

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 13
)	
PATRICIA ANN VAUGHN)	CASE NO. 05-76238-MHM
)	
Debtor)	
<hr/>		
PATRICIA ANN VAUGHN)	
)	ADVERSARY PROCEEDING
Plaintiff)	NO. 05-6552
v.)	
)	
CITIZENS TRUST BANK)	
)	
Defendant)	

ORDER GRANTING DEFENDANT'S MOTION TO OPEN DEFAULT

Plaintiff's complaint was filed December 1, 2005. The complaint alleges that Defendant violated the Truth-in-Lending Act "by failing to properly give disclosures at the time of the consummation of the contract under Reg. Z §226.17." Plaintiff provides no further facts or description of the alleged violation. Approximately 33 minutes after the complaint was filed, Plaintiff filed an Amended Complaint, to correct the main bankruptcy case number in the caption. Service is governed by B.R.P. 7004.¹ On December 9, 2006, Plaintiff filed a certificate of service that recites that the summons and a copy of the complaint were served by regular, first class mail upon:

¹ Monograph on service by Hon. James E. Massey, at www.ganb@uscourts.gov, click "Chambers," then click "Judge Massey," then "Service of Pleadings."

Citizens Trust Bank
Attn: Yolanda Vickers, Manager
2727 Panola Road
Lithonia, GA 30058

No answer was served and, upon request by Plaintiff, the Clerk entered a default April 13, 2006. No default judgment has been entered. Defendant filed a motion to open the default May 19, 2006.

Defendant shows in its motion to open the default that Ms. Vickers was not employed by Defendant on December 9, 2005, as her employment with Defendant had ended October 20, 2005. The date of termination of Ms. Vickers' employment is established by an affidavit by a Vice President of Defendant, based upon her own personal knowledge and Defendant's business records. Plaintiff challenges the date of the end of Ms. Vickers employment, apparently based upon information obtained on the Internet from a site named "People At Work." Plaintiff attaches a printout from that site dated December 6, 2005, showing Ms. Vickers as a manager of Defendant.

The Internet is frequently an excellent source for information. In fact, a particularly reliable website is that of the Secretary of State, which, if Plaintiff had checked, would have shown the name and address of Defendant's registered agent for service of process. A printout of a single page from an inadequately identified commercial website, however, is insufficient to overcome averments in an affidavit; among other things, commercial websites are not typically updated daily, as the Secretary of State's is, as commercial websites serve many purposes, such as

information and advertising. Plaintiff did not challenge the competence of Defendant's affiant. Plaintiff's "evidence" presented to contradict the averments of Defendant's affiant is insufficient to overcome the sworn testimony by affidavit.

Bankruptcy Rule 7055, based on F.R.C.P. 55(c), provides:

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).²

The provisions of Rule 60(b) are inapplicable to the instant case because no default judgment has been entered. Therefore, Defendant need only show good cause to set aside the default. Defendant has shown good cause: the employee upon whom Plaintiff chose to serve the complaint was not employed by Defendant on the date of service. Additionally, no certificate of service has been filed showing service of the Amended Complaint. Although Plaintiff complains that Defendant has failed to show it has a

² F.R.C.P. 60(b) provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. 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; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

meritorious defense, enforcing such a requirement in light of the paucity of facts alleged in the complaint would be unreasonable. Accordingly, it is hereby

ORDERED that Defendant's motion to open the default is granted. Defendant may file an answer or other response to the complaint, as amended, within 20 days of the date of entry of this order.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 13 Trustee.

IT IS SO ORDERED, this the 10th day of August, 2006.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE