

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DIANE BERONA,

Plaintiff,

v.

FRANKLIN COUNTY TREASURER, et al.,

Defendants.

Case No. 2:13-cv-012

JUDGE EDMUND A. SARGUS, JR.

Magistrate Judge Terence P. Kemp

OPINION AND ORDER

This matter is before the Court on Defendant Bank of America, N.A.'s ("BANA") Motion to Set Aside the Clerk's Entry of Default and for Additional Time to Respond to the Complaint (Doc. No. 9), and Plaintiff's Motion for Default Judgment (Doc. No. 10). For the reasons that follow, the Court **GRANTS** BANA'S motion and **DENIES** Plaintiff's motion.

I. BACKGROUND

On January 7, 2013, Plaintiff filed this lawsuit against BANA and the Franklin County Treasurer. On January 11, 2013, the summons issued to the Franklin County Treasurer was returned executed (Doc. No. 4), and on January 18, 2013, the summons issued to BANA was returned executed (Doc. No. 5).

On February 4, 2013, Plaintiff moved for an entry of default against both defendants under Rule 55(a) of the Federal Rules of Civil Procedure. (Doc. No. 6.) The following day, the Clerk of this Court issued an entry of default against BANA and the Franklin County Treasurer.

On February 21, 2013, BANA filed its Motion to Set Aside the Clerk's Entry of Default and for Additional Time to Respond to the Complaint. (Doc. No. 9.) Plaintiff has not responded to that motion.

On March 7, 2013, Plaintiff filed her Motion for Default Judgment. (Doc. No. 10.) In response to that motion, BANA filed a Motion for Extension of Time to Respond to Plaintiff's Motion for Default Judgment. (Doc. No. 13.) On April 10, 2013, this Court granted BANA's Motion for Extension of Time to Respond to Plaintiff's Motion for Default Judgment and stayed the briefing on Plaintiff's Motion for Default Judgment until it issued its decision on the Motion to Set Aside the Entry of Default. (Doc. No. 14.)

II. BANA'S MOTION

A. Standard

Federal Rule of Civil Procedure 55(c) provides that a court may set aside an entry of default for good cause. "In determining whether to grant a motion to set aside a default, Fed. R. Civ. P. 'Rule 55(c) leaves [the decision] to the discretion of the trial judge.'" *United States v. 1988 BMW*, 798 F. Supp. 2d 896, 899 (S.D. Ohio 2010) (quoting *Shepard Claims Service, Inc. v. William Darrah & Associates*, 796 F.2d 190, 193 (6th Cir. 1986)). "Denying such a motion should not be taken lightly, as the Sixth Circuit has a 'strong preference for trials on the merits.'" *Id.* (quoting *United States v. Real Property, All Furnishings Known as Bridwell's Grocery*, 195 F.3d 819, 820 (6th Cir. 1999)). "When a defendant seeks relief from a default that has been entered by the clerk upon a plaintiff's request, the district court enjoys considerable latitude under the 'good cause shown' standard." *Waifersong, Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992). In determining whether good cause exists, a court considers three factors: "(1) [w]hether culpable conduct of the defendant led to the default, (2) [w]hether the defendant has a meritorious defense, and (3) [w]hether the plaintiff will be prejudiced." *Id.* (quoting *United States v. \$22,050.00 in U.S. Currency*, 595 F.3d 318, 323 (6th Cir. 2010)).

B. Analysis

BANA submits affidavit testimony indicating that it was served with the complaint in this action on or about January 11, 2013, at 7105 Corporate Dr., Plano, Texas. (Karina Buitrago¹ Aff. ¶ 3; Doc. No. 9-1.) The Plano Texas address is not the location where BANA typically receives service of process. *Id.* Therefore, the summons and complaint were not forwarded to the proper legal department in a timely manner. *Id.* The legal department was not notified of this lawsuit until January 30, 2013. *Id.* On February 12, 2013, BANA retained counsel to represent it in this action and realized that default had been entered against it by the Clerk. *Id.* ¶ 4. BANA asserts that there is good cause to set aside the entry of default. This Court agrees.

First, the Court finds that Plaintiff will not be prejudiced by the setting aside of the entry of default. The delay caused by a defendant's failure to promptly answer is not sufficient to demonstrate that the plaintiff would be prejudiced by reopening the case. *Invst Fin. Group v. Chem-Nuclear Sys.*, 815 F.2d 391, 398 (6th Cir. 1987). For prejudice to exist, "it must be shown that delay will 'result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.'" *Id.* (citations omitted). BANA filed its motion only three weeks after the date a responsive pleading was due. The Court therefore sees no potential here for any prejudice of the type required nor does Plaintiff submit that there is any.

Next, this Court considers whether BANA has a meritorious defense. "In determining whether a defaulted defendant has a meritorious defense 'likelihood of success is not the measure' . . . rather, if *any* defense relied upon states a defense good at law, then a meritorious defense has been advanced." *Id.* at 398–99 (emphasis in original; citations omitted). BANA

¹Ms. Buitrago is the BANA's Assistant Vice President. (Buitrago Aff. ¶ 1.)

submits:

Plaintiff's unjust enrichment claim fails because such a claim cannot exist when there is a written agreement between the parties. *Gallo v. Westfield Natl. Ins. Co.*, 8th Dist. No. 91893, 2009-Ohio-1094, at ¶ 20. Likewise, Plaintiff's fraud claim, predicated on a mortgage assignment, fails because it was not directed at her nor could it have caused her damages. *See BAC Home Loans Servicing, L.P. v. Fall Oaks Farm, LLC*, No. 2:11-cv-274, 2013 WL 210729, at *5 (S.D. Ohio Jan. 18, 2013) (string-citing cases holding that borrowers like Plaintiff cannot assert a fraud claim based on a mortgage assignment.)

BANA also has numerous meritorious defenses to Plaintiff's Fair Debt Collection Practices Act ("FDCPA") claim. For instance, because BANA is a creditor, and because it began to service the Loan prior to any default by Plaintiff, it is not a debt collector within the meaning of the FDCPA. *King v. CitiMortgage, Inc.*, No. 2:10-cv-01044, 2011 WL 2970915, at *10 (S.D. Ohio July 20, 2011) (citing *Montgomery v. Huntington Bank*, 346 F.3d 693, 699 (6th Cir.2003)). Furthermore, the FDCPA claim is time-barred on its face. *See*, 15 U.S.C. § 1692(k).

(Doc. No. 9 at 6.) The Court finds that these defenses are meritorious.

Finally, the Court determines that BANA's conduct was not culpable. To "be treated as culpable, the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings." *Invst Fin. Group*, 815 F.2d at 399 (citation omitted). There is no evidence before the Court indicating this type of disregard. Moreover, "where the party in default satisfies the first two requirements for relief and moves promptly to set aside the default before a judgment is entered, the district court should grant the motion if the party offers a credible explanation for the delay that does not exhibit disregard for the judicial proceedings." *Id.* (citation omitted). Here, as stated *supra*, BANA moved promptly to set aside the default before a judgment was entered *or even moved for*, has met the first two requirements for relief, and offers a credible explanation for the delay that does not exhibit disregard for the judicial proceedings before this Court.

C. Conclusion

Based on the foregoing, the Court **GRANTS** BANA's Motion to Set Aside the Clerk's Entry of Default and for Additional Time to Respond to the Complaint. BANA shall file a responsive pleading within ten (10) days of the date of this Opinion and Order.

III. PLAINTIFF'S MOTION

Plaintiff moves for default judgment against BANA and the Franklin County Treasurer under Federal Rule of Civil Procedure 55(b), which permits a default judgment only if there has been an entry of default. Because the Court herein has set aside the entry of default against BANA, Plaintiff's motion has been rendered moot as it relates to BANA.

As to Plaintiff's second request, she indicates that "there are no taxes owed to the Franklin County Treasurer, so the damages from that Defendant are non-existent." (Doc. No. 10 at 4.) Plaintiff then states that the Treasurer has not filed an answer or appeared in any way. *Id.* Nowhere does Plaintiff indicate the relief she seeks from this defendant, nor is it clear to this Court what that relief might be. Further, "[w]hen a default is entered against one defendant in a multi-defendant case, the preferred practice is for the court to withhold granting a default judgment until the trial of the action on the merits against the remaining defendants. If plaintiff loses on the merits, the complaint should then be dismissed against both defaulting and non-defaulting defendants." *Kimberly v. Coastline Coal Corp.*, 857 F.2d 1474, 1988 WL 93305, *3 (6th Cir. 1988). Accordingly, the Court **DENIES** Plaintiff's motion as it relates to the Franklin County Treasurer.

IV.

For the reasons set forth above, the Court **GRANTS** BANA's Motion to Set Aside Clerk

