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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ZOOM ELECTRIC, INC.,

No. C 11-1699 CW

Petitioner,

ORDER DENYING
MOTION TO SET
ASIDE DEFAULT
(Docket No. 125)

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 595,
and DOES 1-20,

Respondents.

_____ /

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 595;
ALAMEDA COUNTY ELECTRICAL
INDUSTRY SERVICE CORPORATION;
IBEW LOCAL 595 HEALTH & WELFARE
TRUST FUND; IBEW LOCAL 595
PENSION TRUST FUND; IBEW LOCAL
595 MONEY PURCHASE PENSION TRUST
FUND; IBEW LOCAL 595 VACATION
FUND; IBEW LOCAL 595 APPRENTICE &
TRAINING FUND; ELECTRICAL
CONTRACTORS TRUST; CONTRACT
ADMINISTRATION FUND; LABOR
MANAGEMENT COOPERATION FUND;
VICTOR UNO; and DON CAMPBELL,

Counter-Plaintiffs,

v.

ZOOM ELECTRIC, INC.; VEIKO HORAK;
B-SIDE, INC.; and DOES ONE
through TEN, inclusive,

Counter-Defendants.

_____ /

United States District Court
For the Northern District of California

1 B-SIDE, INC.,

2 Cross-Claimant,

3 v.

4 VEIKO HORAK, doing business as
5 ZOOM ELECTRIC,

6 Cross-Defendant.

7 _____/
8 Cross-Defendant Veiko Horak moves to set aside the default
9 entered against him on December 5, 2012. Cross-Plaintiff B-Side,
10 Inc. opposes the motion. The Court takes the motion under
11 submission on the papers and DENIES it.

12 BACKGROUND

13 On August 15, 2012, B-Side filed a cross-claim against Horak,
14 doing business as Zoom Electric, a sole proprietorship. Docket
15 No. 105. B-Side did not name Zoom Electric, Inc. as a Cross-
16 Defendant. The cross-claim was served upon Horak through the
17 electronic filing system upon his attorney of record, Benjamin
18 Martin. At that time, Martin had represented both Horak and Zoom
19 Electric, Inc.

20 On August 28, 2012, Horak filed a notice of substitution of
21 attorney removing Martin and substituting himself in pro per.
22 Docket No. 106.

23 On October 25, 2012, the Court held a hearing on several
24 motions. Docket No. 119. At that time, Horak stated that he no
25 longer was represented by Martin because Martin had previously
26 represented both him and B-Side, and that Martin had "pretty much
27 told me that the case is over, there was nothing I can do." The
28 Court told him that there was something he could do: that he could

1 file an answer to B-Side's cross-claim, although it was already
2 overdue, and that if he did not, he might be liable for anything
3 that B-Side was ordered to pay. Horak responded that, in that
4 case, he would like additional time to hire a new attorney and to
5 file an answer. The Court permitted Horak an additional twenty-
6 eight days to file an answer and directed B-Side to seek entry of
7 default if he did not do so. The Court also provided Horak with
8 information regarding the Legal Help Center, a free service
9 provided by the Bar Association of San Francisco to provide
10 information and limited-scope legal assistance to pro se litigants
11 in civil cases in the district.

12 On December 3, 2012, thirty-nine days after the hearing, B-
13 Side moved for entry of default. Docket No. 120.

14 On December 5, 2012, Zoom Electric, Inc. filed a notice of
15 substitution of attorney removing Martin as its counsel and
16 substituting Eric Milliken in his place. Docket No. 121. Veiko
17 Horak signed the substitution on behalf of Zoom Electric. Id. In
18 the instant motion, Milliken represents that, on or about that
19 date, Horak also retained him to represent Horak himself. Mot. at
20 4. However, no corresponding notice was filed to substitute
21 Milliken as counsel for Horak himself.

22 On December 5, 2012 as well, Milliken contacted B-Side's
23 counsel and left a message stating that he would be representing
24 Horak and inquired about B-Side voluntarily vacating its entry of
25 default. Last Decl., Docket No. 126, ¶ 3; Milliken Decl., Docket
26 No. 125-1, ¶ 3. On that same day, the Clerk entered Horak's
27 default. Docket No. 122.

28

1 On December 11, 2012, Horak filed the instant motion to set
2 aside the default. Docket No. 125.

3 On December 26, 2012, B-Side filed its six-page opposition to
4 Horak's motion. Docket No. 126. B-Side attached to its
5 opposition a separate, one-page evidentiary objection to portions
6 of Milliken's declaration in support of the motion. Docket No.
7 126-2.¹

8 Pursuant to Civil Local Rule 7-3(c), Horak's deadline to file
9 a reply in support of his motion was January 2, 2013. No reply
10 was filed.

11 LEGAL STANDARD

12 Federal Rule of Civil Procedure 55(c) provides that a court
13 "may set aside an entry of default for good cause." The district
14 court has discretion to determine whether a party demonstrates
15 "good cause." Madsen v. Bumb, 419 F.2d 4, 6 (9th Cir. 1969). The
16 court's discretion is particularly broad where a party seeks to
17 set aside an entry of default rather than a default judgment.
18 Mendoza v. Wight Vineyard Mgmt., 783 F.2d 941, 945 (9th Cir.
19 1986). "This is because in the Rule 55 context there is no
20 interest in the finality of the judgment with which to contend."
21 United States v. Signed Personal Check No. 730 of Yubran S. Mesle
22 (Mesle), 615 F.3d 1085, 1091 n.1 (9th Cir. 2010).

23
24
25 ¹ Pursuant to Civil Local Rule 7-3(a), any evidentiary or
26 procedural objections to the motion were required to be contained
27 in the opposition brief itself. Because B-Side's opposition brief
28 and evidentiary objections together total significantly less than
the twenty-five page limit, the Court excuses B-Side's improper
filing of its evidentiary objections as a separate document.

1 In evaluating whether a party has demonstrated good cause, a
2 district court may consider the following factors, which courts
3 refer to as the "Falk factors": (1) whether the defendant's
4 culpable conduct led to the default; (2) whether the defendant has
5 a meritorious defense; and (3) whether setting aside the default
6 would prejudice the plaintiff. Brandt v. Am. Bankers, 653 F.3d
7 1108, 1111 (9th Cir. 2011) (citing Falk v. Allen, 739 F.2d 461,
8 463 (9th Cir. 1984)); see also Mesle, 615 F.3d at 1091 & n.1
9 (noting that the same test applies for motions seeking to set
10 aside entry of default and relief from a default judgment,
11 although it is applied more liberally in the former context). The
12 standard is disjunctive and "the district court is free to deny
13 relief if any of the three factors is true." Brandt, 653 F.3d at
14 1111 (quoting Franchise Holding II, LLC v. Huntington Restaurants
15 Group, Inc., 375 F.3d 922, 926 (9th Cir. 2004)) (internal
16 quotation marks and formatting omitted). Thus, "a finding of
17 culpability on the part of a defaulting defendant is sufficient to
18 justify the district court's exercise of its discretion to deny
19 relief." Id.

20 Default judgments are "ordinarily disfavored" because
21 "[c]ases should be decided upon their merits whenever reasonably
22 possible." Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986).
23 Thus, whenever "timely relief is sought from the default . . . and
24 the movant has a meritorious defense," a court should resolve any
25 doubt in favor of setting aside the default. Mendoza, 783 F.2d at
26 945-46 (quoting Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th
27 Cir. 1974)) (internal quotation marks omitted; ellipses in
28 original). The party seeking to vacate the entry of default bears

1 the burden of demonstrating that these factors favor doing so.
2 TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir.
3 2001).

4 DISCUSSION

5 I. Culpable conduct

6 Horak argues that he did not act culpably or intentionally
7 fail to answer. He explains that, due to his lack of knowledge of
8 the legal system and limited English comprehension, at the time he
9 retained new counsel, he did not understand that he should have
10 filed an answer and thought that he needed only to file a case
11 management statement. B-Side objects to Milliken's declaration in
12 support of these facts and argues that Horak's conduct was
13 culpable, pointing out that the Court specifically told Horak of
14 the need to file an answer, and that Horak did not require the aid
15 of an interpreter at his deposition in this case.

16 "[A] defendant's conduct is culpable if he has received
17 actual or constructive notice of the filing of the action and
18 intentionally failed to answer.'" Mesle, 615 F.3d at 1092
19 (quoting TCI Group, 244 F.3d at 697) (brackets and emphasis in
20 original). The Ninth Circuit has explained that "in this context
21 the term 'intentionally' means that a movant cannot be treated as
22 culpable simply for having made a conscious choice not to answer"
23 or for having demonstrated "simple carelessness." Id. Instead,
24 "to treat a failure to answer as culpable, the movant must have
25 acted with bad faith, such as an 'intention to take advantage of
26 the opposing party, interfere with judicial decisionmaking, or
27 otherwise manipulate the legal process.'" Id. (quoting TCI Group,
28 244 F.3d at 697); see also id. at 1094 (concluding it was error to

1 find a defendant's conduct culpable based on "his failure to act
2 after being notified of the need to do so, in the absence of any
3 indication that he acted in bad faith"). The Ninth Circuit has
4 typically found culpability only if "'there is no explanation of
5 the default inconsistent with a devious, deliberate, willful, or
6 bad faith failure to respond.'" Id. at 1092 (quoting TCI Group,
7 244 F.3d at 698); see also TCI Group, 244 F.3d at 697 ("Neglectful
8 failure to answer as to which the defendant offers a credible,
9 good faith explanation negating any intention to take advantage of
10 the opposing party, interfere with judicial decisionmaking, or
11 otherwise manipulate the legal process is not 'intentional.'").
12 The Ninth Circuit has only found culpability based simply on the
13 failure to answer after being provided with notice in some limited
14 circumstances in which the moving party was "a legally
15 sophisticated entity or individual," and has specifically
16 cautioned against such a finding when the individual was "not a
17 lawyer" and "was unrepresented at the time of the default." Id.
18 at 1093.

19 The central dispute is whether Horak has submitted a
20 credible, good faith explanation negating bad faith. To support
21 the facts asserted in his motion regarding the reasons for his
22 failure to answer, Horak has submitted the declaration of his
23 attorney only and has not offered his own declaration. In
24 Milliken's declaration, he asserts,

25 The Defendant's lack of knowledge of the U.S. legal
26 system, coupled with his limited comprehension of the
27 English language, has resulted in the Defendant missing
28 the deadline for answering the complaint. When the
Defendant retained my services he was under the
impression that the only document that needed to be
submitted was the case management statement. He did not

1 intentionally fail to answer. To the contrary, he
2 retained my services because he was aware that something
3 needed to be done, but lacked the understanding of the
4 U.S. legal system to understand what needed to be done.
5 . . . The Defendant did not miss the deadline to answer
6 for any willful reason.

7 Milliken Decl. ¶¶ 2-3. B-Side objects to these statements as
8 "inadmissible hearsay, a non-expert opinion, and argument."
9 B-Side's Objections to the Milliken Decl., Docket No. 126-2,
10 ¶¶ 1-2. Horak has not responded to B-Side's evidentiary
11 objections.

12 The Court sustains B-Side's unopposed objections to these
13 portions of the declaration. Although Milliken does not directly
14 repeat the out-of-court statements that Horak made to him,
15 Milliken's recitation of Horak's beliefs at the time that he was
16 retained or reasons for his inaction is based on inadmissible
17 hearsay, offered to establish that Horak in fact had those beliefs
18 and reasons. Further, Milliken presents his opinion as to the
19 reasons that Horak failed to act but does not lay any proper
20 foundation for its admission as rationally based on his personal
21 observation and recollection of concrete facts. See United States
22 v. Beck, 418 F.3d 1008, 1015 (9th Cir. 2005); Federal Rule of
23 Evidence 701 (addressing opinion testimony by lay witnesses). In
24 addition, Milliken impermissibly includes in his declaration
25 statements that consist of legal conclusions and argument, in
26 violation of Civil Local Rule 7-5.

27 To support the facts outside of the record underlying his
28 assertions that his conduct was excusable, Horak was required to
submit admissible evidence. See SEC v. McNulty, 137 F.3d 732, 739
(2d Cir. 1998) (neglect in failing to answer was willful and not
excusable where record contained no affidavit with a satisfactory

1 explanation); In re Stone, 588 F.2d 1316, 1319 (10th Cir. 1978)
2 (distinguishing between the requirement to provide evidence of
3 excusable neglect and alleging a meritorious defense); Moore's
4 Federal Practice, § 55.71[2] (addressing Federal Rule of Civil
5 Procedure 43(c), which relates to the proffer of evidence on a
6 motion, in the context of a motion to set aside entry of default).
7 That Milliken's opinions are at least arguably inconsistent with
8 the exchange at the October 25 hearing, at which Milliken was not
9 present, and with the fact that Horak was able to testify
10 competently without an interpreter at his deposition in this
11 matter makes competent evidence even more important.

12 Accordingly, Horak has not met his burden to offer a credible
13 and good faith explanation for his failure to answer.

14 II. Meritorious defense

15 "A defendant seeking to vacate a default judgment must
16 present specific facts that would constitute a defense. But the
17 burden on a party seeking to vacate a default judgment is not
18 extraordinarily heavy.'" Mesle, 615 F.3d at 1094 (quoting TCI
19 Group, 244 F.3d at 700). "All that is necessary to satisfy the
20 'meritorious defense' requirement is to allege sufficient facts
21 that, if true, would constitute a defense: 'the question whether
22 the factual allegation [i]s true' is not to be determined by the
23 court when it decides the motion to set aside the default." Id.
24 (quoting TCI Group, 244 F.3d at 700). However, a "'mere general
25 denial without facts to support it' is not enough to justify
26 vacating a default or default judgment." Franchise Holding II,
27 375 F.3d at 926 (quoting Madsen v. Bumb, 419 F.2d 4, 6 (9th Cir.
28 1969)). The underlying concern "is to determine whether there is

1 some possibility that the outcome of the suit after a full trial
2 will be contrary to the result achieved by the default." Haw.
3 Carpenters' Trust Funds v. Stone, 794 F.2d 508, 513 (9th Cir.
4 1986).

5 In this action, B-Side is being charged with liability for
6 certain claims made against Zoom Electric, Inc. under California
7 law on the basis that the latter entity was unlicensed and B-Side
8 had hired it as a subcontractor. In the cross-claim, B-Side
9 alleges that it entered into a contract with Horak, who was a
10 licensed electrical subcontractor doing business as Zoom Electric,
11 a sole proprietorship, and that, after B-Side had signed the
12 contract, the contract was modified by adding "Inc." after "Zoom
13 Electric" on the signature block in order to state that Zoom
14 Electric, Inc. was the subcontractor instead of Horak. Cross-
15 Claim ¶¶ 6-7. B-Side further contends that, under the agreement,
16 whether between it and Horak as a sole proprietor or it and Horak
17 as the alter ego of Zoom Electric Inc., Horak had agreed to
18 indemnify it for any liability it incurred in the instant suit.
19 Id. at ¶¶ 9-14.

20 In the instant motion, in support of his argument that he has
21 a meritorious defense, Horak states only,

22 B-Side has accused the Defendant of fraud by adding
23 "Inc." after his Business Name, after the contract was
24 signed, which functionally changed the contracting
25 business entity. However B-Side has offered no facts to
26 back-up this meritless accusation. The fact is that B-
27 Side was the drafter of the contract and either
28 intentionally or negligibly had my client sign a
contract with the wrong party's names. The Defendant
can establish the necessary facts to defend himself
against these meritless accusations.

1 Mot. at 5. Horak has not submitted a proposed answer. B-Side
2 responds that this is insufficient and that Horak did not submit a
3 declaration or any other specific facts to support his allegation
4 that B-Side was responsible for the incorrect name on the
5 contract. Opp. at 5.

6 Although Horak need meet only a minimal burden here, the
7 averments that he has made in his motion are plainly insufficient
8 to carry this burden. The only factual assertion that Horak made,
9 that B-Side, the drafter, intentionally or negligently had Horak
10 sign a contract with the wrong name, Zoom Electric, Inc., does not
11 constitute a defense to B-Side's claim that it is entitled to
12 indemnification from Horak under the agreement whether it was
13 between B-Side and Horak, doing business as Zoom Electric, or
14 Horak, as the alter ego of Zoom Electric, Inc. His general
15 proclamation that he would be able to establish the necessary
16 facts to defend himself is not enough to justify vacating a
17 default.

18 Accordingly, Horak has not met his burden to allege
19 sufficient facts that would constitute a defense if ultimately
20 proven to be true.

21 III. Prejudice

22 Setting aside a default is considered prejudicial if it
23 results "in greater harm than simply delaying resolution of the
24 case." TCI Group, 244 F.3d at 701. The proper inquiry is whether
25 the opposing party's "ability to pursue his claim will be
26 hindered." Id. (quoting Falk, 739 F.2d at 463). To be considered
27 prejudicial, a "delay must result in tangible harm such as loss of
28 evidence, increased difficulties of discovery, or greater

1 opportunity for fraud or collusion." Id. (citing Thompson v.
2 American Home Assur. Co., 95 F. 3d 429, 432 (6th Cir. 1996)).

3 Horak argues that B-Side would suffer no prejudice if his
4 default were set aside. B-Side responds that it would because the
5 motion was untimely and it is scheduled for hearing shortly before
6 the trial in this matter is set to commence. Because B-Side
7 points to no prejudice other than the delaying of the resolution
8 of this matter, which does not constitute prejudice for this
9 purpose, Horak has met his burden of demonstrating that this
10 factor favors relieving him of his default.

11 IV. Summary

12 Even in light of the preference of resolving claims on their
13 merits, the Court finds that the Falk factors favor denial of the
14 motion, particularly because to set aside Horak's default "in the
15 absence of some showing of a meritorious defense would cause
16 needless delay and expense to the parties and court system." Haw.
17 Carpenters' Trust Funds, 794 F.2d at 513.

18 CONCLUSION

19 For the reasons set forth above, the Court DENIES Horak's
20 motion (Docket No. 125).

21 IT IS SO ORDERED.

22
23 Dated: 1/17/2013

24 
25 _____
26 CLAUDIA WILKEN
27 United States District Judge
28