

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND (SOUTHERN DIVISION)**

THE CIT GROUP/EQUIPMENT FINANCING, INC., *

PLAINTIFF, *

v. * **CASE No.: 08-CV-01255 RWT**

PHOENIX PRINTING, INC., et al., *

DEFENDANTS. *

* * * * *

**PLAINTIFF’S REPLY IN SUPPORT OF ITS MOTION FOR ENTRY OF ORDER OF DEFAULT
AND DEFAULT JUDGMENT AS TO DEFENDANT ROSCO LOCKHART**

Plaintiff, The CIT Group/Equipment Financing, Inc. (“CIT”), by its counsel, Leitess Leitess Friedberg + Fedder and Steven N. Leitess, files this Reply in Support of its Motion for Entry of Order of Default and Default Judgment as to Defendant Rosco Lockhart (“Motion for Default”). In support thereof states:

ARGUMENT

Mr. Lockhart failed to plead or otherwise defend within the time required by Federal Rules of Civil Procedure 12(a)(1)(A)(i). In response and in conformance with Federal Rules of Procedure 55(a) & (b), CIT filed a Motion for Default Judgment on August 5, 2008. On August 19, 2008, more than two months after the time allowed under the Federal Rules of Civil Procedure 12(a)(1)(A)(i), Mr. Lockhart filed his Answer to CIT’s Complaint along with a Response in Opposition to CIT’s Motion for Entry of Order of Default and Default Judgment (“Opposition”). As addressed in a separate motion, Mr. Lockhart’s Answer should be stricken as it was filed without leave of the

Court. CIT's Motion for Default should be granted, as Mr. Lockhart's Opposition fails to provide this Court with a valid basis to deny it.

I. Mr. Lockhart Failed to Provide this Court with a Valid Reason to Deny CIT's Motion for Default.

In his Opposition, Mr. Lockhart supplies an Affidavit in support of the claim that he was in Turkey at the time that the process server claims to have served Mr. Lockhart with CIT's Complaint and that he was first made aware of the lawsuit by his wife upon his return to the United States. See Lockhart Affidavit at ¶¶5-6. Although he doesn't provide an exact date for his return to the United States, Mr. Lockhart sets out a timeline between June and early August in which he became aware of the instant litigation and his duty to defend. *Id.* at ¶¶ 5-14. Ultimately Mr. Lockhart asserts that he has numerous claims and defenses in the instant litigation, although neither his Opposition or Answer journey to mention any information to support them, and he places the blame for his ignorance of CIT's Complaint against him on faulty service of process. *Id.* at ¶ 17.

Specifically, in his Opposition and Affidavit, Mr. Lockhart supplies this Court with the following excuses as to why he failed to answer CIT's Complaint in a timely manner, some of which are utterly lacking in veracity: (1) he was "out of the country with a church group doing charitable work in Turkey at the time CIT alleges he was served with the Summons and Complaint in this matter"; (2) he was "made aware of the lawsuit by his wife but was never provided with a copy of the Summons and Complaint until meeting with his own counsel"; (3) he was "unaware that he had an affirmative duty to file a written response", (4) he was "left with the understanding from the co-Defendant that there was nothing for him to do" and (5) "the Summons and Complaint in the instant

matter was served on someone other than myself.” See Lockhart Affidavit. However, CIT disputes Mr. Lockhart’s contentions that he was only apprised of the lawsuit in June of 2008 by his wife and that he failed to receive a copy of the Summons and Complaint until he met with counsel on August 1, 2008. As evidenced by the *Return of Private Process Server* filed with the Court on June 3, 2008, the Summons and Complaint were personally served at the home of Mr. Lockhart, upon Rosco Lockhart, a six foot tall, forty-five year old, black male, on May 25, 2008 (the same time Mr. Lockhart claims to have been out of the country). See Return of Private Process Server attached hereto as Exhibit 1 fully incorporated herein by reference. Given the detailed description of the individual served with the Summons and Complaint, it lacks credulity to assert, as Mr. Lockhart does, that it may have been Mrs. Lockhart who was served with the Summons and Complaint and that she failed to provide him with copies of what was served.

Equally unavailing are Mr. Lockhart’s other excuses in light of his own admissions that he learned he was being sued as early as June of 2008. Mr. Lockhart admits in his Affidavit that his wife informed him of the dispute in June and shortly thereafter that he had an actual conversation with the Co-Defendant – the owners of - Phoenix Printing also in June of 2008. Yet Mr. Lockhart waited an additional two months to act on the Summons and Complaint.

Also ringing hollow are Mr. Lockhart’s counsel’s claims that counsel for CIT misled him. As evidenced by the Affidavit of Shannon A. S. Knox, Esq. filed in support of this Reply, which is attached and filed herewith as Exhibit 2 and incorporated herein by referenced as if fully set forth herein, after being informed by opposing counsel that he was not yet authorized to represent Mr. Lockhart and just wanted a status of the

case, counsel for CIT informed Lockhart's counsel that Mr. Lockhart had been served and had failed to answer the Complaint. Counsel for CIT also indicated that as of that date (August 1, 2008) no Motion for Default had been filed by CIT. Counsel for CIT then requested a letter from counsel confirming that he was representing Mr. Lockhart in this matter before any further discussion took place. At no time were any promises made by counsel for CIT as to the filing of a Motion for Default. It was not until five days later that Counsel for CIT filed a Motion for Default, having heard nothing from opposing counsel. None of these excuses, even that attempted by Counsel, are sufficient to form a basis for denying CIT's Motion for Default.

II. Default is Warranted Pursuant to Rule 55(a) of the Federal Rules of Civil Procedure.

It is undisputed that Mr. Lockhart failed to "plead or otherwise defend" his case within the time proscribed under the Federal Rules. See FED. R. CIV. PRO. 55(a). Rule 55(a) is clear that where a party "fail[s] to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk *must* enter the party's default." *Id.* (Emphasis supplied). Here, Mr. Lockhart was served with this Complaint on May 25, 2008. CIT filed its Motion for Default Judgment on August 5, 2008. Even if the Court accepts Mr. Lockhart's tale that he was not made aware of the dispute until June of 2008, after becoming aware of the dispute against him Mr. Lockhart waited an additional two months to even hire an attorney let alone file an Answer on his behalf. During that time, even the clerk of this Court contacted counsel for CIT to inquire as to whether CIT would be filing a Motion for Default. Based on these facts and the unwarranted delay by Mr. Lockhart, CIT believes that this Court should grant its Motion for Default.

III. Default is Warranted Pursuant to Rule 55(c) of the Federal Rules of Civil Procedure.

Rule 55(c) of the Federal Rules of Civil Procedure provides that “for good cause shown the court may set aside an entry of default.” FED. R. CIV. PRO. 55(c). In discussing the definition of “good cause” the Federal District Court for Maryland has noted that although what is considered “good cause” should be liberally construed to prevent onerous or unjust results, the party seeking to set aside a default must act with “reasonable promptness” and supply the court with a “meritorious defense.” See *Wainwright’s Vacations, LLC. v. Pan American Airway’s Corp.*, 130 F.Supp.2d 712, 717-18 (D.Md. 2001). Other factors supported by the court in weighing Rule 55(c)’s application included “the personal responsibility of the party, the prejudice to the party, whether there is a history of dilatory action, and the availability of sanctions less drastic.” *Id.* Generally the decision to enter a judgment by default rests in the discretion of the trial court, using the Rule 55(c) “good cause” standard to assess a plaintiff’s application for default judgment and the defendant’s opposition thereto. See *F.D.I.C. v. Danzig*, 10 F.3d 806, 1993 WL 478842 (4th Cir., 1993). In so doing, the defendant must do “more than [merely] allege in conclusory fashion that it had a meritorious defense.” *Consolidated Masonry & Fireproofing, Inc. v. Wagman Const. Corp.*, 383 F.2d 249, 251-52 (4th Cir., 1967).

Here, Mr. Lockhart’s Opposition and Answer have failed to demonstrate: (a) that he was not at fault for the delay; (b) that CIT was not prejudiced by the delay; and (c) that Mr. Lockhart has any “meritorious defense” to CIT’s claims.

A. Mr. Lockhart is at Fault for the Delay in the Filing of His Answer to CIT's Complaint.

Even if Mr. Lockhart's Opposition and attached Affidavits are taken for true and this Court believes that Mr. Lockhart was not made aware of the action against him until June of 2008, Mr. Lockhart still failed for almost an additional full two months to respond in any manner. He did not contact counsel for CIT to determine the status of the matter against him, nor did he hire his own counsel to defend him in this matter. Instead, he met with counsel on July 29, 2008 to discuss other matters relating to Phoenix Printing and did not hire that counsel to represent him in this matter until August 18, 2008. Accordingly, Mr. Lockhart's failure to Answer or otherwise plead to CIT's Complaint is no-one else's fault but his own; a fact which he has failed to supply any believable evidence to rebut. Furthermore, CIT never gave Mr. Lockhart or his counsel any reason to believe that it would not move for a default judgment. Indeed, CIT's haste to do so was further supported by this Court whose clerk contacted Counsel for CIT to discuss Mr. Lockhart's failure to answer and to inquire whether CIT planned to file a Motion for Default.

B. CIT is Prejudiced by the Delay.

In the instant case, CIT has an agreement and guarantee signed by Mr. Lockhart which contains a clause requiring Mr. Lockhart to obtain the approval before selling or transferring the Business. See the Contract and Guarantee signed by Mr. Lockhart and Phoenix Printing, Inc. attached hereto as Exhibit 3 and fully incorporated herein by reference. Mr. Lockhart admits in his Opposition that he sold his shares in Phoenix Printing, Inc. on or about July 13, 2006, an action he was prohibited from taking under the terms of the Agreement and Guarantee signed by Mr. Lockhart. See Exhibit 3. CIT

has also supplied the Court with an accurate and certain sum representing the amount owed by Mr. Lockhart on the unpaid debt. By excusing Mr. Lockhart's delay of this case, this Court would be unfairly permitting Mr. Lockhart to prolong the inevitable determination that he has breached his contract and guarantee and is required to make good on the debt owed to CIT.

C. Mr. Lockhart Has Failed to Raise Any Meritorious Defenses in His Answer.

Mr. Lockhart filed his Answer on August 19, 2008, over two months beyond the time required by Federal Rule of Procedure 12(a)(1)(A)(i), without first receiving leave of this Court or making a motion to this Court to do so as required by Federal Rule of Procedure 6(b)(1)(A), (B). Accordingly, any of the defenses or claims set forth in Mr. Lockhart's Answer should not be considered by this Court, an issue further explored in CIT's Motion to Strike Defendant Lockhart's Answer filed separately in this matter.

Even if his Answer is considered along with his Opposition, Mr. Lockhart has failed to set forth any meritorious Defense or basis for this Court to deny CIT's Motion for Default. Mr. Lockhart's Answer is replete with denials and assertions of lack of knowledge. Mr. Lockhart has admitted he made the sale of the business without obtaining consent of CIT, as required by the contract he signed. As a guarantor he is liable to CIT for the unpaid debt on the contract. Baseless denials of liability, without any facts to support them, do not provide the "good cause" necessary to justify withholding a judgment by default.

CONCLUSION

At no point in his Answer or Opposition has Mr. Lockhart set forth facts which show "good cause" for his excessive delay or any "meritorious defenses" to the claims

alleged in CIT's Complaint. Accordingly, CIT requests that this Court grant CIT's Motion for Entry of Order of Default and Default Judgment as to Defendant Rosco Lockhart.

/s/ Steven N. Leitess

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September, 2008, a copy of the foregoing, along with attached exhibit and proposed order, was served *via* first-class mail, postage prepaid, and, if the recipient is properly registered, *via* the Court's CM/ECF system, on:

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/s/ Steven N. Leitess

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