FOR PUBLICATION

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

LETICIA M. PALACIOS, **Plaintiffs,** **v.** **JOSEPH M MENDIOLA** **Defendant.**	**SMALL CLAIMS NO. 10-0157** **ORDER DENYING MOTION TO SET ASIDE DEFAULT JUDGMENT**

I. INTRODUCTION

THIS MATTER came before the Court May 17, 2012 on a motion to set aside default judgment. Attorney Michael A. White appeared on behalf of Leticia M. Palacios ("Plaintiff"). Loren A. Sutton appeared on behalf of Joseph M. Mendiola ("Defendant"). Based on a thorough review of the motions and relevant law the Court now enters this written order.

II. BACKGROUND

This case has an uneventful[1] procedural history spanning nearly two years. The initial Summons and Complaint were filed with the Court on May 25, 2010. The Plaintiff, landlord sought $1,412.66 plus interest and attorney's fees for rent, utilities and related charges, allegedly incurred by Defendant tenant.

[1] After the initial summons and complaint were filed, the Court took this matter off calendar seven times.

On December 23, 2011, a pretrial hearing was held in Tinian. Defendant appeared personally, and Plaintiff appeared through her attorney Mr. White. The Court denied Defendant's request that the evidentiary hearing be held in Tinian, and set the matter for February 27, 2012 at 9:00 a.m. in Saipan.

On February 23, 2012, Defendant retained counsel, Loren A. Sutton and Janet H. King. Counsel agreed between themselves that Mr. Sutton would handle appearances and Ms. King would prepare any written filings. Counsel, by their own admission, was aware of the February 27, 2012 hearing date, because they were in possession of this Court's Order setting trial for that date and time. On February 27, 2012 Defendant failed to appear either personally or through counsel and the Court entered default for the total amount of $2149.94: $1412.66 principal; $347.28 interest; $350 attorney's fees and $40 filing costs.

On March 6, 2012, Defendant filed a "Motion to Set Aside Default Judgment Pursuant to Com. R. Civ. Pro. 60 (b)," ("Motion"). On April 5, 2012, the parties appeared before the Court on the Motion. Mr. Sutton represented that his client was never served with the Motion. Mr. White provided a copy to Mr. Sutton who indicated that he intended to file a written opposition. The Court advised the parties to be prepared to discuss the application of NMI R. Civ. P. 55 and 60(b).[2] On April 12, 2012, Plaintiff filed a "Memorandum in Opposition to Motion to Set Aside Default Judgment," ("Opposition"). On April 25, 2012 Defendant filed a "Reply to Opposition to Motion to Set Aside Default Judgment" ("Reply").

Defendant argues that the default should be set aside pursuant to Rule 60(b), because his counsel, Mr. Sutton, was in trial on another matter at the time of the hearing. Plaintiff

[2] Rules of civil procedure dealing with default judgment.

counters that there is no basis under Rule 60(b)(1) to set aside the judgment, and NMI R. Civ. P. 83(g), not NMI R. Civ. P. 55 governs default in small claims cases. Defendant counters that relief is warranted under Rule 60(b)(1), because: (1) it was counsel not defendant's conduct which caused the failure to appear; (2) the conduct constitutes excusable neglect; and (3) the Court should not penalize Defendant for his lack of a meritorious defense because Plaintiff failed to provide discovery enabling Defendant to prepare a defense.

At the hearing on May 17, 2012, the Court heard oral argument from both parties. Mr. Sutton represented to the Court that he had received the pertinent discovery from Mr. White, and based on that, his client has a defense, namely, that he was not a tenant at the relevant time.

III. GOVERNING LAW

Plaintiff argues that Rule 83(g), not, Rule 55, governs default in small claims cases. The Court agrees.

Rule 83 establishes a procedure for small claims matters within the trial court. *Chen's Corp. v. Frank*, 2008 MP 9, ¶ 4 ("Rule 83 of the Commonwealth Rules of Civil Procedure establishes an inferior small claims court within the trial court."). The rationale behind the small claims procedure is "to enable small claims to be justly decided and fully disposed of with less formality, paperwork, and expenditure of time than is required by the ordinary procedure." NMI R. Civ. P. 83(b). Rule 83 applies to any civil action within the jurisdiction of the court, involving a claim of $3,000.00 or less. NMI R. Civ. P. 83(a). Rule 83(g) provides:

> DEFAULTS. ***If a defendant who has been served five days or more before the hearing date fails to appear personally, or by counsel, judgment may be entered by default*** where the claim is for a clearly determined amount of money, or on proof by the plaintiff of the amount due if the claim is for damages or any amount that is not clearly determined. If the plaintiff fails to

> appear personally, or by counsel, the action may be dismissed for want of prosecution; or the court may make any other disposition thereof that justice may require.

The small claims procedures differ in some significant respects from the general rules of civil procedure. *Chen's Corp.*, 2008 MP 9 ¶ 4. Matters in small claims proceedings which are not expressly covered by Rule 83 are governed by the general rules of civil procedure. NMI R. Civ. P. 83(k). Thus, because Rule 83(g) expressly addresses default this Court need not look to the more elaborate default procedure for civil cases laid out in Rule 55(a)-(b).

Here, no argument has been made that service was improper. Defendant was apparently served sometime in the spring of 2011,[3] more than five days before the initial hearing date on December 23, 2011. He appeared at that hearing submitting to jurisdiction, and the matter was set for a February 27, 2012 hearing date. Consequently the Defendant was served more than five days before the February 27, 2012 hearing date for which he failed to appear. As a result, the default judgment entered by the Court on February 28, 2012 was well within the requirement of the rule and default was procedurally proper. NMI R. Civ. P. 83(g).

IV. MOTION TO SET ASIDE DEFAULT JUDGMENT

Next, the Court will determine if Defendant made a showing sufficient to set aside the default judgment. Pursuant to Rule 55(c)[4] the court may set aside judgment of default in accordance with Rule 60(b). Rule 60(b) provides in pertinent part:

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[3] There are multiple summonses in the file dating back to May 25, 2010, the most recent of which is dated March 8, 2011, although it is unclear when the Defendant was served.

[4] There is no dispute that Rule 55(c) applies to small claims cases and there is no small claims provision to the contrary. *See* NMI R. Civ. P. 83(k).

> On motion and upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud. . .; (4) the judgment is void; (5) the judgment has been satisfied. . .; (6) any other reason justifying relief from the operation of the judgment . . . .

NMI R. Civ. P. 60(b).

The moving party bears the burden of proving the existence of a justification for Rule 60(b) relief. *Cassidy v. Tenorio*, 856 F. 2d 1412, 1415 (9th Cir. 1988). For the purpose of determining whether a justification exists, the court accepts the truth of factual allegations. *Id.* at 1415-16.

A. TIMELINESS

A threshold issue is whether the Motion was timely. Motions under Rule 60(b)(1) must be made within a reasonable time, and in no event more than one year after the order. NMI R. Civ. P. 60(b). Here, the Motion was filed on March 6, 2012, only seven calendar days after default, which is certainly reasonable, thus the Motion is timely.

B. EXCUSABLE NEGLECT – RULE 60(b)(1)

Defendant argues that the default judgment should be set aside because: (1) he only retained counsel on February 23, 2012; (2) Mr. Sutton was immersed in trial on another matter at the time of his hearing; (3) Ms. King was unable to make appearances on his behalf based on a conflict; and (4) opposing counsel had not agreed to stipulate to a continuance even though Ms. King emailed Mr. White to seek a stipulated continuance. Defendant's Reply[5] clarifies that he is seeking relief pursuant to Rule 60(b)(1) for excusable neglect. *See* NMI R. Civ. P. 60(b)(1).

[5] Defendant did not specify which provision of Rule 60(b) he meant to rely on in his initial Motion.

Rule 60(b)(1) is "a remedial rule which normally receives a liberal construction from courts who are concerned that cases not be decided in default against parties who are inadvertently absent," *Reyes v. Reyes*, 2001 MP 13 ¶ 22. "The application of Rule 60(b)(1)'s excusable neglect standard "is committed to the discretion of the [trial] courts." *Brandt v. Am. Bankers Ins. Co*., 653 F.3d 1108, 1112 (9th Cir. 2011).[6]

Principally, in determining whether a default judgment should be set aside pursuant to Rule 60(b) the court considers: (1) prejudice to the plaintiff if the case is reopened; (2) the existence of a meritorious defense; and (3) whether the default was the result of the defendant's culpable conduct. *Roberto v. De Leon Guerrero*, 4 NMI 295, 297 (1995). The determination of what conduct constitutes excusable neglect under Rule 60(b)(1) "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Ins. Svcs. Co. v. Brunswick Assoc. Ltd*., 507 U.S. 380, 395 (1993).

1. Prejudice to Plaintiff

The first issue is whether Plaintiff will be prejudiced if the Court reopens the case. "Prejudice requires greater harm than simply that relief would delay resolution of the case." *Lemoge*, 587 F.3d at 1196 (citing *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001) ("[M]erely being forced to litigate on the merits cannot be considered prejudicial for purposes of lifting a default judgment.")). Here, Plaintiff has not argued any

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[6] "[W]hen interpreting our rules of civil procedure, which are patterned after the federal rules, we will principally look to federal interpretation for guidance." *Commonwealth Dev. Auth. v Camacho*, 2010 MP 19 ¶16.

specific prejudice. Defendant filed the Motion on March 6, 2012, only eight days after default judgment was entered. Thus, given the minor delay here, and no other prejudicial circumstances, Plaintiff has not suffered any prejudice.

2. Meritorious Defense

The second issue is whether Defendant here has a meritorious defense. A defendant seeking relief from a default judgment need only assert a factual or legal basis that is sufficient to raise a particular defense. *E. & J. Gallo Winery v. Cantine Rallo, S.P.A.*, 430 F. Supp. 2d 1064, 1091 (E.D. Cal. 2005).

Here, Defendant argues that the he "had no idea of the basis for the claim," (Reply at 2), that Mr. White, Plaintiff's attorney, failed to provide Defendant any discovery in violation of this Court's order dated January 6, 2012, *see Leticia U. Palacios v. Joseph M. Mendiola*, Small Claim No. 10-0157 (NMI Super. Ct Jan. 6, 2012) (Order), and as a result, Defendant was unable "to construct a meritorious defense." (Reply at 5.) In essence, Defendant urges that the lack of defense should not be held against him because it is due to Plaintiff's actions in disregarding the Court's order. At the hearing, Mr. Sutton represented that Defendant does have a defense; that it was not him, but another person, who occupied the property at issue during the relevant time period. This representation was made without offering any legal support for the defense. Without knowing more about the facts, or the legal relationship between the parties, it is difficult to determine if that factual basis is sufficient to raise a particular defense. Thus, this factor is neutral.

3. Culpable Conduct/Excusable Neglect

The third issue is whether the Defendant's conduct was culpable. Where the client's own inaction is at fault, relief is normally inappropriate. *Reyes*, 2001 MP 13 ¶ 22-23

("[Defendant's] claim that his attorney did not follow his wishes because [he] lost contact with his attorney . . . [does] not constitute foreseeable neglect"). Where a defendant has received actual notice and failed to answer his conduct is generally considered culpable. *Roberto*, 4 NMI at 297. However, "Rule 60(b)(1) normally receives a liberal construction . . . where error is due to failure of attorneys or other agents to act on behalf of their clients." *Reyes*, 2001 MP at ¶ 22.

Routine carelessness by counsel does not generally constitute excusable neglect. *See e.g.*, *Negron v. Celebrity Cruises*, 316 F.3d 60, 62 (1st Cir. 2003). ("[C]arelessness by counsel leading to a late filing is not enough to constitute excusable neglect."). Moreover, an attorney's inability to manage their case load does not rise to the level of excusable neglect. *Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir. 1986) ("[W]e have consistently declined to relieve a client under subsection (1) . . . due to the mistake . . . of his attorney by reason of . . . his inability to efficiently manage his caseload."). However, even "weak" reasons justifying the omission may be grounds for relief. *Bateman v. United States Postal Serv.*, 231 F. 3d 1220, 1225 (9th Cir. 2000) (excusing attorney's failure to timely file a pleading because he had to leave the country on fairly short notice and, upon his return, suffered from jet lag and took some time to sort through his mail.).

Here, the Defendant is a resident of Tinian. Although, a failure to appear generally is considered culpable conduct, given that he hired counsel, ostensibly to appear in his stead on Saipan, in equity, he should not be faulted for failing to personally appear. *See Reyes*, 2001 MP at ¶ 22. Moreover, because Defendant initially appeared in the action in December when the matter was held in Tinian, the failure here was clearly on the part of his attorneys.

The Court must still consider whether the negligent acts of Defendant's counsel qualify as "excusable," in this case. Defendant's Reply argues that Ms. King could not appear based on a conflict because she works at the Law Revision Commission. The Motion further argues that Mr. Sutton's neglect in not attending the Defendant's trial date in the instant matter was "the act of any reasonably prudent attorney faced with the same circumstances." (Reply at 3). The Court disagrees.

First, Ms. King sought a stipulated continuance by sending an email, but no continuance was ever granted by the Court. While the Court and the legal profession encourage professional courtesy, Mr. White was under no obligation to stipulate to a continuance. It is the attorney's responsibility to advocate for their client— to make all appearances, and formally request continuances from the Court if necessary. The failure to do so in this case is not justified by simply seeking a stipulation. Second, Ms. King's concern that she could not appear in the Superior Court based on a conflict is unfounded. Absent any showing of an actual conflict, there mere fact of her part-time employment with the Law Revision Commission alone would not prevent her from making a limited appearance for the purpose of seeking a continuance on her client's behalf.[7] Finally, Mr. Sutton was already in the Superior Court on another matter, when he failed to appear for his client. Like, Ms. King, he could have easily walked over to a different court room, to ask the Court for a continuance. On balance, the inaction of counsel may be fairly characterized as routine carelessness. *See Negron* 316 F.3d at 62 (finding no excusable neglect based on counsel's filing error).

[7] *See* MRPC Rule(s) 1.7, 1.11.

V. CONCLUSION

On balance, although Plaintiff would not be prejudiced by the minor delay in this case and the Defendant may have a defense, the fact that Defendant's counsel admits to knowing of the hearing but failing to show up because one of Defendant's attorneys had a trial that day, reflects routine carelessness or caseload management issues and does not rise to the level of excusable neglect. NMI R. Civ. P. 60(b)(1); *Nemaizer*, 793 F.2d at 62. Consequently, Defendant failed to meet its burden to show circumstances justifying relief.

For the aforementioned reasons, the Motion is **DENIED**.

IT IS SO ORDERED this 12th day of June, 2012.

/s/_____
HON. JOSEPH N. CAMACHO,
Associate Judge