

1 **WO**

2

3

4

5

6

**UNITED STATES DISTRICT COURT**

7

**DISTRICT OF ARIZONA**

8

9

Alberto Sanchez Ibarra and Martha Gayou)  
Matiella, husband and wife; et al.,

CIV 13-2371 TUC JGZ (LAB)

10

Plaintiffs,

11

v.

**REPORT AND  
RECOMMENDATION**

12

Kennedy Funding, Inc., a foreign corporation; et  
al.,

13

Defendants.

14

15

Pending before the court is a motion to set aside entry of default, filed by the defendant,

16

Kennedy Funding Inc. (Doc. 7)

17

This action arises out of a loan in the amount of \$3.46 million made by the defendant,

18

Kennedy Funding, Inc., to the defendant, Fuentes, Gomez & Associates, LLC. (FG&A). The

19

loan was secured by a mortgage on certain property in Mexico, granted by the plaintiffs. FG&A

20

defaulted on the loan, and Kennedy Funding has been unable to foreclose on the Mexican

21

property. Kennedy Funding now claims the individual plaintiffs are liable for the debt. The

22

plaintiffs seek, among other things, a declaratory judgment stating they are not indebted to

23

Kennedy Funding for any amount. They assert any documents to the contrary are forgeries.

24

In the pending motion, the defendant, Kennedy Funding, moves that this court set aside default

25

entered against it pursuant to Fed.R.Civ.P. 55(c).

26

The case has been referred to Magistrate Judge Bowman for report and recommendation

27

pursuant to the Local Rules of Practice. LRCiv 72.1.

28

1           Background

2           This action was originally filed in Santa Cruz County Superior Court on October 29,  
3 2013. (Doc. 1-4, p. 2) The defendant, Kennedy Funding, was served on November 21, 2013.  
4 (Doc. 7, p. 2)

5           Counsel for Kennedy Funding telephoned the plaintiffs’ counsel and asked for a 30-day  
6 extension of the deadline for responding to the complaint because he had just been retained and  
7 had travel commitments during the holidays. The plaintiffs’ counsel agreed to the extension,  
8 and counsel for Kennedy Funding followed up with an email explaining he would “have a  
9 stipulation put together and send it over to you.” (Doc. 7-1, p. 2)

10           Shortly afterwards, Kennedy Funding removed the case to this court alleging diversity  
11 jurisdiction. The plaintiffs’ counsel was apparently perturbed by the change in jurisdiction and  
12 revoked his agreement to an extension of the deadline. (Doc. 7-1, p. 5) Counsel for Kennedy  
13 Funding responded that his need was genuine and his actions were reasonable. He further  
14 explained that if plaintiffs’ counsel insisted on rescinding the extension, then he would have no  
15 choice but to file a motion for an extension of time. (Doc. 7-1, p. 4)

16           Counsel for Kennedy Funding regrettably did not file that motion, and when the time for  
17 filing a responsive pleading ran out, the plaintiffs moved that the Clerk enter default pursuant  
18 to Fed.R.Civ.P. 55(a). Default was entered on January 2, 2014. (Doc. 5)

19           On January 3, 2014, Kennedy Funding filed the pending motion to set aside the default  
20 pursuant to Fed.R.Civ.P. 55(c).

21  
22           Discussion

23           “The court may set aside an entry of default for good cause . . . .” Fed.R.Civ.P. 55(c).  
24 “To determine ‘good cause’, a court must consider three factors: (1) whether the party seeking  
25 to set aside the default engaged in culpable conduct that led to the default; (2) whether it had  
26 no meritorious defense; or (3) whether reopening the default . . . would prejudice the other  
27 party.” *U.S. v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9<sup>th</sup>  
28

1 Cir. 2010) (punctuation modified) “This standard, which is the same as is used to determine  
2 whether a default judgment should be set aside under Rule 60(b), is disjunctive, such that a  
3 finding that any one of these factors is true is sufficient reason for the district court to refuse to  
4 set aside the default.” *Id.* “Crucially, however, judgment by default is a drastic step appropriate  
5 only in extreme circumstances; a case should, whenever possible, be decided on the merits.”  
6 *Id.*

7 The court first considers whether Kennedy Funding engaged in “culpable conduct.” “A  
8 defendant’s conduct is culpable if he has received actual or constructive notice of the filing of  
9 the action and intentionally failed to answer.” *U.S. v. Signed Personal Check No. 730 of Yubran*  
10 *S. Mesle*, 615 F.3d 1085, 1092 (9<sup>th</sup> Cir. 2010). “[I]n this context the term ‘intentionally’ means  
11 that a movant cannot be treated as culpable simply for having made a conscious choice not to  
12 answer; rather, to treat a failure to answer as culpable, the movant must have acted with bad  
13 faith, such as an intention to take advantage of the opposing party, interfere with judicial  
14 decisionmaking, or otherwise manipulate the legal process.” *Id.* (punctuation modified)

15 Here, Kennedy Funding’s failure to file a timely answer was not culpable conduct.  
16 Although counsel knowingly failed to file a response to the complaint within the original  
17 deadline, he apparently believed that the plaintiffs’ counsel had stipulated to an extension of the  
18 deadline and that this stipulation could not be retracted. Counsel directs the court to LRCiv 83.7  
19 and argues that under this Rule, the stipulation was binding because it was memorialized in  
20 writing in an email. Counsel is wrong. The Local Rules notwithstanding, counsel may not  
21 extend any deadlines without a court order. *In re Sonoma V*, 703 F.2d 429, 431 (9<sup>th</sup> Cir. 1983).  
22 Here, there was no court order, the deadline was not extended, and Kennedy Funding was in  
23 default. The default stemmed, however, from ignorance, not bad faith. Accordingly, the court  
24 concludes Kennedy Funding’s failure to file a timely answer was not culpable conduct.

25 “A defendant seeking to vacate a default judgment must present specific facts that would  
26 constitute a defense.” *U.S. v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d  
27 1085, 1094 (9<sup>th</sup> Cir. 2010). “But the burden on a party seeking to vacate a default judgment is  
28

1 not extraordinarily heavy.” *Id.* “All that is necessary to satisfy the ‘meritorious defense’  
2 requirement is to allege sufficient facts that, if true, would constitute a defense . . . .” *Id.*

3 In this case, Kennedy Funding affirmatively asserts that the documents filed by the  
4 plaintiff as exhibits to the complaint establish the plaintiff’s liability for the loan. (Doc. 7, pp.  
5 5-6) These documents are the Loan and Security Agreement; Promissory Note; Guarantee; and  
6 Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and Reports. *Id.*  
7 Kennedy Funding further asserts that none of the documents are forgeries. Kennedy Funding  
8 has alleged sufficient facts to constitute a meritorious defense for the purposes of Rule 55(c).

9 Finally, Kennedy Funding filed the pending motion to set aside the default one day after  
10 default was entered. Setting aside the entry of default would not prejudice the plaintiffs. The  
11 plaintiffs do not argue to the contrary. (Doc. 11)

12 Kennedy Funding’s default was not the result of culpable conduct. Kennedy Funding  
13 asserts a meritorious defense, and the plaintiffs would not be prejudiced if the entry of default  
14 were set aside. The court concludes that Kennedy Funding has established good cause to set  
15 aside the entry of default pursuant to Fed.R.Civ.P. 55(c).

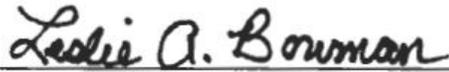
### 16 17 Recommendation

18 The Magistrate Judge recommends the District Court, after its independent review of the  
19 record, enter an order GRANTING the motion to set aside entry of default, filed by the  
20 defendant, Kennedy Funding Inc. (Doc. 7) If the District Court grants the pending motion, the  
21 court should give Kennedy Funding 20 days within which to file an Answer and a response to  
22 the pending motion to remand (Doc. 13)

23 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within  
24 14 days of being served with a copy of this report and recommendation. If objections are not  
25 timely filed, the party’s right to de novo review may be waived. *See U. S. v. Reyna-Tapia*, 328  
26 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003) (en banc), *cert. denied*, 540 U.S. 900 (2003). The Local Rules  
27

1 permit the filing of a response to an objection. They do not permit the filing of a reply to a  
2 response.

3 DATED this 4<sup>th</sup> day of February, 2014.

4  
5 

6 \_\_\_\_\_  
7 Leslie A. Bowman  
8 United States Magistrate Judge  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28