UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant vs. Martinez Cleaning Co., Inc. d/b/a/ Martinez Cleaners, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100370.

ORDER GRANTING RESPONDENT'S REQUEST FOR LEAVE TO FILE A LATE ANSWER AND DENYING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

Statement

1. The notice of intent to fine, alleging violations of 8 U.S.C. 1324a(a)(1)(B) and (b)(1) and requesting civil monetary penalties totalling $21,500, was issued on March 8, 1989, and served on March 10, 1989. On a date not clear in my file, respondent's attorney, Jorge Guttlein, filed a timely written request for a hearing to contest the fine.

2. After attempts to reach a settlement, which attempts complainant describes as ``extensive,'' the complaint herein was filed on July 31, 1989. On the basis of documentation provided by respondent, the amount of the requested penalty was reduced to $15,750. The complaint was received by Mr. Guttlein on August 15, 1989. Under the rules and regulations then in effect, respondent's answer was due no later than about September 20, 1989.

3. The complaint stated, inter alia (emphasis in original):

> The Respondent's Answer must be filed within thirty (30) days after receipt of the Complaint . . . THE ANSWER AND ONE COPY MUST BE FILED WITH THE HONORABLE NANCY M. SHERMAN, THE ADMINISTRATIVE LAW JUDGE ASSIGNED TO HEAR THIS CASE, AND MUST ALSO BE SERVED ON THE COMPLAINANT.
>
> . . . If the Respondent fails to file an Answer within the time provided, the Respondent may be deemed to have waived [its] right to appear and contest the allegations of the Complaint, and the Administrative Law Judge may enter a judgment by default along with any and all appropriate relief.

The notice of hearing correctly set forth my address as 1375 K Street NW, Washington, DC 20005.

4. By letter dated October 2, 1989, to Ronald J. Vincoli (then the acting chief administrative hearing officer), Mr. Guttlein stated, inter alia:

> Due to a heavy litigation schedule, we have been unable to formulate an appropriate answer to the above referenced complaint.
>
> We were involved in prolonged negotiation with Trial Attorney William A. Jankun, in which we turned over a great deal of voluntary discovery in vain hopes of resolving the matter.
>
> My client wishes to litigate this matter and believes he is being victimized as a small minority businessman.
>
> The proposed fines would put him out of business. Accordingly, we request two additional weeks to submit an answer.

This letter was addressed to Mr. Vincoli at ``52113 Leesburg Pine, Suite 310, Falls Church, VA 22041;'' Mr. Vincoli's street address is in fact 5113 Leesburg Pike. A courtesy copy of this letter was date-stamped by my office on October 11, 1989, while I was on a business trip, and was first seen by me on October 23, 1989. Mr. Jankun also received a courtesy copy of this letter, to which he referred in a motion dated October 18, 1989 (see paragraph 6, infra). My file fails to show when this letter was received by Mr. Vincoli, who did not answer it until October 30, 1989 (see paragraph 8, infra).

5. My personal file in this case reflects that on October 4, 1989, when I was hearing a case in Chicago, Mr. Jankun called my Washington office to ask whether I had received an answer; and that on my return, I advised him by telephone on October 10 and I had not received an answer.

6. Over date of October 18, 1989, Mr. Jankun filed a motion with me for a default judgment, based on respondent's failure to file an answer. At that time, Mr. Vincoli had not responded to Mr. Guttlein's October 2 letter, but any answer filed after about October 4 would have been late if the extension requested by Mr. Guttlein had been granted.

7. On October 26, 1989, I issued an order to respondent to show cause, on or before November 15, 1989, why the motion for a default judgment should not be granted, any such showing to be made by motion which also contained a request for leave to file an answer.

8. By letter to Mr. Guttlein dated October 30, 1989, Mr. Vincoli stated:

> Reference your letter of October 2, 1989, requesting an additional two weeks to submit an answer in the above subject case.
>
> We wish to inform you that on August 11, 1989, this case was assigned to the Honorable Nancy M. Sherman, Administrative Law Judge, 1375 ``K'' Street, N.W.,

> Room 1122, Washington, DC 20005. In this regard and in compliance with 28 C.F.R. Part 68.5(a), Service and Filing of Documents, all pleadings must be filed with the Administrative Law Judge assigned to hear each case. A copy of this correspondence be forwarded to the assigned Judge.
>
> Please direct any future correspondence and/or pleadings to Judge Sherman.

9. Also on October 30, 1989, I received from Mr. Guttlein a request, dated October 20, 1989, in an envelope postmarked October 27, 1989, for leave to file a late answer. An accompanying affidavit by Mr. Guttlein stated, in part:

> . . . respondent's counsel requested additional time to submit an answer, because of a heavy litigation schedule . . . The respondent has cooperated fully with the government's investigation of this matter, including providing voluminous discovery. The government can show no prejudice as a result [of] respondent's delay in submitting an answer . . . our request for an extension was still pending before the Court.

Attached to this affidavit was a proposed answer which stated, inter alia:

> 2. With respect to paragraph; [sic] of the complaint, respondent submits that the allegations contained therein constitute legal conclusions which respondent neither admits nor denies.
>
> 3. With respect to the allegation contained in paragraph 3 at Counts I, II, and III respondent denies he is in violation of the Immigration and Nationality Act, but with respect to the remainder of the factual allegations contained therein respondent denies sufficient knowledge or information to submit a response at this time.

The proposed answer also alleges certain affirmative defenses: ``respondent was not properly advised by the complaint [sic] of the requirements under the pertinent [statutory] sections;'' respondent is ``in substantial compliance'' with the pertinent statutory sections; complainant ``refused to consider a fair and equitable settlement of this matter;'' and ``The actions of the complainant and/or its agents evince bias and prejudice against small minority owned businesses.''

10. On October 31, 1989, I issued an order to complainant to show cause, on or before November 20, 1989, why respondent's request for leave to file a late answer should not be granted.

11. On November 9, 1989, I issued an order indefinitely postponing the hearing (then set for about December 5, 1989) pursuant to the parties' agreement during a November 4 conference call and in view of pending negotiations for a settlement.

12. Over date of November 17, 1989, complainant filed an opposition to respondent's pending request for leave to file a late answer.

Analysis

I accept complainant's contention that pursuant to 28 CFR 68.1, the criteria for accepting a late answer are set forth in Rule 6(b)(2) of the Federal Rules of Civil Procedure. This rule reads in relevant part as follows:

> When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . .

Cf. United States of America v. Shine Auto Service, 8 U.S.C. 1324a Proceeding, Case No. 89100180, Vacation by the Chief Administrative Hearing Officer of the Administrative Law Judge's Order Denying Default Judgment, July 14, 1989.

The sole explanation advanced by respondent's counsel for failure to file a timely answer is ``a heavy litigation schedule.'' Complainant is correct in asserting that such a claim, standing alone, does not establish the existence of ``excusable neglect'' within the meaning of Rule 6(b)(2) of the FRCP. See, e.g., McLaughlin v. City of LaGrange, 662 F.2d 1385, 1387 (11th Cir. 1981), cert. denied 456 U.S. 979 (1982); Graham v. Pennsylvania Railroad, 342 F.2d 914, 915 (D.C. Cir. 1964), cert. denied 381 U.S. 904 (1965); Citizens' Protective League v. Clark, 178 F.2d 703 (D.C. Cir. 1949); Maghan v. Young, 154 F.2d 395 (D.C. Cir. 1946); Mawhinney v. Heckler, 600 F.S. 783, 784 (Me. 1985); Osberg Construction Co. v. U.S., 3 Ct. Cl. 652, 654 (1983); Grover v. Commercial Insurance Co., 104 F.R.D. 136, 138 (D.C. Me.).[1] An ``excusable neglect'' contention is further undermined by the fact that respondent's proposed answer--prepared almost 3 months after the complaint was filed, and more than 7 months after respondent received the notice of intent to fine (whose allegations are substantially tracked by the complaint)--avers that as to all of the specific factual allegations of the complaint, ``respondent denies sufficient knowledge or information to submit a response at this time.'' Cf. United States of America v. Dolphin Auto Beauty Salon, 8 U.S.C. § 1324a Proceeding, Case No. 88100137, Order Denying Motion for Leave to File Answer to Complaint--Denial of Motion for Default Judgment (Administrative Law Judge Earldean V.S. Robbins, January 25, 1989) (attached to

[1]Respondent's answer would have been late even if its motion for an extension had been filed with me rather than mistakenly filed with the acting chief administrative hearing officer, and even if that motion had been granted. Accordingly, I need not and do not consider the effect of such misfiling, if any, on whether the lateness of respondent's answer was due to ``excusable neglect.'' See Maghan, supra, 154 F.2d 395; In re Underground Utility Construction Co., 35 B.R. 588 (D.C.S.C. Fla. 1983).

complainant's opposition to respondent's request for leave to file a late answer). Furthermore, respondent's proposed answer contains at least one obvious typographical error--namely, the use of a semicolon instead of a number.

Respondent further contends that a late answer should be accepted because complainant can show no prejudice by the delay. Complainant contends that the absence of a prejudice is immaterial, citing In re South Atlantic Financial Corp., 767 F.2d 814, 819 (11th Cir. 1985), cert. denied 475 U.S. 1015 (1986); see also Matter of Lewis, 93 B.R. 462, 467-469 (U.S. Bankruptcy Court, S.D. Miss. E.D.). However, as South Atlantic recognizes, some courts have examined the prejudicial effect vel non of a late filing in determining whether excusable neglect exists. 767 F.2d at 818. Among these courts is the Court of Appeals for the Second Circuit, within whose jurisdiction this case arises. Supermarkets General Corp. v. Grinnell Corp., 490 F.2d 1183, 1186 (2nd Cir. 1974); see also, In re O.P.M. Leasing Services, 35 B.R. 854, 866 (D.C.S.D.N.Y. 1983); Matte of Heyward, 15 B.R. 629, 638 (U.S. Bankruptcy Court, E.D.N.Y.). Accord: Dominick v. Hess Oil V.I. Corp., 841 F.2d 513, 517 (1st Cir. 1988); In re Four Seasons Securities Law Litigation, 493 F.2d 1288, 1291 (10th Cir. 1974); Kleckner v. Glover Trucking Corp., 103 F.R.D. 553, 566 (D.C.M.D.Pa.). These cases appear to represent the weight of authority. Moreover, they appear more consistent that does the authority relied on by complainant with the portion of Rule 6(b) which leaves to the court's ``discretion'' whether to grant a motion for leave to act out of time; and with 28 CFR § 68.6(b), which states that upon a respondent's failure to file a timely answer, the Administrative Law Judge ``may'' enter a judgment by default. Accordingly, I find material, to the issues presented here, whether complainant has been prejudiced by respondent's failure to file a timely answer.

I conclude that complainant has not been so prejudiced. Thus, I note that complainant does not deny respondent's assertion that it has cooperated fully with the government's investigation of this matter, including voluminous discovery. Moreover, in November 1989, both parties agreed to the indefinite postponement of the hearing in view of pending negotiations for a settlement. Almost all the considerations relied upon by complainant to show prejudice are directed, not to any particular circumstances in this case (such as, for example, the intervening death of a witness), but, rather, to considerations which in almost any case would call for denial of a request for leave to take any action out of time. Furthermore, refusing to permit respondent to file a late answer would almost certainly entitle complainant to favorable action on its motion for a

default judgment; see Dolphin Auto, supra. However, ``. . . the extreme sanction of a default judgment must remain a weapon of last, rather than first resort.'' Meehan v. Snow, 652 F.2d 274, 277 (2nd Cir. 1981). See also, United States of America v. Sebs Corporation, Inc. d.b.a. Sebs Feed and Supply, c/o Jeffrey Siddoway, 8 U.S.C. 1324a Proceeding, Case No. 89100488, Order Denying Default Judgment (E. Milton Frosburg, Administrative Law Judge, November 29, 1989).

For the foregoing reasons, respondent's motion for leave to file a late answer is granted, and complainant's motion for a default judgment's is denied.

Dated, January 4, 1990.

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