

IT IS SO ORDERED.

Dated: September 9, 2014
09:10:32 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MERVIN JONES and
MARY CATHERINE JONES,

Debtors.

* * * * *

MERVIN JONES and
MARY CATHERINE JONES,

Plaintiffs,

v.

VIVIAN J. MAYO, et al.,

Defendants.

CASE NUMBER 13-41138

ADVERSARY NUMBER 14-4010

HONORABLE KAY WOODS

ORDER DENYING MOTION TO SET ASIDE ORDER OF DEFAULT JUDGMENT

Before the Court is Motion to Set Aside Order of Default
Judgment and Request for Hearing ("Motion to Set Aside") (Doc. 11)

filed by Defendant Vivian J. Mayo, by and through counsel Tyrone E. Reed, Esq., on September 4, 2014. The Motion to Set Aside seeks an order from this Court vacating Order Granting Motion for Default Judgement [sic] Against Defendant Vivian J. Mayo, Pursuant to Rule 7055(a) of the Federal Rules of Bankruptcy Procedure ("Default Order") (Doc. 9), which was entered by this Court on August 22, 2014.

Debtors Mervin Jones and Mary Catherine Jones filed a voluntary petition pursuant to chapter 13 of Title 11 on May 22, 2013, which case was denominated Case No. 13-41138 ("Main Case"). The Debtors filed Chapter 13 Plan (Main Case, Doc. 11) on June 5, 2013. On July 16, 2013, Ms. Mayo, by and through counsel John M. Gundy Jr., Esq., filed Objection to Confirmation of the Chapter 13 Bankruptcy Plan (Main Case, Doc. 20). On July 31, 2013, David Benson, Esq., as co-counsel for Ms. Mayo, filed Entry of Appearance on Behalf of Creditor, Vivian Mayo (Main Case, Doc. 26). On August 20, 2013, Ms. Mayo, by and through co-counsel Messrs. Benson and Gundy, filed Amended Objection to Confirmation of the Chapter 13 Bankruptcy Plan (Main Case, Doc. 27).

On November 20, 2013, the Court entered Agreed Order on Vivian Mayo's Amended Objection to Confirmation of the Debtors' Chapter 13 Plan ("Agreed Order") (Main Case, Doc. 30), which was signed by Melissa Macejko, Esq. as counsel for the Debtors and Mr. Gundy as counsel for Ms. Mayo. The Agreed Order, which defined "Property"

as 16300 McSwiggen Rd., Salineville, OH 43945 and "Objector" as Ms. Mayo, provided, "Within ninety (90) days from the entry date of this Agreed Order, the Debtors shall file an adversary complaint for a declaratory judgment to determine the validity, extent and priority of all liens, claims, encumbrances and interests in the Property, specifically including but not limited to, Objector's claimed interest in the Property." (Agreed Order ¶ 2.)

Pursuant to the terms of the Agreed Order, on February 18, 2014, the Debtors/Plaintiffs commenced the instant adversary proceeding by filing Adversary Complaint (For Determination of Interest in Property) (Doc. 1). Ms. Mayo was listed as a defendant and was served on February 19, 2014, as follows¹: (i) via certified and regular U.S. mail, postage fully prepaid, Vivian J. Mayo, 2275 Greenfield Drive, Richmond, Virginia 23235²; and (ii) via regular U.S. mail, postage fully prepaid, Vivian Mayo c/o Gundy Law Firm, 23240 Chagrin Blvd., Suite 450, Beachwood Ohio 44122.³ (See Cert. of Service (Doc. 4) at 3.) Ms. Mayo failed to appear, file an answer or otherwise move in response to the Complaint.

¹ Pursuant to Federal Rule of Bankruptcy Procedure 7004(b)(1), "service may be made within the United States by first class mail postage prepaid . . . [u]pon an individual . . . by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode" FED. R. BANKR. P. 7004(b)(1) (West 2014).

² Ms. Mayo filed a proof of claim, which was denominated Claim No. 11-1, on October 15, 2013. The address listed on Claim No. 11-1 for noticing purposes is: Vivian J. Mayo, 2275 Greenfield Drive, Richmond, VA 23235.

³ This is the address for Mr. Gundy, who signed the Agreed Order on Ms. Mayo's behalf.

On July 22, 2014, the Debtors filed Motion for Default Judgement [sic] as to Defendant Vivian J. Mayo, Pursuant to Rule 7055(a) of the Federal Rules of Bankruptcy Procedure ("Motion for Default") (Doc. 5). The Motion for Default was served on Ms. Mayo at the Richmond, Virginia address where the Summons and Complaint were served. Ms. Mayo did not respond to the Motion for Default.

The Court held a hearing on the Motion for Default on August 21, 2014. Joseph R. Macejko, Esq., counsel for the Debtors, appeared at the hearing. Mr. Macejko represented that the green card, evidencing certified mail service of the Summons and Complaint upon Ms. Mayo, had been returned to him and that Ms. Mayo had not answered or otherwise filed an appearance in this adversary proceeding.

Neither Ms. Mayo nor her counsel appeared at the hearing on the Motion for Default. However, a woman, who identified herself as Agnes Dean, sister to Debtor Mervin Jones,⁴ appeared and attempted to speak on behalf of Ms. Mayo. After ascertaining that Ms. Dean was not an attorney, the Court did not permit Ms. Dean to represent Ms. Mayo at the hearing. At the conclusion of the

⁴ It is somewhat surprising and confusing that the sister of Mr. Jones was attempting to represent a defendant in this proceeding. Despite the representation in the Motion to Set Aside that "Agnes Dean . . . has in the past appeared on behalf of the Defendants [sic]" (Mot. to Set Aside at 2), no one other than Messrs. Benson and Gundy have appeared on behalf of Ms. Mayo in this Court.

hearing, the Court granted the Motion for Default and thereafter entered the Default Order.

The Motion to Set Aside provides no legal basis for the Court to vacate or set aside the Default Order. It fails to allege that Ms. Mayo was not served with the Summons and Complaint. It further fails to provide any basis for the Court to find that Ms. Mayo's failure to answer or appear in this adversary proceeding was occasioned by excusable neglect. See *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd P'ship*, 507 U.S. 380 (1993) (Setting forth the test for excusable neglect). Indeed, the Motion to Set Aside wholly fails to address Ms. Mayo's silence in response to service of the Summons and Complaint and deals only with her alleged late notice of the hearing on the Motion for Default.

Nowhere in the Motion to Set Aside does Ms. Mayo state that she was not timely and properly served with the Summons and Complaint in this adversary proceeding. Ms. Mayo argues that "Defendants [sic] are not attorneys and have no legal background and had no knowledge that anything in the Plaintiffs [sic] bankruptcy matter would affect their long waited [sic] trial in State Court." (Mot. to Set Aside at 2.) However, Ms. Mayo had engaged counsel – Messrs. Gundy and Benson – to represent her in the Debtors' bankruptcy case. Ms. Mayo filed an objection to the Debtors' Chapter 13 Plan, but she apparently did not employ Mr. Gundy or Mr. Benson when she was served with the Summons and

Complaint. As set forth above, Ms. Mayo understood and expressly agreed in the Agreed Order that the Debtors would file this adversary proceeding to resolve Ms. Mayo's objection to the Debtors' Chapter 13 Plan, which also dealt with the Property. Despite having representation in the Debtors' bankruptcy case and knowing that the Complaint would be filed, Ms. Mayo inexplicitly failed or refused to answer the Complaint.

Attached to the Motion to Set Aside is an Affidavit signed by Ms. Mayo, in which she ambiguously states, "That I did not receive a copy of the pleading or hearing notices until September [sic] 20, 2014."⁵ (*Id.*, Ex. B ¶ 2.) The green card evidencing service of the Summons and Complaint contradicts this self-serving statement. In addition, there is no reason to believe that the first class mail service of the Motion for Default, which was mailed on July 22, 2014, would have been delivered on August 20, 2014. Ms. Mayo expressly states that she had actual knowledge of the hearing on the Motion for Default Judgment on August 20, 2014. Thus, Ms. Mayo had sufficient notice to engage legal counsel to enter an appearance in this adversary proceeding and appear at the hearing on the Motion for Default. Ms. Mayo further states, "Due to the labor day [sic] holiday, Attorney Reed was unavailable and I could

⁵ Because the Motion for Default was mailed on July 20, 2014 and it is not yet September 20, 2014, the Court infers that Ms. Mayo misstated the date of receipt and that she intended to represent that she received the Motion for Default on August 20, 2014.

not find other counsel on short notice.” (*Id.* ¶ 4.) However, Ms. Mayo fails to state why she did not contact her previously retained counsel – Messrs. Gundy and Benson.

There is no basis whatsoever in the Motion to Set Aside to justify or require this Court to enter an order to vacate or set aside the Default Order. As a consequence, the request for hearing is denied. The Motion to Set Aside is hereby denied.

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