FILED
United States Court of Appeals
Tenth Circuit

OCT 10 1990

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SUSAN DOROTHY MARTIN,

Plaintiff-Appellee,

v.

KENNETH P. BURRES; KENNETH P. BURRES, M.D., P.C.; KENNETH BURRES, M.D., P.C., Retirement Plan,

Defendants-Appellants,

and

JEFF BURRES; LEONARD P. BURKE, M.D.; COLORADO NEUROSURGICAL ASSOCIATES, P.C.; PENSION & RETIREMENT PLAN,

Defendants.

No. 89-1292
(D.C. No. 88-B-1372)
(D. Colo.)

ORDER AND JUDGMENT*

Before SEYMOUR, BRORBY, and EBEL, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Defendants-appellants (defendants) appeal[1] from a district court order denying their motion to vacate a default judgment that was entered because they had not filed a timely answer with the court as reflected on its docket. Plaintiff brought this action to redress defendants' alleged wrongful failure to pay over to plaintiff, upon her termination from their employ, monies due plaintiff as a participant in defendants' pension and profit sharing plans.

On October 27, 1988, plaintiff served defendants with the summons and complaint. More than three months then passed without any record of a responsive pleading filed with the district court clerk. On February 27, 1989, plaintiff moved for default judgment, citing defendants' failure "to respond in accordance with the Federal Rules of Civil Procedure." The following day, the clerk issued a notice of default, and the district court simultaneously ordered the entry of judgment against defendants. Less than a week later, defendants (i.e., defendant Kenneth P. Burres, acting pro se) filed a response to the notice of default protesting that they had filed with the court and served on opposing counsel a timely answer, which they attached. This latter document addressed the allegations of the complaint in informal but plain and intelligible fashion.

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[1] In light of the district court's certification under Fed. R. Civ. P. 54(b), secured in accordance with this court's order of August 8, 1990, we recognize our jurisdiction over this appeal despite the incompleteness, and consequent nonfinality, of the challenged order, which effected a final disposition of only those claims asserted against the defendants who now appeal.

On March 14, 1989, judgment was entered by the clerk, without any indication of the district court's consideration of defendants' response to the notice of default. Some two weeks later, the district court received a second response from defendants, who objected that plaintiff had been awarded damages without a hearing of defendants' side of the controversy and requested that the court "[p]lease allow [defendants'] arguments." This document was treated as a notice of appeal and forwarded to the clerk of this court, initiating an appeal that, due to the absence of any follow-up action by defendants, including payment of filing fees, was dismissed within a month for lack of prosecution.

Sometime thereafter, defendants retained counsel and moved to set aside the default judgment under Fed. R. Civ. P. 60(b). After briefing by the parties, the district court entered an order denying the motion. In this, its first and only consideration of the various materials defendants had filed in response to the notice and entry of default judgment, the district court stated:

> Here, justification for relief is that defendants timely mailed a response to plaintiff's complaint to the court and to opposing counsel. Having done so, defendant believed that "all action necessary to preserve my rights in the pending lawsuit" was taken. Both plaintiff and defendants submitted affidavits to this Court upon Kenneth Burres' Motion to Set Aside Default Judgment. Having reviewed both parties affidavits and in light of the facts of the case, this Court is of the opinion that Kenneth Burres' excuse does not constitute a good cause or acceptable reason for failing to take action in his defense. Kenneth Burres is an M.D.; not an unsophisticated litigant. He was given an opportunity to appeal the entry of default judgment, but his case was dismissed due to defendants' failure to prosecute. His lack of knowledge of court procedures and his failure to hire an attorney until

> after entry of default judgment does not constitute excusable neglect.

District court order of August 3, 1989, at 3-4.

We review the district court's refusal to vacate the default judgment under an abuse of discretion standard. Barta v. Long, 670 F.2d 907, 910 (10th Cir. 1982); 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2692 at 469 (2d ed. 1983). On the other hand, default is a disfavored exception to the general preference for adjudication on the merits, see Barta, 670 F.2d at 909; Federal Practice and Procedure, § 2693 at 480, and, consequently, in a case such as this any doubts should be resolved in favor of the defaulted party, Federal Practice and Procedure, § 2693 at 485 and numerous cases cited therein.

It is significant here that although the district court docket would support the finding that defendants failed to file their answer with the court--a finding that appears to be assumed but is never made explicit in the district court's order--there is no evidence in the record specifically disputing defendants' repeated and, finally, sworn affirmation that they had served a timely answer on plaintiff's counsel, in fulfillment of the sole procedural requirement recited in the summons. Under these circumstances, a number of authorities support excusal of defendants' apparent failure to comply with the formal filing requirement of Fed. R. Civ. P. 5(d). See A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co., 461 F.2d 40, 42-43 (7th Cir. 1972)(default judgment vacated where defendant's counsel had failed to file answer with the court but had served opposing party); Kinnear Corp. v. Crawford Door Sales Co., 49 F.R.D. 3, 5-8 (D. S.C. 1970)(default judgment vacated where defendant, acting without counsel, had not filed answer with court but had sent letter "answer" to plaintiff addressing subject matter of complaint); Dalminter, Inc. v. Jessie Edwards, Inc., 27 F.R.D. 491, 492-93 (S.D. Tex. 1961)(same); Woods v. Severson, 9 F.R.D. 84, 86-87 (D. Neb. 1948)(same). Cf. Charlton L. Davis & Co., P.C. v. Fedder Data Center, Inc., 556 F.2d 308, 309 (5th Cir. 1977)(phone call and letter "responsive to plaintiff's formal court action" sufficient to constitute formal appearance necessitating notice under Fed. R. Civ. P. 55(b)(2) prior to hearing on default application; default judgment entered without such notice vacated under Rule 60(b)); H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 690-92 (D.C. Cir. 1970)(written correspondence between parties' counsel indicating intent to defend sufficient to constitute appearance necessitating Rule 55(b)(2) notice; default judgment entered without such notice vacated).

However, "[a] party requesting relief from default must [also] show 'a meritorious defense to the action.'" Republic Resources Corp. v. ISI Petroleum West Caddo Drilling Program, 836 F.2d 462, 464 (10th Cir. 1987), quoting Gomes v. Williams, 420 F.2d 1364, 1366 (10th Cir. 1970). This does not mean defendants must demonstrate a likelihood of success on the merits, United Coin Meter Co. v. Seaboard Coastline R.R., 705 F.2d 839, 845 (6th Cir. 1983); see also Coon v. Grenier, 867 F.2d 73, 77 (1st Cir. 1989)(same point made in Rule 55(c), rather than Rule 60(b), context), but rather only the existence of a "colorable" or "prima facie" defense, see United States v. Forty-Eight Thousand, Five Hundred Ninety-Five Dollars, 705 F.2d 909, 915 (7th Cir. 1983); Feliciano v. Reliant Tooling Co., 691 F.2d 653, 657 (3d Cir. 1982); see also Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 895 (5th Cir. 1984)(relevant test is whether "defendant cannot come forward with a defense of sufficient merit to raise the possibility of a change of outcome").

The defense raised by defendants is two-dimensional. First, because plaintiff's state law causes of action all in one way or another relate to defendants' employee benefit plans, these claims are preempted by section 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a). There is substantial authority to support this point. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47-48 (1987); Straub v. Western Union Tel. Co., 851 F.2d 1262, 1263-64 (10th Cir. 1988). Second, defendants maintain plaintiff pled an entitlement to ERISA plan benefits pursuant only to an ancillary (employment) contract promise, not to the written terms of the plans themselves. Defendants argue that the former is not a cognizable basis for an ERISA claim, citing cases holding that because ERISA plans must "be established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), secondary oral agreements or representations cannot modify the written terms of an ERISA-governed employee benefit plan. See Straub, 851 F.2d at 1265; Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986).

As defendants emphasize, the complaint does allege that defendants agreed to contribute to the benefit plans certain sums on plaintiff's behalf "as part and parcel of the employment contract between Plaintiff and Defendants," Complaint at paragraph 12, but it also alleges "[t]hat Plaintiff, upon termination of her employment by Defendants, had a balance of vested monies <u>under the terms of the plan</u>, due her on termination," <u>id.</u> at paragraph 26 (emphasis added). We are concerned that the final resolution of this case not turn on the (im)provident, and quite possibly fortuitous, choice of particular phraseology in the initial articulation of plaintiff's ERISA claim. The evidence relating to the plans and plaintiff's substantive rights thereunder should control. Accordingly, while we need not and do not hold that defendants have conclusively established a valid defense on the strength of the authorities cited and language quoted above, we reverse the district court's denial of Rule 60(b) relief and remand with directions to vacate the default judgment and reopen the proceedings.

The judgment of the United States District Court for the District of Colorado is REVERSED and the cause REMANDED for further proceedings consistent herewith.

ENTERED FOR THE COURT
PER CURIAM