

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30627
Summary Calendar

In The Matter Of:

WESLEY ZIEBARTH,

Debtor,

JACK CLARK and MYRTLE CLARK,

Appellees,

versus

WESLEY ZIEBARTH,

Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-94-1653-E)

March 27, 1995

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Wesley (Elmer) Ziebarth appeals the district court's dismissal of his appeal of the bankruptcy court's denial of his motion to vacate a default judgment entered against him in an adversary proceeding filed by Jack and Myrtle Clark. We **AFFIRM**.

¹ Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In response to Ziebarth's petition for relief under Chapter 7 of the Bankruptcy Code, the Clarks filed an adversary complaint on November 2, 1989, alleging that Ziebarth fraudulently received more than \$15,000 from sales of goods belonging to them; they objected to his discharge or, alternatively, to the dischargeability of the debt. Ziebarth did not answer the complaint.² Spencer Livingston appeared as counsel for Ziebarth at a status conference on February 8, 1990, at which the bankruptcy court ordered him to answer within two weeks; but, none was filed.

At another status conference on April 24, 1990, Livingston advised the bankruptcy court that counsel had agreed to continue the matter and that a motion would be filed. The bankruptcy court continued the conference indefinitely, to be reset, if necessary, upon motion of counsel. Approximately six months later, on November 5, the Clarks requested that the bankruptcy court clerk enter default, because Ziebarth had failed to file responsive pleadings or to make a formal appearance. The clerk's certificate for entry of default was signed on November 7.

After more than a year passed without any activity in the case, the Clarks served a request for entry of default judgment on Ziebarth on January 14, 1992; the request was not filed in the record, however, until March 20. On January 27, a letter from

² Bankruptcy Rule 7012 provides that an answer is due within 30 days after service of the summons and complaint, except when a different time is prescribed by the court.

Ziebarth, purporting to respond to the allegations in the complaint, was filed.

On March 20, the bankruptcy court signed a default judgment in favor of the Clarks, finding Ziebarth liable to them for \$15,000, plus interest from the date of judicial demand, and all court costs. The judgment was entered on March 22, and the Clarks' counsel sent a certified copy of it to Ziebarth on March 30. Ziebarth did not appeal the judgment; instead, on December 3, 1993, approximately 20 months after entry of judgment, he filed a motion to set it aside, which the bankruptcy court denied on January 27, 1994. It also denied Ziebarth's motion for reconsideration of its denial of his motion to set aside the default judgment. Ziebarth appealed to the district court, which affirmed the bankruptcy court's orders, dismissed Ziebarth's appeal, and denied his motion to reconsider.

II.

Ziebarth contends that the default judgment should have been set aside under Fed. R. Civ. P. 60(b)(4),³ because it was obtained in violation of due process and was, therefore, void. Ziebarth maintains that the bankruptcy court violated due process in several respects: by failing to construe his letter to the bankruptcy court clerk as an answer to the complaint; by finding that he had

³ Bankruptcy Rule 9024 provides for the application of Fed. R. Civ. P. 60 in cases under the Code, with certain exceptions not relevant here. Fed. R. Civ. P. 60(b) sets forth the grounds for relief from a judgment or order. Rule 60(b)(4) provides that the court may relieve a party from a final judgment if "the judgment is void". Fed. R. Civ. P. 60(b)(4).

not appeared or otherwise responded; by failing to give notice of a hearing prior to rendering the default judgment; and by entering the default judgment without any proof of damages.⁴

"We review a district court's refusal to set aside ... a default judgment under Fed. R. Civ. P. 60(b) under an abuse of discretion standard." *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 63 (5th Cir. 1992). However, when a judgment is void, within the meaning of Rule 60(b)(4), it must be set aside. *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646, 649 (5th Cir. 1988); see also 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2862, at 197 (1973) ("[t]here is no question of discretion on the part of the court when a motion is under Rule 60(b)(4)"). On the other hand, "[i]n the sound interest of finality, the concept of void judgment must be narrowly restricted". *United States v. 119.67 Acres of Land, Etc.*, 663 F.2d 1328, 1331 (5th Cir. 1981) (internal quotation marks and citations omitted). "A judgment is not void simply because it is erroneous, but only where the court rendering it lacked jurisdiction over the subject matter or the parties, or if it acted in a manner inconsistent with due process of law". *Id.*

The bankruptcy court's failure to construe Ziebarth's letter as an answer to the complaint does not constitute a due process

⁴ The Clarks contend erroneously that the motion to vacate the default judgment was untimely because it was made more than one year after entry of judgment. As stated in Rule 60(b), the one-year time limit governing motions under subsections (1)-(3) is not applicable to those under subsection (4). See, e.g., *Briley v. Hidalgo*, 981 F.2d 246, 249 (5th Cir. 1993).

violation. Assuming that the letter, liberally construed, constituted an answer, it did not cure Ziebarth's default, because it was filed more than three years after an answer was due, and more than two years after the clerk's entry of default. Because Ziebarth did not secure leave to file the "answer", the bankruptcy court was not obligated to treat it as having cured the default or to recognize it as a valid response to the complaint. See 10 C. Wright, A. Miller & M. Kane, **Federal Practice & Procedure**, § 2688, at 466 (1983) ("[W]hen defendant fails to answer within the time specified by the rules, he is in default even if that fact is not officially noted. Therefore, he must request that the default be 'excused' and secure leave to answer before his responsive pleading will be recognized.").

Likewise, the bankruptcy court's finding that Ziebarth had not appeared or otherwise responded, even if erroneous, is not a violation of due process.⁵ Whether Ziebarth had appeared is relevant only to whether he was entitled to receive three days' notice prior to entry of the default judgment. See Fed. R. Civ. P. 55(b)(2).⁶ As explained *infra*, Ziebarth had more than three days'

⁵ "'Appearance' is defined broadly ... to include a variety of informal acts on defendant's part which are responsive to plaintiff's formal action in court, and which may be regarded as sufficient to give plaintiff a clear indication of defendant's intention to contest the claim." **Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n**, 874 F.2d 274, 276 (5th Cir. 1989).

⁶ Bankruptcy Rule 7055 provides that Fed. R. Civ. P. 55 applies in adversary proceedings. Rule 55(b)(2) provides, in pertinent part, that "[i]f the party against whom judgment by default is sought has appeared in the action, the party ... shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application". Fed. R. Civ. P.

notice that the Clarks were seeking entry of a default judgment against him.

Ziebarth's contention that the default judgment is void because he did not receive three days' written notice of the entry of the default judgment is unavailing. As noted, the Clarks served a copy of their request for entry of default judgment on Ziebarth on January 14, 1992, approximately five weeks before the default judgment was entered. Therefore, Ziebarth had ample notice that the Clarks were seeking entry of the default judgment, and had ample time in which to request a hearing on damages and contest the amount to be assessed against him.

Finally, the bankruptcy court did not violate Ziebarth's due process rights by entering the default judgment without any proof of damages. It is well settled that a default judgment does not establish the amount of damages. See, e.g., **United States for Use of M-Co Constr. Co. v. Shipco General, Inc.**, 814 F.2d 1011, 1014 (5th Cir. 1987). Accordingly, the failure to conduct a hearing on damages might have constituted reversible error had Ziebarth timely appealed the default judgment. As noted, however, Ziebarth did not appeal the default judgment, but instead waited nearly two years before seeking to have it set aside. Our court has stated that the lack of evidence on damages does not constitute a violation of due process sufficient to render a default judgment void "so long as a defendant has the regular avenues of appeal available to him". **Williams v. New Orleans Public Service, Inc.**, 728 F.2d 730, 733-35

55(b)(2).

(5th Cir. 1984). Ziebarth was notified of the entry of the default judgment prior to the expiration of the time for filing a notice of appeal or a motion for rehearing, but chose not to take advantage of either the appeal or rehearing processes to challenge the lack of evidence supporting the damage award.⁷ Ziebarth waited far too long to seek to have the judgment set aside because of the lack of evidence of damages.

Ziebarth's reliance on ***Bass v. Hoagland***, 172 F.2d 205 (5th Cir.), *cert. denied*, 338 U.S. 816 (1949), is misplaced. Although our court held that the defendant had been denied due process, that holding was not based solely on the lack of evidence of damages or the fact that the defendant did not receive notice of the entry of the default judgment which, apparently, was entered *sua sponte*. Instead, the due process violation resulted from a combination of circumstances: the defendant's demand for a jury trial was denied; the default judgment was entered solely because the defendant's attorney failed to appear for trial; and notice of the entry of the judgment had been fraudulently withheld by the opposing party for two and one-half years, long after the expiration of the time for appealing it.

⁷ Bankruptcy Rule 8002(a) provides that a notice of appeal shall be filed within 10 days of the date of the entry of the judgment appealed from. Rule 8002(c) specifies the circumstances in which the bankruptcy judge may extend the time for filing the notice of appeal. Bankruptcy Rule 8015 provides that a motion for rehearing may be filed within 10 days after entry of the judgment.

III.

For the foregoing reasons, the judgment is

AFFIRMED.