UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re:	
THOMAS DANIEL Debtor(s).	Case No. 05-36908-B-7
WASHINGTON MUTUAL BANK Plaintiff(s) vs. THOMAS DANIEL, Defendant(s).	Adv. No. 06-2366-B Docket Control No. RGF-1 Date: March 6, 2007 Time: 9:30 a.m.

On or after the calendar set forth above, the court issued the following ruling. The official record of the ruling is appended to the minutes of the hearing.

Because the ruling constitutes a "reasoned explanation" of the court's decision under the E-Government Act of 2002 (the "Act"), a copy of the ruling is hereby posted on the court's Internet site, www.caeb.uscourts.gov, in a text-searchable format, as required by the Act. However, this posting does not constitute the official record, which is always the ruling appended to the minutes of the hearing.

DISPOSITION AFTER ORAL ARGUMENT

Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the

resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

As an initial matter, the court notes that the motion, notice of hearing, proof of service, and memorandum of points and authorities were not filed separately, as required by Paragraph 3(a) of the court's Revised Guidelines for the Preparation of Documents and Local Bankruptcy Rule 9014-1(d)(1). Counsel for respondent also improperly attached to her declaration an exhibit which should have been separately filed. Procedural defects such as these are grounds for denial or continuance of the motion pursuant to Local Bankruptcy Rule 9014-1(l). In this instance, however, the court will reach the merits of the motion.

The motion is denied.

Defendant's request for dismissal of his case is denied without prejudice because defendant served only counsel for plaintiff and counsel for the other defendant in this adversary proceeding with the motion. Pursuant to Federal Rule of Bankruptcy Procedure 2002(a)(4), notice of the hearing to dismiss a chapter 7 case, other than a hearing under 11 U.S.C. §§ 707(a)(3) or 707(b) must be given to all creditors. In addition, the motion to dismiss the bankruptcy case was improperly brought in this associated adversary proceeding, rather than in the main bankruptcy case. Accordingly, the motion to dismiss is denied without prejudice. Defendant's request in his late-filed reply to continue the hearing on this motion until a properly noticed motion to dismiss can be heard is denied.

Defendant's request that the court set aside his default in this adversary proceeding is also denied. Defendant has not shown

good cause for setting aside the default. Defendant cites authority from the district of Maine as setting forth a multi-factor test to be used in determining whether good cause has been shown, but the court agrees with plaintiff that there is binding authority in this circuit regarding the standard for setting aside defaults. The Ninth Circuit rule on motions to set aside defaults and default judgments is set forth in Franchise Holding II, LLC v. Huntington Rests. Group, Inc., 375 F.3d 922, 925-27 (9th Cir. 2004):

> Rule 55(c) provides that a court may set aside a default for "good cause shown."
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> * * *
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> The "good cause" standard that governs vacating an entry of default under Rule 55(c) is the same standard that governs vacating a default judgment under Rule 60(b). See TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001). The good cause analysis considers three factors:
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> (1) whether [moving party] engaged in culpable conduct that led to the default; (2) whether [moving party] had a meritorious defense; or (3) whether reopening the default judgment would prejudice [the plaintiff]. See id. As these factors are disjunctive, the district court was free to deny the motion "if any of the three factors was true." American Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1108 (9th Cir. 2000).
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> [Moving party] bore the burden of showing that any of the these factors favored setting aside the default.

Franchise Holding II, 375 F.3d at 926-27. See also TCI, 244 F.3d at

696 (9th Cir. 2001). This court also adopts the view that default judgments are "appropriate only in extreme circumstances" and that, whenever it is appropriate, cases should be decided on the merits. See TCI, 244 F.3d at 696. Accordingly, the court will address each of the three factors set forth above in relation to the facts of this case.

(1) Culpability. "A defendant's conduct is culpable . . . where there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond." TCI, 244 F.3d at 698. The facts of this case show that defendant's behavior was culpable as so defined. Defendant asserts that his default was not the result of his bad faith or willful conduct. Rather, defendant asserts that his default was caused by physical and mental disabilities that overwhelmed him and prevented him from answering the complaint. However, defendant provides no independent, competent evidence of his ailments aside from his own self-serving declaration. In light of the events which led plaintiff to file this adversary proceeding, defendant's declaration, without more, is insufficient evidence of his good faith. Defendant allegedly spent the funds as to which the trustee seeks a turnover order between November 2005 and June 2006. In July - August, 2006, after he spent the funds, defendant settled with the trustee by stipulating to turn over to the funds to the trustee even though he would have been unable to perform under the terms of the settlement. In November, 2006, defendant also obtained the vacation of a trial date in another adversary proceeding on the strength of that settlement, because it was expected to produce enough funds to pay all or a substantial

portion of the plaintiff's claim. Defendant has not denied these allegations in attempting to establish a meritorious a defense for purposes of this motion to set aside his default. Furthermore, at no time prior to the filing of this motion was the issue defendant's inability to defend the complaint due to physical or mental disability raised. In a letter responding to the trustee's inquiry in January, 2007, defendant stated only a lack of means to return the funds or defend the complaint.

In light of the aforementioned facts, the court finds that defendant has not shown that he was so physically or mentally disabled that he could not respond to the complaint. Rather, his actions to this point are those of a person who knows he has acted wrongly and is trying to postpone his day of reckoning as long as possible. The court finds that the defendant engaged in culpable conduct that led to the default.

(2) Meritorious Defense. "To justify vacating the default judgment . . . [defendant] had to present the district court with specific facts that would constitute a defense. . . . A 'mere general denial without facts to support it' is not enough to justify vacating a default or default judgment." Franchise Holdings II, 375 F.3d at 926 (quoting Madsen v. Bumb, 419 F.2d 4, 6 (9th Cir. 1969)). But this burden "is not extraordinarily heavy." TCI, 244 F.3d at 700 (citing In re Stone, 588 F.2d 1316, 1319 n.2 (10th Cir. 1978). A movant need only demonstrate facts or law showing the trial court that a "a sufficient defense is assertible." Id. Considering the argument in defendant's motion and the statements in his declaration together, the court construes the defenses set forth by defendant as follows: 1)

that defendant spent the money that plaintiff seeks to have turned over because he needed it to pay for his living expenses, and 2) that defendant did not spend the money with "malicious" or "vengeful" intent.

Defendant has not set forth a meritorious defense for the purposes of setting aside the default. Defendant's assertion that he needed the money is not a defense to any of the causes of action set forth in the complaint. Defendant's assertion that he did not spend the money with a malicious, vengeful, or bad intent may be relevant to a defense to the punitive damages claims in the causes of action for violation of the automatic stay under 11 U.S.C. § 362(k) and conversion. However, this assertion is no more than a general denial of those aspects of the complaint. Defendant does not set forth specific facts sufficient to form an assertable defense. The court finds that the meritorious defense prong of the standard is not met.

(3) Prejudice. "To be prejudicial, the setting aside of a judgment must result in greater harm than simply delaying the resolution of the case. Rather, 'the standard is whether [plaintiff's] ability to pursue his claim will be hindered." TCI, 244 F.3d at 701 (quoting Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984)). Merely being forced to litigate on the merits cannot be considered prejudicial for purposes of lifting a default judgment, and a plaintiff does not suffer "any cognizable prejudice merely by incurring costs in litigating the default." TCI, 244 F.3d at 701. However, satisfaction of this factor does not warrant granting the motion given the court's rulings on the other prongs of the test.

Defendant has failed to carry his burden of proof of showing

that the facts of this case show good cause favoring a setting aside of the default. Accordingly, the motion is denied.

The court will issue a minute order.