UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

JAMES L. LANGLEY,

Debtor.
_____/

Case No. DK 10-11900
Hon. Scott W. Dales
Chapter 7

S & D INVESTORS, LLC,

Plaintiff,

v.

JAMES L. LANGLEY,

Defendant.
_____/

Adversary Pro. No. 11-80007

ORDER DENYING MOTION
FOR RELIEF FROM JUDGMENT

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

Precisely one year after the court's entry of a default judgment, Defendant James L. Langley filed a motion to set it aside under Fed. R. Civ. P. 60(b). The court held a hearing in Kalamazoo, Michigan, on August 8, 2012 and, after considering both parties' briefs and the oral argument from the Defendant's counsel, the court took the matter under advisement. For the following reasons, the court will deny the motion.

The default judgment (the "Judgment," DN 16) stems from a complaint that S&D Investors, LLC (the "Plaintiff") filed against James L. Langley (the "Defendant") alleging that he defrauded Plaintiff's assignor. The Defendant did not answer the complaint, so the

Clerk entered a default pursuant to Fed. R. Civ. P. 55(a) and Fed. R. Bankr. P. 7055. The Plaintiff then filed a motion for default judgment, and the court scheduled a hearing.

The Defendant attended the default hearing on May 10, 2011 without counsel. He did not formally move to set aside the entry of default, but he did describe a possible defense to the complaint. At the hearing, the Plaintiff challenged the Defendant's right to be heard (given the default), and the court informed him that it would permit him to contest the Plaintiff's allegations only if he filed a motion to set aside the entry of default. The court was quite clear about what the Defendant needed to do, and to avoid any confusion, issued an order (the "Rule 55 Order," DN 12) memorializing these instructions. The Rule 55 Order also warned the Defendant that his failure to file the motion to set aside the entry of default would result in the court's issuing a default judgment against him.

Despite this warning, the Defendant failed to follow the Rule 55 Order, and instead sent an untimely letter describing his defense. This failure prevented the court from considering the standards that it regarded as applicable under Rule 55(c), namely: (1) whether the Plaintiff would be prejudiced by setting aside the default; (2) whether the Defendant had a meritorious defense; and (3) whether the Defendant's culpable conduct led to the default. *Shepard Claims Serv., Inc. v. William Darrah & Assoc.*, 796 F.2d 190, 194 (6th Cir. 1986).

Although the court was aware of the Defendant's untimely letter, that document included no satisfactory presentation regarding the *Shepard* factors, other than a possible defense based on identity theft. In view of this further default, and in fairness to the

Plaintiff who was playing by the rules and expecting the same from its adversary, the court entered the Judgment.

Exactly one year after the entry of the Judgment, the Defendant, now through counsel, filed a Motion for relief from the Judgment under Fed. R. Civ. P. 60(b) (the "Motion," DN 20).

Rule 60(b) authorizes the court to grant relief from judgment only for the following reasons:

1) mistake, inadvertence, surprise, or excusable neglect;

2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

4) the judgment is void;

5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b); Fed. R. Bankr. P. 9024. When considering the six grounds specified in Rule 60(b), a court's authority is limited or "circumscribed by public policy favoring finality of judgment and termination of litigation." *See Waifersong Ltd., Inc. v. Classic Music Vending,* 976 F.2d 290, 292 (6th Cir. 1992).

At the August 8, 2012 hearing, the court asked Defendant's counsel to identify any of the circumstances prescribed in Rule 60(b) upon which the court could rely in setting aside the Judgment, but counsel could not. Instead, he reiterated the Defendant's claim that he was a victim of embezzlement and identity theft. This argument again suggests

only the existence of a meritorious defense. Under our Circuit's precedent, however, the court must not consider possible defenses until the Defendant satisfies Rule 60(b).[1] As the Sixth Circuit noted:

> . . . a defendant cannot be relieved of a default judgment unless he can demonstrate that his default was the product of mistake, inadvertence, surprise, or excusable neglect. It is only when the defendant can carry this burden that he will be permitted to demonstrate that he also can satisfy the other two factors: the existence of a meritorious defense and the absence of substantial prejudice to the plaintiff should relief be granted.

Waifersong, Ltd. Inc., 976 F.2d at 292.

When it entered the Judgment, the court was aware of the Defendant's proposed defense, and understood that it should consider the defense, along with the other *Shepard* factors, in a Rule 55(c) motion. In fact, by entering the Rule 55 Order, the court encouraged the Defendant to take steps, which the court outlined, to obtain relief from the default. Setting the default hearing in the first place for the non-appearing Defendant, and then issuing the Rule 55 Order represented the court's attempt to balance the Defendant's lack of counsel against the Plaintiff's rights. The Defendant has not offered, and the court cannot perceive, anything excusable about the Defendant's neglect in answering the complaint or, for that matter, complying with the Rule 55 Order after the default hearing.

Had the Defendant moved to set aside the entry of default under Rule 55(c) as the court encouraged, he certainly might have asserted the supposed embezzlement and identity theft as a defense to the Plaintiff's complaint. The court, however, cannot set aside a judgment just because the Defendant might have a defense. *Waifersong* teaches

[1] The court does not perceive how subsections 3 through 5 of Rule 60(b) could possibly apply, nor did the Defendant expressly rely on these subsections. Instead, he appears to have relied on Rule 60(b)(1), (2) and (6).

that the court may consider the defense *after* the Defendant establishes a right to relief under Rule 60(b)(1), a hurdle he never surmounted. Courts ought not reward a party who ignores the rules at the expense of a party who follows them.

As for Rule 60(b)(2), the Defendant fares no better. Although defense counsel argued that recent developments in other litigation against his client fortify his identity-theft defense, the court is not persuaded. An additional lawsuit against the alleged identity thief does not qualify as "newly discovered evidence" within the ambit of Rule 60(b)(2), especially given the fact that the Defendant was aware of the identity theft prior to entry of the Judgment.

As for Rule 60(b)(6), the amplification of a meritorious defense, without more, does not qualify as "exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir.2001); *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990). The Defendant's counsel argued that it would be in the "interest of justice" to set aside the Judgment. If the court is precluded under *Waifersong* from considering a defense until after a defendant meets the test of Rule 60(b)(1), it certainly cannot regard the same possible defense -- standing alone -- as meeting the test of Rule 60(b)(6). *See Blue Diamond Coal*, 249 F.3d at 525 (suggesting that litigants cannot use Rule 60(b)(6) to avoid strictures of Rule 60(b)(1)-(5)). Permitting a defendant's mere invocation of the "interest of justice" to satisfy Rule 60(b) would undermine finality and the important policies it serves.

Finally, Defendant's counsel argued that the discovery by Plaintiff's attorney of the possible embezzlement claim against the alleged embezzler, Chad Meyers, may result in

a double recovery. The court recognizes the concern, but regards it as immaterial to the factors the court must consider under Rule 60(b). Moreover, the Plaintiff may address any double recovery issues in post-judgment collection proceedings.

For these reasons, the court will deny the Defendant's Motion.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion (DN 20) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Julianna Marie Hyatt-Wierzbicki, Esq., Robert J. Sayfie, Esq., Stephen L. Langeland, Esq., and the United States Trustee.

END OF ORDER

IT IS SO ORDERED.

Dated August 14, 2012

Scott W. Dales
United States Bankruptcy Judge