

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HAROLD L. ROSENBERGER,

Plaintiff,

-against-

04-CV-0475

NEW YORK STATE OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE; ROBERT DOAR,
Commissioner, in his official capacity; and ULSTER
COUNTY FAMILY COURT,

(GLS)(DRH)

Defendants.

**MEMORANDUM OF LAW IN REPLY TO PLAINTIFF'S
OPPOSITION TO DEFENDANTS' MOTION TO SET ASIDE
THE CLERK'S ENTRY OF DEFAULT
AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION
FOR A DEFAULT JUDGMENT
("DEFENDANTS' DEFAULT MEMORANDUM II")**

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Date: July 26, 2004

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PRELIMINARY STATEMENT

The defendants in this action, the New York State Office of Temporary and Disability Assistance (“OTDA”), OTDA’s Commissioner, Robert Doar, and the Ulster County Family Court, moved to vacate the Clerk’s entry of default pursuant to Rule 55(c) of the Federal Rules of Civil Procedure. In support of the motion, defendants submitted Declaration of David B. Roberts (“Roberts Decl. I”) and the Memorandum of Law in Support of Defendants’ Motion to Set Aside the Clerk’s Entry of Default (“Defendants’ Default Memorandum I”). In response, plaintiff submitted a Memorandum of Law in Support of Plaintiff’s Motion for Default Judgment and to Sustain Entry of Default (“Plaintiff’s Default Memorandum”). This memorandum of law (“Defendants’ Default Memorandum II”) is submitted on behalf of defendants in reply to plaintiff’s opposition to defendants’ motion to set aside the Clerk’s entry of default and in opposition to plaintiff’s cross-motion for a default judgment. Submitted together with this memorandum is the Reply Declaration of David B. Roberts (“Roberts Decl. II”) and the Affidavit of Linly L. Rarick (“Rarick Aff.”).

It must be noted that directly before the motion to set aside the entry of default was filed, defendants moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. In support of that motion, defendants submitted a Memorandum of Law in Support of Defendants’ Motion to Dismiss the Complaint (“Defendants’ Dismissal Memorandum I”). Plaintiff responded with a Memorandum of Law in Support of Plaintiff’s Cross-Motion to Strike, or in the Alternative, to Deny Defendants’ Motion to Dismiss the Complaint (“Plaintiff’s Dismissal Memorandum”). On this date, defendants have submitted a memorandum of law in reply to plaintiff’s opposition to defendants’ motion to dismiss the complaint and in opposition to plaintiff’s cross-motion to strike defendants’ motion to dismiss (“Defendants’ Dismissal Memorandum II”).

The instant memorandum demonstrates that plaintiff has failed to sufficiently rebut defendants’ arguments in support of setting aside the default entered by the Clerk. In addition, as discussed below, plaintiff has failed to show that he is entitled to a default judgment against defendants.

ARGUMENT

POINT I

THE ENTRY OF DEFAULT AGAINST THE DEFENDANTS SHOULD BE SET ASIDE.

As explained in defendants' previous memorandum of law and in its accompanying Roberts Declaration, defendants' attorney, due to an oversight, inadvertently failed to timely file a response to the complaint or to request an adjournment of time to file such response. Defendants asked the Court to set aside the entry of default under Rule 55(c) of the Federal Rule of Civil Procedure, which allows such relief for "good cause", based on the factors set forth by the Second Circuit, e.g., in Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993).

Under that standard, the criteria used to determine whether a party should be relieved "from default or from a default judgment . . . are: (1) whether the default was willful; (2) whether setting aside the default would prejudice the adversary; and (3) whether a meritorious defense is presented. Enron Oil Corp., 10 F.3d at 96, citing Action S.A. v. Marc Rich & Co., 951 F.2d 504, 507 (2d Cir. 1991), cert. denied, 112 S. Ct. 1763 (1992). The Court may also consider other factors, such as "whether the failure to follow a rule of procedure was a mistake made in good faith and whether the entry of default would bring about a harsh or unfair result." Enron Oil Corp., 10 F.3d at 96, citing, Sony Corp. v. Elm State Elecs., Inc., 800 F.2d 317, 320 (2d Cir. 1986); see Defendants' Default Memorandum I.

In this case, defendants demonstrated that setting aside the entry of default is appropriate because the default was not wilful and because plaintiff was not prejudiced thereby. In addition, the motion to dismiss submitted by defendants set forth several meritorious reasons why the complaint should be dismissed. Finally, defendants' motion to set aside the entry of default also argued that allowing the entry of default to stand would be unduly harsh, as the statutes which plaintiff seeks to have annulled serve as an inseparable part of the State's statutory scheme aimed at securing child support for deserving children, a scheme which is mandated by federal law. Defendants respectfully submit that they have satisfied the requisite factors, warranting an order setting aside the entry of

default.

Plaintiff's memorandum of law, submitted in opposition to defendants' motion, does not set forth adequate reasons why the motion should be denied. Plaintiff contests defendants' assertion that the default was not wilful, indicating that the Attorney General's office ignored multiple reminders of the upcoming deadline to serve a response to the complaint. Plaintiff's Default Memorandum, p. 6. As explained in the Roberts Declaration submitted herewith, the allegation is without merit. There was but a single opportunity for Assistant Attorney General Roberts, then assigned to the case, to calendar the appropriate deadline, which he regrettably failed to do. See Roberts Decl. II ¶¶ 6-10; Rarick Aff. ¶¶ 4-9.

Plaintiff also alleges that the Attorney General's office ignored plaintiff's Notice of Defendants' Failure to Serve Answer, thus showing that the default was wilful. Plaintiff's Default Memorandum, p. 4. However, as previously indicated, Assistant Attorney General Roberts first became aware of plaintiff's notice on the evening of June 21, 2004, a day before the Clerk entered default. After returning from depositions held in another city on June 22, 2004, Assistant Attorney General Roberts ensured that defendants' motion to dismiss and the motion to set aside the entry of default were filed on June 23, 2004. Roberts Decl. I ¶¶ 5 and 6. As such, it can hardly be said that plaintiff's notice was "ignored". Accordingly, the default must be characterized as inadvertent rather than wilful.

Further, plaintiff has failed to sufficiently counter defendants' argument as to the lack of prejudice he suffered on account of the delay caused by the default, a delay that amounted at most to twenty-one days. See Defendants' Default Memorandum I, p. 3. Specifically, plaintiff argues that his constitutional rights continued to be deprived during the period of the delay. Plaintiff's Default Memorandum, p. 4 and 7. This argument is without force, as plaintiff was not entitled to any actual relief on the date of the deadline in question. If defendants had not defaulted, they would have made their motion to dismiss twenty-one days earlier. The Court would take time to evaluate the motion and then, if the motion were not granted, the parties would be given a number of months within

which to conduct discovery and to submit dispositive motions. The twenty-one days is quite minimal given that the case is in the early stages of litigation. The lack of prejudice caused to plaintiff supports defendants' request for an order setting aside the entry of default.

With respect to the third criteria employed by the courts under Rule 55(c), plaintiff questions defendants' argument that meritorious defenses to the complaint exist. See Plaintiff's Default Memorandum, p. 15. Defendants respectfully refer to the Defendants' Dismissal Memorandum II for a detailed response showing that plaintiff's arguments are without merit. In particular, plaintiff has failed to sufficiently rebut defendants' argument that the Court lacks subject matter jurisdiction over plaintiff's claims, which constitute a collateral attack on the Ulster County Family Court orders and judgments. See Defendants' Dismissal Memorandum I, Point I; Defendants' Dismissal Memorandum II, Point II. Second, plaintiff has not submitted persuasive arguments in response to defendants' assertion that the complaint fails to present a "case or controversy" over which this Court can exercise its Article III jurisdiction. See Defendants' Dismissal Memorandum I, Point II; Defendants' Dismissal Memorandum II, Point III. Third, despite plaintiff's contention to the contrary, the Court should refrain from consideration of plaintiff's claims pursuant to the doctrine of abstention as set forth in Younger v. Harris, 401 U.S. 37 (1971). See Defendants' Dismissal Memorandum I, Point III; Defendants' Dismissal Memorandum II, Point IV. Finally, plaintiff has failed to establish why defendants should not be entitled to dismissal of plaintiff's due process claim on grounds that it fails to state a claim upon which relief can be granted. See Defendants' Dismissal Memorandum I, Point IV; Defendants' Dismissal Memorandum I, Point IV; Defendants' Dismissal Memorandum II, Point V. In sum, plaintiff's opposition papers do not sufficiently rebut the bases for dismissal raised by defendants in their initial motion to dismiss.

Finally, as set forth in Defendants' Default Memorandum I, the entry of default in this case "would bring about a harsh or unfair result," Enron Oil Corp., 10 F.3d at 96, warranting that the default be set aside. Plaintiff argues, in response, that no hardship would result should the Court declare that New York State Family Court Act § 413 and Domestic Relations Law § 240; the

Legislature would in such event be free to enact “proper legislation” in place of the annulled statutes. Plaintiffs’ Default Memorandum, p. 7. This simplistic view is neither realistic or accurate.

In reality, as explained by defendants’ papers in support of the motion to dismiss, the importance of the statutes in question is self-evident. Family Court Act § 413 requires that the parents of a child under 21 years of age must support their child, and, if the parents do not comprise a single household, the custodial parent is entitled to child support payments from the non-custodial parent. Family Court Act § 413(1); see also Social Services Law § 101; Defendants’ Dismissal Memorandum I, p. 1-3. Both Family Court Act § 413 and Domestic Relations Law § 240, inter alia, set forth the formula by which a court calculates the amount of child support chargeable to the non-custodial parent. Family Court Act § 413(c); Domestic Relations Law § 240(c). Absent these laws, there is no mechanism by which a court can require a non-custodial parent to pay support. Moreover, as previously explained, the statutes in question are required by federal law. Defendants’ Dismissal Memorandum I, p. 1-3; 42 U.S.C. § 651 et seq.; 42 U.S.C. § 667; In re Dutchess County Dept of Social Services v. Day, 96 N.Y.2d 149, 152 (2001); Bast v. Rossoff, 91 N.Y.2d 723, 728 (1998); 42 U.S.C. §§ 602(a)(2) and 609(a)(8). To dismantle the State’s child support methodology in hopes that the Legislature will subsequently enact a scheme that meets plaintiff’s approval is unwarranted and would do a great disservice to the children of this State.

Clearly, the statutory scheme at issue is of such great importance that the equities require that defendants be given the opportunity to defend the instant litigation. On the other hand, the hardship if defendant to plaintiff is non-existent, given that there are multiple bases supporting dismissal of his challenge, as explained above. Accordingly, under the criteria enumerated by the Second Circuit, the Court should set aside the entry of default.

POINT II

PLAINTIFF’S CROSS-MOTION FOR A DEFAULT JUDGMENT SHOULD BE DENIED.

Plaintiff’s cross-motion for a default judgment should be denied. “While courts are entitled to enforce compliance with the time limits of the Rules by various means, the extreme sanction of

a default judgment must remain a weapon of last, rather than first, resort.” Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981). Rule 55(b)(2) permits the Court to enter a default judgment on notice. The Second Circuit has stated that "opposition to a motion for a default judgment can be treated as a motion to set aside the entry of a default, despite the absence of a formal Rule 55(c) motion”. Meehan, 652 F.2d at 276. The showing that must be made by a defendant opposing a motion for default judgment is thus the same as the standard required to show that entry of default should be set aside under Rule 55(c). Defendants have satisfied that standard, as discussed in Point I above. Consequently, plaintiff’s motion for a default judgment should be dismissed.

CONCLUSION

**DEFENDANTS’ MOTION FOR AN ORDER
SETTING ASIDE THE CLERK’S ENTRY OF DEFAULT
SHOULD BE GRANTED AND PLAINTIFF’S CROSS-MOTION
FOR A DEFAULT JUDGMENT SHOULD BE DENIED.**

Dated: Albany, New York
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