

STATE OF VERMONT
CALEDONIA COUNTY

GENE S. CESARI
Plaintiff

v.

DRAGONE CLASSIC MOTOR
CARS, INC.
Defendant

SUPERIOR COURT

Docket No. 283-10-00 Cacv

FILED

FEB 16 2010

CALEDONIA COURTS

**DECISION AND ORDER ON MOTION TO VACATE, MOTION FOR DEFAULT
JUDGMENT, AND MOTIONS TO DISMISS**

This matter is before the court on the plaintiff's motion to vacate the judgment order of January 24, 2001 and the plaintiff's motion to issue a new default judgment on the same matter. The defendant objects to the motion for a new default judgment, moves to strike the original default, and to dismiss for lack of personal jurisdiction and for the plaintiff's failure to prosecute. The plaintiff in this matter, Gene S. Cesari, is represented by Attorney Kyle C. Sipples. The defendant, Dragone Classic Motor Cars, Inc., is represented by the law firm of DesMules, Olmstead & Ostler.

Introduction

The history of this case covers many years. The defendant was initially served with a summons and complaint on August 4, 2000. The plaintiff filed the action with the Caledonia County Superior Court on October 4, 2000.

On October 5, 2000 the defendant became the subject of a bankruptcy proceeding in United States Bankruptcy Court. The plaintiff was neither named in nor notified of the bankruptcy proceeding. Following the commencement of the bankruptcy case, on January 24, 2001, the Caledonia County Superior Court entered a default judgment against the defendant on the basis that the defendant failed to answer. The default judgment was for \$10,000, plus costs and interests for a total of \$10,721.

The federal case was discharged from bankruptcy on March 20, 2006.

The plaintiff now requests that the court vacate the initial default judgment and enter a new default judgment based on the defendant's failure to respond within the statutory time limits following discharge from bankruptcy. The plaintiff requests the same judgment amount of \$10,000 plus costs and additional interest for the period following dismissal from bankruptcy. The plaintiff does not request interest for the period during the bankruptcy proceeding.

The defendant moves to strike the original default judgment and objects to the new motion for default judgment. The defendant further claims that the case should be dismissed for lack of personal jurisdiction or for failure to prosecute.

Original Default Judgment

The parties fundamentally agree, if based on distinct reasoning, that the original default judgment should no longer be the controlling outcome of this case. The plaintiff moves to vacate on the basis that the original judgment order was issued during a stay attached to the defendant's bankruptcy proceeding and the court was enjoined from ordering a judgment. The defendant moves to strike, essentially arguing that since the judgment was entered during the bankruptcy stay, it is void; there is technically no existing judgment in the case.

Pursuant to 11 U.S.C. § 362, when a case enters a bankruptcy proceeding there is an automatic "stay, applicable to all entities, of the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy] case. . . , or to recover a claim against the debtor that arose before the commence of the [bankruptcy] case."

Consequently, the filing of a bankruptcy petition automatically stayed this action. Although purely administrative, ministerial acts undertaken while an automatic stay is in effect may not violate the stay, core judicial functions do violate the stay. See *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994); see also *In re Soares*, 107 F.3d 969, 974 (1st Cir. 1997); *Levant v. National Car Rental, Inc.*, 33 A.D.3d 367, 368, 824 N.Y.S.2d 218, 220 (2006). Entering a default judgment is a core judicial function and "[a]ny actions taken in violation of the stay are void and without effect." *Krondes v. O'Boy*, 69 Conn. App. 802, 810, 796 A.2d 625, 630 (2002) (internal citations omitted); see also 46 Am. Jur. 2d *Judgments* § 233 (distinguishing between entry of default by a court clerk and default judgment by a judge). This is true even when the party had no actual notice of the bankruptcy stay. See e.g. *In re Morway*, 2002 WL 34438674 (D. Vt. Bankr.); *Rexnord Holdings v. Biderman*, 21 F.3d 522 (2d Cir. 1994).

This court notes that there is some disagreement among the states as to whether actions taken in violation of a bankruptcy stay are void or voidable. But "[t]hat distinction is of little significance, as any power to validate the acts undertaken in violation of the stay are vested exclusively in the Bankruptcy Court. See 11 U.S.C. § 362(d); *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir.1984) (bankruptcy courts' power to "annul" stay includes retroactive validation of acts in violation of the stay)." *Krondes*, 69 Conn. App. at 810, 796 A.2d at 631.

Thus, the original default judgment is void and there is no outstanding judgment in this case.

New Default Judgment

The plaintiff argues for a new default judgment on the basis that the defendant failed to answer the original complaint, even following termination of the automatic stay. The defendant counters that the plaintiff never had personal jurisdiction to bring the case, and alternatively that the action should be dismissed for failure to prosecute.

A default judgment by the court is vested in the sound discretion of the presiding judge. See V.R.C.P. 55(b). Furthermore, “the rules relating to default judgments should be liberally construed in favor of defendants, and of the desirability of resolving litigation on the merits, to the end that fairness and justice are served.” *Desjarlais v. Gilman*, 143 Vt. 154, 158-59, 463 A.2d 234, 237 (1983). “Due process favors the rights of the defendants to be heard in their own defense. ‘[D]enial of that right, and rejection of the remedies for default, must have strong support.’” *Dougherty v. Surgen*, 147 Vt. 365, 518 A.2d 364 (1986) (internal citations omitted) (discussing opening decrees entered by default). “Generally, the rules relating to default judgments should be liberally construed in favor of defendants, and of the desirability of resolving litigation on the merits, to the end that fairness and justice are served.” *Desjarlais v. Gilman*, 143 Vt. 154, 158-59 (1983).

Given the surprisingly long timeline of this case, the circumstances under which the defendant originally failed to answer, and the fact that the defendant has now appeared and indicated an intention to defend, this court does not feel it is in the interests of justice to order a judgment by default at this time.

Failure to Prosecute

The defendant claims that given the protracted timeline, the case should be dismissed for failure to prosecute. In determining whether to grant a motion to dismiss for failure to prosecute, courts primarily consider five factors: 1) the duration of the plaintiff’s failures or non-compliance; 2) whether plaintiff had notice that such conduct would result in dismissal; 3) whether prejudice to the defendant is likely to result; 4) whether the court balanced its interest in managing its docket against plaintiff’s interest in receiving an opportunity to be heard; and 5) whether the court adequately considered the efficacy of a sanction less draconian than dismissal.” *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.*, 222 F.3d 52 (S.D.N.Y. 2000) (citing *Nita v. Connecticut Dep’t of Env’tl. Protection*, 16 F.3d 482, 485 (2d Cir. 1994)).

In this case, the plaintiff did not believe he was waiting to prosecute. Regarding the first of the above-listed factors, the delay in resolving the case is not solely due to the actions of the plaintiff. In fact, the plaintiff believed the prosecution stage of the case was complete, as he was not notified of the bankruptcy proceeding until he attempted to collect on the judgment. When the plaintiff learned of the bankruptcy proceeding, he quickly attempted to resolve the situation. This court believes this is distinct from not prosecuting in a timely way.

Furthermore, this court sees no justification for dismissing the case for failure to prosecute based on the other four factors. The defendant has presented no argument that the plaintiff had reason to believe that his delay would lead to dismissal of the case. There is no evidence that the defendant was prejudiced by the delay, or that the defendant will be prejudiced any further by a resolution of this case on the merits, so long as the present action

continue unimpeded by other interruptions. Finally, consideration of the final two factors does not tip the balance in favor of dismissal, the motion to dismiss for failure to prosecute is denied.

Personal Jurisdiction

The defendant also asserts that the case should be dismissed for lack of personal jurisdiction. V.R.C.P. 12 addresses defenses and objections including the defense of lack of personal jurisdiction. It establishes that a defendant must serve an answer within 20 days of being served with a summons and complaint. V.R.C.P. 12(a). A defense of lack of personal jurisdiction must be made before pleading and is waived if not made in accordance with the rules, either by motion, responsive pleading, or allowable amendment. V.R.C.P. 12(b) & (h). The Vermont Supreme Court has noted that "absent a failure of due process, a party who has received actual notice of a suit against him must raise all jurisdictional objections listed in V.R.C.P. 12(h)(1) within the time and in the manner prescribed by that rule, else they are waived." *Myers v. Brown*, 143 Vt. 159, 167, 465 A.2d 254, 258 (1983).

Although considerable time passed since the original complaint and summons were served, the passage of time, in and of itself, is not sufficient to waive personal jurisdiction. Although the defendant did not respond to the 2001 default judgment, as established above, that judgment was void and is "of no legal effect." Black's Law Dictionary 1604 (8th ed. 2004). The defense of lack of jurisdiction has not been waived.

This court does not have sufficient pleadings to come to a conclusion regarding the issue of personal jurisdiction. As such, this court orders additional briefing on the personal jurisdiction issue specifically on whether this court has personal jurisdiction over the defendant. Such additional filings are due within thirty days of the issuance of this order.

ORDER

Defendant's motion to dismiss for lack of personal jurisdiction remains open for further briefing and later decision on this issue.

Parties shall have no more than thirty days to submit further briefings.

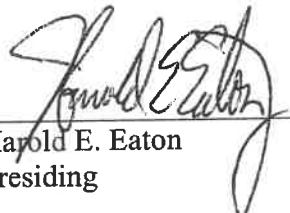
Plaintiff's motion to vacate judgment order is MOOT.

Plaintiff's motion for default judgment is DENIED.

Defendant's motion to dismiss for failure to prosecute is DENIED.

Defendant's motion to strike default is MOOT.

DATED February 12, 2010 at St. Johnsbury, Vermont.


Harold E. Eaton
Presiding