UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1592
Summary Calendar

AMERICAN AIRLINES, INC.,

Plaintiff-Appellee,

versus

RUBEN REINIS, d/b/a
Americana Travel System, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Texas
(92-CV-1786-R)

(April 19, 1994)

Before JOLLY, WIENER, and Emilio M. GARZA, Circuit Judges

PER CURIAM:[*]

Plaintiff-Appellee American Airlines, Inc. (American) sued Defendants-Appellants Ruben Reinis, d/b/a Americana Travel System, et al. (collectively "Defendants"), for breach of

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[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

contract and))after two time extensions to allow Defendants to answer the complaint))won a default judgment for $92,434.32. At about the same time, Defendants filed an answer; and approximately two weeks later they filed a motion under Federal Rule of Civil Procedure Rule 60(b) to set aside the default judgment for excusable neglect. The district court denied the motion, and Defendants timely appealed, arguing that the district court had abused its discretion.

I

FACTS AND PROCEEDINGS

American and Defendants entered into an agreement))the SABRE System Access and Lease Agreement (the SABRE Agreement)[1]))by which Defendants acquired the right for a specified period of time to access a computer travel reservation data base (the SABRE system) developed and operated by American. When Defendants discontinued use of the SABRE system before the expiration date specified in the Agreement, American sued for breach of contract, serving process on the Texas Secretary of State (qua Defendants' agent) in accordance with the terms of the Agreement.[2]

Defendants failed to answer American's complaint by September 30, 1992, the last date on which an answer could be filed timely. Nine days later American's counsel, Allen Stewart (Stewart), was

[1]SABRE is a registered trademark for American's computer reservation data base.

[2]At least one defendant received a copy of the summons and complaint shortly after the Secretary of State mailed copies to all Defendants on September 10, 1992.

contacted by a Ms. Edi Cuartas, who claimed to be the daughter-in-law of defendant Ruben Reinis (Reinis), and who explained that Defendants had not yet retained counsel. She requested a thirty-day extension of time within which Defendants could file their answer, and Stewart granted the extension. Defendants again failed to meet their deadline, however, and on November 10, 1992, the day after the deadline, another attorney))Richard Condla (Condla)))contacted another counsel for American))Dana Bruce (Bruce)))on Defendants' behalf to request another extension. Bruce assented to this second extension, but avers that he warned Condla that American would not consent to any further extensions. Bruce also sent Condla a letter memorializing their agreement to extend Defendants' deadline for filing an answer to November 30.[3]

On the very day that, pursuant to the Bruce extension, Defendants' answer was due))for the third time))defendant Reinis contacted attorney Michael Wimer (Wimer), not to ask him to file an answer, or even to retain him, but to ask him to determine whether the deadline for filing an answer had passed, and whether a default judgment had already been entered. Wimer phoned Stewart to ascertain the status of the case. Stewart was informed by Wimer that he did <u>not</u> represent Defendants and that))based on the pleadings))he thought that Defendants had missed their deadline for filing. In response Stewart advised that he did not have the case files in front of him and could not be certain about the relevant

[3]Bruce sent this letter via certified mail, return receipt requested, and Mr. Condla signed for the letter on November 17, 1992.

dates, but that he thought that American had already granted Defendants another extension (which would have been Defendants' third).[4] Stewart gave Wimer what he believed to be the new, applicable deadlines (December 22, 1992 for an answer coupled with a motion to dismiss and January 22, 1993 for a simple answer) but suggested that he check his recollection against the files and call Wimer back.

Upon checking the files the next day, Stewart discovered that Defendants' answer had been due the day before and that his recollection that Defendants had been granted another extension was in error.[5] The parties disagree about whether Stewart attempted to call Wimer back: In his affidavit Stewart asserts that he called Wimer and left a message to return his call, whereas Defendants present the phone logs of Wimer's firm, which appear not to reflect receipt of any call from Stewart. It is clear, however, that Wimer made no effort to confirm Stewart's uncertain assessment of the situation until a week later, when Defendants finally decided to retain Wimer.

Upon discovering that Defendants had missed the third and final deadline for filing an answer, American filed a motion for default judgment (on December 2, 1992), which the district court

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[4]Unsurprisingly, the parties present the facts with different emphases, but they essentially agree that Stewart qualified his belief that American had granted another extension by pointing out he was not certain and by offering to check the files and call Wimer back.

[5]Stewart's recollection that an additional extension had been granted was based on another, similar case in which such an extension was in fact granted.

granted, entering a default judgment against Defendants on December 4, 1992. After finally being retained by Defendants on December 7, 1992, Wimer phoned Stewart. At that time, Stewart informed Wimer that his (Stewart's) initial recollection of the situation had been wrong and that American had already filed a motion for default judgement against Defendants. That same day, Wimer filed an answer on Defendants' behalf, and approximately three weeks later (on December 23, 1992) he filed a Federal Rule of Civil Procedure 60(b) motion to set aside the default judgment for excusable neglect. The district court denied that motion, and Defendants appealed))arguing that the district court had abused its discretion.[6]

II

ANALYSIS

In addition to asserting that their neglect in failing to file a timely answer was excusable and that the district court consequently abused its discretion by failing to aside the default judgment, Defendants also insist that the default judgment should be vacated because they were never properly served. We address both of Defendants' concerns in turn.

A. Excusable Neglect

"Review by a court of appeals of an appeal from an order refusing to reopen default is limited to the question whether the

[6]Even Defendants' appeal of the district court's order was not timely. But the court granted Defendants' motion to reopen the time for appeal.

district court abused its discretion."[7] This places a heavy burden on defendants.[8] Nonetheless, Rule 60(b) does permit relief from a default judgment for excusable neglect,[9] but defendants must show that their failure to file a timely answer actually resulted from excusable neglect and that they would have had a fair probability of success on the merits.[10] In deciding whether to reverse a district court's refusal to set aside a default judgment, we commonly examine three factors: (1) the culpability of the moving party, (2) the merits of the moving party's asserted defense, and (3) the extent of prejudice to the non-moving party.[11] In this case, however, American does not assert that it would have been prejudiced if the district court had set aside the default judgment, so we focus our examination on the other two factors.

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[7]Federal Sav. and Loan Ins. Corp. v. Kroenke, 858 F.2d 1067, 1069 (5th Cir. 1988).

[8]Northshore Development, Inc. v. Lee, 835 F.2d 580, 582 (5th Cir. 1988).

[9]Fed. R. Civ. P. 60(b).

[10]Kroenke, 858 F.2d at 1069; accord CJC Holdings, Inc. v. Wright & Lato, Inc., 979 F.2d 60, 64 (5th Cir. 1992). American is correct that in CJC Holdings, Inc. we determined that an "excusable neglect" standard "is more consistent with rule 60(b)" than a "willful neglect" standard. Id. And while neglect that is willful cannot be excusable, the inverse is not true; neglect that is not willful may still be inexcusable.

[11]Id. at 1069-70; accord CJC Holdings, Inc., 979 F.2d at 64. These three factors are not talismanic, and we will consider other factors that bear on the ultimate inquiry whether the defendant shows good cause to set aside the default judgment. 979 F.2d at 64.

1. Defendants' Culpability

Defendants assert that their failure to file a timely answer was excusable neglect because they "reasonably relied on American Airlines' [sic] representation" that the deadline had been extended for yet a third time, and because they did not receive notice of the default proceedings as required under Rule 55(b). The district court disagreed with both contentions and so do we.

By the time the misunderstanding occurred between Wimer and Stewart, Defendants' had already evidenced palpable neglect of their defense. They missed their initial filing deadline and did not even utter a peep until nine days later when Reinis' daughter-in-law phoned Stewart to ask for a post hoc extension. Then, after a full thirty days' extension, Defendants again missed their filing deadline. Not until the day after expiration of this second deadline did Defendants' attorney, Richard Condla, contact Bruce and request a further extension. Bruce agreed to the additional extension, but states under oath that he expressly warned Condla "that no further extensions would be granted"))an averment which Defendants do not deny. Bruce also sent a letter to Condla, confirming the new answer deadline. As Condla signed for the letter, which had been sent return receipt requested, we must presume that he received it. Yet, his clients (Defendants) claim not to have been aware of that letter's contents, a claim which))even if true))is not particularly helpful to Defendants because it reflects their own failure to make even minimal efforts to ascertain the status of their case))from their own attorney, no

less.[12]

Again, it was not until November 30, 1992, the last day for answering under the third))and, according to Bruce, the final))deadline, that the Defendants contacted Wimer. But even this contact was not made for the purpose of having Wimer file an answer for Defendants, or even to retain him, but merely to ask him to ascertain whether they had already missed their final deadline. Based on the asserted ability of Wimer to file an answer on the same day that he was retained (December 7), Defendants insist that))but for Stewart's "misrepresentations"))they would have been able to file an answer before the expiration of the last extension. But this contention is difficult to accept.

When Reinis contacted Wimer on the afternoon of November 30,[13] he was))by his own admission))"not prepared to retain Mr. Wimer" because he had to "discuss th[e] matter with the other defendants, and make a decision as soon as possible." In fact, "as soon as possible" proved to be a week later. Yet Defendants ask us (as they asked the district court) to believe that))after they had already missed two deadlines and then waited until the eleventh hour of the third))Reinis could have and would have secured each

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[12]A party seeking relief under Rule 60(b) has "a duty to diligently ascertain" the status of his case. See, e.g., Wilson v. Atwood Group, 702 F.2d 77, 79 (5th Cir. 1983), aff'd, 725 F.2d 255, 257 (5th Cir. 1984) (en banc).

[13]The Affidavit of Ruben Reinis reveals that the conversation between Reinis and Wimer on November 30 occurred in the afternoon, which makes it even less likely that Defendants could come to an agreement about whether to hire Wimer and file their answer before expiration of the deadline.

party-defendant's consent to hire Wimer, and that Wimer could have and would have filed an answer for them))within the few remaining hours, had Defendants only not (reasonably) relied on Stewart's mistaken representations.

More importantly, Defendants' reliance on Stewart's representation that another extension had been granted was not reasonable. Although an attorney has a duty to be fair and honest in his dealings with others, he has no duty to keep the opposing party's trial calendar: he is))after all))not the clerk of the court. When Stewart spoke with Wimer on November 30, Stewart stated that he did not have the relevant files before him and could not be certain about the status of the case: he merely offered his recollections. Despite Stewart's admonitions, Defendants did not bother to confirm the status of their case. And even though Defendants may affect outrage at Stewart's error, it is they not Stewart who had a duty to exercise diligence in ascertaining the status of their case.[14]

Neither can Defendants excuse their own neglect by complaining that Wimer (their attorney) did not receive notice of the default judgment, which notice they assert was required under Fed. R. Civ. P. 55(2)(b). Rule 55(b)(2) only requires a party seeking a default judgment to provide written notice to a defaulting party who has appeared in the lawsuit. Here, Defendants made no formal

[14]See, e.g., Mizell v. Attorney General of New York, 586 F.2d 942, 944-45 n.2 (2nd Cir. 1978) (citing several cases for the proposition that a parties must make diligent efforts to ascertain the status of their cases), cert. denied, 440 U.S. 967 (1979).

appearances.[15]

Through their actions, indecisive though they were, Defendants may have implied an intention early on to defend the suit when they indicated through different persons (Cuartas and Condla) that they needed additional extensions to arrange for local counsel. Their consistent failure to follow through on such intentions, however, or even to engage in any formal correspondence respecting their defense, casts doubt on the bona fides of their intentions and satisfies us that Defendants never truly manifested an intention to defend their suit.[16] Their behavior is more consistent with irresolution))or even willful delay))than with a clear intention to contest American's lawsuit. Defendants are thus culpable of inattention to their own defense and for relying on opposing counsel's equivocal and conditional estimate of the status of their case. American's counsel's admonition to Wimer as putative counsel for Defendants that he (Stewart) could not be certain of the accuracy of his assessment is alone sufficient to refute Defendants' claim that their neglect is excusable.

2. The Merits of Defendants' Asserted Defenses

Defendants contend that they need only demonstrate "a hint of a suggestion" of a meritorious defense to justify reversal of the

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[15]Federal Sav. and Loan Ins. Corp. v. Kroenke, 858 F.2d 1067, 1071 (5th Cir. 1988); see also Fed. R. Civ. P. 55(b)(2) ("if the party . . . has appeared in the action, the party . . . shall be served with written notice) (emphasis added).

[16]See, e.g., J. Slotnik Co. v. Clemco Indus., 127 F.R.D. 435, 439 (D. Mass. 1989) (finding the defendant's intentions "murky at best" when the defendant did nothing for seven weeks after stating his intention to file an answer).

district court. That contention is simply an incorrect characterization of the applicable law. To be entitled to relief under 60(b), a party must demonstrate "that a fair probability of success on the merits [would] exist[] if the judgment were to be set aside."[17] In this case, Defendants have not done so.

Defendants' first proffered defense is that they ceased using the SABRE system long before the SABRE Agreement expired and thus are not liable for all the damages asserted by American. Even a cursory inspection of the SABRE Agreement, however, reveals that such premature, discontinued use of the SABRE system is not a defense, but a breach of the SABRE Agreement, entitling American to liquidated damages.

Alternatively, Defendants argue that the liquidated damages clause in the SABRE Agreement is unenforceable as a penalty. That assertion too is simply wrong. Courts have rejected similar challenges to virtually identical provisions,[18] and Defendants adduce neither evidence nor statutorily or jurisprudentially supported legal arguments suggesting why the liquidated damage provision in this case should not be similarly upheld.

Finally, relying on Reinis' affidavit, Defendants assert that American failed to give them credit for some lesser amounts that they had already paid. As this assertion is unsupported by any

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[17] Kroenke, 858 F.2d at 1069; United States v. One 1978 Piper Navajo PAA-31 Aircraft, 748 F.2d 316, 318-19 (5th Cir. 1984).

[18] See, e.g., American Airlines, Inc. v. Nationwide Trading Enterprise, Inc., No. CA3-89-2633-R (N.D. Tex. December 31, 1990).

documentary evidence, however, it is nothing more than a bald allegation and cannot reasonably be said to offer a fair probability of success as a defense on the merits.[19]

We thus conclude both that the Defendants' were culpable for neglecting their defense and that their defense lacked a fair probability of success on the merits. Consequently, we disagree with Defendants' assertion that their neglect is excusable, and therefore perceive no justification for reversing the district court.

B. Service of Process

Defendants also contend that the default judgment should be vacated because they were never properly served with process. As noted above, however, service of process was effected by the method assented to by Defendants when they signed the SABRE Agreement: American served process on the Texas Secretary of State who then forwarded copies to Defendants via registered mail at the addresses

[19]Additionally, Defendants' contention that they can mount a meritorious defense merely by disputing the amount of damages awarded by the default judgment amounts to a misreading of the very precedents they cite. In Tecnart Industria E Comercio LTDA., v. Nova Fasteners Co., Inc., 107 F.R.D. 283, 285 (E.D.N.Y. 1985), for example, the district court vacated the default judgment against the defendant because the defendant "adduced evidence of the business transactions between the parties that tends to show that plaintiff may ultimately be entitled to far less than the amount awarded in the default judgment." Emphasis added. In this case, in contrast, Defendants do not support their allegations with any evidence. Neither do they assert that American is entitled to far less than was awarded in the default judgment. Indeed, Defendants do not even favor us with an estimate of the amounts that they allegedly paid.

they provided.[20] As the United States Supreme Court has expressly held that service is sufficient if made in a manner agreed to by contracting parties,[21] we see no reason to disturb the district court's conclusion that service was sufficient in this case.

III

CONCLUSION

We understand Defendants' concern that our affirmance of the district court's denial of their motion to set aside the default judgment denies them a trial on the merits; but litigants who sit on their rights))particularly those who do so repeatedly))have only themselves to blame when those rights are lost. In this case, we agree with the district court: Defendants' pronounced neglect of their own defense was not excusable. Defendants have missed virtually every deadline involved in this lawsuit. Indeed, they even missed their deadline for filing this appeal, and would not be before us today but for the district court's generous grant of their motion to reopen the time within which to file a notice of appeal. We cannot therefore say that the district court abused its discretion in declining to set aside the default judgment. A litigant's vacillation, neglect, or willful delay itself works an imposition on the opposing party, not to mention the judicial system. The order of the district court is

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[20]At least one of the parties defendant initially received a copy of the summons and complaint from the Secretary of State, and in due course all Defendants were apprised of the suit.

[21]National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 316, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964).

AFFIRMED.