FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

O'CONNOR BERMAN DOTTS & BANES, **Plaintiff,** **vs.** **DAVID OH,** **Defendant.**	**CIVIL ACTION NO. 03-0312C** **ORDER GRANTING DEFENDANT'S MOTION FOR RELIEF FROM ORDER, DEFAULT JUDGMENT, AND ENTRY OF DEFAULT**

I. Introduction

THIS MATTER came before the Court for a hearing on May 12, 2008 at 1:30 p.m. on Defendant David Oh's Motion for Relief from Order, Alleged Judgment and Alleged Default. Plaintiff appeared though counsel, George L. Hasselback, Esq. Defendant appeared through his counsel, Richard W. Pierce, Esq. The Court, having reviewed the parties' memoranda and hearing counsel's arguments, now issues its decision granting Defendant's motion for the following reasons.

II. Factual and Procedural Background

On June 20, 2003, Plaintiff O'Connor Berman Dotts & Banes, a law firm ("Law Firm"), filed this lawsuit against Defendant David Oh, its former client, for a breach of contract and unjust enrichment. In the complaint, the Law Firm prayed for a sum certain, to wit: $11,433.58 in general damages. Plaintiff caused the summons and complaint to be served on the defendant personally three days later. Before the 20 day period to file an answer to the complaint expired, counsel for Plaintiff and

Defendant stipulated in writing to extend the time for the Defendant to file an answer to August 15, 2003, which this Court granted and ordered.

Three years and five months after the August 15, 2003 deadline, on January 15, 2007, Plaintiff e-filed a Petition for Entry of Default and Default Judgment ("Petition").[1] Plaintiff's Petition was accompanied by its attorney's declaration attesting that as of the filing of the Petition, no answer to the complaint had been received and Defendant's counsel had not contacted Plaintiff's counsel to seek another extension to file an answer to the complaint. The same declaration acknowledged that, by stipulation of the parties, the Defendant had until August 15, 2003 to file his answer. The Petition's page three had the words "[PROPOSED] ENTRY OF DEFAULT AND ENTRY OF DEFAULT JUDGMENT" across the top and a blank signature line for the Clerk of the Superior Court.

About eleven months after submitting its Petition, on or about December 27, 2007, the Law Firm's counsel contacted the Superior Court Clerk of Court's office to determine if the Clerk had signed and entered the default and default judgment against the Defendant as he had so petitioned on January 15, 2007. (Declaration of George L. Hasselback, ¶2 filed April 22, 2008.) Counsel was informed and provided a copy of the signed entry of default and default judgment dated January 16, 2007. The signed entry of default and default judgment is page three of the Petition.

On January 31, 2008, a little over a year after the clerk signed the proposed entry of default and default judgment, Plaintiff e-filed a Request for Immediate Issuance of Writ of Execution Against Defendant ("Request"). The Court *sua sponte* set the Request for a hearing on February 19, 2008, and ordered Plaintiff to serve notice of the hearing on the Defendant. Defendant Oh appeared personally with a translator at the hearing. Based on the facts presented at the hearing, the Court ordered the

---

[1] On January 12, 2006, the Commonwealth Rules for Electronic Filing and Services became permanent rules of the courts. *In re: Commonwealth Rules for Electronic Filing and Services*, General Order No. 2006-300 (Jan. 12, 2006). Beginning April 24, 2006, the Commonwealth Supreme Court required attorneys to electronically file legal documents in all civil actions involving claims. *See* March 21, 2006 Notice to Counsel.

Defendant to make monthly payments towards the judgment. Defendant thereafter obtained a new attorney to defend him in this case, and now seeks relief from the clerk's entry of default, default judgment, and the Court's payment order. Defendant responded to Plaintiff's application for a writ of execution with a motion for relief from the default judgment based upon Rules 55(c), 60(a), 60(b)(1) and 60(b)(6) of the Commonwealth Rules of Civil Procedure, and by application of 7 CMC § 4207.

III. Issue

The issue presented is whether there has been a lawful entry of default and/or default judgment by the Clerk against Defendant Oh entitling the Law Firm to its payment order in aid of judgment and a writ of execution.

IV. Analysis

A. Timeliness of Defendant's Motion.

In order for this Court to grant Defendant Oh's request, it must first consider its timeliness. A clerk's entry of default pursuant to Com.R.Civ.P. 55(a) may be challenged and set aside pursuant to Com.R.Civ.P. 55(c) ("Setting Aside Default"). The entry alone may be set aside "for good cause shown." Rule 55(c), however, further provides that if a judgment by default has been entered, the court may likewise set it aside in accordance with Rule 60(b). Rule 60 in general provides for "Relief From Judgment or Order." Rule 60(a) allows the court to correct clerical mistakes "*at any time* of its own initiative or on the motion of any party and after such notice, if any, as the court orders." (emphasis added). Rule 60(b) on the other hand provides for six different reasons to grant relief from a final judgment, and restricts reasons (1), (2), and (3) to be made not more than one year after the judgment was entered or taken. The motion to relieve a party for any of the other three reasons, including those listed in subsections (4) and (6) of Rule 60(b), must be made *within a reasonable time* and upon such terms as are just.

Defendant argues that pursuant to Rule 60, this Court should vacate the payment order and, if it is determined that a default and default judgment *were* in fact entered on the docket, they should be vacated. (Def.'s Mem. at 5). Defendant further challenged the clerk's authority to enter a default judgment in this case. (*Id*. at 6-7). In particular, Defendant argued the clerk "had no authority to enter a default judgment because Mr. Oh had appeared in the proceeding through counsel in August 2003." (*Id*.). Relying on Com.R.Civ.P. Rule 60(a), 60(b)(1) or 60(b)(6), Defendant reasoned that "[b]ecause Mr. Oh appeared, the clerk had no authority to enter a judgment against him, and the Court could not do so except upon a hearing with three days notice to Mr. Oh." (*Id*. at 8).[2]

Defendant filed the instant motion a year and three months after the clerk signed the proposed entry of default and default judgment, and four months after the Law Firm's counsel received confirmation that the proposal was actually signed by a clerk. At the hearing on his motion, Defendant, through counsel, agreed with Plaintiff's counsel that the judgment at issue in this case is not void, and therefore Rule 60(b)(4) ("the judgment is void") is not applicable. From all of the circumstances surrounding the disputed entry of Defendant's default in this case, particularly because of the Deputy Clerk's unauthorized and erroneous "approval" of Plaintiff's petition, this Court finds that the Defendant's motion is timely under Com.R.Civ.P. 60(b)(6) and would also be timely if brought pursuant to Com.R.Civ.P. 60(b)(4).

B. Clerk's "Entry" of Default and Default Judgment.

The resolution of the central issue in this case requires the Court to determine the status and effect of Plaintiff's January 15, 2007 Petition for Entry of Default and Default Judgment, which incorporated into a single three-page document Plaintiff's petition and proposed order for (combined)

---

[2] At the hearing, Defendant's counsel conceded that his motion does not lie on challenging the clerk's entry of default and is, therefore, not based on Com.R.Civ.P. Rule 55(c) motion to set aside the entry of default. He does, however, assert that there has been no proper entry of default and default judgment, and that any default judgment entered is beyond the clerk's authority.

entry of default and default judgment. The final page of this document was manually signed in one place by a deputy clerk for the Clerk on January 16, 2007, but it was never separately entered on the Court's docket as either a default or a default judgment. (Def.'s Ex. G to Declaration of Richard W. Pierce, LexisNexis Case History Search of 03-0312-CVC as of Mar. 3, 2008); (Def.'s Ex. H to Declaration of Maria Rita A. Maravilla, CNMI Superior Court Case Proceedings as of Mar. 4, 2008). Defendant does not dispute that a clerk signed page three of the Petition and it is contained in the Court's file. However, Defendant argues that there is no effective entry of default or default judgment in this matter. (Def.'s Mem. in Supp. of Mot. for Relief, Apr. 8, 2008, at 6). The mere fact that the third page was signed by a clerk and then filed in the Court's file does not constitute an entry on the Court's docket. Plaintiff responds that a "*de facto*" entry of default is apparent from the record; that the Court may correct such "procedural shortcomings" *nunc pro tunc* by application of Com. R. Civ. P. 60(a) or Com. E-Filing R.6.7, and that Defendant is time-barred from obtaining relief from the default judgment pursuant to Com. R. Civ. P. 60(b). (Pl.'s Opp. To Def.'s Motion, Apr. 22, 2008).

i. When an entry of default and/or default judgment is "effective."

The disputed issue presented is whether the entry of default and/or default judgment, when executed by the Clerk, became "effective" between the parties when signed by the Clerk and placed in the Court's file, or only upon their formal entries into the Court's civil docket. Com. R. Civ. P. 79(a),(b). The Commonwealth Supreme Court, adopting provisions of Fed. R. Civ. P. 58 not mirrored in Com. R. Civ. P. 58, has mandated for purposes of appeal "that an entry of judgment or order issued as a separate document is a necessary adjunct that must be filed with the Superior Court clerk, which would then be entered on the docket." *Commonwealth v. Kumagai*, 2006 MP 20, ¶ 22. Federal Civil Rule 58 requires the clerk in all instances to "enter" the judgment, that the judgment be "set forth in a separate document" and that the "judgment is effective only when so set forth." *Id.* Rule 79(a) of the Commonwealth Rules

of Civil Procedure also requires the Clerk to enter all judgments and orders in the "civil docket" and to show the date when the entry is made.

The Ninth Circuit has found that trial court orders and judgments become "effective" for purposes of collateral estoppel only when entered on the docket under Fed. R. Civ. P. 79(a). *Barber v. Cincinnati Bengals, Inc.*, 41 F.3d 553, 556 (9th Cir. 1994). The same circuit has also held, in circumstances where the time for notice of appeal under Rule 4(a) was not an issue, that the "effectiveness" of an order or judgment as between the parties is not necessarily dependant upon compliance with Rule 58 or Rule 79(a). *In re Sewell*, 345 B.R. 174, 181-182 (9th Cir.BAP 2006), citing *Noli v. C.I.R.*, 860 F.2d 1521, 1525 (9th Cir. 1988); both opinions quoting *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (declaring "sole purpose" of Rule 58 is to fix time for appeal). The Federal Rule 58 was amended in 2002 and the Advisory Committee notes explain that the attempt to define the "effectiveness" of a judgment was abandoned by the drafters; that the amendment instead "replaces the definition of effectiveness with a new provision that defines *when* judgment is entered." Fed. R. Civ. P. 58 (Advisory Committee Notes 2002) (emphasis added). At the same time, the Advisory Committee noted that the rule may be relevant "to other questions that may turn on when a judgment is entered." *Id.* The "effectiveness" of a judgment or order that is otherwise within the court's jurisdiction, therefore, remains relative to the purpose for which it is invoked and the parties who are seeking to invoke the judgment.

From these authorities, this Court concludes that the Clerk's action of manually signing a proposed entry of default or default judgment and placing it in the court's file is not rendered a legal nullity on the basis of the fact that neither the proposed entry or default judgment appear on separate documents and neither are separately entered on the docket pursuant to Com. R. Civ. P. 79(a). In this case, the Clerk failed to separately enter the requested default against Defendant on the Court's civil docket as required by Com. R. Civ. P. 55(a) and Com. R. Civ. P. 79(a). The listing of documents on file

with LexisNexis (Def.'s Ex. G to Declaration of Richard W. Pierce) and the Case Proceedings from the CNMI Superior Court Clerk of Court's Office (Def.'s Ex. H to Declaration of Maria Rita A. Maravilla) do not reflect any entry of default or default judgment. By definition under the rules, there was no entry of default against Defendant on January 16, 2007. In appropriate circumstances, the clerk's action may be given its intended legal effect pursuant to Com.R.Civ.P. 60(a). However, the clerk's failure to separately enter the default and default judgment on the docket does not end the inquiry here.

ii. Clerk's authority to enter default judgment.

The Clerk is authorized to enter a default judgment for a sum certain only if a defendant "has been defaulted for failure to appear." Com. R. Civ. P. 55(b)(1). This means that a default judgment may be entered only if there is a *prior entry of default* by the Clerk, although a plaintiff may make both requests simultaneously and the Clerk may separately docket the default and default judgment in the proper order at the same time. Com.R.Civ.P. 55(a); *Brooks v. U.S.*, 29 F.Supp.2d 613, 618 (N.D. Cal. 1998), *aff'd mem.*, 162 F.3d 1167 (9th Cir. 1998); *United States v. Herlong*, 9 F.R.D. 194, 195-196 (W.D.S.C. 1949). In this case, there is no docket entry of the purported default judgment as required by Rule 79(a). The Clerk, however, evidenced approval of Plaintiff's requests for entry of default and default judgment thereon by signing the last page of Plaintiff's Petition and placing it in the Superior Court's public file.

Defendant had constructive notice of Plaintiff's *Petition* for Entry of Default and Default Judgment when it was electronically filed and served on Plaintiff's *and Defendant's original* counsel of record on January 15, 2007.[3] (Def.'s Ex. F, p.2 to Declaration of Richard W. Pierce) Reasonable inquiry by Defendant would arguably have led to the discovery of the Clerk's apparent approval of the petition in the Court's file. If the missing entries are a mechanical mistake in the record caused by an

[3] Defendant's original attorney closed her private law practice in the Commonwealth sometime after the stipulation was entered. However, it is not clear when she actually left the Commonwealth.

"oversight or omission" on the part of the Clerk, they may be correctible by an order directing their entry *nunc pro tunc* to the date they should have been entered on the docket. Com. R. Civ. P. 60(a). In some cases, dispositive court orders and judgments have been retroactively entered on the courts' docket pursuant to rules identical to Com. R. Civ. P. 60(a), with the courts' orders or judgments given effect between the parties in the interim. *See, In re American Precision Vibrator Co.*, 863 F.2d 428, 429-430 (5th Cir. 1989); *Hamilton v. Stillwell Van & Storage Co.*, 343 F.2d 453, 455 (9th Cir. 1965); 11 C. WRIGHT & A. MILLER, FED. PRAC. & PROC. CIV.2D § 2854 (Thompson/West 2008) (WRIGHT & MILLER). The present matter, however, concerns a judgment issued by the Clerk, not by the Court. Because the Clerk's authority to issue such judgments is strictly limited, procedural irregularities may render the Clerk's judgment void.[4]

"A clerk has authority to enter a default judgment *if* the defaulting party did not appear *and* the judgment entered was for a sum certain." *J.C. Tenorio Enterprises, Inc. v. Uddin*, 2006 MP 22, ¶ 14 (emphasis added). In *Uddin*, the Court considered the issue of whether the Clerk's judgment of default entered under Rule 55(b)(1) would have been void, or merely irregular, when entered upon plaintiff's affidavit showing a correct amount of statutory damages but where the affidavit failed to properly

---

[4] The Clerk's authority to enter a default and default judgment is conferred by Rules 55(a),(b)(1) and 77(c) of the Commonwealth Rules of Civil Procedure. The questions of whether the Clerk's entry of a judgment or order is void or merely irregular, as well as the question of whether a particular action or omission by the Clerk constitutes a mechanical error of a clerical nature remediable under Com. R. Civ. P. 60(a) rather than a substantive error occurring in the exercise of the Clerk's authority, are rarely presented. This is because the Clerk's function is ministerial and under the Court's inherent power and pursuant to rule any such action by the Clerk "may be suspended or altered or rescinded by the court upon cause shown." Com. R. Civ. P. 77(c). The ministerial function of the Clerk, however, means that its grant of authority to enter judgments will be strictly construed. The contrast with court-issued judgments has been the subject of judicial comment:

> 'There is a marked difference between a default judgment entered by the court under subdivision 2 [of Rule 55(b)]… and one entered by the clerk under the first subdivision of the section. Having jurisdiction of the parties and of the subject-matter of the litigation, any impropriety in the Court's entry of judgment constituted, at most, but an erroneous exercise of jurisdiction. However, where a clerk purports to enter a default and judgment prematurely, or otherwise exceeds the limited power conferred upon him by the statute, there is an entire absence of jurisdiction and his action … is a nullity and open to attack at any time.'

Lewis v. LeBaron, 254 Cal.App.2d 270, 277 (Cal.App. 1967), quoting *Baird v. Smith*, 14 P.2d 749, 751 (Cal. 1932); *Accord*, *Ferlita v. State*, 380 S0.2d 1118, 1120 (Fla.App. 1980) ("If the record does not reflect the statutory prerequisites to the clerk's power to act, the judgment so entered is void."); *See, also* 10A WRIGHT & MILLER § 2683; 158 A.L.R. § 1091.

reference the statute or to provide a simple means of calculating the "sum certain" requested. *Id.*, ¶ 15. The Court concluded that the deficient affidavit in that case did not bar the Clerk's authority to enter judgment upon the request and that the default judgment was not void for lack of jurisdiction. *Id.*, ¶¶14-15, citing *Franchise Holding II, LLC. v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 925-929 (9th Cir. 2004).

In *Franchise Holding II*, the Ninth Circuit Court of Appeals stated "Rule 55(b)(1) 'applies only to parties who have never appeared in the action.' Therefore, if [defendant] appeared, the clerk's entry of default is *void ab initio*." 375 F.3d at 927, quoting *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 689 (9th Cir. 1988). In *Direct Mail*, the Ninth Circuit had stated:

> The plaintiff's request for entry of default was on the *clerk*, not the court. Under Rule 55(b)(1) the clerk can enter the default if "the plaintiff's claim against a defendant is for a sum certain ... and if the defendant has been defaulted for failure to appear." "Thus, the rule applies only to parties who have never appeared in the action." 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2683, at 415 (2d ed. 1983). As already stated, the issue is whether [defendant] appeared. If it did, a default entered by the clerk is void *ab initio*.

Direct Mail Specialists, Inc., 840 F.2d at 689.

iii. Com.R.Civ.P. Rule 55(a) requires a defendant's failure to plead or otherwise defend.

The Clerk may enter default if it is "made to appear by affidavit or otherwise" that the defendant has "failed to plead *or otherwise defend*" in the matter. Com. R. Civ. P. 55(a) (emphasis added). The Clerk is authorized to enter a default judgment only after "the defendant has been defaulted for failure to appear." Com. R. Civ. P. 55(b)(1). In all other cases, the plaintiff must apply to the Court for a default judgment and provide the prescribed three-day notice to the defaulting defendant who has previously appeared. Com. R. Civ. P. 55(b)(2). Rule 55 uses the term "plead or otherwise defend" in subsection (a) and the term "appear" in subsection (b)(1), but it is apparent that the "defaulted for failure to appear" in the latter subsection is a reference to a defendant whose "default" has been entered under 55(a) for having failed to "plead or otherwise defend." Valid entry of defendant's default on the basis of Rule

55(a) is a prerequisite to the Clerk's authority to enter a default judgment under Rule 55(b)(1). *Brooks v. U.S., supra,* 29 F.Supp.2d at 618. It follows that if a defendant *has* appeared by filing an answer or otherwise defending against the action *prior* to the Clerk's entry of default under subsection (a), the entry of default, as well as the Clerk's judgment based upon the entry, will be invalid as an act in excess of the Clerk's authority. *Direct Mail Specialists, Inc.*, 840 F.2d at 689.

The prior "appearance" sufficient to avoid default has been defined broadly to include any manifestation on the part of the defendant of a clear intention to defend the suit. 840 F.2d at 689. "The appearance need not necessarily be a formal one, *i.e.*, one involving a submission or presentation to the court. In limited situations, informal contacts between the parties have sufficed when the party in default has thereby demonstrated a clear purpose to defend the suit." *In re Roxford Foods, Inc.*, 12 F.3d 875, 879 (9th Cir. 1993), quoting *Wilson v. Moore & Assocs., Inc.*, 564 F.2d 366, 369 (9th Cir. 1977). A single letter from defendant to plaintiff's counsel may be a sufficient "appearance" to require plaintiff to proceed under Rule 55(b)(2) and for the court to vacate the clerk's entry of default. *Dalminter, Inc. v. Jessie Edwards, Inc.*, 27 F.R.D. 491, 493 (D.Tex. 1972); 10A WRIGHT & MILLER § 2683.[5]

From the standpoint of the Clerk's *authority* to enter a default and default judgment under Rule 55(a) and (b)(1), however, it need only "appear by affidavit or otherwise" that there has been no appearance by the defendant. Matters that are not apparent from the Court's file or the plaintiff's affidavit cannot affect the Clerk's authority to enter the default or judgment. In *Franchise Holding II*, the Ninth Circuit reached this conclusion by holding that the parties' communications did not amount to an "appearance" rendering the clerk's entries void, when the defendant otherwise had filed no response and the communications were not reflected in the record. *Franchise Holding II, supra,* 375 F.3d at 927.

[5] Conversely, activity by a defendant that may correctly qualify as an "appearance" under other rules (e.g., to establish personal jurisdiction) may nonetheless fail to constitute an "appearance" under Rule 55 if such activity does not manifest defendant's intention to defend the suit. *Id.*

The court distinguished its earlier decision in *Wilson v. Moore & Assocs.*, *supra*, on the basis that the defendant in that case had copied the court with its letter to the plaintiff. *Id.*

Both parties to the present action, through their respective legal counsel, executed a written stipulation extending the time for Defendant to file his answer to the complaint. The stipulation, which contains the letterhead and telephone number of Defendant's counsel, was apparently drafted by Defendant's attorney and filed with the Court on August 4, 2003, prior to the expiration of Defendant's time to file a responsive pleading. From the nature of the filing and the caption under which it was entered, the Court finds the stipulation to be a representation by Defendant of his clear purpose to defend the action. *See, Segars v. Hagerman*, 99 F.R.D. 274, 275-276 (D.Miss. 1983) (citing authorities holding stipulated extensions of time to be sufficient for "appearance" under Rule 55). This notice of Defendant's intent to defend the action was present in the Court's file and appeared on the docket prior to Plaintiff's application to the Clerk for entry of default and its effect on any application made under Rule 55(a) or Rule 55(b)(1) is not erased by the passage of time. If a plaintiff has become aware of a defendant's expression of a clear purpose to challenge or to defend against plaintiff's claims, the plaintiff thereafter may only apply to the Court for default pursuant to Com. R. Civ. P. 55(b)(2). If a document is on file with the Court which, by its appearance, in any way reveals defendant's purpose to defend the suit, the Clerk is without authority to enter defendant's default. Com. R. Civ. P. 55(a).

iv. The effect of noncompliance with Rule 55 as addressed by *J.C. Tenorio Ent., Inc. v.Uddin.*

Defendant asserts "excusable neglect" pursuant to Rule 60(b)(1) due to his alleged abandonment by former counsel and argues that he has a meritorious defense based upon Plaintiff's undisclosed conflicts of interest occurring in the course of its former representation of Defendant. Defendant's motion pursuant to Rule 60(b)(1), however, is untimely if measured from the January 16, 2007 date of the Clerk's signature on Plaintiff's "[PROPOSED] ENTRY OF DEFAULT AND ENTRY OF

DEFAULT JUDGMENT." Appropriate relief under subsections (4) or (6) of Com. R. Civ. P. 60 however may be granted beyond the one year limitation.

Defendant has not expressly sought relief under Rule 60(b)(4) (relief from void judgments), but does claim that the default "doesn't exist" for not having been entered on the docket. Pursuant to Civil Rule 55(c), the Court may set aside an entry of default "for good cause shown" and may set aside a default judgment in accordance with Rule 60. If there is independent and sufficient cause to set aside the Clerk's entry of default, however, the Clerk's judgment on that default is necessarily vitiated. Com. R. Civ. P. 55(b)(1); *Brooks v. U.S.*, *supra*, 29 F.Supp.2d at 618. This appears to leave subsection (b)(4) of Rule 60 as the appropriate basis for the relief requested by Defendant. Defendant, however, apparently regard the Commonwealth Supreme Court's decision in *J.C. Tenorio Ent., Inc. v. Uddin*, 2006 MP 22, as foreclosing such a challenge to the Clerk's entry of default and default judgment.[6]

In *Uddin*, the Commonwealth Supreme Court began by distinguishing judgments which are irregular or erroneous, and therefore "voidable," from judgments which are "void" for lack of jurisdiction. *Id.*, ¶ 11, quoting *Reyes v. Reyes*, 2001 MP 13. The *Uddin* Court then framed the issue as the question of whether or not a plaintiff is required to provide to the Clerk an affidavit presenting sufficient detail or stating a simple calculation to demonstrate a "sum certain" due from defendant "*as a prerequisite to the Clerk obtaining authority to enter the judgment.*" ¶ 12. (emphasis added). In the next paragraph, the Court described that "the trial court held that the attorney's fee portion of the default

---

[6] At the hearing on May 12, 2008, Defendant expressed a willingness to concede that the Clerk's *entry of default*, as compared to the Clerk's default judgment, may at most be declared irregular and hence "voidable" rather than void, when it is entered by the Clerk without authority under Com. R. Civ. P. 55(a). Defendant's express basis for this conclusion is the notion that the "appearance" that is lacking under Rule 55(a) when a defendant fails to "plead or otherwise defend according to these rules" is *different*, or judged by a *different standard*, from the "appearance" that is lacking when "defendant *has been defaulted* for failure to appear," the latter permitting judgment to be entered by the Clerk pursuant to Rule 60(b)(1). This presumption apparently flows from Defendant's reading of *Uddin*, as well as certain statements in the persuasive authority cited to the Court. *See, J.C. Tenorio Enter., Inc. v. Uddin*, 2006 M.P. 22, ¶ 12 ("It is clear from our rules that the Clerk has the authority to enter default judgments."); *United States v. Melichar*, 56 F.R.D. 49, 50 (D.Wis. 1972) (clerk had no authority to enter default judgment absent plaintiff's affidavit showing "sum certain," but entry of default for failure to appear was valid).

judgment was void because [plaintiff] did not present an explanation for how the attorney's fees were calculated" and stated "we disagree with the analysis of the Superior Court." ¶ 13. The Court next applied the Ninth Circuit's standard for determining the sufficiency of such an affidavit as set forth in *Franchise Holding II*, *supra*. ¶¶ 14-15. This invoked a *second* question of "what constitutes a 'sum certain'." ¶ 14. The Court examined the particular affidavit in that case and found that it was missing an express calculation and contained a typographical error, but that the affidavit had set forth a definite sum which was correct. ¶ 15. Without reference to either of the prior questions, it simply concluded: "Accordingly, we hold that the Clerk had authority to enter the judgment, which was not void for lack of jurisdiction." *Id*.

This Court has thoroughly examined the opinion in *Uddin* but cannot with confidence resolve the ambiguity in its holding. Specifically, it is unclear whether the holding states that the clerk had authority to enter a valid judgment based upon the affidavit in that case, or whether the clerk *always* has the general authority to grant default judgments, the words of limitation appearing in Rules 77(c) and 55 serving only to mark the bounds of procedural error. The Court agrees with Defendant that *Uddin* may reflect a holding that the jurisdictional authority of the Clerk of Court is co-extensive with that of the Court itself, so that a judgment issued by the Clerk may be deemed void only where the same judgment, if issued by the Court itself, would be void. If this interpretation is correct, judgments by the Clerk that exceed the authority conferred by rule on the Clerk, including the requirement of an actual default or the limitations on the scope or type of relief requested, are not *void* but only irregular, so long as the Court has personal jurisdiction over the parties and subject matter jurisdiction over the controversy.[7] This

---

[7] The Wisconsin Supreme Court has adopted this rule, expressly equating the subject matter jurisdiction and powers of its courts with its clerks of court and holding proper "a determination by the clerk of his or her own power." *Wisconsin Public Service Corp. v. Krist*, 311 N.W.2d 624, 629-630 (Wis. 1981). Wisconsin's Rules of Civil Procedure are not patterned after the federal rules. *See*, Wis. Stats. § 806.02, 1987 Act. 256 § 12, amended 1994 (*orig.* Wis. L.1866, c.70, § 1). Compare *Agnetta v. State Street Bank*, 674 N.E.2d 653, 654-655 (Mass.App. 1997) (clerk's award of costs not reviewable by appeal because clerk's decision "is not 'an order, judgment [or] decree' of a… court.").

rule, however, would directly conflict with the rule of the Ninth Circuit that was espoused in the very same authority cited with approval by the Commonwealth Supreme Court in *Uddin*. *See, Franchise Holding II*, 375 F.3d at 927 ("if [defendant] appeared, the clerk's entry of default is *void ab initio*."); *Direct Mail*, 840 F.2d at 689. The Court in *Uddin* did not specifically address the question of whether, on the clerk's premature entry of default, the defect in the entry is waivable and subject to the limitations of direct challenge, or is instead a defect that may be raised collaterally, or at any time under Com.R.Civ.P. 60(b)(4). This Court has not found anything in the *Uddin* opinion that clearly implies an answer to this question.[8]

Defendant therefore cautiously moves for relief on the alternative basis provided by Rule 60(b)(6). For the reasons set forth below, the Court agrees that subsection (6) of Rule 12(b) is an available ground for relief in this case.

---

[8] Because earlier reported decisions often indiscriminately used the term "void" to characterize judgments or orders exhibiting a variety of defects, there is now a trend toward limiting, if not eliminating, the terminology of "voidness" in favor of the explicit process of determining whether the particular defect or irregularity in the judgment at hand should, in light of the statutes or rules involved and upon considerations of policy and due process, make that judgment subject to collateral attack. *See*, RESTATEMENT (SECOND) OF JUDGMENTS § 65, cmt. a. (1982); *also*, *Filling The Void: Judicial Power And Jurisdictional Attacks On Judgments*, 87 Yale L. J. 164. This trend accords with the one adopted by the drafters of the federal civil rules, who eliminated from the rules the definition of "effective" as applied to judgments in general. (*Supra*, **B. i.**, p. 6). Each recognizes that the adjectives "void" or "effective" when attached to a given judgment only convey a *legal conclusion* on a particular matter; but that the terms are easily misperceived to reference threshold categories limiting the court's inquiry, so that any basis discovered for consigning a disputed judgment to one or another category will tend to be determinative for all purposes. This Court is also mindful of the need to avoid the reverse error: sweeping away outmoded terminology should not breathe substantive life into a purported judgment that rightly has no legal effect.

The Ninth Circuit's rule is based upon the doctrine that a grant of specific powers does not imply a grant of general powers and operates as a limitation on general powers already held. *See, Operating Engineers Local Union No. 3 v. Burroughs*, 417 F.2d 370, 373-374 (9th Cir. 1969) (on statutory claim for equitable relief, court lacked inherent power to consider equitable defenses not specified in statute). The Superior Court has general subject matter jurisdiction over "civil actions" pursuant to N.M.I. Const., Art. IV, s. 2, and 1 CMC § 3202, but its competency to act on certain matters otherwise regarded as "civil" (e.g., arising from a breach of contract) is limited by specific legislative grants of authority and by the legislative or constitutional hierarchy of the different tribunals. The Commonwealth Supreme Court and the reviewing courts of other jurisdictions have not hesitated to declare judgments exceeding the prescribed limits on such matters to be "void." *See, In re Sik Chang v. Norita*, 2006 MP 02, ¶¶ 22-24, citing RESTATEMENT (SECOND) OF JUDGMENTS § 11, cmt. e. (1982); *Office of Attny. Gen. v. Estel*, 2004 MP 20 , citing *Office of Attny. Gen. v. Jimenez*, 3 CR 827 (Dist.Ct.App.Div.1989); *Del Rosario v. Camacho*, 2001 MP 03, ¶ 48, citing *Piteg v. Piteg*, 2000 MP 03; *Wabol v. Villacrusis*, 4 N.M.I. 314, 317 (1995); *Rivera v. Guerrero*, 4 N.M.I 79, 84, n.37 (1994). *See, also*, *Watts v. Pickney*, 752 F.2d 406, 409 (9th Cir. 1985) (mailing complaint without using certified mail as required by admiralty statute deprived trial court of subject matter jurisdiction; resulting judgment was "void" per Fed.R.Civ.P. 60(b)(4)).

C. Relief Available to Defendant Pursuant to Civil Rules 55(c) and 60(b).

The rules permitting relief from default are remedial and should be liberally construed in favor of permitting adjudication on the merits. *Reyes v. Reyes*, 2001 MP 13 ¶ 22, 6 N.M.I. 299, 304. A movant seeking relief under Rules 55(c) or 60(b)(1) must show: "(1) that the plaintiff will not be prejudiced; (2) the existence of a meritorious defense; and (3) that the default was not the effect of the defendant's culpable conduct." *Roberto v. De Leon Guerrero*, 4 N.M.I. 295, 297 (1995) (*citing, Hawaii Carpenter's Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir. 1986)). These factors are nonexclusive, however, and a defendant's culpability arising from delay must be weighed against the conduct of the plaintiff in pursuing the action. *Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 394, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993); *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1224 (9th Cir. 2000).

In this particular case, the issue has been presented in a form opposite from the usual request for relief from default. Here, Defendant argues there was no actual entry of default or default judgment by the Clerk into the Court's docket as contemplated by Com. R. Civ. P. 79(a). Plaintiff on the other hand requests the Court to treat such actions as were taken by the Clerk with respect to its proposed entries as either sufficient under Rule 79(a) and E-Filing Rule 6.7, or to determine that the Clerk's failure to enter the proposed default and default judgment on the docket are merely clerical errors in the record, not reflective of the Clerk's actual *decision* to accept the proposed entries, and accordingly to "correct the record" pursuant to Com. R. Civ. P. 60(a). Had there truly been a failure by the defendant to plead or otherwise defend, this Court is inclined to find the clerk's omissions to enter the default and default judgment according to Com.R.Civ.P. 77(c), and upon the separate documents required by *Kumagai*, to be no more than clerical mistakes that can be cured *nun pro tunc* under Com.R.Civ. P. 60(a).

The Clerk's entry of default upon plaintiff's request, or the Clerk's rejection of such a request, however, is a substantive action within the ministerial authority of the Clerk. At least the *entry* of the

default or judgment may contain "clerical errors," but an error is not "clerical" under Rule 60(a) merely because it is committed by the Clerk. *In re Sik Chang, supra,* 2006 MP 02, ¶ 28. The Court may correct errors by the Clerk, whatever the nature of the error, at any time as justice permits. Com. R. Civ. P. 77(c). In doing so, the Court is not bound to ascertain the *action intended by the Clerk.* In the present circumstances, however, the Court is not persuaded that it should retroactively deem as performed those acts that Plaintiff argues should have been performed, when doing so would operate to prematurely cut off the *appearing* Defendant's procedural right to notice under Com. R. Civ. P. 55(b)(2).

The determination of whether a judgment issued in excess of a particular grant of authority should be denied its *res judicata* effect involves a balancing of the competing policies of the finality of judgments with the requirement that judicial powers remain constrained to legally defined limits. RESTATEMENT (SECOND) OF JUDGMENTS § 12. One approach adopted by courts in reliance upon Ninth Circuit precedent is to treat procedural errors affecting the defendant's right to due process and leading to judgment against the defendant as a sufficient basis for vacating the judgment pursuant to Rule 60(b)(4). *First Nat'l Bank of Telluride v. Fleisher*, 2 P.3d 706, 712-713 (Colo. 2000). In this view, even if the failure to meet procedural prerequisites is not strictly considered to be a "jurisdictional defect" making the default judgment "void" *per se*, any basis for relief stating circumstances in which vacatur of the default judgment is made *mandatory* is properly asserted under Rule 60(b)(4). *Id.*, at 713, citing *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985). At least one commentator critical of the "voidness doctrine" has suggested that narrowing the application of the remedy of Rule 60(b)(4) by restricting the types of judgments properly characterized as "void" is offset by the fact that the same considerations support broadening the relief available under Rules 60(b)(1)-(3), and particularly Rule 60(b)(6), to include challenges to the judgment that were formerly considered "jurisdictional." Dobbs, 87 Yale L. J. 164, 224 (*Supra*, n.7).

There are a substantial number of judicial decisions in which errors by the courts resulting in default judgments that could be characterized as exceeding the courts' jurisdiction and therefore falling under Rule 60(b)(4) have been found to present circumstances permitting relief, alternatively or additionally, under Rule 60(b)(6). *See*, *Malloy v. Wilson*, 878 F.2d 313, 315-316 (9th Cir. 1989) (failure to give notice of dismissal per Rule 77(d)), citing *Traveltown, Inc. v. Gerhardt Inv. Group*, 577 F.Supp. 155, 157 (N.D.N.Y. 1983) (either (b)(4) or (b)(6) may apply to entry of default where defendant had served but did not file answer—if entry was only "voidable," (b)(6) would apply); *Compton v. Alton S.S. Co., Inc.*, 608 F.2d 96, 104-106 (4th Cir. 1979) (default judgment exceeding statutory recovery may be vacated under *either* (b)(6) *or* (b)(4)); *U.S. v. Miller*, 9 F.R.D. 506, 509 (M.D.Pa. 1949) (clerk "without power" to enter default where defendant's stipulation was on file and damages stated were arbitrary—relief appropriate under (b)(6)).

Relief under Com.R.Civ.P. 60(b)(6) is available if justice so requires for some "other reason" than those specified in 60(b)(1)-(3). The comprehensive scope of subsections (1)-(3), however, practically means that such "other reason" as might be construed within the prior subsections will still present a basis for relief if "extraordinary circumstances" are present. In cases where both parties share some responsibility for the delay in process and the court's own error contributes to the failure of the defendant to receive the prescribed notice pursuant Rule 55(b)(2), relief may be available under Rule 60(b)(6). *Traveltown, supra*, 577 F.Supp. at 157.

In the present matter, Plaintiff waited nearly three and a half years from the date Defendant's formal answer was due to petition the Clerk for default and almost another year to telephone the Clerk to find out if default had been entered. This information was unavailable to either party from the Court's docket due to the Clerk's failure to make the proper entries, which error resulted from the improper format of Plaintiff's petition and proposed entries. In the interim, Defendant's counsel had permanently moved from the Commonwealth and Defendant received no notice of these actions, despite having

previously appeared. Defendant was negligent in failing to remain apprised of the action, but responded promptly with a proposed defense when notified of Plaintiff's attempt to execute judgment. Defendant's proposed defense is in the form of recoupment based upon Plaintiff Law Firm's breach of duty arising from its representation of Defendant in 2002. From all of these circumstances, including the errors of the Clerk of Court and Defendant's entitlement to notice pursuant to Com.R.Civ.P. 55(b)(2), the Court concludes that Defendant is alternatively entitled to relief from judgment pursuant to Com.R.Civ.P. 60(b)(6). *Traveltown, supra*; *U.S. v. Miller*, *supra*, 9 F.R.D. at 509.

V. Conclusion

This Court concludes that the Court's documents on file and record in this action, as it existed on January 15, 2007 when Plaintiff presented its request for entry of default and default judgment to the Clerk of Court, already contained an evident prior appearance by Defendant in the action and the Clerk therefore lacked authority at that time to enter default against Defendant. No entry of default was in fact perfected on the docket, but the Deputy Clerk's signature on Plaintiff's proposed entry and judgment was made without authority and is ineffective to constitute an entry of default or default judgment. This Court concludes that Defendant is therefore entitled to relief from the apparent entry of default and default judgment pursuant to Com. R. Civ. P. 60(b)(4). Because the Court finds that the controlling construction of Com. R. Civ. P. 60(b)(4) remains uncertain following the Commonwealth Supreme Court's decision in *J.C. Tenorio Enterprises, Inc. v. Uddin*, 2006 MP 22, the Court also states its conclusion that Defendant would be entitled to relief pursuant to Com. R. Civ. P. 60(b)(6). For the reasons stated herein, Defendant's motion for relief from the Clerk's entry of default and default judgment irregularly posted on January 16, 2007 is GRANTED, and Defendant may file his Proposed Answer or other responsive pleading no later than June 16, 2008.

Accordingly, the signature of the Clerk appearing on Plaintiff's "[PROPOSED] ENTRY OF DEFAULT AND ENTRY OF DEFAULT JUDGMENT," which was filed with the Court as a part of

Plaintiff's Petition on January 16, 2007, is hereby ordered stricken, and the entry of default and default judgment are vacated and set aside.

This Court's prior Order in Aid of Judgment entered February 21, 2008 is hereby vacated.

SO ORDERED this 5th day of June, 2008.

/s/_____
RAMONA V. MANGLONA, Associate Judge