

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Raymond Orrand, *et al.*,

Plaintiffs,

v.

Case No. 2:08cv556

Judge Michael H. Watson

Robert C. Welling,

Defendant.

OPINION AND ORDER

Before the Court is the February 12, 2009 Motion of Defendant Robert C. Welling dba Wellco Industries (hereinafter "Defendant") for Relief from Judgment (Doc. 13). On March 5, 2009, Plaintiffs Raymond Orrand, Administrator, and Trustees of the Ohio Operating Engineers Health and Welfare Plan, Ohio Operating Engineers Pension Fund Ohio Operating Engineers Apprenticeship Fund and Ohio Operating Engineers Education and Safety Fund (hereinafter collectively "Plaintiffs") filed a Memorandum in Opposition (Doc. 14).

This matter is now ripe for review. For the reasons which follow, Defendant's motion is hereby **DENIED**.

I. FACTS

Plaintiffs initiated this action against Defendant to recover unpaid fringe benefit contributions due to the Ohio Operating Engineers Health and Welfare Plan, Ohio Operating Engineers Pension Fund Ohio Operating Engineers Apprenticeship Fund and Ohio Operating Engineers Education and Safety Fund (hereinafter collectively "Funds"). Plaintiffs assert Defendant, an employer, was obligated pursuant to a Collective

Bargaining Agreement (hereinafter "CBA") with Local 18 of the Ohio Operating Engineers International Union (hereinafter "Union") to pay contributions to the Funds to provide certain fringe benefits to Defendant's employees, including but not limited to pension and health converge benefits. Plaintiffs contend an audit of Defendant's payroll records revealed more than \$32,000.00 in unpaid contributions.

In June 2008, Plaintiffs attempted to obtain personal service upon Defendant at two addresses, Wales Avenue and Drenta Circle, both in Stark County, Ohio. Plaintiffs also attempted service by the Stark County Sheriff's office. The Stark County Sheriff's office was unsuccessful.

In October 2008, Defendant's counsel telephoned Plaintiffs' counsel to discuss the lawsuit and the fact service had not been perfected. Plaintiffs' counsel sent Defendant's counsel a copy of the Complaint along with a Waiver of Service form, requesting that Defendant waive the requirement of service. Defendant failed to execute the waiver within the thirty (30) days set forth in Fed. R. Civ. Pro. 4(d).

As such, Plaintiffs again attempted to obtain service on Defendant. On December 17, 2008, the Stark County Sheriff's office obtained personal service on Defendant at the Drenta Circle address. Upon receiving the Return of Service from the Sheriff's office, it was filed with the Court. (Doc. 6).

Defendant failed to file an answer within the proscribed time frame. As such, on January 12, 2009, Plaintiffs filed an application for entry of default and a motion for default judgment against Defendant (Docs. 7-8). On January 13, 2009, the Clerk of Court entered an entry of default and an entry of default judgment against Defendants (Docs. 9-10).

II. ANALYSIS

A two-pronged inquiry is utilized in evaluating motions to vacate a default judgment. *Burrell v. Henderson*, 434 F.3d 826 (6th Cir. 2006) (citations omitted). Under Fed. R. Civ. P. 55(c), a court "may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)." Three factors are considered in determining whether there is "good cause" to set aside a default:

- (1) whether culpable conduct of the defendant led to the default,
- (2) whether the defendant has a meritorious defense, and
- (3) whether the plaintiff will be prejudiced.

Burrell, 434 F.3d 826.

When the default has ripened into a default judgment, the court must consider these factors, as well as determine whether the stricter requirements of Fed. R. Civ. P. 60(b) are met. *Id.* at 832. Rule 60(b) provides:

On motion and just terms, the court may relieve a party . . . 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 other 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.

"Culpability is 'framed' by the specific language of [Rule 60(b)] *i.e.*, a party demonstrates a lack of culpability by demonstrating . . . excusable neglect." *Williams v. Meyer*, 346 F.3d 607, 613 (6th Cir. 2003 (citations omitted)). "And because Rule 60(b)(1) mandates such a demonstration, it is only when the party seeking relief can carry this burden that he will be permitted to demonstrate that he also can satisfy the other two factors: the existence of a meritorious defense and the absence of substantial prejudice to the other party." *Id.*

Thus, the initial inquiry is whether Defendant has demonstrated excusable neglect. If Defendant fails to do so, the Court does not need to determine whether the other factors have been met.

[T]he finding of excusable neglect is an equitable one, taking account of all relevant circumstances surrounding the party's omission. Considerations relevant to the determination include: (1) the danger of prejudice to the opposing party; (2) the length of delay and potential impact upon the current proceedings; (3) the basis for the neglect and whether it was within the reasonable control of the moving party; and (4) whether the moving party acted in good faith.


Gumble v. Waterford Twp., 171 Fed. Appx. 502 (6th Cir. March 23, 2006).

Defendant asserts it acted with excusable neglect in failing to respond to the Complaint. Specifically, Defendant alleges it notified its counsel that it had been served with the Complaint, on or about December 17, 2008, and counsel mistakenly calculated the answer date. Additionally, Defendant contends counsel checked the docket on December 22, 2008 and it did not reflect service being perfected. Due to the holiday, service was not checked again by counsel until January 12, 2009. At that time, the application for entry of default judgment was filed and the Court entered judgement on January 13, 2009.

Upon consideration, the Court concludes Defendant's failure to timely file its answer was not excusable neglect. Defendant was aware this action had been filed against it. In October, 2008, Defendant's counsel discussed the lawsuit and the fact service had not been perfected with Plaintiff's counsel. In response, Plaintiffs' counsel sent Defendant's counsel a copy of the Complaint and Waiver of Service form. Additionally, Defendant notified counsel that it had been served with the Complaint. The summons Defendant received with the Complaint informed Defendant of the need to file an answer and that failure to do so will result in a default judgment. As such, Defendant, and counsel, were aware of the need to answer the Complaint. These facts demonstrate that the neglect at issue was within the reasonable control of Defendant.

Accordingly, February 12, 2009 Motion of Defendant for Relief from Judgment (Doc. 13) is hereby **DENIED**.

IT IS SO ORDERED.



Michael H. Watson, Judge
United States District Court