


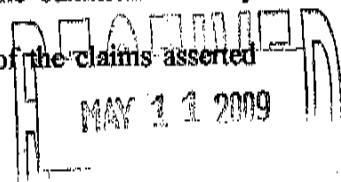
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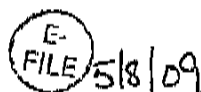
District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 498-6100	EFILED Document CO Larimer County District Court 8th JD Filing Date: May 8 2009 1:31PM MDT Filing ID: 25096131 Business Clerk: Cheryl Colebank FILED IN COMBINED COURT LARIMER COUNTY, COLO.  MAY 08 2009 SHERLYN K. BAMPSON ▲ COURT USE ONLY ▲
Plaintiff: ED ROTH, d/b/a/ INFORMATION AGE COMPUTER SERVICES v. Defendants: CHARLES WEINBECK III, GLOBAL IMAGE TECHNOLOGIES, CORP., and WENR CORP. v. Third-Party Defendants: WENR CORP. DIRECTORS DANA GREEN, IRVING LEVIN, and RICHARD HAGMAN	Case No. 02CV458 Courtroom: 5C
ORDER REGARDING DEFENDANT WENR CORP.'S RENEWED MOTION TO SET ASIDE DEFAULT JUDGMENT	

This MATTER is before the Court on the Renewed Motion of WENR Corp. to Set Aside Default Judgment. The Court has considered parties' submissions. Being fully advised in the premises, the Court hereby finds and orders as follows:

On July 13, 2004, this Court entered default judgment against WENR and awarded damages in favor of Weinbeck and against WENR in the amount of \$1,720,950.05. On May 30, 2007, this Court granted summary judgment in favor of Third Party Defendant Hagman and Third Party Defendant Green. On June 14, 2007, WENR filed a Motion to Set Aside Default Judgment, which the Court denied as untimely. On September 4, 2008, the Colorado Court of Appeals found that this Court erred as a matter of law in denying WENR's motion as untimely under C.R.C.P. 60(b) and remanded the case for further proceedings in accordance with its order.

In its Renewed Motion, WENR asserts that where service of the summons was by personal service out of state, C.R.C.P. 55(f) requires proof to be made of the claims asserted


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before default judgment may be entered. WENR claims that affidavits which fail to establish grounds for a plaintiff's claims are not sufficient. WENR argues that this Court did not make sufficient findings in this matter; therefore, the default judgment entered against it must be vacated. WENR further argues that the default judgment entered against it in the amount of \$1,720,950.05 was grossly excessive. WENR asserts that C.R.C.P. 55(b) requires that a court conduct a hearing before entering a default judgment for money damages, except in limited circumstances. WENR claims that this case is similar to *Johnston v. S.W. Devanney & Co.*, 719 P.2d 734 (Colo. App. 1986), where the Colorado Court of Appeals concluded that the trial court erred in awarding compensatory damages where the court entered its findings and judgment based on allegations in the verified complaint and without taking any testimony. In addition, WENR argues that even though Notice of Hearing was not sent to Irvine Levin ("Levin"), the Court signed the Order for Default Judgment on July 13, 2004, thereby entering judgment against WENR and Levin.

Next, WENR argues that the undisputed facts in this matter show that the evidence was insufficient to support the money judgment entered against it in favor of Weinbeck. First, WENR claims that there is no competent evidence to support the Court entering judgment in the amount of \$1 million for breach of contract relative to Weinbeck's stock. Second, WENR argues that the contract between the parties does not authorize noneconomic damages as required by C.R.S. § 13-21-21.102.5(6); therefore, there is no legal basis to support an award of \$50,000 for pain and suffering due to breach of contract. Third, WENR asserts that the evidence does not support an award of \$15,000 for its failure to pay Weinbeck for the work he performed while closing Global Image Technologies, Corp.'s ("GIT") Fort Collins office and training the new owners. WENR claims that Weinbeck, who stated in his affidavit that he was to receive \$5,000

per month for a period of three months, admitted during his deposition that he and his wife were promised \$5,000 per month each for their work closing the Fort Collins office and that it took less than a month for them to do so. Next, WENR claims that there is no competent evidence to support the Court entering judgment in the amount of \$42,526.30 for business purchases made by Weinbeck and his wife using their personal credit cards. WENR argues that during his deposition, Weinbeck was unable to identify a single item which he or his wife purchased for which WENR was responsible. WENR further argues that it gave the surviving corporation ("New GIT") more than \$150,000 from the end of June 2000 to July 2001, and that Weinbeck could have used these funds to repay any business expenses which may have been charged to his personal credit cards.

WENR next claims that the evidence does not support an award of judgment in the amount of \$112,133.65 for debts owed by GIT or WENR for which Weinbeck is responsible to third parties. WENR states that Weinbeck has acknowledged that he was not personally obligated to pay the creditors of GIT or New GIT. As to the Court's award of \$500,000 to Weinbeck for punitive damages for WENR's conduct in breaching the contract, WENR asserts that there were no special circumstances which would warrant an award of punitive damages and that no specific findings for such an award were made. Lastly, WENR asserts that the evidence does not support prejudgment interest on all amounts awarded commencing July 27, 2000 because no money or property was wrongfully withheld from Weinbeck as of that date. WENR argues that the only monies awarded to Weinbeck which could possibly support an award of prejudgment interest were monies for work allegedly performed by Weinbeck. WENR argues that because there was no competent evidence to support the money judgment entered against it in favor of Weinbeck, the default judgment against it should be set aside.

In his Response, Weinbeck argues that WENR's Renewed Motion is untimely because final judgment was entered in September 2007. Weinbeck states that a motion filed pursuant to C.R.C.P. 60(b) must be made upon terms that are just and within a reasonable time. Weinbeck argues that WENR had failed to file its motion to set aside default within a reasonable time. Weinbeck further argues that WENR has failed to establish any mistake, inadvertence, surprise or excusable neglect or any other reason under C.R.C.P. 60(b) indicating why it is entitled to the relief requested. Weinbeck asserts that WENR has failed to establish by clear and convincing proof that its neglect in causing the default was excusable, that it has a meritorious defense, and that the relief from the judgment would be equitable. Weinbeck further argues that the Court should only consider the original motion filed by WENR in September of 2007 and disregard any of the new arguments raised in WENR's Renewed Motion.

Next, Weinbeck argues that WENR's claim that the facts in this matter are undisputed is erroneous. Weinbeck argues that the requirement under C.R.C.P. 55(f) that he prove his claims in a hearing prior to entry of default judgment was satisfied at the hearing on default conducted on July 7, 2004. Weinbeck argues that WENR's reliance on *Johnston v. S.W. Devanney & Co.* is misplaced because the affidavit he submitted in support of damages for default "went beyond the complaint and offered specifics of the claims and damages." Weinbeck further claims that while Levin did receive the Notice of Hearing, it is irrelevant to the issue of whether the default judgment should be set aside as to WENR.

Weinbeck then argues that WENR has failed to establish that it has a meritorious defense. Weinbeck contends that while WENR claimed that there is no competent evidence to support the money judgment entered against it, the affidavit he submitted in April 2004 proves his claims and damages. First, Weinbeck argues that it set forth sufficient evidence in support of his claim

for breach of contract. Weinbeck asserts that at the time the Stock Purchase Agreement was signed, WENR's stock was trading at twenty-five cents per share, and the parties agreed in writing that the purchase price equaled \$1 million for Weinbeck's 4 million shares. As to his claims for pain and suffering, Weinbeck asserts that C.R.S. § 13-21-21.102.5(6) does not apply because subsection (6) was only added in July 1, 2004, approximately two years after he filed his cross-complaint and WENR defaulted. Next, Weinbeck argues that he was promised \$5,000 per month to close the Fort Collins office, deal with creditors and finalize the accounting. Weinbeck claims that while he was able to close the Fort Collins office in a matter of days, he spent several months dealing with creditors and getting the accounting finalized. Weinbeck claims that WENR's argument with respect to his personal credit card is without merit. Weinbeck further claims that the funds that were "loaned" to him by WENR were insufficient. Weinbeck argues that WENR's claim that it has no liability for third party debts is also without merit because Article 8 of the Merger Agreement provided that WENR would indemnify him for all claims made against him in his capacity as a director of GIT. As for WENR's claim that no special circumstances exist which entitle Weinbeck to punitive damages, Weinbeck claims that his affidavit sets forth WENR's fraudulent conduct and misrepresentations. Finally, in regards to the award of interest, Weinbeck asserts that it is clear that WENR withheld money from Weinbeck since it refused to allow him to sell his stock. Weinbeck further asserts that WENR withheld money when it failed to indemnify him for credit card debt and other GIT debt.

In its Reply, WENR states that the mandate from the Court of Appeals confirms that its original Motion to Set Aside Default Judgment was timely. WENR argues that its Renewed Motion is simply a renewal of its original Motion, but even if it is considered a separate and distinct motion, it was made within the time allowable such that it may be considered by the

Court. WENR claims that it is entitled to relief under C.R.C.P. 60(b)(2) due to fraud, misrepresentation, or other misconduct by Weinbeck. WENR states that in its original Motion, it identified several misrepresentations and material omissions in Weinbeck's affidavit, which led this Court to enter default judgment in the amount of \$1,720,950.05 against it. Specifically, WENR asserts that Weinbeck's affidavit "misrepresented WENR's alleged liability to him and misrepresented the damages he allegedly sustained." Next, WENR argues that under C.R.C.P. 55(f), it is entitled to have the liability portion of the judgment set aside by the Court because liability cannot be assumed when entering a default judgment against an out of state defendant. Additionally, WENR claims that the judgment entered against it "violated the limitations of C.R.C.P. 54(e) which provides that a judgment by default may not be different in kind or exceed the amount prayed for in the demand for judgment." WENR argues that it is entitled to the relief requested pursuant to C.R.C.P. 60(b)(1) because it has established that it has a meritorious defense, and that such relief would be equitable as the judgment is not supported by any competent evidence. WENR further argues that evidence exists upon which the Court could find that the neglect causing the default judgment to enter was excusable because the record shows that Notice of Hearing was not sent to either WENR or Levin, the registered agent for WENR.

C.R.C.P. 55 governs default judgments. Rule 55(c) provides that the court may set aside an entry of default for good cause shown and in accordance with C.R.C.P. 60. Rule 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for . . . (1) [m]istake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;" A party seeking relief from judgment has the burden of demonstrating "by clear, strong, and satisfactory proof"

that such relief is warranted. *Domenico v. Southwest Properties Venture*, 914 P. 2d 390 (Colo. App. 1995). Because the resolution of disputes on their merits is favored, the requirements for vacation of a default judgment should be liberally construed in favor of the movant. *Craig v. Rider*, 651 P.2d 397, 402-03 (Colo. 1982).

First, the Court finds that both WENR's original Motion to Set Aside Default and Renewed Motion to Set Aside Default are timely. Rule 60(b) provides that the a motion requesting relief pursuant to Rule 60(b)(1) and (2) must be made within six months after the judgment was entered. In its Opinion remanding the case, the Colorado Court of Appeals concluded that although this Court entered an order of default judgment on July 13, 2004, the order did not become a final judgment until September 21, 2007 when this Court certified the default judgment as final pursuant to Rule 54(b). Thus, the Court of Appeals concluded that WENR's Motion to Set Aside Default Judgment, which was filed on June 14, 2007, was timely under Rule 60(b). As to WENR's Renewed Motion, this Court finds that the matter was stayed from October 3, 2007, when WENR filed its Notice of Appeal, until September 4, 2008, when the Court of Appeals issued its Opinion. Thus, the Court finds that WENR's Renewed Motion, which was filed on December 30, 2008, is timely for purposes of Rule 60(b).

Next, the Court finds that WENR has demonstrated "by clear, strong, and satisfactory proof" that relief from the entry of default judgment is warranted and that there is sufficient proof to set aside the damages award. WENR cites Rule 55(f) in support of its argument that it is entitled to have the liability portion of the judgment set aside by the Court. Rule 55(f) provides that "[i]n actions where the service of summons was by publication, mail, or personal service out of the state, the plaintiff, upon expiration of the time allowed for answer, may upon proof of service and of the failure to plead or otherwise defend, apply for judgment." Rule 55(f) further

provides that "[t]he court shall thereupon require proof to be made of the claim and may render judgment subject to the limitations of Rule 54(c)."

On April 10, 2003, the Court found that WENR and Levin were in default and set a hearing on damages for April 23, 2003. On April 11, 2003, Levin filed a Motion to Continue Hearing because of a conflict in his schedule. Levin further requested that he be able to participate in selecting the next hearing date. The Court granted Levin's Motion and continued the hearing on default damages as to Levin. On April 22, 2003, Weinbeck filed a Motion to Postpone Hearing on Default Damages Pending Settlement Negotiations, which the Court granted. On May 2, 2003, Levin filed a Motion to Set Hearing Date. On May 13, 2002, the Court issued an Order requesting that counsel for Weinbeck advise the Court as to the current status of this matter, including the settlement negotiations. In its Order, the Court noted that it had "grave concerns with the procedural aspects of this matter, proper service on all defaulting defendants, proper notice of hearings being sent to all parties, and generally the posture of this case."

Following a change of counsel and other delays, Weinbeck filed a Case Status Report on September 8, 2003 in which various issues, including service on Third Party Defendants was addressed. On February 11, 2004, Weinbeck filed a Motion to Set Hearing on Default Damages, requesting that the Court reset the hearing on damages or, in the alternative, allow Weinbeck to submit an affidavit of damages in lieu of a hearing. On April 27, 2004, Weinbeck submitted an Affidavit Regarding Damages for Default Judgment. Along with his affidavit, Weinbeck submitted a number of exhibits in support of his request for damages. On May 3, 2004, a Notice to Set was sent to the parties indicating that a setting would occur at 1:15 p.m. on May 12, 2004 at which time the Court and the parties would set the date for a hearing on the issue of damages.

This Notice to Set was sent by Stanley Matsunaka, counsel for Plaintiff Ed Roth ("Roth"), to Walter Winslow, counsel for Weinbeck; Dennis Polk, counsel for Third Party Defendant Dana Green ("Green"); and Levin. The setting was held with representatives appearing on behalf of Roth, Weinbeck, and Green. On May 13, 2004, Mr. Matsunaka sent a Notice of Hearing to counsel for Weinbeck and counsel for Green. Notice was not sent to Levin. This Notice stated that a hearing on the issue of damages was set for July 7, 2004 at 9:00 a.m. On July 7, 2004, the Court held the hearing on damages. Mr. Winslow appeared on behalf of Weinbeck and GIT and Mr. Polk appeared on behalf of Green. Levin did not appear. At the hearing, Mr. Winslow informed the Court that he believed Levin had been made aware of the hearing. On July 13, 2004, this Court entered an order of default judgment in favor of Weinbeck and against WENR and Levin, jointly and severally, in the amount of \$1,720,950.05.

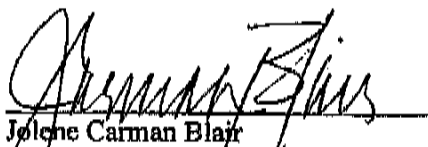
The Court finds that despite his request and clearly stated desire to attend the hearing on default damages, Levin was not properly notified of the hearing held on July 7, 2004. Although Mr. Winslow indicated that he believed Levin had notice of the hearing, there is nothing in the Court's record indicating that such notice was actually provided and Weinbeck has not provided evidence indicating otherwise. In both the original Motion and the Renewed Motion, WENR argues that the award of damages against it was excessive and requested that the Court require that Weinbeck prove by a preponderance of the evidence those damages allegedly incurred by him and allow it to defend against such damage claims. Because Levin did not receive notice of the hearing, he was not afforded the opportunity to present evidence to defend against Weinbeck's claim of damages. Therefore, after reviewing the record, the Court finds that the Renewed Motion of WENR Corp. to Set Aside Default Judgment should be, and hereby is, GRANTED. Accordingly, Weinbeck is required to prove by a preponderance of the evidence

those damages allegedly incurred by him. Furthermore, the Court finds that Levin is entitled to proper notice of the hearing so that he may be present to defend against such claims.

As this matter is still at issue as to two of the Third Party Defendants, the Court finds that it would not be in the interest of judicial economy to litigate the issue of damages at this time. The Court, therefore, instructs counsel for Weinbeck to set the matter for a settlement conference. If the settlement conference does not resolve the issues, then the matter will be set for trial so that the claims against all Third Party Defendants can be resolved simultaneously.

Dated this 6th day of May, 2009.

BY THE COURT:



Jolene Carman Blair
District Court Judge