Intercontinental Trading Corp. v. Johnsrud, 1 ROP Intrm. 569 (1989)

INTERCONTINENTAL TRADING CORPORATION, an Oregon Corporation, Appellee,

v.

ANTONIA JOHNSRUD, d/b/a/ A.J.J. ENTERPRISES and LAWRENCE C. JOHNSRUD, Appellants.

CIVIL APPEAL NO. 23-87
Civil Action No. 288-86

Supreme Court, Appellate Division
Republic of Palau

Order dismissing appeal
Decided: January 20, 1989

Counsel for Appellants: John S. Tarkong

Counsel for Appellee: Thomas C. Sterling and Kevin N. Kirk

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice; ARTHUR NGIRAKLSONG, Associate Justice.

MAMORU NAKAMURA, Chief Justice:

Defendants-Appellants filed this appeal from a default judgment granted in favor of the plaintiff-appellee by the National Court of the Republic of Palau on April 23, 1987. The amount of the judgment was $122,109.93, together with interest at the rate of nine (9%) percent per annum. The trial court also awarded reimbursement for costs incurred in the amount of $1,147.00.

⊥570 I.

Issues on Appeal

Appellants have asked this Court to decide the following questions:

1. Whether the trial court erred in denying appellants motion to set aside the default judgment; and

2. Whether the trial court erred in awarding the appellee $1,147.00 as reimbursement for costs incurred.

For the reasons set out below, this Court answers both questions in the negative, and accordingly this appeal is dismissed.

II
Default Judgment

Appellants admit that they did not comply with the Republic of Palau Rules of Civil Procedure and recognize that it is within the discretionary power of a trial court to refuse to set aside a default judgment. However, they argue that in the circumstances of this case the trial court should have exercised its discretion to set the default judgment aside.

Specifically, appellants aver the following "special circumstances" and reasons why the trial court should have ⊥571 ruled favorably on their motion to set aside the default judgment: that matters involving large sums of money should not be decided by defaults or default judgments; that appellants are domiciled in Koror, Republic of Palau and appellee is domiciled in Portland, Oregon; that appellants normally paid appellee by sight drafts; that appellants had in previous course of dealing sometimes been late with part of their payment to appellee; that appellants and appellee had engaged in business with each other for approximately six years; that appellants experienced difficulty and delay in finding appropriate counsel in Palau; and that appellants have a meritorious defense to appellee's claims. We find no merit in any of these contentions.

The two rules of civil procedure which are pertinent to this case, Rule 55(c) and Rule 60(b), are identical with the United States Federal Rules of Civil Procedure, and United States decisions are therefore persuasive.

Rule 55(c) of the Republic of Palau Civil Procedure reads as follows:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60(b) sets forth various grounds for vacating a judgment. The appellants sought relief pursuant to Rule 60(b)(1) pertaining to "mistake, inadvertence, surprise, or excusable neglect." "A default that has become final as a ⊥572 judgment can be set aside only under Rule 60(b) standards for setting aside final, appealable orders." *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Civ. 1980). The criteria for setting aside a default judgment under Rule 60(b) are: 1) whether the default was willful; 2) whether the defendant has a meritorious defense; and 3) the level of prejudice that may occur to the non-defaulting party if relief is granted. *See, Davis v. Musler*, 713 F.2d 907, 915 (2nd Cir. 1983).

The factors to be considered in determining whether a movant has met the good cause standard of Rule 55(c) in setting aside a mere entry of default are similar, except that the standards are not as stringent as in a default judgment under Rule 60(b). Here, a default was entered by the clerk and at the default judgment prove up hearing the trial judge permitted the appellants to file a motion to set aside the default. However, the court indicated that the motion would be treated as a motion to set aside a default judgment rather than a default.

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Appellants filed a motion to set aside under Rule 55(c) of the Republic of Palau Rules of Civil Procedure, asserting the default had been entered as a result of "mistake, inadvertence, and excusable neglect." The trial court applied the more lenient "good cause" standard of Rule 55(c) applicable to getting aside defaults, which gave appellants a better chance of prevailing. In spite of this easier standard, appellants did not prevail, nor could they, given the facts of this case.

⊥573 Unless the trial court was "clearly wrong" in finding that good cause had not been shown for the motion to set aside [a] default judgment (emphasis added), an abuse of discretion has not been shown. *Madsen v. Bumb* , 419 F.2d 4, 6 (9th Cir. 1969), 6 J. Moore, Moore's Federal Practice ¶ 55.10[1].

It is true that a trial court should set aside a default for "good cause," but a trial court may "just as clearly" refuse to set aside a default "where the defaulting party has no meritorious defense, where the default is due to wilfulness or in some other respect the defaulting party is not proceeding in good faith." 6 J. Moore, Moore's Federal Practice ¶ 55.10[2] at 55-240.

In the instant case the record shows that appellants have repeatedly and wilfully failed to meet the deadlines mandated by our rules of procedure, despite extensions of time. More inconvenience in complying with deadlines, without more, is not good cause to set aside a default. *Michigan Window Cleaning Co. v. Martino* , 173 F.2d 466 (6th Cir. 1949); 6 J. Moore, Moore's Federal Practice ¶ 55.10[2]. In the circumstances of this case, the repeated lack of timeliness is, alone, enough to justify the trial court's refusal to set aside the default.

The "special circumstances" to which appellants refer to excuse their delays do not rise to the level of "good cause", to set aside a default, let alone to set aside a default judgment. 6 J. Moore, Moore's Federal Practice ¶ 55.10[2] at 55-240.

⊥574 The fact that appellants are located in Palau and appellee in Oregon could have worked to appellants' benefit, not detriment. The fact that appellants had engaged in business with appellee for approximately six years prior to the incidents in this case has no relevance to appellants default. Likewise, appellants' method of payment, usually by sight drafts, has no rational relationship to appellants behavior before the trial court. The mere assertion by appellants that they were sometimes allowed to make part of their payments to appellee late does not establish that appellants have a meritorious defense that would have allowed the trial court to set aside the default; appellants neither contended nor demonstrated that they relied substantially on being allowed to make late payments.

Appellants may have had difficulty in obtaining appropriate representation, but they were granted extra time for this. In any case, appellants admitted that the default was primarily caused by their "forgetting" about the action. We add that, in view of the history of this case and of the amount at issue, we find this claim of "forgetting" minimally credible. In view of the appellants knowledge of legal processes, the amount of money involved, and the granting of extra time by the trial court, there is no excuse for appellants default.

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Appellants contend that they have a meritorious defense. In a motion to set aside a default or default ⊥575 judgment, the moving party must present, with specificity, argument(s) that, if believed at trial, would be persuasive. *In Re Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978); *American Metals Service Export v. Ahrens Aircraft* , 666 F.2d at 721-722; 6 J. Moore, Moore's Federal Practice ¶ 55.10[1] at 55-233, 234. This is particularly so if the movant's conduct in the action, as in the instant case, has been dilatory. *American Metals Service Export v. Ahrens Aircraft*, 666 F.2d at 721-722.

No specific argument has been presented by appellants to buttress their claim of a meritorious defense. They merely assert that they do not owe the appellee as much money as appellee claims, and couple this assertion with a substantial number of raw documents. The trial court spent time sifting through these documents and found that a meritorious defense had not been demonstrated. We will not reverse this finding on appeal unless no reasonable support for it exists in the record below, or unless the finding is clearly erroneous. *Silmai v. Magistrate of Ngardmau Municipality, Kumangai* , 1 ROP Intrm. 181, 183 (App. Div. 1984). There is reasonable support for the trial court's finding and it is not clearly erroneous; it is therefore upheld.

Appellants contend that since this case involves a large amount of money, (in excess of $100,000), it should not be decided by a default judgment. The mere fact that a substantial amount of money is at stake will not alone require, ⊥576 or even recommend, a trial court to set aside a default. *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1208 (7th Cir. 1984). In fact, it is difficult to understand how appellants could treat this case in so cavalier a fashion in view of the relatively large amount in controversy. Defaults and default judgments are sanctions which exist, in part, to remind litigants that they may not disregard the rules of courts without certain consequences.

III
Reimbursement For Costs

An award taxing costs is within the discretion of the trial court. This rule has been codified by 14 PNC § 702:

> Additional costs may be taxed.
> The court may allow and tax any additional items of cost or actual disbursement, other than fees of counsel, which it deems must and finds have been necessarily incurred for services which were actually and necessarily performed.

Trial courts sometimes tax legitimate costs to the losing party, particularly when it is clear, as it is in the instant case, that the party against whom the costs are to be taxed has not behaved appropriately with respect to the litigation.

The costs awarded by the trial court consisted of travel expenses incurred for appearance in response to court order and for long distance telephone calls made during the course of the litigation. The amount of costs was supported by ⊥577 the record and, in view of the

circumstances of this case, the award was an appropriate exercise of the trial court's discretion.

IV
Conclusion

Courts prefer that controversies be settled after a hearing on the merits, but this does not mean that litigants may not lose by default. Where litigants abuse the processes of the courts or violate the rules of civil procedure, and fail to show that they would prevail at a hearing on the merits defaults remain an important sanction which courts may legitimately use.

IT IS, THEREFORE, ORDERED that this appeal be, and the same is, hereby DISMISSED.