpable “if he has received actual or constructive notice of the filing of the action and *intentionally* failed to answer.”²²

¹⁷ Docket 31 (Reply Aff.) at ¶ 4.

¹⁸ Docket 30 (Opp’n) at 5-7.

¹⁹ Docket 30 (Opp’n) at 6.

²⁰ See *United States v. Real Property Located at 3846 Nisenan Lane*, No. 06-cv-1383, 2009 WL 2777178, at *4 (E.D. Cal. 2009).

²¹ It is also not clear to the Court whether service of the Summons and Complaint upon Louis Colabella, which was delivered to his attorney by U.S. certified mail, was proper, as there does not appear to be any assertion from the Government that the attorney was authorized to accept service.

²² *U.S. v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1092 (9th Cir. 2010) (quoting *TCI Group Life Ins. Plan. v. Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001) (emphasis

The defendant “must have acted with bad faith, such as an ‘intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process.’ . . . We have “typically held that a defendant’s conduct was culpable . . . where there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond.”²³

Mr. Colabella states that he “did not answer the summons and complaint because I believed my attorney . . . was negotiating with the plaintiff’s attorney and that a judgment would not be entered.”²⁴ He states that his lawyer had been “helping me out and attempting to negotiate some type of settlement” and, accordingly, he is not culpable.²⁵ Likewise, Theresa Colabella states that “I believed that my husband was taking care of this matter through [his lawyer].”²⁶ Mr. Colabella refers the Court to copies of correspondence between the Government and his lawyer in Docket 25-4, which contains only October 2014 correspondence from the Government to Mr. Colabella’s lawyer. Docket 25-3 contains correspondence between CBP and Mr. Colabella from August through October of 2011. Mr. Colabella also filed an affirmation from his lawyer, who states that she communicated with the Government “in an attempt to resolve this matter amicably” but “[w]ithout [her] knowledge a judgment was entered against the

in original), *overruled in part on other grounds by Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001)).

²³ *U.S. v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1092 (9th Cir. 2010) (quoting *TCI Group Life Ins. Plan. v. Knoebber*, 244 F.3d 691, 697-98 (9th Cir. 2001)).

²⁴ Docket 26 (Aff. of Louis Colabella) at ¶ 8.

²⁵ Docket 31 (Reply Aff.) at ¶ 2b.

²⁶ Docket 27 (Aff. of Theresa Colabella) at ¶ 5.

defendant.”²⁷ The lawyer’s affirmation states that “Mr. Colabella brought me certain papers in connection with this lawsuit in October, 2014.”²⁸ And yet, as noted above, service of the Summons and Complaint was apparently made on the lawyer in August of 2014.

The Government asserts in opposition to Defendants’ motion to vacate that Defendants’ conduct in the default was culpable because “Defendants seek to gain an advantage through their default” and the motion “is simply a continuation of conduct exhibited during the administrative and pre-default phases of the case: claim ignorance; stall for time; fail to provide any evidence to support their defense.”²⁹

The default and default judgments were entered in September of 2014, so Mr. Colabella’s communications with his lawyer in October 2014 do not explain his failure to respond to the Complaint after it was filed in June. On the other hand, the Government served the Summons and Complaint on Mr. Colabella through his lawyer on August 14, 2014, which lends credence to his assertions that he believed his lawyer was negotiating with the Government at that time. After reviewing the sworn statements of the Colabellas and Mr. Colabella’s lawyer, as well as the correspondence in the record, the Court is not persuaded that Defendants’ default constituted “devious, deliberate, willful, or bad faith failure to respond.”

²⁷ Docket 33-1 (Aff’m of Sharon Silver) at ¶ 2-3.

²⁸ Docket 33-1 (Aff’m of Sharon Silver) at ¶ 2.

²⁹ Docket 30 (Opp’n) at 5.

Because the Court finds that none of the *Falk* factors apply here, the Court will grant Defendants' motion to set aside the default judgments and, for the same reasons, will set aside the defaults.

Mr. Colabella requests that the case be transferred to New York because "[i]t would be another violation of my constitutional rights to require me to defend this case in Alaska where I do not conduct any business have no contacts whatsoever and am unable to afford an attorney" ³⁰ This request is denied without prejudice to properly file a motion to transfer this case to New York. Any such motion must be filed in accordance with the Federal Rules of Civil Procedure. Defendants must serve an answer or responsive motion within 14 days of the date of this Order.

CONCLUSION

Based on the foregoing, IT IS ORDERED that the Defendants' Motion to Set Aside Default Judgment at Docket 32 is GRANTED and Defendants' Motion to Vacate Default Judgment at Docket 25 is DENIED as moot. The Clerk of Court is directed to set aside the defaults at Dockets 14 and 15 and the default judgments at Dockets 22 and 23. Defendants shall serve an answer or responsive motion within **14 days** from the date of this Order.

DATED this 27th day of May, 2015 at Anchorage, Alaska.

/s/ Sharon L. Gleason
United States District Judge

³⁰ Docket 31 (Reply Aff.) at ¶ 7.