

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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AMERICA ONLINE, INC.,

Plaintiff,

- against -

98 Civ. 8959 (DAB)  
ORDER

THE CHRISTIAN BROTHERS and JASON VALE,

Defendants.

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DEBORAH A. BATTIS, United States District Judge.

This action was commenced by filing of a Summons and Complaint on December 18, 1998. Defendants were served on December 20, 1998. Neither Defendant moved or answered with respect to the Complaint, and on June 8, 1999, a default was entered against both Defendants. The matter was then referred to Magistrate Judge Pitman for an Inquest and Report and Recommendation concerning the damages to be awarded to Plaintiff. On December 9, 1999, Judge Pitman issued a Report and Recommendation containing Findings of Fact and Conclusions of Law, and recommending damages and a permanent injunction.

Judge Pitman directed that "Any requests for an extension of time for filing objections [to the Report and Recommendation] must be directed to Judge Batts. FAILURE TO OBJECT WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE

APPELLATE REVIEW." Report and Recommendation ("R&R") at 53. On January 4, 2000, the Court received a motion to vacate the default from both Defendants that had been entered seven months earlier. Defendant Vale ("Vale") filed the motion to vacate pro se, in his individual capacity and also as representative of The Christian Brothers ("TCB").

It is clear that corporations, partnerships and associations may not appear in federal court except through a licensed attorney. Rowland v. California Men's Colony, 506 U.S. 194, 202 (1993). Thus, Vale's motion to vacate the default is only considered as to him individually. The default as to the corporate Defendant TCB is not addressed herein, and thus stands.

Despite Defendant's untimely requests, Plaintiff responded to Defendants' motion to vacate the default, and Defendant Vale submitted a reply, in the form of an unsworn letter, on January 26, 2000.

Defaults "are generally disfavored and are reserved for rare occasions." Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993). However, default procedures "provide a useful remedy when a litigant is confronted by an obstructionist adversary." Id. Determining whether a default should be entered depends on a

consideration of equitable factors, including "(1) whether the default was willful; (2) whether setting aside the default would prejudice the adversary; and (3) whether a meritorious defense is presented." Id.

#### A. Willfulness of Default

Willfulness constitutes more than simple carelessness or even negligence. Standard Enterprises, Inc. v. Bag-it Inc., 115 F.R.D. 38, 39 (S.D.N.Y. 1987); see also L.A. Gear, Inc. v. Kobacker Co., 1994 WL 455573 (S.D.N.Y. 1994) (citing John v. Sotheby's, 141 F.R.D. 29, 36 (S.D.N.Y. 1992) ("[i]mprudent, inattentive, careless, or even negligent handling of a case, although not to be condoned, does not demonstrate willfulness"). Even gross negligence, "while it can weigh against the party seeking relief from a default judgment, . . . does not necessarily preclude relief." American Alliance Ins. Co., Ltd. v. Eagle Ins. Co., 92 F.3d 57, 61 (2d Cir. 1996). A court may refuse to vacate a default judgment, however, if the litigant has "made a strategic decision to default." Id. at 60.

Vale does not even address whether the default was willful.<sup>1</sup>

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<sup>1</sup> At best, Vale's argument appears to be that he suffers from "a very rare and deadly form of cancer," and, because his "time is spent

Indeed, Defendants made a strategic decision to default: they ignored numerous cease and desist letters prior to the commencement of the lawsuit, (R&R at 13, ¶¶ 30-31); on January 25, 1999, Defendant Vale told Plaintiff's counsel that the Defendants were inclined to default, (R&R at 13-14, ¶ 32); when Plaintiff's process server attempted personal, in-hand, service of the Complaint and Plaintiff's Motion for Default, Defendant Vale refused to accept the papers and threw the papers out the door (R&R at 15, ¶ 35); and Defendants repeatedly failed to appear or to respond to any of Judge Pitman's Orders concerning the Inquest. (R&R at 1-3; 16). During the pendency of this lawsuit, Defendants have continued their unlawful activity while at the same time ignoring every aspect of the judicial process in this case.

#### B. Meritorious Defenses

A party "seeking to vacate entry of default must present some evidence beyond conclusory denials to support his defense." Enron

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in recovery, helping other victims and trying to earn money to battle this disease," he has not responded to the Court. (Notice of Motion, ¶¶ 7-9.) However, the exhibits which Defendant Vale attaches to the Notice of Motion are dated from 1986 and 1994, and do not address whether Vale would have been able to respond to the Complaint in 1998 and 1999. Furthermore, even if the Court accepted this argument, it would not inure to the benefit of TCB because Vale cannot represent TCB.

Oil, 10 F.3d at 98. The defense "need not be ultimately persuasive"; for the purposes of vacating entry of default, "[a] defense is meritorious if it is good at law so as to give the factfinder some determination to make." American Alliance, 92 F.3d at 61.

The sole defense that Vale asserts is that the original service of the Summons and Complaint was invalid under New York General Business Law § 11 because it was effected on a Sunday (December 20, 1998), and Vale is a born-again Christian. (Vale Decl. at ¶¶ 3, 5-5.) However, it is undisputed that service complied with Rule 4 of the Federal Rules of Civil Procedure. Nothing in the Federal Rules of Civil Procedure prohibits service on a Sunday, and there is no requirement that service in a federal action must comply with both federal and state rules in order to be valid. See Hanna v. Plumer, 380 U.S. 460 (1965) (holding that Federal Rules of Civil Procedure are "the standard against which the District Court should . . . measure[] the adequacy of service"). Thus, Defendant Vale has not presented a meritorious defense.

C. Prejudice to Plaintiff

"Delay standing alone does not establish prejudice," Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 98 (2d Cir. 1993) (emphasis added). However, there is more to this case than mere delay. In Enron, the plaintiffs waited over one year after the pro se defendant's default before seeking entry of a default judgment. Id. at 96, 98 (default should be granted sparingly when defaulting party appears pro se). Here, Plaintiff diligently pursued the litigation, even going so far as encouraging the Defendants not to default, informing the Defendants of the existence of the Pro Se Office, and accepting and responding to the untimely motion to vacate the default. Despite Defendants' default, Plaintiff continued to serve copies of all letters, pleadings and Orders in this case.

Defendants, however, ignored Plaintiff and the Court for over a year. More importantly, during the pendency of this action, Defendants have continued their illegal activities, diluting Plaintiff's trademark each day. Thus, the Court finds that vacatur of the default would prejudice Plaintiff.

D. Conclusion

Judge Pitman's Report and Recommendation sets out in detail the Defendants' willfulness in defaulting in the face of Plaintiffs' diligent pursuit of their claims. Defendant Vale has utterly failed to raise any meritorious defenses. Defendant Vale has acted as the quintessential 'obstructionist adversary' while continuing to engage in illegal activity. In this action, a default judgment is the appropriate remedy. Accordingly, Defendant Vale's motion to vacate default as to him, is DENIED.

SO ORDERED.

DATED: New York, New York  
January 27, 2000



DEBORAH A. BATTIS  
United States District Judge