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IT IS SO ORDERED.



*Jeffery P. Hopkins*  
Jeffery P. Hopkins  
United States Bankruptcy Judge

Dated: June 27, 2011

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re

**THOMAS A. HOLMES**  
**HALETA R. HOLMES**

Debtors

Case No. 10-13408  
Chapter 7  
Judge Hopkins

**ERIC W. GOERING, TRUSTEE**

Plaintiff

Adversary Case No. 10-1131

vs.

**ONEWEST BANK, ET AL.**

Defendants

**ORDER GRANTING MOTIONS FOR LEAVE  
AND DENYING MOTION FOR DEFAULT JUDGMENT**

Three motions are before the Court. The Plaintiff seeks default judgment. See Doc. 13. The following three defendants seek leave to file untimely answers: OneWest Bank

("OneWest"), Thomas A. Holmes and Haleta R. Holmes ("Debtors"). See Docs. 17 & 18.

The Plaintiff perfected service upon OneWest and the Debtors (collectively "Defendants") on December 27, 2010, and August 12, 2010, respectively. See Docs. 11, 6 & 5. The Defendants did not make an appearance in this proceeding until May of 2011. See Docs. 17 & 18. Although the Plaintiff never sought entry of a default, pursuant to Fed. R. Civ. P. 55(a), the record reveals that the Defendants were in default.

The Defendants' motions effectively seek to set aside their default, pursuant to Fed. R. Civ. P. 55(c), which permits courts to set aside a default for "good cause." Courts must balance three factors to determine if good cause exists: (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct of the defendant led to the default. *Waiferson, Ltd. Inc. v. Classic Music Vending*, 976 F.2d 290, 292 (6<sup>th</sup> Cir. 1992); *Shepard Claims Service, Inc. v. William Darrah & Assocs.*, 796 F.2d 190, 194 (6<sup>th</sup> Cir. 1986). These factors are also used to determine whether a default judgment should be set aside pursuant to Fed. R. Civ. P. 55(c). See *United Coin Meter Co., Inc. v. Seaboard Coastline Railroad*, 705 F.2d 839, 845 (6<sup>th</sup> Cir. 1983). However, the standard is more lenient when determining whether to set aside a default. *Waiferson*, 976 F.2d at 292; *Shepard*, 796 F.2d at 193.

Setting aside the default will not prejudice the Plaintiff. The only basis for prejudice alleged by the Plaintiff is attorney's fees and expenses of more than \$2,500 related to "trying to get the defendants to file a response to the adversary case since September, 2010." See Doc. 21 at 2; Doc. 22 at 2; Doc. 23 at 2. This is not a recognized basis for prejudice. "To establish prejudice, the plaintiff must show that the delay will result in the loss of evidence, increased difficulties in discovery, or greater opportunities for fraud and collusion." *Berthelsen v. Kane*, 907 F.2d 617, 621 (6<sup>th</sup> Cir. 1990). The Plaintiff has not made such a showing.

The Defendants have asserted a meritorious defense. The Plaintiff's complaint seeks to avoid any lien held by OneWest on Thomas Holmes' one-half interest in the Debtors' residence. According to the complaint, Mr. Holmes' interest is unencumbered because he signed a mortgage in favor of OneWest, executed by Haleta Holmes, only "to waive Homestead and Dower/Curtesy rights." See Doc. 1. All three of the Defendants assert the following affirmative defenses: (1) failure to state a claim; (2) valid mortgage of Mr. Holmes' interest; and (3) Plaintiff is not a bona fide purchaser. See Docs. 17 & 25.

A defense is meritorious if it could change the outcome achieved by default. *United States v. \$22,050.00 United States Currency*, 595 F.3d 318, 326 (6<sup>th</sup> Cir. 2010). The Defendants' defenses are stated in a conclusory manner with no factual support. However, Rule 55(c) does not require this. "[A]ll that is needed is a hint of a suggestion which, proven at trial, would constitute a complete defense." *Id.* A likelihood of success does not matter. *Id.* Consequently, the affirmative defenses are meritorious.

If the factors of prejudice and meritorious defense weigh in favor of the defendant, courts must set aside a default unless it was willful.<sup>1</sup> *Shepard*, 796 F.2d at 194. A default is not willful so long as the defendant "offers a credible explanation for the delay that does not exhibit disregard for the judicial proceedings." *Id.* at 195. The Court is satisfied that the default was not willful. Counsel for OneWest states that OneWest just authorized it to file an answer. See Docs. 18 & 24. The Debtors explain that they did not timely answer because they expected a compromise between the Plaintiff and OneWest that would render their appearance unnecessary. Although these explanations are not impressive, they do not exhibit a willful disregard for these proceedings.

Given the strong preference for adjudication on the merits in federal courts, *Shepard*, 796 F.2d at 193, the Court concludes that the Defendants' default should be set aside pursuant to Rule 55(c). Accordingly, the motions for leave (Docs. 17 & 18) are **GRANTED** and the motion for default judgment (Doc. 13) is **DENIED** as to the Defendants.<sup>2</sup>

The Debtors shall file their answer within ten days of the entry of this order.<sup>3</sup>

Copies to:

John A. Schuh  
jaschuh@nuvox.net

R. Michael Smith  
rms@legalhelpers.com

Holly N. Wolf  
bankruptcy@mdk-llc.com

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<sup>1</sup> The Plaintiff argues that the motions for leave should not be granted because the Defendants cannot demonstrate excusable neglect. "[I]t is not necessary that conduct be excusable to qualify for relief under the 'good cause' standard of Rule 55(c)." *Shepard*, 796 F.2d at 194.

<sup>2</sup> In addition to the Defendants, there are two other defendants that have not answered. If the Plaintiff would like an order granting his motion as to these two, he may upload a proposed order.

<sup>3</sup> The Debtors attached their answer to their motion for leave. See Doc. 17. OneWest already filed its answer. See Doc. 25.