

1 WRITTEN DECISION -- NOT FOR PUBLICATION

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5 NOV - 5 2008  
6 CLERK, U.S. BANKRUPTCY COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA  
8 BY DEPUTY

9 UNITED STATES BANKRUPTCY COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re ) Case No. 06-00464-PB7  
12 ) Adv. No. 08-90111  
13 CENTRO MEDICO LATINO, INC., )  
14 ) Debtor. ) ORDER ON DEFENDANT'S MOTION  
15 ) FOR RELIEF FROM DEFAULT  
16 ) JUDGMENT  
17 GREGORY A. AKERS, )  
18 Chapter 7 Trustee )  
19 ) Plaintiff, )  
20 v. )  
21 DR. TIM GURTCH, )  
22 an individual, )  
23 Defendant. )

24 Defendant, Dr. Tim Gurtch, failed to file a timely  
25 answer in this adversary proceeding. The Trustee, Gregory  
26 Akers, sought and obtained a default judgment. Defendant  
now asks this Court to set aside the default judgment  
alleging "excusable neglect" under Rule 60(b) of the Federal  
///

1 Rules of Civil Procedure. For the reasons discussed below,  
2 Defendant's motion is denied.

3 This Court has subject matter jurisdiction over the  
4 proceeding pursuant to 28 U.S.C. § 1334 and General Order  
5 No. 312-D of the United States District Court for the Southern  
6 District of California. This is a core proceeding under  
7 28 U.S.C. § 157(b)(2)(A) & (O).

8 **BACKGROUND**

9 In July 2005, Defendant purchased a medical clinic in Chula  
10 Vista, California ("Clinic") from Centro Medico Latino, Inc.,  
11 (Debtor). The purchase price was initially set at \$50,000 to be  
12 paid over time. However, under certain conditions the price was  
13 to be reduced to \$40,000.<sup>1</sup>

14 On March 15, 2006, the Debtor filed a petition commencing  
15 this bankruptcy case. Plaintiff was appointed as the chapter 7  
16 Trustee. Debtor's schedules indicated that Defendant owed Debtor  
17 \$34,000 for the unpaid portion of the purchase price. The  
18 Trustee, through communications with the Debtor and his counsel  
19 Debra Scheufler, was able to establish a payment plan. Defendant  
20 made payments (through Attorney Scheufler) totaling \$21,000.  
21 However, at some point Defendant ceased making payments. It  
22 appears that the disagreement about the proper purchase price and  
23 some accounting concerns played a role. According to the  
24 Trustee's calculations, \$14,035 remained to be paid.

25 \_\_\_\_\_  
26 <sup>1</sup> The Defendant and the Trustee disagree as to whether those conditions have been met. The resolution of that disagreement is not relevant to the current matter before the Court

1 The Trustee, deciding his efforts to collect had become  
2 futile, retained attorney Nannette Farina and commenced the  
3 present adversary proceeding seeking to recover the outstanding  
4 balance of the purchase price. The complaint and summons were  
5 served on Defendant on March 13, 2008. A courtesy copy of the  
6 complaint was emailed to Attorney Scheufler.

7 After the complaint was filed, Attorneys Farina and  
8 Scheufler were in communication, though there is some  
9 disagreement about the exact nature and extent of the  
10 communications. According to the Trustee, Attorney Scheufler had  
11 promised an accounting and/or payment, but failed to follow  
12 through.

13 It is undisputed that on April 11, 2008, Attorney Farina  
14 sent an email to Attorney Scheufler noting the failure to provide  
15 the promised paperwork, and stating that an answer to the  
16 complaint was due on April 14, 2008. The email also stated that  
17 if an answer was not timely filed the Trustee would seek a  
18 default judgment.

19 Neither Defendant nor Attorney Scheufler filed a timely  
20 answer and Scheufler did not reply to the email. On April 21,  
21 2008, the Trustee's request to enter default was filed. On April  
22 24, 2008, the Notice of Entry of Default was served on Defendant.

23 On April 29, 2008, the Trustee filed his prove-up papers for  
24 entry of a default judgment against Defendant. On the next day  
25 the judgment was entered (Default Judgment).

26 ///

1 On August 11, 2008, Defendant filed the present motion  
2 seeking to set aside the Default Judgment on the ground that it  
3 was entered due to "mistake, inadvertence, or excusable neglect  
4 within the meaning of Rule 60(b)(1) of the Federal Rules of Civil  
5 Procedure." A hearing was held and the Court took the matter  
6 under submission.

7 **DISCUSSION**

8 Rule 60(b)(1) of the Federal Rules of Civil Procedure  
9 provides that a court may relieve a party or a party's legal  
10 representative from a final judgment on the basis of mistake,  
11 inadvertence, surprise, or excusable neglect.<sup>2</sup> Excusable  
12 neglect is an equitable concept which takes into account factors  
13 such as "prejudice, the length of delay and impact on judicial  
14 proceedings, the reason for the delay, including whether it was  
15 within the reasonable control of the movant, and whether the  
16 movant acted in good faith." TCI Group Life Ins. Plan v.  
17 Knoebber, 244 F.3d 691, 696 (9<sup>th</sup> Cir. 2001 citing in Pioneer Inv.  
18 Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395,  
19 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993).

20 When determining whether good cause exists to vacate a  
21 default judgment, the Court must consider three factors: (1)  
22 whether the defendant's culpable conduct led to the default, (2)  
23 whether the plaintiff would be prejudiced if the judgment is set  
24 aside, or (3) whether the defendant has no meritorious defense.

25 \_\_\_\_\_  
26 <sup>2</sup> Rule 60 is made applicable to bankruptcy cases by Rule 9024 of the Federal Rules of  
Bankruptcy Procedure.

1 Franchise Holding II, LLC. v. Huntington Rest.'s Group, Inc.,  
2 375 F.3d 922, 926 (9th Cir.2004). A motion for relief can be  
3 denied upon a finding of any of these. Id. In Franchise  
4 Holding, the Ninth Circuit upheld denial of defendant's motion to  
5 set aside a default judgment where defendant received actual  
6 notice of the complaint and plaintiff's intent to pursue the  
7 action, and yet failed to file an extension or anything else  
8 until after the default was entered. Id. at 927.

9 In the present case, Defendant urges the Court to relieve  
10 him of the Default Judgment because:

11 A response was not filed to the adversarial  
12 complaint out of which this matter arises because the  
13 moving party's counsel, who was not in the best of  
14 health at the time, believed negotiations were ongoing,  
15 the party himself did not understand the significance  
16 of the default once he became aware of it, the delay in  
bringing the matter before the court on its merits was  
unintentional, in good faith, will not prejudice the  
non-moving party and this matter should in fact be  
heard on its merits.

17 Motion for Relief at 2:9-14.

18 The Court is not convinced that good cause exists to excuse  
19 Defendant from his and/or counsel's negligence under Rule 60. At  
20 the hearing, Attorney Scheufler explained that she did not file  
21 an answer, because she believed that she and the Trustee were in  
22 negotiations, and that the matter could be resolved informally.  
23 The Court finds that the failure to file an answer based upon a  
24 hope and believe of settlement is not excusable in this case. At  
25 the very least, counsel should have sought and obtained an  
26 extension from the Trustee, before allowing the due date to pass.

1 Counsel's failure to properly monitor this matter is particularly  
2 troubling in light of her long history of involvement in this  
3 matter. Before the bankruptcy case was even started, Counsel  
4 acted as go-between between Defendant and the Debtor, making the  
5 payments on Defendant's behalf. Before the adversary proceeding  
6 was commenced, Counsel had communication with the Trustee and  
7 made payments to the Trustee on Defendant's behalf.

8 Further, Counsel had email notice of the adversary  
9 complaint. She also was emailed a reminder of the last date to  
10 file an answer and that the Trustee intended to seek a default if  
11 no answer was filed. Counsel's failure to file a timely answer  
12 was not excusable under Rule 60(b).

13 As to the alleged misunderstanding of the Defendant, it is  
14 completely unsupported by the record. The Defendant did not even  
15 submit a declaration in support of his motion. In her  
16 declaration, Attorney Scheufler explains that the Defendant  
17 stated to her that he did not understand the significance of the  
18 Default Judgment. However, this is clearly hearsay.

19 Finally, as noted above, in order to obtain relief from a  
20 default judgment on ground that default was caused by inadvertent  
21 and excusable mistake and erroneous belief, a party must show  
22 that he had a meritorious defense to the action. See also  
23 Central Operating Co. v. Utility Workers of America, AFL-CIO, 491  
24 F.2d 245, 252 (4<sup>th</sup> Cir. 1974). A party seeking to vacate entry  
25 of default must present some evidence beyond conclusory denials  
26 to support such a defense. Artmatic USA Cosmetics, a Div. of

1 Arthur Matney Co., Inc. v. Maybelline Co., a Div. of Schering  
2 Plough, Inc., 906 F.Supp. 850, 855 (E.D.N.Y. 1995). In the case  
3 at hand, Defendant has provided no evidence of a defense  
4 whatsoever. The only declarations provided are those of Counsel  
5 and her physician relating to Counsel's medical condition. In  
6 his reply, Defendant explains that he has provided evidence to  
7 the Trustee. That is not only insufficient, but it is a prime  
8 example of Defendant's self-defeating approach to this case.

9 When a party, such as the Trustee in this case, files a  
10 formal complaint seeking redress, a formal response is demanded.  
11 As the Defendant has learned, a failure to file an answer (or  
12 other appropriate response) with the Court results in a default  
13 judgment. In the present situation, Defendant's failure to file  
14 with the Court evidence which he claims to have provided the  
15 Trustee, is fatal to this motion for relief.

16 **CONCLUSION**

17 For the reasons set forth above the Court denies  
18 Defendant's motion.

19  
20 IT IS SO ORDERED.

21 DATE: NOV -5 2008

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24 \_\_\_\_\_  
25 PETER W. BOWIE, Chief Judge  
26 United States Bankruptcy Court