



By order of the court, Judge PERRY B. INOS

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FOR PUBLICATION

E-FILED
CNMI SUPERIOR COURT
E-filed: Feb 6 2012 2:13PM
Clerk Review: N/A
Filing ID: 42315721
Case Number: 11-0491-fcd
N/A



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

ROBERTO O. MENDOZA,)	CIVIL CASE NO. 11-0491
)	
Petitioner,)	
)	
vs.)	ORDER SETTING ASIDE
)	ENTRY OF DEFAULT
MA. TERESA MARCELO,)	
)	
Respondent.)	
)	
)	

I. INTRODUCTION

THIS MATTER was heard on January 23, 2012 in Courtroom 217A on a motion for relief from entry of default. Roberto O. Mendoza (“Mendoza” or “Petitioner”) was represented by Ramon Quichocho, Esq. Ma. Teresa Marcelo (“Marcelo” or “Respondent”) was represented by Collin Thompson, Esq. The Court, having had the benefit of written briefs, and oral argument from counsel, now enters this written Order.

II. PROCEDURAL BACKGROUND

On October 17, 2011, Mendoza filed a Petition for Divorce from Marcelo with this Court. On October 27, 2011, Mendoza filed a Plaintiff’s Ex Parte Motion for an Order to Appear or Plead and for an Order Allowing Service by Publication that “[u]pon Petitioner’s best knowledge and belief,

1 Respondent Ma Teresa Marcelo cannot be found or served within the Commonwealth of the Northern
2 Mariana Islands.” That same day, this Court granted the motion and issued an Order to Appear or Plead
3 and for Service by Publication.

4 The next day, on October 28, 2011, the Summons was posted on the Superior Court’s bulletin
5 board. Also, on November 1, 2011, the Summons was published in the Marianas Variety. On
6 November 22, 2011, Mendoza filed a Request for an Entry of Default. That same day, this Court
7 granted the motion and the default of Marcelo was entered according to law. Thereafter, on December
8 28, 2011, Marcelo filed a Motion for Relief from Entry of Default.

9 10 **III. DISCUSSION**

11 **A. Entry of Default**

12 Default is governed by Commonwealth Rule of Civil Procedure 55. Rule 55(a) provides, in
13 relevant part, as follows: “When a party against whom a judgment for affirmative relief is sought has
14 failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must
15 enter the party’s default.” NMI R. Civ. P. 55(a); *Roberto v. De Leon Guerrero*, 4 NMI 295 (1995).
16 The Rule does not limit the ability of the Court to consider a request for entry of default. Wright, Miller,
17 & Kane, *Federal Practice and Procedure (Civil 3d)* § 2682 (“The fact that Rule 55(a) gives the clerk
18 authority to enter a default is not a limitation on the power of the court to do so.”). Nevertheless, the
19 court may set aside an entry of default for “good cause.” NMI R. Civ. P. 55(c).

20 In general, an entry of default is disfavored and is to be avoided because such a remedy is
21 inconsistent with the policy that claims and defenses be disposed of on their merits. *See Enron Oil*
22 *Corp. v. Diakuhara*, 10 F.3d 90, 95-96 (2d Cir. 1993); *United States on Behalf of and for Use of Time*
23 *Equip. Rental & Sales, Inc. v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993); *Tazco, Inc. v. Director, Office*
24 *of Workers Compensation Program, U.S. Dep’t of Labor*, 895 F.2d 949, 950 (4th Cir. 1990) (“The law
25 disfavors default judgments as a general matter.”); *Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir.
26 1984)). After a review of the facts and arguments in this case and taking into consideration the strong
27 preference that claims be decided on their merits, the Court finds that the entry of default issued by the
28 Clerk on November 22, 2011 be set aside.

1 **B. Service of Process**

2 The central issue before the Court in this matter is whether Marcelo received adequate notice
3 of the Petition for Divorce. The Court cannot exercise jurisdiction over a party that has not been
4 properly served. *See Gold Kist, Inc. v. Laurinburg Oil Co.*, 756 F.2d 14, 19 (3d Cir. 1985) (“A default
5 judgment entered when there has been no proper service of the complaint is, *a fortiori*, void, and should
6 be set aside.”). Therefore, in determining whether to set aside the entry of default, the Court must first
7 consider whether the Court has personal-jurisdiction in the case.

8 For personal-jurisdiction, the Court must address the adequacy of service on Marcelo. Personal
9 service requirements are set forth in Commonwealth Rule of Civil Procedure 4(e)(1). Rule 4(e)(1)
10 provides, in relevant part, that service may be effected “in any manner prescribed or authorized by any
11 law of the Commonwealth.” NMI R. Civ. P. 4(e)(1). Under Commonwealth law, an individual may
12 be served, *inter alia*, by personal delivery, or service by mail coupled with acknowledgment of receipt.
13 *See* 7 CMC § 1104(a).

14 When a defendant cannot be served as specified by 7 CMC § 1104(a), 7 CMC § 1104(b)
15 authorizes service by publication:

16 **[I]f the defendant cannot be personally served by mail the summons**
17 **and complaint**, and if by affidavit or otherwise the court is satisfied that
18 with **reasonable diligence** the defendant cannot be served, and that a
19 cause of action arises against the party upon whom service is to be made,
20 or he is a necessary and property party to the action, the court may order
21 that service be made by publication of the summons in at least one
22 newspaper published and having a general circulation in the
23 Commonwealth. Publication shall be made once each week for four
24 successive weeks, and the last publication shall be not less than 21 days
25 prior to the return date stated herein.

22 7 CMC § 1104(b) (emphasis added). Service by publication is only permissible “where it is not
23 reasonably possible or practicable to give more adequate warning,” because “in the case of persons
24 missing or unknown, employment of an indirect and even a probably futile means of notification is all
25 that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.”
26 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950).

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1 At oral argument, Mendoza contended that “there is no legal requirement” to use reasonable
2 diligence or attempt service by mail before resorting to service by publication. In light of the clear
3 requirements of 7 CMC § 1104(b), Mendoza’s contention is without merit.

4 In this matter, service has not been a straightforward process. It is also telling that the Petition
5 for Divorce was filed by Mendoza on the day that Marcelo left Saipan to travel to New Jersey. It is not
6 clear from the record what “reasonable diligence” Mendoza used to locate and serve Marcelo before
7 requesting service through publication. Indeed, at oral argument, Mendoza could not state any
8 reasonable diligence. Moreover, 7 CMC § 1104(b) requires an attempted service by mail, where
9 practicable, before the court can allow service by publication. Here, even though Mendoza had the
10 means to contact Marcelo and obtain her address in New Jersey, he took no efforts to contact her or
11 serve her by mail. The Order allowing service by publication should not have been granted.

12 Assuming, arguendo, that the Order allowing service by publication was properly granted, the
13 publication requirements were still not met. Section 1104(b) requires that the publication “be made
14 once each week for four successive weeks, and the last publication shall be not less than 21 days prior
15 to the return date stated herein.” 7 CMC § 1104(b). Here, the record indicates that the summons was
16 published for only one day and not “once each week for four successive weeks.” The proper procedure
17 under § 1104(b) would have been to publish the Summons in a newspaper of general circulation once
18 for the weeks of November 1st, 8th, 11th, 15th, and 22nd. Thereafter, the Answer would have been due
19 December 13, 2011, and the earliest possible date for entry of default would have been December 14,
20 2011. In this case, entry of default occurred on November 22, 2011.

21 The party seeking entry of default has the burden of proving the defendant was properly served.
22 *See e.g., Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir.
23 2006). In this case, there is inadequate evidence that Marcelo was properly served. She was not served
24 personally or by mail, and the one-day publication falls far short of compliance with the
25 Commonwealth’s service by publication statute. Accordingly, Mendoza has failed to meet his burden
26 of proving that this Court has personal-jurisdiction over Marcelo. This Court lacked personal-
27 jurisdiction over Marcelo when the entry of default was issued; therefore, the entry of default is null
28 and void and must be set aside.

1 **C. Waiver**

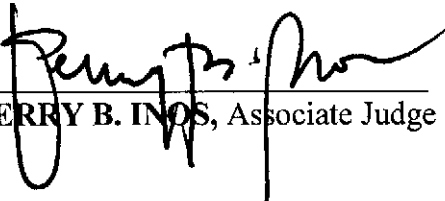
2 Even though the Court lacked personal-jurisdiction over Marcelo when the entry of default was
3 issued, she has since waived this defense going forward. “Because the requirement of personal
4 jurisdiction represents first of all an individual right, it can, like other such rights, be waived.” *Ins.*
5 *Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); *see also id.* at 706
6 (cautioning that there is nothing “unique about the requirement of personal jurisdiction, which prevents
7 if from being established or waived like other rights”). Marcelo waived any further personal-
8 jurisdiction objections at oral argument. Waiver is the intentional relinquishment or abandonment of
9 a known right. *United States v. Olando*, 507 U.S. 725, 733 (1993). In this case, by virtue of her
10 attorney, Marcelo stated in open court that she concedes this Court has personal-jurisdiction over her
11 and she merely wants the entry of default to be set aside so she may participate in the matter before
12 judgment. Therefore, Mendoza need not effect further service for this matter to proceed on the merits
13 before the Court.

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IV. CONCLUSION

Based on the foregoing reasons the Court hereby **GRANTS** Respondent’s Motion to Set Aside
Entry of Default.

SO ORDERED this 6th day of February, 2012.


PERRY B. INOS, Associate Judge