IP 04-1207-C T/K Standard Insurance v Cole
Judge John D. Tinder Signed on 8/19/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STANDARD INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-01207-JDT-TAB
	)	
CALVIN COLE,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STANDARD INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:04-cv-1207-JDT-TAB
	)	
CALVIN COLE,	)	
	)	
Defendant.	)	

ENTRY ON DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT (Docket No. 13)[1]

This matter comes before the court upon the motion of the Defendant, Calvin Cole ("Cole"), to set aside the default judgment granted in favor of the Plaintiff, Standard Insurance Company ("Standard"). The court, having considered the briefs and submissions of the parties, finds that the Defendant's motion to set aside the default judgment should be GRANTED for the reasons set forth below.

I. BACKGROUND

This case revolves around a disability insurance policy issued by Standard for the benefit of Cole. On January 28, 2002, Cole completed and signed an application ("Application") for the issuance of an individual disability income insurance policy with Standard. (Compl. ¶ 5.) On February 6, 2002, Standard issued policy number 00C7834900 ("the Policy") to Cole, providing a monthly disability benefit of $500

[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

payable to age 65 if Cole were to become disabled. (Compl. ¶ 10.) The Policy contained a three-year "Time Limit" provision stating that after three years from the Policy's effective date, "no misstatements, except fraudulent misstatements, made by [Cole], in the application for the policy . . . shall be used to" rescind the policy or deny a claim for disability. (Compl. ¶ 13.)

On April 29, 2003, Cole filed a claim for disability benefits under the Policy. (Compl. ¶ 14.) On April 7, 2004, Standard denied Cole's disability claim, determining that Cole was able to perform the substantial and material duties of his occupation. (Compl. Ex. D.) Standard subsequently conducted a "preexisting condition and contestable review" based on the medical records received in the investigation of Cole's claim. (*Id.*) As a result of the review, Standard concluded that material portions of Cole's answers on his original Application were untrue. Consequently, Standard informed Cole on July 19, 2004 that it was rescinding the Policy. (*Id.*) Standard commenced this action on July 20, 2004 by filing the Complaint. Defendant received a copy of the Complaint and a summons on August 2, 2004. Defendant failed to respond to the court. Accordingly, a clerk's Entry of Default was entered against Defendant on September 20, 2004.

Just two days after judgment in favor of the Plaintiff was entered, on October 1, 2004, the court received a letter written to it by Cole, which the court construed as a motion to set aside the default judgment, asking that "this decision is reversed" and that he be "given a chance to respond to the allegations made against me." (Def.'s Mot. Set Aside Default J.; Docket No. 13.) In his motion, Cole admits to receiving "information

that [Cole] was being sued" and that he expected to receive additional information regarding a court date. Instead of answering the Complaint, Cole apparently took the summons and complaint to the Indiana Department of Insurance where he filed his own complaint against Standard. (Def.'s Reply, Ex. B).

Although Cole is currently represented by counsel, he was representing himself ("pro se") at the time the court entered the default judgment against him.

II. DISCUSSION

Cole's October 1, 2004 letter to the court, construed as a motion to set aside the default judgment, is governed by Fed. R. Civ. P. 60(b)(1). The relevant portion of Rule 60(b) provides: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ." The decision to grant relief under Rule 60(b) is "left to the sound discretion of the trial court." *C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1205 (7th Cir. 1984); *see also Jones v. Phipps*, 39 F.3d 158, 162 (7th Cir. 1994). And while relief under Rule 60(b) is an "extraordinary remedy and is granted only in exceptional circumstances," *McCormick v. City of Chicago*, 230 F.3d 319, 327 (7th Cir. 2000), the Seventh Circuit has also noted that "the philosophy of modern federal procedure favors trials on the merits." *A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 43 (7th Cir. 1984); *see also C.K.S. Eng'rs, Inc.*, 726 F.2d at 1205. Furthermore, Rule 60(b) relief is granted more liberally in those cases where the relief is sought to vacate a default judgement.

C.K.S. Eng'rs, Inc., 726 F.2d at 1205; *Ellingsworth v. Chrysler*, 665 F.2d 180, 185 (7th Cir. 1981). Thus, "default judgments should generally be set aside where the moving party acts with reasonable promptness, alleges a meritorious defense to the action, and where the default has not been willful." *Dormeyer*, 461 F.2d at 43. Since *Dormeyer*, the Rule 60(b)(1) analysis has developed into a three-part standard which places the burden on the moving party to show: 1) "good cause" or "excusable neglect" for the default; 2) quick action to correct the default; and 3) the existence of a meritorious defense to the original complaint. *Jones*, 39 F.3d at 162 (citing *Pretzel & Stouffer v. Imperial Adjusters*, 28 F.3d 42, 45 (7th Cir. 1994); *United States v. DiMucci*, 879 F.2d 1488, 1495 (7th Cir. 1989)).

First, Rule 60(b)(1) provides that good cause can consist of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b). Here, Cole apparently claims mistake, or not knowing that he was to respond with the court to Standard's Complaint, as good cause for setting aside the default judgment. At the time Cole failed to respond to the Complaint, he was not represented by counsel. In the federal system, "civil litigants who represent themselves ("pro se") benefit from various procedural protections not otherwise afforded to the ordinary attorney-represented litigant." *Jones*, 39 F.3d at 163 (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)(per curiam)(requiring liberal construction of pro se litigant pleadings)). While "pro se litigants are not entitled to a general dispensation from the rules of procedure or court imposed deadlines," *id.*, this court is inclined to be more lenient toward the pro se litigant's mistakes, at least where "no willful disregard for duties" exists. *Id.* at 164. The

court is satisfied in this case that Cole did not willfully disregard his duties, but rather was mistaken in the steps he should take in the litigation process. Although Cole did not respond or file an answer with the court, he certainly did not "do nothing for two months," as Standard suggests. (P.'s Resp. Mot. Set Aside Default J. at 3.) Instead of responding to the complaint with the court, Cole mistakenly responded by taking the complaint to the Indiana Department of Insurance "for them to look into because [Cole could not] afford an attorney" due to his disability. (Def.'s Mot. Set Aside Default J. at X). Of course, filing a complaint with the Department of Insurance, by itself, is not the proper method of responding to a complaint filed in this court. But his action with the Department of Insurance demonstrates the lack of willful disregard for his duties. Since Cole was a pro se litigant and took steps, although mistaken steps, in responding to the Complaint, the court finds that he has good cause under Rule 60(b)(1) to set aside the default judgment.

Second, Cole must demonstrate that he acted promptly to correct the default. The court's entry of default occurred on September 20, 2004. Upon receiving the notice of entry of default, Cole immediately notified the court of his mistake through his letter received by the court on October 1, 2004, which was construed as a motion to set aside the default judgment. The court finds his actions to correct the default sufficiently prompt in this case.

Finally, Cole must demonstrate the existence of a meritorious defense to the original complaint. A meritorious defense is "not necessarily one which must, beyond a doubt, succeed in defeating a default judgment, but rather one which at least raises a

serious question regarding the propriety of a default judgment and which is supported by a developed legal and factual basis." *Jones*, 39 F.3d at 165 (citing *Merrill Lynch Mortg. Corp. v. Narayan*, 908 F.2d 246, 252 (7th Cir. 1990)). Cole presents a defense based on the issue of whether Standard can raise alleged misrepresentations in the Application more than two years after issuance of the Policy. Cole argues that Indiana Code § 27-8-5-3(a)(2)[2] limits the period in which Standard can contest any misrepresentations in the Application to two years after the issuance of the Policy. Standard issued the Policy to Cole on February 6, 2002. Standard rescinded the Policy on July 19, 2004 in a letter sent to Cole stating the misstatements made on Application as the reason for the rescission. More than two years passed from the issuance of the policy to its rescission. While the court will not undertake an in-depth substantive review of Cole's defense at this time, it will note that Cole has at least raised a serious question regarding the propriety of a default judgment and, thus, has provided a meritorious defense for purposes of Rule 60(b)(1).

The court finds that Cole has demonstrated good cause for his mistake, has shown quick action to correct the default, and has presented a meritorious defense to

---

[2] Indiana Code § 27-8-5-3(a)(2) provides:

> TIME LIMIT ON CERTAIN DEFENSES:
>
> (A) After two (2) years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two (2) year period.

this action. Accordingly, the court **GRANTS** Cole's Motion to Set Aside the Default Judgment.

III. CONCLUSION

For all the foregoing reasons, Defendant Cole's Motion to Set Aside the Default Judgment (Docket No. 13) is **GRANTED**. The Entry of Default (Docket No. 10) and Default Judgment (Docket No. 12) are now **VACATED**. The Clerk of the Court is directed to reactivate the docket of this case, and the Magistrate Judge is requested to schedule an initial pretrial conference for the purpose of establishing a case management plan.

ALL OF WHICH IS ENTERED this 19th day of October 2005.

_____
John Daniel Tinder, Judge
United States District Court

Copies to:

Robert L. Clark
Schmidtke Hoeppner Consultants, LLP
rclark@hwelaw.com

Steven K. Huffer
Huffer & Weathers, P.C.
steve_huffer@hufferandweathers.com

Magistrate Judge Tim A. Baker