

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8123
Summary Calendar

JERRY TANZY, TRUSTEE FOR THE ESTATES OF
HEALTHCARE SERVICES OF MIDLAND-
ODESSA, INC., d/b/a
UPJOHN HEALTHCARE SERVICES OF MIDLAND-
ODESSA,
HEALTHCARE SERVICES OF LUBBOCK, INC.,
d/b/a UPJOHN HEALTHCARE SERVICES OF
LUBBOCK, AND,
HEALTHCARE SERVICES OF EL PASO, INC.,
d/b/a UPJOHN HEALTHCARE SERVICES OF
EL PASO,

Plaintiffs-Appellants,

versus

OWNERSHIP ENTERPRISES INCORPORATED, ET AL.,

Defendants,

TEXAS COMMERCE BANK-MIDLAND, N.A.,

Garnishee-Appellee.

Appeal from the United States District Court for the
Western District of Texas
(MO-91-CV-76)

(December 17, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

*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

Tanzy obtained a default judgment against Texas Commerce, which the district court set aside pursuant to Fed.R.Civ.P. 60(b). Tanzy appeals. We conclude that good cause existed to set aside the default judgment, and the district court therefore did not abuse its discretion. The decision of the district court is thus affirmed.

I

Jerry Tanzy, Trustee for the Estates of Healthcare Services of Midland-Odessa, Inc.,¹ recovered a judgment in the district court of Texas against Nick Miller, James Nix, Lonene Miller, and Malcolm McPhail.² Subsequent to these judgments, Tanzy filed an application for garnishment in the district court of Texas, which resulted in an order granting the application for garnishment on June 24, 1991. A United States marshal served Texas Commerce Bank-Midland, N.A., with the writ of garnishment. When Texas Commerce did not answer within the required time period, the district court entered an order granting default judgment to Tanzy in the sum of \$1,263,079.59, plus interest and court costs. After becoming

should not be published.

¹d/b/a Upjohn Healthcare Services of Midland Odessa, Healthcare Services of Lubbock, Inc., Upjohn Healthcare Services of Lubbock, Healthcare Services of El Paso, Inc., and Upjohn Healthcare Services of El Paso.

²The judgment against Nick Miller was \$200,000, against Nix \$500,000, against Lonene Miller \$200,000, and against McPhail \$100,000.

informed of the default judgment,³ Texas Commerce filed a motion to vacate the default judgment, and on December 6, 1991, the district court granted this motion and set aside the default judgment. Tanzy appeals.⁴

II

A

Rule 60(b) motions are directed to the sound discretion of the district court judge; we thus review a district court's order vacating a default judgment only for abuse of discretion. Carimi v. Royal Caribbean Cruise Line, 959 F.2d 1344, 1345 (5th Cir. 1992). In a case where relief from a default judgment has been granted, we are permitted to examine the full merits of the case, and the district court's granting of the motion to vacate will not be reversed if it was permissible or even warranted. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981).

B

On appeal, Tanzy argues that Texas Commerce cannot explain how, when, or where it lost the garnishment papers. The papers

³Texas Commerce became aware of the entry of default judgment only after being notified by an attorney who happened to overhear statements by Tanzy's counsel; Tanzy nor his counsel had actually attempted to notify Texas Commerce.

⁴On February 14, 1992, the district court, after conducting a bench trial, entered a judgment in favor of Tanzy for the sum of \$1,279.49 from Nick Miller's bank account and \$2,990.35 from Roy Miller's bank account; the court also ordered Texas Commerce to pay attorney's fees of \$550.00 to Tanzy's counsel, and Texas Commerce was allowed to recover \$1,280 in attorney's fees.

were served on a secretary and vice president of Texas Commerce, and the secretary accepted service. The secretary placed the papers at her work station, and she and the vice-president both assumed that they had been delivered to the proper officials at the bank's main building. Tanzy argues that Texas Commerce simply forgot about the papers, lost them, or misplaced them through its own internal process. Tanzy therefore argues that the district court should not have set aside the default judgment.

C

Texas Commerce argues that the district court correctly set aside the default judgment for four reasons: (1) good cause exists under Rules 55(c) and 60(b); (2) the court acted under its equitable powers; (3) Tanzy failed to comply with Texas garnishment laws; and (4) its due process rights were violated. Texas Commerce states that neither the application for writ of garnishment nor the writ of garnishment itself identified which bank was the garnishee, and at the time the writ was executed there were at least five west Texas banks using this business name. Furthermore, at all material times Texas Commerce did not have any accounts in the specific name of any of the debtors; it did have some accounts that may have belonged to one or more of the debtors, but the amount in these accounts was never more than \$4,269.84. Texas Commerce argues that there were extenuating circumstances surrounding the serving of the process and that the process papers themselves were ambiguous.

Regarding its good cause argument, Texas Commerce argues that Tanzy was not prejudiced by its failure to answer, it had a meritorious defense, and the failure to answer was inadvertent, excusable, and a mistake. Texas Commerce also argues that under Rule 60(b)(6), the court was free to exercise its equitable powers and vacate the default judgment for any other reason justifying relief. Texas Commerce further argues that Tanzy failed to comply with Texas garnishment laws and that the writ did not fully advise the bank that property could be taken if it did not answer, thus violating Texas Commerce's due process rights.

III

In determining whether there is good cause to set aside a default judgment, three factors are considered: (1) the extent of prejudice to the plaintiff if the default judgment is set aside; (2) whether the defendant can present a meritorious defense; and (3) whether the default was wilful. Dierschke v. O'Cheskey, 975 F.2d 181, 183 (5th Cir. 1992). Applying the first factor, the extent of prejudice to the plaintiff, it is clear that Tanzy was not prejudiced. Texas Commerce agreed to go to trial at the earliest opportunity, which turned out to be just two months after the default judgment was entered. Furthermore, Texas Commerce agreed to pay Tanzy's cost of obtaining the default judgment.

Applying the second factor, the merits of the defendant's asserted defense, after a trial on the merits it was determined that Texas Commerce had in its possession only \$4,269.84 of the

assets of the judgment debtors. Texas Commerce thus had a meritorious defense.

Applying the third factor, the culpability of the defendant, Texas Commerce argues that its failure to answer was inadvertent, excusable, and a mistake. Texas Commerce presented evidence of an internal procedure for handling the service of process, and the bank did indeed attempt to follow this procedure. In an apparently unusual move, this process was delivered to an annex of the bank, not the main building. In addition, the bank was not clearly identified as the garnishee; Texas Commerce argues that if the writ was lost or misplaced, a measurably attentive person would not have assumed that it belonged to the bank. Furthermore, the process was handled by the server after the bank was served, which broke the chain of possession. There is no indication whatsoever that Texas Commerce purposely refused to answer or that it even had actual knowledge about the contents of the writ. In addition, once Texas Commerce learned of the default judgment, it moved with speed to answer and to have a trial on the merits as soon as possible. This minimal tardiness by Texas Commerce does not justify a million dollar default judgment. Texas Commerce's neglect was excusable.

Applying all three of these factors, it was proper for the district court to vacate the default judgment taken against Texas Commerce. To hold Texas Commerce liable under these facts would be tantamount to confiscation of its assets. See FDIC v. Yancy Camp Development, 889 F.2d 647, 649 (5th Cir. 1989). Furthermore, other

factors to be considered include whether there was a significant financial loss to the defendant and whether the defendant acted expeditiously to correct the default. Dierschke, 975 F.2d at 184. Both of these factors also support the district court's decision to vacate the default judgment.

IV

We conclude that the district court did not err in vacating the default judgment entered against Texas Commerce. Having decided that good cause existed under Rules 55(c) and 60(b), we do not address the other points raised by Texas Commerce. The decision of the district court is therefore

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