

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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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 SUPPORT OF  
DEFENDANTS' MOTION TO SET ASIDE THE  
CLERK'S ENTRY OF DEFAULT**

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Date: June 23, 2004

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## **PRELIMINARY STATEMENT**

This memorandum of law is submitted on behalf of defendants, the New York State Office of Temporary and Disability Assistance (“OTDA”), OTDA’s Commissioner, Robert Doar, and the Ulster County Family Court. Because of an oversight by their attorney, the defendants neglected to timely file a response to the complaint or to request an adjournment of time to file such response. See Declaration of Assistant Attorney General David B. Roberts (“Roberts Decl.”), ¶ 4. On June 22, 2004, following plaintiff’s filing of a “Notice of Defendants’ Failure to Serve Answer” (Docket No. 6), the Clerk of the Court filed a “Certificate of Action Taken on Plaintiff’s Request for Entry of Default” (Docket No. 7). The defendants now move to set aside the entry of default against them pursuant to Rule 55(c) of the Federal Rules of Civil Procedure. It should be noted that papers in support of a motion to dismiss have been served upon plaintiff and filed with the Court on this date.

In brief, the complaint appears to challenge two New York State statutes pertaining to child support. Plaintiff claims that the Ulster County Family Court held a hearing which resulted in an order requiring that he contribute toward his children’s support and pay a certain portion of their health care expenses. Complaint, ¶¶ 38 and 39; Exhibit 2. Plaintiff contends that the order, along with the associated wage execution issued by an enforcement unit of OTDA Complaint, ¶ 40; Exhibit 3, violates his constitutional “Right to Privacy” in making parenting decisions. Complaint, ¶ 25. The specific relief sought by the complaint is a declaratory judgment that New York State Family Court Act § 413 and Domestic Relations Law § 240 are unconstitutional.

As discussed below, the Clerk’s entry of default should be set aside because the default was not wilful and because plaintiff was not prejudiced thereby. Moreover, defendants’ motion to dismiss asserts several meritorious reasons why the complaint should be dismissed, which supports in favor of defendants’ request for an order setting aside the entry of default. Finally, the entry of default should be set aside because the consequences of allowing the entry of default to stand would be unduly harsh.

## ARGUMENT

### POINT I

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

Entry of default against a defendant may be set aside for good cause. Fed. R. Civ. Pro. 55(c).

As the Second Circuit has stated:

Because Rule 55(c) does not define the term "good cause," we have established three criteria that must be assessed in order to decide whether to relieve a party from default or from a default judgment. These widely accepted factors 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. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993), citing Action S.A. v. Marc Rich & Co., 951 F.2d 504, 507 (2d Cir. 1991), cert. denied, 112 S. Ct. 1763 (1992); In re Men's Sportswear, Inc., 834 F.2d 1134, 1138 (2d Cir. 1987); Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981). In addition,

[o]ther relevant equitable factors may also be considered, for instance, 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). The district court may exercise its discretion in ruling on an application made under Rule 55(c),

but "an abuse of discretion need not be glaring to justify reversal." The narrow scope of the district court's discretion stems from "strong policies favoring the resolution of genuine disputes on the merits," and for the same reasons, "doubts are to be resolved in favor of a trial on the merits."

Traguth v. Zuck, 710 F.2d 90, 94 (2d Cir. 1983) (citations omitted); Meehan, 652 F.2d at 277; Enron Oil Corp. 10 F.3d at 95.

In this case, defendants respectfully submit that application of the relevant criteria warrant setting aside the default entered against them. First, the default was inadvertent rather than willful, as explained by the Assistant Attorney General then handling the case. Roberts Decl. ¶ 4. In addition, upon becoming aware of the entry of default, defendants' attorney acted immediately by

causing both the instant motion and a motion to dismiss the complaint to be served and filed. Roberts Decl. ¶ 6. It should be emphasized that the failure to serve a timely response to the complaint was attributable to defendants' attorney, not to defendants themselves. See Lutwin v. New York, 1985 U.S. Dist. LEXIS 18507, \*5 (S.D.N.Y. 1985) (copy annexed hereto as Appendix A), aff'd, 795 F2d 1004 (2d Cir. 1986).

Second, there is no conceivable prejudice to the plaintiffs if the entry of default is set aside. As noted, a motion to dismiss the complaint has been served on this date, meaning that defendants have responded to the complaint no more than twenty-one days after the date such response was initially due. At most, the short delay inconvenienced the plaintiff; as the Second Circuit has stated, "delay standing alone does not establish prejudice." Enron Oil Corp., 10 F.3d at 98, citing Davis v. Musler, 713 F.2d 907, 913 (2d Cir. 1983). A review of the complaint shows that plaintiff's claims are not of such an urgent nature that any of his substantive rights or his ability to prosecute his case were in any way compromised by a twenty-one day delay in service of defendants' motion. Accordingly, defendants have satisfied the first and second criteria used to determine whether an entry of default should be set aside.

The third criterion is satisfied as well; as set forth in defendants' motion to dismiss, there are a number of meritorious objections which warrant dismissal of the complaint. In particular, plaintiff's claims, which challenge the constitutionality of two New York State child support statutes, constitute a collateral attack on the Ulster County Family Court orders and judgments. However, this Court lacks subject matter jurisdiction over such a claim. See Defendants' Memorandum of Law in Support of Motion to Dismiss, Point I. As a second basis for dismissal, defendants contend that the complaint fails to present a "case or controversy" over which this Court can exercise its Article III jurisdiction. Third, defendants have argued that 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' Memorandum of Law in Support of Motion to Dismiss, Point III. Defendants have also moved to dismiss plaintiff's due process claim on grounds that it

fails to state a claim upon which relief can be granted, warranting dismissal of that cause of action under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Defendants' Memorandum of Law in Support of Motion to Dismiss, Point IV.

Defendants have therefore established, under the three-part test articulated above, that the entry of default should be set aside. Furthermore, as indicated by the Second Circuit in Enron Oil Corp., the Court may take into consideration the fact that "the entry of default would bring about a harsh or unfair result." Enron Oil Corp., 10 F.3d at 96. In this case, by asking the Court to declare that New York State Family Court Act § 413 and Domestic Relations Law § 240 are unconstitutional, plaintiff seeks to effectively annul two very important laws that serve as an inseparable part of the State's statutory scheme aimed at securing child support for deserving children -- and a statutory scheme that is mandated by federal law. If defendants are not permitted the opportunity to interpose all defenses which are otherwise available, the consequences will be devastating, not only for defendants but for the children served by the laws in question. Accordingly, under the criteria enumerated by the Second Circuit, the Court should set aside the entry of default.

In sum, defendants OTDA, Doar and the Ulster County Family Court respectfully request that they be relieved from the entry of default, permitting them to defend against the complaint for the various reasons set forth in their motion to dismiss.

**CONCLUSION**

**DEFENDANTS' MOTION FOR AN ORDER  
SETTING ASIDE THE CLERK'S ENTRY OF DEFAULT  
SHOULD BE GRANTED.**

Dated: Albany, New York  
June 23, 2004

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