UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 11
	)	
BRAMLETT PLUMBING, INC.	)	CASE NO. 05-73925-MHM
	)	
Debtor	)	
	)	
BRAMLETT PLUMBING, INC.	)	
	)	**ADVERSARY PROCEEDING**
Plaintiff	)	**NO. 05-6492**
	)	
v.	)	
	)	
MARCANTELL NUGENT	)	
	)	
Defendant	)	

ORDER GRANTING DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT

On March 17, 2006, Plaintiff filed a motion for default judgment in this adversary proceeding, and default judgment was entered April 17, 2006. Defendant filed a motion to open default April 17, 2006. By order entered June 15, 2006, Defendant was accorded the opportunity to supplement its motion to set forth additional facts and legal argument to support setting aside a default judgment instead of merely opening a default entered by the Clerk. Defendant filed such supplement and an answer June 29, 2006. Plaintiff filed a brief response without a brief.

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).[1]

A defendant may establish grounds to set aside a default judgment pursuant to Rule 60(b) if the defendant shows (1) [it] has a meritorious defense that may affect the outcome, (2) granting the motion to set aside would not result in prejudice to the plaintiff [the nondefaulting party], and (3) good reason existed for failing to reply to the complaint. *Florida Physician's Insurance Co., Inc. v. Ehlers,* 8 F. 3d 780(11th Cir. 1993).

In its supplemental motion to set aside the default judgment, Defendant has set forth sufficient facts to establish a meritorious defense. Defendant asserts that Plaintiff will suffer no prejudice from setting aside the default judgment. Plaintiff, however, asserts that the setting aside of the default judgment alone is prejudice. Judgment by default, however, is not favored; resolution of a claim on the merits is preferred. *Florida Physician's Insurance Co., Inc. v. Ehlers,* 8 F. 3d 780 (11th Cir. 1993); *Rogers v. Allied Media, Inc.,*

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[1] 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.

160 B.R. 249 (Bankr. N.D. Ga. 1993). Plaintiff certainly would not have filed its complaint unless prepared to prosecute it. Being required to do so cannot, therefore, constitute prejudice.

Finally, Defendant has shown good cause for its failure to timely file an answer. Defendant showed that Defendant's principal had timely consulted an attorney about the complaint and left it in the attorney's hands to file an answer. Defendant shows, however, that no answer was filed because Defendant's attorney apparently abandoned his practice and Defendant. While a client may be held accountable for an attorney's negligence, to be held accountable when abandoned by its attorney would be a harsh result and could lead to a proliferation of litigation. Defendant had initially timely consulted its attorney and then acted in a timely manner to obtain new representation when Defendant discovered no answer had been filed. Accordingly, it is hereby

ORDERED that Defendant's motion to set aside the default judgment is granted. Defendant's answer will be deemed timely filed as of the date of entry of this order. It is further

ORDERED that the parties' counsel confer and submit to the court the following scheduling information within 15 days of the date of entry of this order:

(a) A description of any amendments to the pleadings which are anticipated and a time-table for the filing of amendments;

(b) A description of any motions which are anticipated and a time-table for filing of such motions;

(c) Information regarding the time needed for discovery.

Upon receipt of the above information, the court will enter a scheduling order setting the period for discovery, the date for filing a consolidated pretrial order and a trial date.

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

IT IS SO ORDERED, this the 22nd day of August, 2006.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE