IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EMPIRE FIRE AND MARINE INSURANCE COMPANY,	)	Civil Action No. 18-1396
Plaintiff,	)	Magistrate Judge Lisa Pupo Lenihan
v.	)	
MUSE GUTEMA and HEIDI AUBEL,	)	
Defendants.	)	ECF No. 13

MEMORANDUM OPINION

For the following reasons, the Motion to Set Aside Default filed by Defendant Heidi Aubel (ECF No. 13) will be granted.

A. Procedural Background

A Complaint was filed against Heidi Aubel and Muse Gutema on October 18, 2018. ECF No. 1. Aubel was served on November 2, 2018 and her answer was due in November 23, 2018. ECF No. 7. Gutema was served on November 26, 2019 and his answer was due December 17, 2018. ECF No. 8. Plaintiff moved for default and the Clerk entered default as to both Defendants on December 28, 2018. ECF No. 10. Aubel has filed this motion to set aside default. Nothing has been filed by Gutema.

The Court ordered a response to the Motion, which has now been filed along with a brief in support. ECF Nos. 16 and 17. This was followed by a brief in opposition, reply brief and sur-reply brief. ECF Nos. 18, 20 and 23. In addition, Plaintiff filed a Motion for Default Judgment as to both Defendants on February 14, 2019. ECF No. 15.

B. Standard of Review

Fed. R. Civ. P. 55(c) governs a request to set aside the entry of default. It simply states that a "court may set aside an entry of default for good cause…." The decision to set aside the entry of default is within the discretion of the district court. *Bailey v. United Airlines,* 276 F.3d 194, 204 (3d Cir. 2002) The Third Circuit has instructed that courts must liberally construe a motion to set aside an entry of default with an eye toward resolving litigation on the merits. *Hritz v. Woma Corp.,* 732 F.2d 1178, 1181 (3d Cir. 1984). The Circuit has established three factors for a district court to consider in deciding whether to set aside a default: "1) whether the plaintiff will be prejudiced; 2) whether the defendant has a meritorious defense; 3) whether the default was the result of the defendant's culpable misconduct." *World Entm't Inc. v. Brown*, 487 F. App'x 758, 761 (3d Cir. 2012).

C. Discussion

1. Facts

This is an insurance coverage dispute arising from an accident on July 11, 2017 involving Muse Gutema and Heidi Aubel. Gutema was driving a car he had rented from Enterprise RAC Company of Maryland, LLC ("Enterprise"). When he rented the car Gutema also purchased a supplemental liability protection policy through Empire Fire and Marine Insurance Company ("Empire"), the insurance carrier for Enterprise. Empire filed this declaratory judgment action alleging that when Gutema rented the car he falsely represented to Enterprise that he had a valid drivers license when in fact, his license was suspended at the time. The complaint further alleges that Gutema was aware his license was suspended; therefore, he made a material misrepresentation on his rental agreement, negating any entitlement to insurance coverage from Empire. ECF No. 1 ¶¶ 7, 8, 11, 24.

Heidi Aubel, alleging injuries in the accident, filed a lawsuit in the Court of Common Pleas of Allegheny County. This declaratory judgment action requests that the court declare that Empire has no duty to defend or indemnify Gutema in the civil action filed by Aubel.

Aubel was served with a copy of the summons and complaint in this action on November 1, 2018. ECF No. 7. [1] Her response was due by November 23, 2018. Nothing was filed and Empire filed a praecipe for entry of default on December 27, 2018. ECF No. 9. Default was entered by the Clerk of Court on December 28, 2018. ECF No. 10. This motion to set aside default was filed on January 31, 2019.

2. Arguments

Aubel's motion alleges that a process server attempted service and Aubel subsequently contacted the process server via telephone. He advised her that her daughter should accept service on her behalf and that she "had no responsibilities…and that this lawsuit had nothing to do with [her]." Aubel affidavit, ECF No. 13-2. She allowed her daughter to accept service and, although the process server said he would also mail her copies of the paperwork, he did not do so. Id.

Aubel contacted her attorneys in the state court case and they advised her that they were aware of the federal court litigation and that she did not have to do anything. She relied on these representations and did not take any further action. Erie Insurance is Aubel's insurance carrier and it has filed the instant motion to set aside on her behalf. Aubel argues that the judgment should be set aside due to the material misrepresentations

[1] Gutema was served on November 26, 2018 (ECF No. 8) but has not filed a motion to set aside default.

of the process server and the fact that Aubel relied on the advice of counsel in not responding to the instant complaint. [2]

Empire countered that Aubel does not have a meritorious defense to the claims presented in its complaint. Due to the default against the defendants, they have admitted all of the allegations of the complaint, which clearly show that Empire does not owe coverage to Gutema, and therefore, to Aubel. Empire seems to argue that it has no way of pursuing its requested remedy if default is not entered. It further argues that Aubel is merely seeking to delay a determination of coverage for the underlying claims. Finally, Empire argues that both defendants have displayed sufficiently culpable conduct to warrant default. The Summons states that an answer or Rule 12 motion must be served within a certain time or a default would be entered. Her attorneys in the state court action had a copy of the summons and Aubel waited 91 days after service to file the motion for set aside. Empire argues that the facts here are close to those in *Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc.,* 175 Fed. Appx. 519 (3d Cir. 2006), where the Third Circuit affirmed the trial court's regusal to set aside a default.

As Aubel did not address the issue of a meritorious defense in her motion, the court ordered her to do so. As indicated above, a brief on that issue was filed as a Reply and Empire filed a Sur-Reply. ECF Nos. 20 and 23. On that issue, Aubel argues first that she is not required to show a meritorious defense at this stage because there is only a default, not a default judgment and that a lesser showing is required in this procedural status. She further argues that she will plead the defense of unclean hands. She disputes that Empire

[2] She further argues that the plaintiff was required to apply to the court for a default judgment, not the Clerk. This is erroneous. Plaintiff correctly asked the Clerk to enter default- not a judgment. The next action would be for plaintiff to request the court to enter default judgment, which was filed on 2/14/19.

has established, at this juncture, that Gutema knew his drivers license was suspended when he entered into the contract with Empire and states that if permitted to file a responsive pleading will assert that Epire should be barred from seeking rescission due to its own inequitable, unrighteous and "unconscientous" conduct. ECF No. 20 p. 3. She will further plead that the contract is a contract of adhesion.

Empire counters first, that the Third Circuit in *United States v. $55,518.05 in U.S. Currency*, 728 F. 2d 192, 195 (3d Cir. 1984), ruled that the establishment of a meritorious defense is a requirement for opening both a default and a default judgment. The Court agrees. Empire further argues that Enterprise was not obligated to investigate whether Gutema's license was valid. Also, as Gutema has not responded to the complaint it will be deemed admitted that he knew his license was invalid at the time of the rental. The argument that the contract in question was one of adhesion is, in Empire's opinion, conclusory.

3. <u>Analysis</u>

Given that only a little over 2 months elapsed between the date Aubel's responsive pleading was due and her motion to set aside, the Court finds that there is no prejudice to Plaintiff if the default is set aside. Any delay in the prosecution of this action is minimal. Plaintiff has not shown any loss of evidence or substantial reliance. *See Scholz Design, Inc. v. Costa*, No. 2:10-1640 2011 WL 635277 at * 3(W.D. Pa. Feb. 11, 2011), citing *Mike Rosen & Assocs., P.C. v. Omega Builders Ltd.,* 940 F. Supp. 115, 117-18 (E.D. Pa. 1996). Delay in the satisfaction of a claim has not been found to be sufficient to support the degree of prejudice required to prevent the opening of a default, particularly at this early stage of the proceeding. *Feliciano v. Reliant ToolingCo., Ltd.,*

691 F.2d 653, 656-7 (3d Cir. 1982). The court further finds that Aubel's reliance on statements of both the process server and her counsel were reasonable and her conduct was not culpable. For the purposes of Rule 55, culpable conduct is dilatory behavior that is willful or in bad faith. *Gross v. Stereo Component Sys.,* 700 F.2d 120, 124 (3d Cir. 1983). Aubel's conduct does not rise to that level.

The third and final test, whether Aubel has a meritorious defense, is less clear. "Rule 55 does not require the defaulting party to prove beyond a shadow of a doubt that [it] will win at trial, but merely to show that [it has] a defense to the action which at least has merit on its face." *Dizzley v. Friends Rehabilitation Program, Inc*., 202 F.R.D. 146, 148 citing Emasco *Ins. Co. v. Sambrick*, 834 F.2d 71, 74 (3d Cir. 1987). The defense proffered by Aubel is admittedly marginal. However, the case has just been filed and she has not had an opportunity to conduct discovery. Given the preference in this circuit that cases be disposed of on the merits and the short amount of time between the entry of default and the motion to set aside the Court believes that Aubel deserves an opportunity to develop her defense to the complaint rather than suffer the serious and final effects of a default.

Dated: March 18, 2019.

Lisa Pupo Lenihan
United States Magistrate Judge