IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

MARK E. DAVIS, Plaintiff,	)	**CIVIL NO. 607/1996**
vs.	)	**ACTION FOR DEBT; BREACH OF CONTRACT**
RICHARD J. BOEHM, Defendant.	)	NOT FOR PUBLICATION

MEMORANDUM OPINION
(Filed: April 24th 1997)

THIS MATTER comes before this Court on defendant's motion to set aside default judgment, plaintiff's opposition thereto, defendant's reply memorandum, and plaintiff's motion for leave to respond to defendant's reply memorandum.

I. Plaintiff's Motion for Leave to respond to Defendant's Reply Memorandum

On January 16, 1997, defendant filed a motion to vacate the default judgment that had been entered against him on November 30, 1996. Plaintiff opposed said motion on January 21, 1997 and defendant filed a reply memorandum on January 27, 1997. Plaintiff seeks leave to respond to defendant's reply memorandum.

Local Rule of Civil Procedure 7.1(g) states

> *Motion, Response and Reply.* Only a motion, a response in opposition, and a reply may be served on counsel and filed with the court; further response or reply may be made only by leave of court obtained before filing (counsel will be sanctioned for violation of this limitation).

Defendant requests leave to respond to defendant's reply memorandum on two grounds:

> 1) the defendant has mischaracterized certain material facts in his January 24, 1997 Memorandum; and
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> 2) a response is required in order to correct the record and to allow the court to decide this matter on the facts, rather than defendant's unsupported assertions, which have been submitted to this court in the guise of facts.

Plaintiff included his response to defendant's reply memorandum in his motion for leave to respond to defendant's reply memorandum. Thus, plaintiff violated LRCi 7.1(g) since the Court had not granted him leave to file the response. Accordingly, the Court shall deny plaintiff's motion for leave to respond and strike his response to defendant's reply.

II. Motion to Vacate Default Judgment

The Court may set aside a judgment pursuant to Fed. R. Civ. P. 60. A decision to vacate a default judgment is left to the sound discretion of the trial court which must consider the following three requirements:

> (1) vacating the default judgment will not visit prejudice on the plaintiff;
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> (2) the defendant has a meritorious defense; and
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> (3) the default was a result of excusable neglect on the part of the defaulting party.

Skinner v. Guess, 27 V.I. 193 (D.Virgin Islands, App. Div. 1992); See also Zawadski de Bueno v. Bueno Castro, 822 F.2d 416 (3d Cir. 1987); Scatliffe v. George, 17 V.I. 91, 94 (Terr.Ct. 1980); RESTATEMENT (SECOND) OF JUDGMENTS §67 (1982). A party seeking to set aside a default judgment must generally meet all three requirements before a court can vacate the default judgment. See Medunic v. Lederer, 533 F.2d 891 (3d Cir. 1976); RESTATEMENT (SECOND) OF JUDGMENTS

§67 cmt. a.; and Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: Civil 2d §2857 (1995). Finally, the law in the Third Circuit does not favor default judgments and any doubt should be resolved in favor of setting them aside. Fountain Valley Corp. v. Wells, 19 V.I. 607 (D.C.V.I. 1981).

A. *Excusable Neglect*

Fed.R.Civ.P. 60(b)(1) provides for relief from judgment where there is found to be mistake, inadvertence, surprise or excusable neglect.

Defendant claims that at the time he was served with plaintiff's complaint, he "was in the midst of attempting to obtain a preliminary injunction against my estranged wife [Mary Boehm], in connection with the ongoing operation of the Club Comanche Hotel and Comanche Restaurant."[1] In addition, the Comanche Restaurant, of which defendant was in charge of operations, was in a state of financial crisis at that time and required defendant's constant attention. Defendant states that because of these pressing events, he failed to deliver a copy of the Complaint to his counsel.

Plaintiff, in his opposition, points to the fact that his complaint was served on defendant during a period where there was no ongoing litigation between the defendant and Mary Boehm. Specifically, he points to the fact that on September 6, 1996, defendant had entered into a stipulation with Mary Boehm in Civil Action No. 327/1996, styled Richard J. Boehm v. Mary Boehm and on November 20, 1996, defendant initiated another action captioned Richard J. Boehm v. Mary Boehm and John Sheen, Civil No. 710/1996. Plaintiff claims that during the gap from September 6, 1996 to November 20, 1996, it is clear that defendant was not involved in other litigation when he was

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[1] See Motion to Set Aside Default Judgment, Affidavit of R. Boehm, paragraph 4.

served and that the defendant and his counsel have intentionally misrepresented this fact to the court in an effort to obtain relief in the case at bar. In response to plaintiff's allegations, defendant claims that the dispute between he and his estranged wife were ongoing during this time and that during the "gap" from September 6 through November 20, 1996, the parties and their counsel were in repeated contact over alleged failures to comply with the Stipulation.

Although this jurisdiction does not favor default judgments and any doubt should be resolved in favor of setting them aside, this general rule is not an absolute. The Territorial Courts of the Virgin Islands have held that motions to vacate default judgments should be denied where defendants or their counsel act with ignorance, carelessness, mere forgetfulness, outright disregard, or a cavalier indifference to the service process. See Government of the Virgin Islands v. Virgin Islands Pleasure Boat, Inc., 14 V.I. 123 (Terr.Ct. 1977); Scatliffe v. George, 17 V.I. 91 (Terr.Ct. 1980); Miranda Hermanos Co. v. Asad, 13 V.I. 271 (Terr.Ct. 1977).

In the instant matter, defendant specifically states that he and his counsel were in repeated contact from September 6 through November 20, 1996 in an attempt to resolve the ongoing dispute with Mary Boehm. During this time, plaintiff was served with both a complaint (served on defendant on October 11, 1996) and a motion for default (served on defendant on November 4, 1996). Despite being in repeated contacts with his counsel, he failed to bring to the attention of his counsel both matters and accordingly never responded to the complaint nor the motion for default. The Court cannot accept defendant's claims that he was so distracted for a period of five to six weeks that he could not remember to inform his counsel. By defendant's own admission, he was in repeated contact with his lawyer during this time, he had been served with plaintiff's complaint, and plaintiff's motion for default. Additionally, after this Court entered a default judgment in the amount of $9,437.00 against defendant on November 30, 1996, it took defendant nearly seven weeks to file a motion to set aside the default judgment. Such conduct on the part of the defendant, who appears to have a good deal of experience in matters concerning litigation, cannot be deemed excusable, but instead reveals either an outright disregard or a cavalier indifference by the defendant to the service of process upon him. Accordingly, the defendant has failed to make a proper showing of excusable neglect.

B. *Meritorious Defense*

In his motion to set aside default judgment, defendant claims that he has a meritorious defense. He alleges in an affidavit that because plaintiff was disqualified at trial from continuing his representation because of a conflict of interest,[2] defendant received little, if any, benefit from the services allegedly performed by plaintiff.

While a defendant need not prove that he would prevail on the merits of his defense, he must do more than make an unsupported allegation of a defense. Scatliffe, 17 V.I. at 94. At a minimum, he must allege a credible factual basis of such a meritorious defense and must accompany such a motion with supporting evidence that tends to show that the asserted defense is potentially meritorious. Id.

The case of In re Eastern Sugar Antitrust Litigation, et al. v. Finley, Kumble, Wagner, Heine, Underdog & Casey, 697 F.2d 524 (3d Cir. 1982), has been cited by the parties with regards to the

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[2] Plaintiff alleges that the conflict arose from the fact that Maurice Cusick, an associate of the plaintiff's law firm, had once worked for Lee Rohn, an attorney whom Mrs. Boehm had retained for the divorce action at issue.

issue of whether the plaintiff's disqualification as defense counsel for Richard Boehm in the divorce action instituted by his estranged wife, Mary Boehm, bars plaintiff from recovering attorney's fees incurred up to the point of disqualification.

In Eastern Sugar, a conflict of interest arose when the appellee law firm which was representing certain defendants in the class action suit, until it was ordered to withdraw by the District Court, began to negotiate a merger with a law firm who was then representing some members of the plaintiff class. Id. at 527. Appellants moved under Rule 60(b) to vacate the award of attorney's fees on grounds that the appellees should be sanctioned for failing to make a timely disclosure of the merger negotiations. Id. That motion was denied.

On appeal, appellants argued that the fees earned from the inception of the attorney-client relationship should be returned as a sanction against the appellee law firm for their failure to disclose the conflict. Although the Third Circuit found that the appellees' conduct in failing to disclose the conflict constituted an ethical violation, it rejected appellants' argument with respect to the return of attorneys' fees. The Third Circuit first detailed the applicable law:

> Some courts have used the deterrence rationale to disallow attorneys' fees for services rendered before the occurrence of the ethical violation in question. We agree that return of fees paid for services rendered before the date of the impropriety may be an appropriate remedy for some ethical violations. Yet, because such a remedy provides the client with a windfall and deprives the attorney of fees earned while acting ethically, we believe such a sanction should be reserved for cases in which the breach of professional ethics is so egregious that the need for attorney discipline and deterrence of future improprieties of that type outweighs the former concerns.
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> Id. at 533.

The court then went on to hold the following:

> In the present case, the attorneys' fees granted in the district court's first fee award order were intended to compensate Danzansky, Dickey [the appellees] for services performed between 1975 and February 1, 1980. Because the end of this period precedes the date of the ethical violation, June 27, 1980, an order requiring Danzansky, Dickey to give back any portion of these fees would be appropriate only if the firm's failure to disclose its merger negotiations constituted a particularly egregious violation of professional ethics. Normally this decision would be one for the district court to make in its discretion. However, we believe it would be an abuse of discretion under the circumstances of this case if the district court on remand were to order return of these fees. Because the ethical question involved in this case is one of first impression under canon 9's rather undefined standard, we believe neither attorney discipline nor deterrence of future misconduct of this type would justify disgorgement of fees earned pursuant to ethical conduct. Therefore, we will affirm the district court's denial of appellants' Rule 60(b) motion, even though we disagree with the court's rationale. See Rhoads v. Ford Motor Co., 514 F.2d 931, 934 (3d Cir. 1975).
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> Id.

Defendant argues that plaintiff clearly violated the Rules of Professional Conduct in representing Boehm to begin with. In other words, he claims that the entire contract between defendant and plaintiff was void ab initio. Defendant further claims that because plaintiff is bound by the finding of the court at Boehm's divorce trial that plaintiff violated his ethical obligations, the holding in Eastern Sugar makes it clear that an attorney cannot keep fees earned during a period in which he is found to have a conflict of interest (or even the appearance of a conflict of interest).

In the instant matter, defendant fails to cite any authority that upon an attorney's disqualification in an action, the entire contract between the attorney and his/her client is void ab initio. Local Rule of Civil Procedure 7.1(b)(1997). Additionally, defendant fails to offer any evidence in support of his allegation that the court which presided over the divorce action made a finding that plaintiff violated his ethical obligations in representing Boehm to begin with. Furthermore, defendant has not offered any evidence whatsoever that plaintiff acted unethically or knew of the conflict before the date of the divorce trial. Finally, defendant's interpretation of Eastern Sugar's holding is incorrect. Eastern Sugar stands for the proposition that attorneys' fees shall not be awarded in cases where the breach of professional ethics is so egregious that the need for attorney discipline and deterrence of future improprieties of that type outweighs the former concerns. In Eastern Sugar, the Third Circuit expressly held that, despite the fact that the appellees had knowledge of the potential conflict and nevertheless failed to disclose the conflict to either the client or the court, such nondisclosure was not an egregious enough violation of the Canons of professional ethics to warrant forfeiture of fees earned. Unlike Eastern Sugar, there is no evidence of a court finding that plaintiff violated an ethical obligation to defendant or evidence that plaintiff knew of a possible conflict of interest before the divorce trial date. Thus, absent authority from defendant that plaintiff is barred from recovering attorneys' fees in the instant matter, defendant has failed to state a meritorious defense. Accordingly, the defendant has failed to make a showing that his conduct was excusable or that he has a meritorious defense in this matter.

CONCLUSION

The plaintiff, in his motion for leave to respond to defendant's reply memorandum, included his response in violation of LRCi 7.1(g). Accordingly, the Court shall deny his motion for leave and strike his response. In addition, the defendant has failed to make a showing in support of his motion to set aside the default judgment that (1) his conduct was excusable and (2) he has a meritorious defense. Accordingly, the Court shall deny defendant's motion.

Maria M. Cabret

MARIA M. CABRET
Territorial Court Judge