UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-3111
Summary Calendar

DOUGLAS HARGRAY,

Plaintiff-Appellee,

VERSUS

CITY OF NEW ORLEANS, ET AL.,

Defendants,

ERIC BERGER and AARON LACABE, Individually,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana
(90-CV-2092-N1)

(December 17, 1993)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellants, Berger and LaCabe appeal the default judgment rendered against them and assert that the district court erred in denying their motions to set aside the entries of default. We affirm.

I.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Eric Berger, a New Orleans police officer, and Aaron LaCabe were involved in an altercation with Douglas Hargray during which Hargray was shot in the head. Hargray filed a complaint in federal court naming a number of defendants, including Berger and LaCabe and alleging causes of action under Louisiana law and 42 U.S.C. §§ 1983 and 1988. Berger and Lacabe's failure to answer the complaint resulted in entries of default. Seven months after entry of default, Berger and LaCabe filed motions to set aside the entry of default pursuant to Fed. R. Civ. P. 55(c). The district court denied Berger and LaCabe's respective motions because their reasons for failing to file answers did not reach the standard of good cause. Hargray eventually settled his claims against the other defendants, and the district court entered default judgments against Berger and LaCabe. Berger and Lacabe now appeal the denial of their motions to set aside entry of default and the default judgments, contending that denial of their motions constitutes an abuse of discretion.

II.

On appeal, Berger and LaCabe contend that the district court erred in denying their motions to set aside entry of default. An entry of default may be set aside if the party seeking relief shows good cause. Fed. R. Civ. P. 55(c); **United States v. One Parcel of Real Property**, 763 F.2d 181, 183 (5th Cir. 1985). The decision to set aside a default decree lies within the sound discretion of the district court. However, an abuse of discretion need not be glaring to justify reversal. **One Parcel**, 763 F.2d at 183. In

determining whether to set aside a default decree, the district court should consider whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented. **CJC Holdings, Inc. v. Wright & Lato, Inc.**, 979 F.2d 60, 64 (5th Cir. 1992); **One Parcel**, 763 F.2d at 183. These factors are not "talismanic," and others can be considered. **CJC Holdings**, 979 F.2d at 64. Nor must the district court consider all of these factors. **Id.**; **In re Dierschke**, 975 F.2d 181, 184 (5th Cir. 1992).

Berger and Lacabe contend that the district court abused its discretion because they had meritorious defenses, there was no prejudice to the plaintiff, and their failure to answer was not willful. Although the district court did not make detailed findings as to Berger and LaCabe's assertions, the district court's order states: "A review of the facts indicates that the defendants' reasons for failing to file answers does not reach the standard of good cause." Thus the district court apparently concluded that the appellants' failure to answer was a willful failure.

An absence of prejudice and the existence of meritorious defenses do not automatically overcome the willful failure to answer. "Willful failure alone may constitute sufficient cause for the court to deny" a motion to set aside entry of default. **Dierschke**, 975 F.2d at 184-85; **see CJC Holdings**, 979 F.2d at 64. Willfulness is a finding of fact and is reviewed under a clearly erroneous standard. **CJC Holdings**, 979 F.2d at 64. As the record

amply supports a finding of willful failure to answer, the district court acted well within its discretion in denying Berger and LaCabe's motions to set aside entry of default.

Both Berger and LaCabe contend that their failure to answer was not willful, but rather, the result of mistakes stemming from inexperience and miscommunication. As his reason for failing to answer, Berger's counsel made the following representations to the district court: Berger was served on November 5, 1990; Berger contacted the City Attorney's Office, representatives for the New Orleans Police Department, and was informed that a City Attorney would not represent him; Berger read the summons and believed that he was supposed to file the summons in the courthouse; accordingly, Berger filed the summons with the Clerk of Court on November 26, 1990; Berger then called the City Attorney who informed him that he needed to file an answer or he could "be defaulted"; Berger replied that he had "'already filed a paper with the Courthouse'"; believing that he had filed an answer, Berger did nothing until he learned of the entry of default; Berger then "immediately" contacted a private attorney who filed the instant motion on his behalf. Berger attached an affidavit to his motion, however, he did not confirm the above facts; he merely addressed the allegations underlying the lawsuit. Given the above, the district court was justified in concluding that Berger did not show good cause.

The summons clearly stated that Berger was to file an "answer to the complaint" or a default judgment would be taken. Berger

contacted the City Attorney's Office, but when they declined to represent him, he made no further efforts to ascertain what was required of him or to locate another attorney who could prepare his defense. The fact that Berger initially contacted the City Attorney's Office supports an inference that he understood the importance of the documents and the desirability of securing professional legal advice. However, Berger made no effort to secure another lawyer before returning the summons to the clerk (which he understood to be an answer). Upon filing a copy of the summons with the Clerk of Court, Berger again contacted the City Attorney's Office, but failed to ascertain whether filing the summons constituted an answer, despite a City Attorney's warning that a failure to answer would result in default. Berger's mistaken belief that he had answered the complaint might have been excusable if he had subsequently taken any steps towards preparing a defense to the lawsuit. Berger, however, did nothing until June 20, 1991, when he filed his motion to set aside the entry of default. This action was not precipitated by Berger's own inquiry into the lawsuit proceedings, but was the result of information forwarded by an attorney unconnected to Berger. In the preceding six to seven months there is no indication that Berger consulted in any way with an attorney to prepare a defense, or that he made any effort to act on his own behalf in defending a lawsuit which he believed to be ongoing. Hargray asserts in his brief, although there is no indication in this record, that Berger was concurrently represented by the same attorney in a criminal proceeding stemming

from the Hargray shooting. The record does reflect an Internal Affairs investigation and that Berger was suspended from duty for ninety-nine days, then reinstated. Based on the above, the district court did not abuse its discretion in refusing to set aside the entry of default.

LaCabe's excuse for not filing an answer was virtually identical to Berger's and the district court was also justified in concluding that LaCabe did not show good cause for setting aside the entry of default.

Berger and LaCabe rely on **One Parcel**, 763 F.2d at 183, for the proposition that "filings even outside the time limits indicate that the default was not willful." However, the appellee in **One Parcel** did not contend that the appellant's failure to timely file was willful. Furthermore, the Court noted that there was no evidence that the appellant "acted willfully in failing to assert her opposition to the forfeiture proceeding **once she became aware of it**." **One Parcel**, 763 F.2d at 183 (emphasis added). In the instant case, Berger and LaCabe were aware of the lawsuit upon service of the summons and complaint and failed to take adequate steps to defend against the lawsuit for six to eight months. This failure to act supports a finding of willfulness. Thus, the instant case is unlike **One Parcel**, and appellants' reliance on it is misplaced.

As willful failure alone may constitute sufficient cause to deny a motion to set aside entry of default, **Dierschke**, 975 F.2d at 184-85, and the district court based its denial of Berger and

LaCabe's motions on the inadequacy of their explanations as to their failure to answer, it is not necessary to consider whether Hargray would be prejudiced, or whether Berger and LaCabe have meritorious defenses. The district court could justifiably find that Berger and LaCabe's failure was willful and that their willful failure to answer indicated a lack of good cause. The district court, therefore, did not abuse its discretion.

AFFIRMED.