

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

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22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
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MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

JOHN SOLOMON,)
)
Plaintiff,)
) Cause No. 2022-CC00080
vs.)
) Division No. 19
ST. LOUIS CIRCUIT ATTORNEY,)
)
Defendant.)

ORDER

The Court has before it Defendant St. Louis Circuit Attorney ("Defendant")'s Motion to Set Aside Default Judgment and Plaintiff John Solomon ("Plaintiff")'s Motion for Civil Contempt. The Court now rules as follows.

I. Defendant's Motion to Set Aside Default Judgment.

On January 10, 2020, Plaintiff filed his petition alleging violations of the Missouri Sunshine Law against Defendant. On June 5, 2020 at a hearing for Plaintiff's first request for Default Judgment, Plaintiff with defendant's consent sought leave to file an Amended Petition and Defendant was ordered to respond within 30 days of receipt. On June 9, 2020, Plaintiff filed his Amended Petition. The Court entered an interlocutory default judgment after a hearing against Defendant on July 31, 2020. Defendant now moves to set aside the default judgment.

"In order to set aside a default judgment under Rule 74.05(d), the moving party must establish: (1) a meritorious defense to the suit; (2) good cause for failing to respond to the petition; and (3) that the motion was filed within a reasonable

time not to exceed one year.” Irvin v. Palmer, 580 S.W.3d 15, 23 (Mo. App. E.D. 2019). A motion to set aside a default judgment is not self proving and must be verified or supported by affidavits or sworn testimony produced at the hearing on the motion. Id. The movant in a motion to set aside default judgment bears the evidentiary burden of proving entitlement to the relief requested. Hinton v. Proctor & Schwartz, Inc., 99 S.W.3d 454, 458 (Mo. App. E.D. 2003). If a defendant fails to establish either “a meritorious defense” or “good cause” for setting aside the default judgment, the trial court is required to deny the motion. Paes v. Bear Communications, LLC, 568 S.W.3d 52, 58 (Mo. App. W.D. 2019). The Court has greater discretion in setting aside a default judgment than in declining to do so. Myers v. Pitney Bowes, 914 S.W.2d 835, 838 (Mo. App. S.D. 1996).

A. Defendant’s Good Cause Arguments.

Defendant argues she has shown good cause under Rule 74.05(d). Defendant attached an affidavit from Assistant Circuit Attorney Lopa Blumenthal (“Blumenthal”), Defendant’s counsel previously in this case, to its Motion. As to the original Petition, Blumenthal states she prepared a Motion to Dismiss, but due to a clerical error, it was not timely filed. Blumenthal states she investigated, but was unable to identify the source of the error specifically. Blumenthal notes that a responsive pleading was due on March 20, 2020 at the beginning of the coronavirus pandemic when staff members were starting to work from home.

As to the Amended Petition, Blumenthal admits to receiving a copy of the Amended Petition through email, but states she did not receive notice from the electronic filing system that it had been filed. Blumenthal also admits to receiving the proposed order following the June 5, 2020 hearing, where the Court granted

Plaintiff's oral Motion for Leave to file Amended Petition, but states she did not receive notice the Order had been signed and filed. Blumenthal states she filed a responsive pleading on Wednesday, July 15, 2020, just six days late. Defendant claims the untimely responses to the original and Amended Petition were the result of inadvertent error and not the result of any intentional effort to subvert the powers or processes of the Court.

Plaintiff argues there is no good cause for setting aside the default judgment in light of the Defendant's blatant and ongoing disregard for this Court's orders.

"Good cause is to be interpreted liberally, not only to prevent a manifest injustice but to avoid a threatened one[.]" Mullins v. Mullins, 91 S.W.3d 667, 670 (Mo. App. W.D. 2002) (internal quotations omitted). Rule 74.05 defines good cause as "a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." Rule 74.05(d). "Courts should interpret 'good cause' liberally to include good-faith mistakes, and even negligence, in failing to timely answer." Jones v. Riley, 560 S.W.3d 540, 544 (Mo. App. E.D. 2018) (internal citation omitted). "A person is negligent if her inadvertence, incompetence, unskillfulness, or failure to take precautions precludes her from adequately coping with a possible future emergency." Id. "On the other hand, a person is reckless if she consciously chooses a course of action, either with knowledge of the serious danger to others involved or with knowledge of facts that would disclose the danger to a reasonable person." Id. "Recklessness involves some amount of deliberateness and risk." Id. "When determining whether a person intentionally or recklessly designed her conduct to impede the judicial process, the court should resolve reasonable doubt in favor of good

faith." Id.

The Court finds that Defendant has not demonstrated good cause for failing to respond to the lawsuit.

Defendant admits to being properly served with the summons and the petition on February 19, 2020. However, Defendant failed to file a responsive pleading. As a result, on June 5, 2020, the Court heard Plaintiff's Motion for Default as to Plaintiff's original Petition. Defendant finally filed a Motion to Dismiss the original Petition that day, on June 5, 2020, prior to the hearing. Giving Defendant another opportunity to respond to the lawsuit, Plaintiff's Motion for Default was denied. However, Plaintiff's oral Motion to File an Amended Petition was granted by consent. The Court's June 5, 2020 Order further stated: "Defendant Circuit Attorney is ordered to answer Plaintiff's Amended Petition within thirty days of **receipt.**" (emphasis added). Plaintiff's Amended Petition was filed on June 9, 2020. Blumenthal admits to receiving a copy of the Amended Petition on June 9, 2020 as well. Yet, no timely responsive pleading was filed within 30 days.

The Court's June 5, 2020 Order states Defendant needed to respond to the Amended Petition within thirty days of receipt, not within thirty days of filing. Therefore, even if Blumenthal did not receive notice from the electronic filing system of the Amended Petition being filed, Defendant was still required to respond within thirty days of receiving the Amended Petition on June 9, 2020. Also, Blumenthal could have checked Casenet on her own, given that she was aware already she was not receiving notices from the electronic filing system. She states in her affidavit that she was not receiving notices of other filings in the case in April and May.

Defendant's Motion to Dismiss as to the Amended Petition was

then filed out of time on July 15, 2020. No motion for leave accompanied the Motion to Dismiss. This Motion to Dismiss was identical to the Motion to Dismiss filed on June 5, 2020, and was only filed after Plaintiff filed his Motion for Judgment on the Pleadings. The Court noted at the July 28, 2020 hearing, the Court found the Motion to Dismiss meritless, and if ever called to rule on it, would have denied it.

The Court finds that Defendant's conduct in this case has recklessly impeded the judicial process. Defendant's conduct shows a consciously chosen course of action with knowledge of facts that would disclose the danger of Defendant's actions to a reasonable person. Defendant was given two opportunities to respond to the lawsuit. After being given a second chance with additional time to respond to Plaintiff's claims, Defendant did not respond within the time provided. Defendant consistently fails to act in this case unless Plaintiff seeks relief. The Court finds nothing in the affidavits submitted that support a finding of mistake, inadvertence or mere negligence.

In addition, the record contradicts a finding of mistake or inadvertence. At the July 28, 2020 hearing, Blumenthal stated she prepared an Answer to Plaintiff's pleading but chose not to file the Answer because she claimed it raised ethical issues as to Plaintiff's attorney, Mr. Roland, inserting himself as a witness in the case. This statement indicates there was no inadvertence involved in Defendant's lack of filing an Answer.

The cases cited by Defendant in support of the Motion, Billingsley v. Ford Motor Co., 939 S.W.2d 493 (Mo. App. S.D. 1997) and Jones v. Riley, 560 S.W.3d 540 (Mo. App. E.D. 2018), are distinguishable.

Therefore, having determined that Defendant failed to

establish good cause, the Court need not address whether Defendant presented sufficient facts to show a meritorious defense.

B. Defendant's Procedural Arguments.

Defendant also argues that procedural irregularities cloud the default judgment. Defendant argues since Plaintiff filed only one Motion for Default, which related to the original Petition, and the original Petition was abandoned, there was no motion capable of consideration at the Court's hearing on July 28, 2020. Defendant also argues the Motion for Reconsideration was granted without providing Defendant five days' notice under Rule 44.01(d).

Rule 44.01(d) states:

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by law or court rule or by order of the court. Such an order may for cause shown be made on ex parte application..

The Court does not find there is a procedural issue with the default judgment as the Court indicated on the record at the July 28, 2020 hearing that it was considering Plaintiff's motion as an oral Motion for Default Judgment, or a reconsideration of the Motion for Default Judgment filed in April 2020. Defendant's arguments do not show a procedural deficiency in the Court granting an oral Motion for Default Judgment.

II. Plaintiff's Motion for Civil Contempt.

Plaintiff moves the Court to enter an order holding Defendant in civil contempt for failing to comply with the Court's Judgment on July 31, 2020. Plaintiff argues as of the date of filing of his Motion for Contempt, Defendant had not produced to Plaintiff even

one record responsive to his July 5, 2019 Sunshine Law request. Plaintiff contends Defendant's failure to comply with this Court's order to produce these records warrants a finding of civil contempt against Defendant and an assignment of penalties sufficient to compel Defendant's expedient compliance with the Judgment.

Defendant argues the Motion for Civil Contempt should be denied because there is no final judgment as to which contempt may be ordered. Also, Defendant argues the judgment was subject to being set aside, and therefore, Defendant did not think asking for a stay was needed.

Civil contempt proceedings are remedial in nature. Yeager v. Yeager, 622 S.W.2d 339, 343 (Mo. App. E.D. 1981). "Civil contempt is intended to benefit a party for whom an order, judgment or decree was entered." State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 578 (Mo. banc 1994). The purpose is to coerce compliance with the relief granted. Id. "To support a charge of contempt for disobedience of a judgment, decree or order, the court's pronouncement may not be expanded by implication in the contempt proceeding and must be so definite and specific as to leave no reasonable basis for doubt of its meaning." Wuebbeling v. Wuebbeling, 574 S.W.3d 317, 328 (Mo. App. E.D. 2019). Before final judgment, a trial court may open, amend, reverse or vacate an interlocutory order. Around The World Importing, Inc. v. Mercantile Tr. Co., 795 S.W.2d 85, 88 (Mo. App. E.D. 1990).

The Court will deny Plaintiff's Motion for Civil Contempt. The July 31, 2020 Judgment in this case was interlocutory in nature, and, thus, remains subject to the Court's jurisdiction.

THEREFORE, it is Ordered and Decreed as follows:

1. Defendant St. Louis Circuit Attorney's Motion to Set Aside Default Judgment is hereby DENIED.

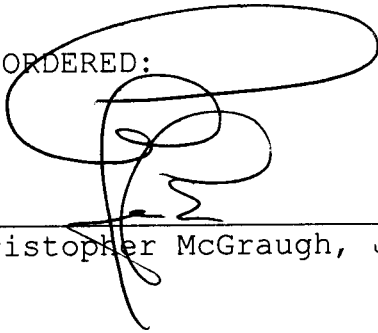
2. Plaintiff John Solomon's Motion for Civil Contempt is hereby DENIED.

3. Defendant shall produce to Plaintiff within thirty (30) days from the date of this Order a list that identifies every document responsive to Plaintiff's Sunshine Law Request. The list should specify: (1) the type of record (email, long distance toll record, text message, calendar entry, etc.); (2) which member(s) of Defendant's staff (including the Circuit Attorney, if applicable) participated in the communication; (3) the entity identified in Plaintiff's Sunshine Law request with whom Defendant or members of Defendant's staff communicated; (4) the date and time of the communication; and (5) the basis for any privilege that Defendant claims as justification for withholding or redacting the record.

4. Defendant shall also produce to the Court within thirty (30) days of the date of this Order a copy of every document responsive to Plaintiff's Sunshine Law Request as well as a copy of the foregoing list. Thereafter, the Court will conduct an in camera review of the records and assess Defendant's claims of privilege.

SO ORDERED:

Dated: November 4, 2010



Christopher McGraugh, Judge