IT IS ORDERED as set forth below:

Date: June 29, 2007

W. H. Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
JOSEPH ANDREW MYLES,	:	BANKRUPTCY CASE NO. 06-11231-WHD
Debtor.	:	
PATTI BARNETTE,	:	
Plaintiff,	:	ADVERSARY PROCEEDING NO. 06-1115
v.	:	
JOSEPH ANDREW MYLES,	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
Defendant.	:	

O R D E R

This matter comes before the Court on the Motion to Set Aside Entry of Default Judgment filed by the Defendant, Joseph Andrew Myles, in the above-captioned adversary

proceeding. The issues involved herein arise from a complaint filed by the Plaintiff, Patti Barnette, to declare a debt owed by the Defendant to the Plaintiff nondischargeable. This matter is a core proceeding over which the Court has jurisdiction. 28 U.S.C. § 157(b)(2)(I).

PROCEDURAL HISTORY AND FACTS

The Plaintiff filed her complaint on December 26, 2006. The Defendant failed to file an answer or otherwise respond to the Complaint. On February 14, 2007, the Plaintiff filed a request for entry of default and a Motion for Default Judgment. The Clerk of Court entered the default against the Defendant on February 15, 2007. The Court entered a default judgment against the Defendant on February 26, 2007. The Defendant filed the instant motion on May 24, 2007.

In the Defendant's motion to set aside the default judgment, the Defendant contends that his failure to respond to the complaint resulted from complications from diabetes that required him to visit the emergency room on five separate occasions from approximately the end of December 2006 through mid-February 2007. According to the Defendant's affidavit, the Defendant met with his counsel on March 13, 2007. The Defendant signed the affidavit on March 29, 2007. The Defendant did not file the motion to set aside the default judgment until May 24, 2007. Between the time of the entry of the default judgment and the hearing on the Defendant's motion, the Plaintiff initiated a garnishment action against the Defendant.

CONCLUSIONS OF LAW

The grounds for setting aside an entry of default or a default judgment are set forth in the Federal Rules of Civil Procedure, which specifically provide that "[f]or 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)." FED. R. CIV. P. 55(c) (made applicable to bankruptcy cases by FED. R. BANKR. P. 7055). 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; (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. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

FED. R. CIV. P. 60(b).

"In order to establish mistake, inadvertence, or excusable neglect, the defaulting party must show that: (1) it had a meritorious defense that might have affected the outcome; (2) granting the motion would not result in prejudice to the non-defaulting party; and (3) a good reason existed for failing to reply to the complaint." *Florida Physician's Ins. Co. v. Ehlers*, 8 F.3d 780, 783 (11th Cir. 1993) (citing *E.E.O.C. v. Mike Smith Pontiac GMC, Inc.,*

896 F.2d 524, 528 (11th Cir. 1990)). As to the first factor, "[i]t is well settled that general denials and conclusive statements are insufficient to establish a meritorious defense; the movant must present a *factual basis* for its claim." *Matter of Rogers*, 160 B.R. 249 (Bankr. N.D. Ga. 1993) (Drake, J.) (emphasis in original) (citing *Turner Broadcasting, Inc. v. Sanyo Elec., Inc.*, 33 B.R. 996, 1001 (N.D. Ga. 1983), *aff'd*, 742 F.2d 1465 (11th Cir. 1984)); *see also In re Tires and Terms of Columbus, Inc*., 262 B.R. 885 (Bankr. M.D. Ga. 2000).

As to the existence of a meritorious defense, the Plaintiff's complaint alleges that the Defendant was in the business of storing and cleaning furs for individuals. According to the complaint, the Plaintiff entrusted several furs to the Defendant for storage, and the Defendant never returned or accounted for the furs. The Plaintiff obtained a default judgment against the Defendant in state court for the approximate amount of $34,247. The Plaintiff asserts that the judgment amount is nondischargeable under section 523(a)(2)(A) and (a)(6). The Court notes that, assuming the facts stated in the complaint are true, the Plaintiff may have a valid claim under section 523(a)(6), which provides that any debt for willful and malicious injury by the debtor shall be nondischargeable. 11 U.S.C. § 523(a)(6). Such an injury can include a willful and malicious injury to a person's property. *See Davis v. Aetna Acceptance Co*., 293 U.S. 328 (1934); *In re Wolfson,* 56 F.3d 52 (11th Cir. 1995); *In re Pharr Luke*, 259 B.R. 426 (Bankr. S.D. Ga. 2000); *In re LaGrone,* 230 B.R. 900 (Bankr. S.D. Ga.1999) (the act of conversion of property is an intentional injury contemplated by the exception to discharge). Additionally, as the Plaintiff has noted, the

judgment entered by the state court against the Defendant may be entitled to preclusive effect.

The Defendant's motion does not address any possible defense. At the hearing, the Defendant's counsel indicated that an answer had been prepared, but it was not presented at the hearing and has not been filed with Court. Rather than present a defense at the hearing, the Defendant simply asserted that the state court judgment would not collaterally estop him from asserting a defense. While that may or may not be true, without specific information about the nature of a defense that could be asserted in the absence of collateral estoppel, the Court cannot determine whether the Defendant has a meritorious defense.

The Court also finds that granting the motion to set aside the default judgment would result in prejudice to the Plaintiff. "As a general proposition, a mere delay in the ultimate resolution of the issues on the merits does not constitute prejudice to a plaintiff." *Rogers,* 160 B.R. at 255 (citing *Francisco Inv. Corp.*, 873 F.2d at 479; *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir.1983)). However, "'where it is clear that no meritorious defense exists, the delay in vindicating the plaintiff's rights . . . [and] the expense a plaintiff incurs in prosecuting a suit in which the defendant has defaulted and presented no meritorious defense, unduly prejudices the plaintiff.'" *Id*. (quoting *Turner Broadcasting*, 33 B.R. at 1003).

The Plaintiff has incurred attorney's fees in prosecuting her suit against the Defendant in state court, has incurred fees to file the instant adversary proceeding to protect

from discharge the judgment resulting from that suit, and has incurred fees to begin collection efforts on the nondischargeable judgment obtained from this suit. Even under the facts as alleged by the Defendant, the Defendant's attorney could have filed a motion to extend the time to file an answer until his client could be reached. Failing that, the Defendant could have responded to the motion for default judgment in mid-February to alert the Court and the Plaintiff that the Defendant intended to defend the suit. At the very least, the Defendant could have filed his motion to set aside the default judgment at the time he signed the affidavit. If the Defendant had not delayed in filing the motion to set aside the default judgment until late May, the Plaintiff may have been spared the time and expense of initiating collection efforts. The Defendant's contention that his illness in January and early February was responsible for his failure to file the instant motion until late May simply rings hollow.

While the Court generally prefers to decide cases on the merits, the Court "must also consider the competing policy of finality in the judicial process." *In re Brackett*, 243 B.R. 910, 915 (Bankr. N.D. Ga. 2000) (Drake, J.). Where the defaulting party has not presented a meritorious defense, the Court cannot be certain that the nondefaulting party will not suffer unnecessary delay and expense from reopening the default. Because the Defendant has failed to show the existence of a meritorious defense or that the Plaintiff will not suffer prejudice from setting aside her judgment, the Court must conclude that there is no just reason to disturb the judgment entered in this case.

CONCLUSION

For the above-stated reasons, the Defendant's Motion to Set Aside Default is hereby **DENIED**.

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