UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

LYNNIAL JEROME JONES,

Debtor.

Case No. 02-12616-DHW
Chapter 7

TALBRION TREE FARMS, INC.,
McKEE & COMPANY EQUIPMENT
SALES, and N. ALLAN McKEE,

Plaintiffs,

v.

Adv. Proc. No. 03-1118-DHW

LYNNIAL JERRY JONES d/b/a
B & J TIMBER SERVICES, INC.,

Defendant.

OPINION ON MOTION FOR DEFAULT JUDGMENT

The plaintiffs commenced this complaint on October 14, 2003 objecting to the debtor's discharge under 11 U.S.C. § 727. A summons issued the following day on October 15, 2003. The court file reflects that counsel for the plaintiffs served a copy of the summons and complaint on the defendant and defendant's counsel on October 21, 2003.

The defendant filed an answer to the complaint on November 26, 2003 opposing the relief sought. The answer was filed twelve days after the time for filing a complaint had expired. *See* Fed. R. Bankr. Proc. 7012(a).[1]

---

[1] "If a complaint is duly served, the defendant shall serve an answer within 30 days after the *issuance* of the summons, except when a different time is prescribed by the court." Fed. R. Bankr. Proc. 7012(a) (emphasis added). The summons was issued

Counsel for the plaintiffs filed an affidavit on December 23, 2003 stating that the defendant "has not appeared in this action." A motion for a default judgment and supporting legal brief followed in early January 2004. The motion acknowledges the untimely answer.

The defendant filed a response contending that his counsel incorrectly calendared the time for filing an answer. In addition, the defendant filed verified evidence of a meritorious defense to the complaint. Further the defendant notes that the answer was filed prior to the motion for a judgment by default.

A hearing on the motion for default judgment was held January 26, 2004. Following the hearing, the parties submitted the motion to the court on arguments of counsel and briefs to be filed by the parties.

Though the defendant's default has not been entered of record by the Clerk, the adversary proceeding is ripe for entry of default because of the untimeliness of the answer.[2]

Because the proceeding is ripe for entry of a default, the court concludes that the standards governing the setting aside of an entry of default control the decision in this case.

Under Fed. R. Bankr. Proc. 7055(c), the court may set aside an entry of default for "good cause shown." The "good cause" standard is less stringent than the "excusable neglect" standard for setting aside the entry of a default judgment under Fed. R. Bank. Proc. 60(b). *EEOC v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524 (11th Cir. 1990); *Cielinski v. Kitchen (In re*

---

on October 15, 2003. Therefore, an answer was due by November 14, 2003.

[2] *See* Fed. R. Bankr. Proc. 7055(a): "Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."

Tires and Terms), 262 B.R. 885 (Bankr. M.D. Ga. 2000).

The decision is left to the discretion of the court. *Jones v. Harrell*, 858 F.2d 667, 669 (11th Cir. 1988). The court is mindful that a "[d]efault judgment is not a favored remedy, and should be used only in extreme situations." *Heaton v. Bonacker & Leigh*, 173 F.R.D. 533 (M.D. Ala. 1997). "Generally, defaults are not favored because of the strong policy of deciding cases on their merits." *Cielinski,* 262 B.R. at 888.

The United States District Court for the Middle District of Alabama has stated:

> The good cause standard is not strictly defined and varies depending on the factual situation, *Compania Interamericana Export-Import v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir.1996). While the standard is quite flexible, courts have considered basic guidelines such as "whether the default was culpable or willful, whether setting it aside would prejudice the adversary, and whether the defaulting party presents a meritorious defense." *Id.* at 951 (citing *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 242 (2d Cir.1994); *Robinson v. U.S.*, 734 F.2d 735, 739 (11th Cir.1984)). These guidelines are not "talismatic" and others may just as easily " 'identify[ ] circumstances which warrant the finding of 'good cause' to set aside a default.' " *Id.* (quoting *Dierschke v. O'Cheskey*, 975 F.2d 181, 184 (5th Cir.1992)).

Heaton, 173 F.R.D at 535. Both the plaintiffs and the defendant have cited the following two cases which consider similar factors for setting aside the entry of a default: *Cielinski v. Kitchen (In re Tires and Terms)*, 262 B.R. 885 (Bankr. M.D. Ga. 2000); *Rogers v. Allied Media, Inc. (In re Rogers)*, 160 B.R. 249 (Bankr. N.D. Ga. 1993).[3] The factors are as follows:

---

[3] Two of the cases cited by the plaintiffs in brief address the standards governing the setting aside of a default judgment. Those cases are not relevant to the issue at

> (1) whether the defaulting party took prompt action to vacate the default;
> (2) whether the defaulting party provided a plausible excuse for the default;
> (3) whether the defaulting party presented a meritorious defense; and
> (4) whether the party not in default will be prejudiced if the default is set aside.

Cielinski, 262 B.R. at 888 (citing *Turner Broadcasting System, Inc. v. Sanyo Electric, Inc.*, 33 B.R. 996, 1001 (N.D. Ga. 1983), *aff'd* 742 F.2d 1465 (11th Cir. 1984)).

In the case *sub judice*, the defendant filed the answer only twelve days after the time had expired and almost one month before the plaintiffs filed a motion for a judgment by default. In addition, the defendant timely responded to the plaintiffs' affidavit of default, appeared at the January 26, 2004 hearing and filed a timely brief in opposition to the motion. The court concludes that the defendant acted promptly.

Counsel for the defendant characterizes his calendaring mistake as a "careless error." He argues that "careless error" can justify relief under even the higher standard of "excusable neglect." *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 113 S. Ct. 1489 (1993) (late filing of a proof of claim). The Court stated that "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Pioneer*, 113 S. Ct. at 1495. The Eleventh Circuit has upheld relief under the excusable neglect standard in a case in which the delay was the result of a failure in communication between the associate attorney and the lead counsel. *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996) (failure to file a timely request for a trial *de novo)*. The court characterized the delay as "simply

---

hand.

an innocent oversight by counsel." *Id.* at 850. Therefore, the court concludes that the defendant has offered a plausible excuse for the delay in filing the answer.

The defendant has submitted an affidavit with attached exhibits to support his allegation of a meritorious defense and has not relied on mere conclusory statements and general denials.

Finally, the defendant argues that the plaintiffs are not prejudiced by the twelve-day delay in filing the answer. "As a general proposition, a mere delay in the ultimate resolution of the issues on the merits does *not* constitute prejudice to a plaintiff." *Rogers*, 160 B.R. at 255. The plaintiffs have not asserted any prejudice other than delay in the trial on the merits.

Upon consideration the length of the delay, the reason for the delay, the proffer of a meritorious defense, and the absence of prejudice to the plaintiffs, the court concludes that the defendant has shown good cause for setting aside an entry of default in this case. Therefore, no entry of default will enter, and the motion for a default judgment will be denied.

Done this 12th day of April, 2004.

/s/ Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Michael P. Cielinski, Attorney for Plaintiffs
Gary A. Hudgins, Attorney for Debtor/Defendant