

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

OKLAHOMA DEPARTMENT OF)
SECURITIES *ex rel.* IRVING L. FAUGHT,)
Administrator.)

OCT 12 2018

Plaintiff,)

RICK WARREN
COURT CLERK

31 _____

v.)

Case No. CJ-2018-4572

JOE LAWRENCE GREGORY,)

Defendants.)

MOTION TO VACATE DEFAULT JUDGMENT
AND BRIEF IN SUPPORT

COMES NOW THE DEFENDANT, Joe Lawrence Gregory, by and through his attorney, M. Michael Arnett, and hereby moves the Court, pursuant to 12 Okla. Stat. §1031(7), to vacate the default judgment entered against Defendant on October 9, 2018. In support of this motion, Defendant shows the Court as follows:

1. On August 23, 2018, Plaintiff filed an action against Defendant for Permanent Injunction and/or other Equitable Relief for alleged violations of the Oklahoma Uniform Securities Act of 2004. Plaintiff has alleged that Defendant has defrauded more than 90 investors in five (5) states out of more than Five Million Dollars.
2. Defendant was served with a Summons and copy of the Petition on September 15, 2018.
3. Defendant hired Counsel M. Michael Arnett on September 28, 2018.
4. Due to an internal docketing error at Mr. Arnett's office, an Entry of Appearance and Answer was not filed until October 12, 2018.

5. On October 9, 2018 Defendants filed a Motion for Default Judgment against Defendant, which was signed by the Court on the same date.

6. Defendant respectfully moves the Court to vacate its order of Default Judgment for the reason that Defendant Joe Lawrence Gregory was prevented from complying with the Answer deadline due to his counsel's clerical error, over which he had no control. Therefore, he has suffered unavoidable misfortune which allows for a Default Judgment to be set aside, as contemplated by 12 O.S. §1031(7).

BRIEF IN SUPPORT

Oklahoma law views default judgments with disfavor. *Feely v. Davis*, 1989 OK 163, ¶ 16, 784 P.2d 1066, 1070. The Court's plenary control over its terminal decisions is deeply rooted in the common-law and has been codified in 12 O.S. §1031.1, which provides that a party may file a motion within thirty (30) days after a judgment has been entered requesting that the Court vacate the Court's judgment. *Schepp v. Hess*, 1989 OK 28, 770 P.2d 34. The District Court has full control over its judgments or orders during the term in which they are rendered, and may vacate its judgments, in the exercise of its sound discretion, for sufficient cause shown. *Crabtree v. Crabtree*, 1966 OK 222, 420 P.2d 494.

ARGUMENT AND AUTHORITIES

Under Oklahoma case law and statutes, default judgments are viewed with disfavor and the district court “**shall have power** to vacate or modify its own [default] judgments or orders within the times prescribed hereafter...[f]or **unavoidable casualty or misfortune**, preventing the party from prosecuting or defending... 12 Okla. Stat. § 1031(7). Emphasis added. When considering a motion to vacate a default judgment, trial courts should consider: (1) whether the defaulting party had a valid defense; (2) whether vacation could be granted without substantial

delay or injustice; and (3) whether allowing the default judgment to stand would work a serious injustice. *St. John Medical Center v. Brown*, 2005 OK CIV APP 101, 125 P.3d 700; 12 O.S. §1031.1; *Erbar v. Rare Hosp. Int'l, Inc.*, 2013 OK CIV APP 109, 316 P.3d 937.

1. **Defendant has a Valid Defense.** In this instance, Defendant Gregory was prevented from timely Answering the Petition due to a clerical error within his counsel's office. Additionally, Defendant has numerous defenses against the Plaintiff's serious allegations of fraud and violations of the Securities Acts against 90 investors across five states totaling in excess of Five Million Dollars. Plaintiff's Petition raises a litany of fact issues that Defendant is entitled to dispute and defend in a court of law. Defendant asserts that the allegations in Plaintiff's Petition are not substantiated by the evidence and will be successfully defended at the trial on the merits.

2. **No Substantial Delay or Injustice to Plaintiff will Result.** The vacation of the default judgment by this Court would not create any substantial delay or injustice to the Plaintiff. The Answer date was October 5, 2018. Default judgment was requested and granted on October 9, 2018. Plaintiff's counsel has filed an Entry of Appearance, Answer and this Motion to Vacate Default Judgment on October 12, 2018. This case is not set on the trial docket, no scheduling conference has yet occurred and no discovery deadlines have been set. Upon vacation of the default judgment, Plaintiff will have ample opportunity to conduct discovery concerning its claims against Defendant Gregory. The order vacating the judgment will merely require Plaintiff to proceed with discovery and to ultimately, if possible, prove its claims on the merits. Therefore, it is clear that no substantial delay would be caused by setting aside the default judgment.

3. **Substantial Injustice and Injury to Defendant will occur if Judgment is not Vacated.** Courts must consider whether substantial hardship would result from granting or refusing to grant the motion to vacate. See, *Burroughs v. Bob Martin Corporation*, 1975 OK 80,

536 P.2d 339; *Latson v. Eaton*, 1957 OK 105, 311 P.2d 231; *Horowitz v. Alliance Home Health, Inc.*, 2001 OK 45 ¶9, 32 P.3d 825, 828, citing *Ferguson Enters., Inc. v. Webb Enters., Inc.*, 2000 OK 78 at ¶ 5, 13 P.3d 480. No substantial hardship would be suffered by Plaintiff as it would be required to prove its case anyway against the Defendant. See, *Baldrige v. Kirkpatrick*, 2003 OK CIV APP 9, 63 P.3d 568. However, if the default judgment is allowed to stand, substantial harm and injury will occur to Defendant as he will now be deprived of his right and ability to defend himself against the incredibly serious, far-reaching and unsubstantiated claims of the Plaintiff.

A trial court addressing a timely motion to vacate a default judgment has very wide and extended discretion that is almost unlimited to vacate such a judgment. 12 O. S. §1031.1(B). See also, *Erbar v. Rare Hosp. Int'l, Inc.*, 2013 OK CIV APP 109, 316 P.3d 937. In *American Bank of Commerce v. Chavis*, 1982 OK 66, 651 P.2d 1321, the pleadings were served and forwarded to the defendant's attorney and, due to inadvertence, the pleadings were not docketed. After a default judgment was rendered, the defendant sought vacation pursuant to 12 O.S. §1031(7), “[f]or an unavoidable casualty or misfortune, preventing the party from prosecuting or defending.” The Court held that inadvertence or neglect should not deprive a party of his day in court. It is notable that the default judgment in *Chavis* resulted from a “breakdown in office procedure,” as in the instant case.

Another similar case is *Midkiff v. Luckey*, 1966 OK 49, 412 P.2d 175. In *Midkiff*, the summons was served, and the defendant handed it to his secretary to put in a file so that it could be sent to an attorney for defense of the suit. Due to a previous fire in the office, papers and documents had been moved, “resulting in a state of confusion in the normal operation of their business” *Id.* at 177. As a consequence of this state of confusion, the summons was misplaced or lost. The Court upheld the trial court's setting aside of the default judgment.

In *Burroughs v. Bob Martin Corp.*, 1975 OK 80, 536 P.2d 339, a default judgment was rendered in a personal injury action after the summons and petition were lost in the mail by one of the defendants. Emphasizing its view that justice is better served when a litigant is afforded his day in court, the Oklahoma Supreme Court affirmed the trial court's order vacating the default judgment. The Court also noted that a much stronger showing of abuse of discretion is required to reverse the trial court's judgment, where a judgment has been set aside, than where it has been refused.

CONCLUSION

WHEREFORE, Defendant moves this Court to vacate the default judgment against him on the grounds and for the reasons that he has been prevented from timely responding to the Petition by reason of a clerical error; that no substantial delay will result and that the interest of justice requires him to be allowed to respond to and defend against the allegations in Plaintiff's Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on the 12th day of October, 2018, a true and correct copy of the above and foregoing document was faxed and/or mailed, postage prepaid, to the following:

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M. Michael Arnett

NOTICE OF HEARING

DATE: 11-16-18
TIME: 900
JUDGE: Parrish