

Ngeliei v. Rengulbai, 3 ROP Intrm. 4 (1991)
SYLVANUS NGELIEI,
Appellee,

v.

MOSES RENGULBAI, et al.,
Appellants.

CIVIL APPEAL NO. 17-86
Civil Action No. 50-86

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: July 4, 1991

Counsel for Appellants: Johnson Toribiong

Counsel for Appellee: Clara Kalscheur

BEFORE: MAMORU NAKAMURA, Chief Justice; ARTHUR NGIRAKLSONG, Associate Justice; FREDERICK J. O'BRIEN, Associate Justice.

PER CURIAM:

This appeal addresses the issue whether the trial court abused its discretion in refusing to set aside its entry of default against Appellant for failure to timely file his answer to the complaint.

Background

On March 12, 1986, Plaintiff-Appellee filed a complaint against Defendant/Appellant and others for conversion and trespass to chattels claiming that Appellant had destroyed his house. On April 1, 1986, Appellant's attorney filed a Motion for an Extension of Time to file his answer, requesting that he be allowed until April 22 to respond. The motion was granted on April 16, 1986. By April 22, the Answer had not been **15** filed. On April 23, Appellee filed and served upon Appellant a motion for default judgment. On the same day, Appellant filed a 10 line Answer in which he set forth one affirmative defense: that because he claimed ownership of the land in question, plaintiff had no rights to the improvements on the land.

On April 25, 1986, Appellant filed a motion for leave to file an answer late, asserting that his involvement in all day meetings through April 23 caused him to miss filing his Answer in a timely fashion. This motion was denied on May 22, 1986. Appellee's motion for a default judgment was granted on April 30, 1986. A hearing on damages was scheduled for May 22,

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1986 but was subsequently continued indefinitely, pending the outcome of other litigation involving the same land.

On October 9, 1986, Appellant filed a Motion To Set Aside Default Judgment pursuant to Rules 55(c) and 60(b) of the ROP Rules of Civil Procedure, arguing that Appellant's attorney's oversight constituted "excusable neglect," that the Answer presented a "strong defense of the merits," (Appellant's Brief at 5), that the delay was minimal, that no prejudice to Appellee would result from the granting of the motion, and that Appellant was entitled to notice of, and a hearing on, the application or default.

On November 7, 1986, a hearing was held on the motion to set aside the default; Appellant's counsel failed to appear to argue the motion, which was denied on the merits. The trial court found that "oversight" and "forgetfulness" does not constitute excusable neglect, that no violation of Rule 55(b)(2) **L6** occurred as the motion for Default was filed and served by placing it in Appellant's attorney's box at the courthouse on April 23, 1986, 7 days prior to the day the order granting the default was entered, and that there was no presence of a strong defense of the action on the merits.

Appellant timely filed a motion to appeal the denial of the motion to set aside the default.

Notice Issue

The first issue we consider is whether the default judgment should be set aside for failure of appellee to give proper notice pursuant to ROP Civil Procedure Rule 55(b)(2) which provides:

. . . [a] party against whom judgment by default is sought . . . shall be served with written notice of the application for judgment at least (3) days prior to the hearing on such application. If, in order to enable the court to enter judgment or carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. (emphasis added)

ROP Rules of Civil Procedure, Rule 55(b)(2).

The trial court entered the default judgment without holding a hearing and postponed a hearing on damages until other matters in the case could be resolved. To date, a hearing on damages has not been held. Thus, we must consider whether the trial court was obligated to hold a hearing prior to entering the default judgment and what exactly the notice **L7** requirement in Rule 55(b)(2) refers to.

The cases interpreting the United States Federal Rule 55(b)(2) (which contains exactly the same language as Palau's Rule 55(b)(2)) make clear that where the defaulting party has made an appearance, as in the present case, the court may enter a default against that party without a hearing. *See, e.g., Ad West Marketing Inc. v. Hayes* , 745 F.2d 980 (5th Cir. 1984). As the

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language of the Rule specifically states, a hearing may be held if the court deems it necessary to adduce evidence, to assess damages, etc. Indeed, several U.S. Appellate Courts have concluded that Rule 55(b)(2) leaves the decision of whether even a hearing on damages is necessary to the discretion of the trial judge. *See, e.g., Fustok v. Conticommodity Services, Inc.*, 873 F.2d 38, 40 (2d. Cir. 1989). We agree with that line of reasoning and therefore hold that a judgment of default may be entered by the court ex-parte in a situation such as this where a hearing on damages is scheduled to be held at a subsequent time.

Because we find that Rule 55(b)(2) required no hearing prior to the entry of a default, Appellant's claim that he is entitled to notice of such hearing disintegrates. Appellant cites *Wilson v. Moore and Associates, Inc.*, 564 F.2d 366 (9th Cir. 1977) in support of his argument that since no notice was issued or hearing held, the default should be void. However, in *Wilson*, no formal notice was given of a default judgment in which a sum certain was awarded and a summons for garnishment issued. *Wilson* holds that where a default is entered involving 18 an award of a specific sum, some notice, formal or informal, that a default motion is pending, must be given. As the present case does not involve an award of any sum, *Wilson* is not relevant. To the extent that *Wilson* is relevant, it bolsters the argument that "informal" notice, such as the service upon Appellant of the Motion for Default Judgment, was sufficient. And Appellant's argument that "a Motion for Default Judgment should not have been entered absent a three-day notice to him of the application for default judgment" (Appellant's Brief at 7) fails since the Rule clearly states that the three day notice requirement only applies to the hearing on the application for judgment."

We note that after Appellant was served with Appellee's Motion for Default Judgment, he could have requested a hearing but did not. Neither did Appellant request a hearing after the judgment was entered in the form of a motion for relief under ROP Civ. Pro. 55(c) and 60(b). Indeed, it was not until five months later that Appellant contested the entry of default or raised the notice/hearing arguments in the form of his motion to set aside. Appellant's professed eagerness to be heard on this issue is belied his failure to appear at the hearing on the motion to set aside and by the fact that the representative he sent was not prepared to argue.

Abuse of Discretion

Having found that Appellant was not entitled to any more notice or further hearings than he received when the Motion for Default was served upon him, we turn to the issue of 19 whether the trial court abused its discretion in refusing to set aside the default judgment on its merits.

Appellant moved under both Rules 55(c) and 60(b) to set aside the default. The proper standard under which to view the entry of default is that set forth in Rule 60(b). The standards outlined in Rule 55(c) should be used to set aside an entry of default made pursuant to Rule 55(a). Those standards are different from the ones used in setting aside a default judgment. Rule 60(b) deals with motions for relief from final judgments or orders such as the judgment of default entered on this case. Therefore, the trial court properly applied the "excusable neglect" standard.

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The sanction of judgment by default, although most severe, is within the discretion of the trial judge. *Flaks v. Koegel*, 504 F.2d 702, 707 (2nd Cir. 1974); *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 614 (2nd Cir. 1964). However, the discretion of the trial court to deny a 60(b) motion is counter-balanced by three considerations. First, Rule 60(b) is remedial in nature and therefore must be applied liberally, 7 J. Moore, Fed. Prac., 60.10[7], [9] and 60.18[8]. Second, default judgments are generally disfavored; whenever it is reasonably possible, cases should be decided on their merits. 6 J. Moore, Fed. Prac., 55.10[1]. Third, where timely relief is sought from a default judgment and the movant has a meritorious defense, any doubt should be resolved in favor of the motion to set aside the judgment. *See, Butner v. Neustader*, 324 F.2d 783, 786 (9th Cir. 1963); *Schwab v. 110 Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); 7 J. Moore, Fed. Prac., 60.19.

Appellant depicts his failure to timely file an answer as a minor lapse, largely technical in nature and attributes his neglect to his involvement in all day meetings. The trial court, however, had little sympathy for Appellant's neglect, finding that "forgetfulness" and oversight did not provide a basis for relief. As this is a mixed finding of law and fact, we review it *de novo*.

This Court has not looked kindly in the past upon assertions by counsel that pressures of practice, the rigors of being a professional or calendaring problems excuse neglectful behavior. *See Sebaklim v. Uehara*, 1 ROP Intrm. 649 (App. Div. Aug. 17, 1989) (conclusionary statement that counsel needed more time to prepare did not meet excusable neglect standard); *In the Matter of the Estate of Kloulubak*, 1 ROP Intrm. 364 (App. Div. Feb. 14, 1986) (failure to keep accurate and timely calendar does not constitute excusable neglect); *Silmai v. The Pension Fund Board of Trustees*, 1 ROP Intrm. 631 (App. Div. May 25, 1989) (appeal dismissed; counsel's secretary's mistake leading to late filing not good cause). In this case, Appellant had already been granted one time extension, failed to do anything about the default judgment until 5 months after it was entered and didn't even appear at the motion to set aside the default. That Mr. Toribiong was dilatory in his attempts to remedy the default detracts further from his position that the default should be set aside. *See Dow Chemical Pacific Ltd. v. 111 Rascator Maritime S.A.*, 782 F.2d 329, 336 (2d Cir. 1986). Since mere inconvenience in complying with deadlines, without more, is not good cause to set aside a default, *Intercontinental Trading Corporation v. Johnsrud*, 1 ROP Intrm. 569 (App. Div. Jan. 20, 1989), we AFFIRM the trial court's findings regarding excusable neglect.

Meritorious Defense

In determining whether the default judgment should be set aside, we also consider whether the defense presents "a strong defense on the merits." Appellant's Answer contains a one sentence assertion that because Appellant owns the land in question, Appellee has no rights to it. We agree with the trial court that this does not present a "strong" enough defense on the merits to warrant setting aside the default judgment.

Filing of Answer

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The only issue left to consider is whether the fact that Appellant filed his Answer prior to the date of the entry of default requires that the default be set aside. We find that it does not.

Failure of Appellee's Counsel To Appear At Hearing

The rule that oversight and forgetfulness do not constitute excusable neglect applies to Appellee's counsel, as well as to Appellant's counsel in this case. Ms. Kalscheur failed to appear for the oral argument originally scheduled; the argument had to be continued for a week so that Ms. Kalscheur could be there. At the oral argument, Ms. Kalscheur ¶12 stated that she had been in Saipan on the original date and had forgotten about the hearing. Transcript of Oral Argument, Civil Appeal No. 17-86. We FIND that such "forgetfulness" warrants sanctions against Ms. Kalscheur in the amount of \$100.00 to be paid to the Clerk of Courts.

Conclusion

For the foregoing reasons, we AFFIRM the trial court's denial of Appellant's motion to set aside the Default Judgment and REMAND the case to the trial court for an assessment of damages.

This Court is mindful of the fact that Appellant will bear the burden of his attorney's neglect and notes that Appellant may have further remedies at law against his attorney.