

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2462
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAJJ RANCH, Located 8.2 Miles East of
Highway 6 on The South Side of Highway
105, Grimes County Texas, ET AL.,

Defendants,

JOE MEYERS AND DEBORAH MEYERS,

Claimants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(CA H 91 1028)

(March 17, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The Government filed a forfeiture action against the DAJJ Ranch, claiming that the property was used by its owners, Joe and Deborah Meyers, to conceal Joe Meyers's income from illegal gambling. Joe and Deborah filed individual notices of claim to the property to defend their interests against the forfeiture action. After repeated attempts by the Government to take the Meyers's depositions and to obtain from them certain documents in the course of discovery, the district court entered an order compelling the Meyers to produce records demanded by the Government during discovery and to attend their depositions. If the Meyers did not do as ordered, the district court would grant the Government's motion for entry of default judgment. The district court later granted the Government's motion for default judgment on the grounds that the Meyers did not comply with its previous order, failed to appear for their deposition, and undermined the Government's efforts to obtain discovery. The Meyers moved to set aside the default judgment. The district court denied the motion.

OPINION

As an initial matter, the Government raises the issue on appeal that Deborah Meyers was not properly before the district court as a claimant as she had never perfected a claim under the appropriate rules governing forfeiture proceedings. However, since the Government has failed to file a notice of cross-appeal, this Court is precluded from reviewing this issue. Thurman v. Sears, Roebuck & Co., 952 F.2d 128, 130 n.4 (5th Cir.), cert. denied, 113 S. Ct. 136 (1992).

The Meyers sought relief under a Fed. R. Civ. P. 60(b) motion to set aside the default judgment as provided under Fed. R. Civ. P. 55(c). Harcon Barge Co. v. D & G Boat Rentals, Inc., 784 F.2d 665, 669 (5th Cir.) (en banc), cert. denied, 479 U.S. 930 (1986), states that if a motion is served within ten days of the judgment and draws into question the correctness of the judgment, it is functionally a motion under Fed. R. Civ. P. 59(e). Rule 55(c) states that if a judgment by default has been entered, it may be set aside in accordance with Rule 60(b). Fed. R. Civ. P. 55(c). One 1988 Dodge Pickup, 959 F.2d 37, 40-41 (5th Cir. 1992) determined that the "brightline rule" of Harcon Barge would apply, and that a motion to set aside a default judgment could be treated as a Rule 59(e) motion, at least for some purposes. Yet, this Court expressly reserved the question of the effect of Rule 55(c) on the standard to be applied in ruling on a motion to set aside a default judgment served within ten days of the judgment's entry, and the appellate standard of review of such a ruling, stating that Harcon Barge only related to the time and effectiveness of the notice of appeal or the effect thereon of Fed. R. App. P. 4(a)(4).

If a claimant serves a motion to set aside default judgment within ten days after entry of the judgment, the time for giving notice of appeal does not start running until the district court overrules the motion. Thus, a notice of appeal given within the applicable time period thereafter is a timely notice of appeal of both the default judgment itself and the order denying the motion to set it aside. United States v. One 1988 Dodge Pickup, 959 F.2d

at 40. The district court entered the default judgment on April 10, 1992, and the Meyers served their motion to set aside the default judgment on April 15, 1992, within the ten-day time limit.

Thereafter, the district court entered the denial of the motion to set aside the default judgment on May 28, 1992, and the Meyers filed a timely notice of appeal. Therefore, the Meyers's notice of appeal applies to both the default judgment and the order denying the motion to set it aside.

The Meyers argue that the district court erred in granting the Government's motion for default judgment. They argue that they complied with the court order compelling discovery to the best of their ability and that the default judgment is incorrect in stating that default should be entered for their failure to appear at their depositions.

The district court may properly enter default judgment pursuant to Rule 55 for failure of a party to comply with court rules of procedure. McGrady v. D'Andrea Elec., Inc., 434 F.2d 1000, 1001 (5th Cir. 1970). The standard of review is abuse of discretion. Id. Fed. R. Civ. P. 37(b)(2)(C) provides that a default judgment may be entered if a party fails to comply with a court order to provide or to permit discovery. See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1486 (5th Cir. 1990). Although judgment by default is considered an extreme sanction, if a defendant demonstrates "flagrant bad faith and callous disregard of its responsibilities," the district

court's choice to enter a default judgment is not an abuse of discretion. Id.

The district court's order specifically stated that the Meyers were to attend their depositions and to produce all records requested the Government. If the Meyers did not do as ordered, the district court would grant the Government's motion for default judgment. While Deborah Meyers did attend her deposition, she failed to provide almost all of the requested documents, in defiance of the order. Those records were still in the possession of David Towery, the Meyers's tax attorney. Deborah Meyers's attorney at the deposition explained that he had orally requested the records from Towery, but Towery had refused to release them. Such action was the only attempt made to obtain the records. Joe Meyers attempted to avoid his deposition by filing a motion barring the taking of his deposition the day before the deposition was to begin. Such motion was not ruled upon, and Meyers appeared at his deposition the next day. Meyers did not produce any of the requested documents, contending that the majority of such documents were in the possession of his tax attorney, David Towery, who was not amenable to producing those records. Further, Meyers did not answer any questions at the deposition, and generally asserted his Fifth Amendment privileges, asserting that anything he would say under oath could be used to revoke the probation he is currently undergoing for his conviction of illegal gambling. "A blanket refusal to answer questions at deposition on the ground that they are privileged is an improper invocation of the fifth amendment .

. . ." First Financial Group, Inc., 659 F.2d 660, 668 (5th Cir. 1981) (internal quotations and citations omitted). Instead, the party must present himself with his records for questioning, and as to each question and each record elect to raise or not to raise the defense. Id.

The Government argues that the Meyers's actions as stated above did not amount to compliance with the district court's order compelling the Meyers to participate in discovery, and that therefore, entry of default against the Meyers was proper.

Although the order entering default judgment stated that default was granted because the Meyers failed to appear at their deposition, it also stated that the default was being granted for the Meyers's failure to comply with the order directing them to produce all requested documents. It further stated that default was being granted because the Meyers had undermined all the Government's efforts to obtain discovery. While the district court misstated the fact the Meyers did not appear at their deposition,¹ the court still stated adequate reasons for granting default judgment. Therefore, the district court did not abuse its discretion in granting a default judgment.

The Meyers also argue that the district court erred in denying their motion to set aside the default judgment. In order to set aside a default judgment, a claimant must show that his failure to

¹ The Meyers brought to the district court's attention through their motion to set aside the default judgment the facts that they did appear and did produce some documents. However, the district court refused to disturb the default judgment.

defend was due to justifiable neglect and that he has a meritorious defense to the action. United States v. One 1978 Piper Navajo PA-31 Aircraft, 748 F.2d 316, 318 (5th Cir. 1984). The Meyers have failed to satisfy both prongs of the test.

The Meyers argue that they were denied an opportunity to oppose the motion for default judgment by the district court's failure to grant them proper notice and a hearing as required under Fed. R. Civ. P. 55(b)(2). Rule 55(b)(2) provides that the party against whom judgment by default is sought shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. The record in this case reflects that the Government hand-delivered the Meyers a copy of the motion for default judgment on January 13, 1992, approximately four months before the district court granted the motion. "Rule 55(b)(2) does not require a district court to hold either an evidentiary hearing or oral argument on a motion for a default judgment." First Financial Group of Texas, 659 F.2d at 669. Further, the Government's hand-delivery of a copy of the motion for default judgment months before the court granted the motion was proper notice under Rule 55(b)(2). See id. Therefore, the Meyers have failed to advance a justifiable reason for not defending their claim.

The Meyers must also show they had a meritorious defense to the Government's forfeiture action. One 1978 Piper Navajo PA-31 Aircraft, 748 F.2d at 318. The district judge determined that the Meyers had offered no reason why the court should set aside the

default judgment. The record contains no indication that the district court erred in reaching that decision. The Meyers asserted in their motion that they had a meritorious defense to the cause of action, however, they did not identify any particular defense.

The only attempt at a specific defense appears to be the Meyers's argument on appeal that default judgment was improper because the Government did not allege that Deborah Meyers used any of her separate funds to purchase the DAJJ ranch. Issues raised for the first time on appeal are not reviewable unless they involve "purely legal questions and failure to consider them would result in manifest injustice." United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990).

An affidavit of an IRS special agent attached to the Government's motion for summary judgment details Deborah Meyers's role in using DAJJ ranch to conceal illegal gambling funds. The affidavit states that Deborah Meyers holds a \$100,000 mortgage on the ranch. It further explains that as Deborah was not an innocent party, her interest in the ranch is considered a portion of the forfeiture action. Given this evidence, the Government has asserted that Deborah Meyers has a valid interest in the ranch and has played a role in using the ranch for illegal purposes. Therefore, manifest injustice would not result in failing to consider the Meyers's attempt at presenting a meritorious defense. The district court properly denied the Meyers's motion to set aside the default judgment.

The judgment of the trial court is AFFIRMED.