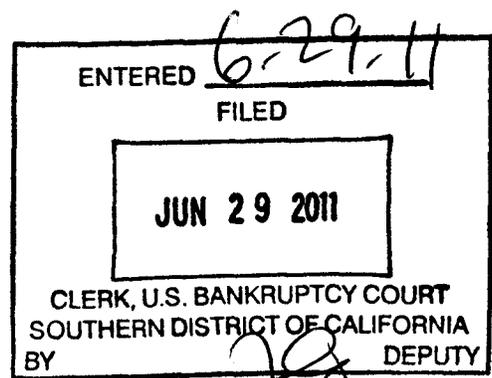


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10

11 In re) Case No. 07-04977-PB7
12 CREATIVE CAPITAL LEASING,) Adv. No. 09-90454-PB
13 Debtor.)
14 _____)
15 LESLIE T. GLADSTONE, Chapter 7)
16 Trustee,)
17 Plaintiff,)
18 v.)
19 WELLS FARGO HOME MORTGAGE, INC.,)
20 a California corporation,)
21 Defendant.)

ORDER ON MOTION TO VACATE
DEFAULT JUDGMENT

22 This is a motion by Wells Fargo Home Mortgage, Inc. ("WFHM")
23 to vacate the Default Judgment entered against it as a result of
24 it's failure to respond to a Complaint.

25 The Court has subject matter jurisdiction over this
26 proceeding pursuant to 28 U.S.C. § 1334 and General Order

1 No. 312-D of the United States District Court for the Southern
2 District of California. This is a core proceeding under
3 28 U.S.C. § 157(b)(2)(A), (H), (O).

4 WFHM made a loan to David Winick on September 27, 2003,
5 secured by a first trust deed on Mr. Winick's condominium. An
6 equity line second deed of trust in favor of Wells Fargo Bank,
7 N.A. ("Wells Fargo") was later placed on the condo. WFHM
8 recorded a Notice of Default in March 2008, and the property sold
9 at a Trustee's Sale to a third party with WFHM receiving a full
10 payoff in September 2008.

11 David Winick was a principal of Debtor, which filed for
12 Chapter 11 relief on September 10, 2007, shortly after the WFHM
13 loan went into default. The case was converted to a Chapter 7
14 proceeding in October 2008. Trustee filed this action, claiming
15 that Debtor made the payments on the WFHM loan, rather than
16 Mr. Winick, and seeking damages under fraudulent transfer
17 theories.

18 This action was filed on October 9, 2009, and WFHM was
19 served by mail on October 14, 2009. WFHM did not respond to
20 the Complaint, and as a result, Default Judgment was entered
21 on May 10, 2010.

22 A similar action was filed by Trustee against Wells Fargo,
23 also on October 9, 2009, concerning the second deed of trust on
24 the Winick condo. Wells Fargo was served by mail and answered
25 the Complaint on May 14, 2010.

26 ///

1 On September 24, 2010, outside counsel for Wells Fargo was
2 made aware, by counsel for the Trustee, of the Default Judgment
3 which had been entered against WFHM.

4 It is uncontested that WFHM was, in fact, served on
5 October 14, 2009. The Summons and Complaint were routed to the
6 correct department on October 19, 2009, however no action was
7 taken. The Notice of Default was received in the correct
8 department on February 12, 2010, but no action was taken until
9 WFHM received notice of the Default Judgment in September 2010.

10 On October 8, 2010, counsel for WFHM informed counsel for
11 Trustee that WFHM's failure to respond to the Complaint was an
12 oversight, and requested that the entry of Default and Default
13 Judgment be set aside. Counsel for Trustee suggested combining
14 the WFHM issues into the mediation occurring between the Trustee
15 and Wells Fargo. Counsel for WFHM again requested that the
16 Default Judgment be set aside, but agreed to participate in joint
17 mediation. On April 11, 2011, counsel for WFHM requested that
18 counsel for Trustee stipulate to extend the time for WFHM to
19 bring a motion to set aside the default while settlement
20 discussions continued. The Trustee refused. WFHM moved for
21 the Default Judgment to be vacated based on excusable neglect.

22 This Court has the discretion to set aside a Default
23 Judgment under Federal Rules of Civil Procedure 55 and 60.
24 Rule 60(b) states that the Court may relieve a party from a
25 final judgment based on "mistake, inadvertence, surprise, or
26 excusable neglect." FED. R. CIV. P. 60(b)(1). While the Court

1 has discretion in vacating a default judgment, cases should,
2 whenever possible, be decided on the merits. TCI Group Life Ins.
3 Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001) (quoting
4 Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984)). Where a
5 party seeks timely relief and has a meritorious defense, any
6 doubt should be resolved in favor of the motion to set aside
7 the Default Judgment. In re Hammer, 940 F.2d 524, 525 (9th Cir.
8 1991).

9 There are three factors to be considered when vacating a
10 Default Judgment for reasons of excusable neglect: whether there
11 is a meritorious defense, whether vacating the Default Judgment
12 will prejudice the nonmoving party, and whether culpable conduct
13 led to the default. TCI Group Life Ins. Plan, 244 F.3d at 696.

14 Generally, a liberal standard of excusable neglect is
15 preferred. Pioneer Ins. Servs. Co. V. Brunswick Assocs.,
16 507 U.S. 380, 383 (1993). Neglect should be given its ordinary
17 meaning ("to give little attention or respect"; "to leave undone
18 or unattended to especially through carelessness"). Doing so
19 allows the theory of excusable neglect to "encompass both simple,
20 faultless omissions to act and, more commonly, omissions caused
21 by carelessness." Id. at 388.

22 Along with the factors to be considered under the Federal
23 Rules of Civil Procedure, the conduct or neglect must be
24 considered excusable. The Pioneer Court set out a standard for
25 determining just that, analyzing such additional factors as the
26 reason for the delay, the length of the delay in filing and its

1 potential impact on judicial proceedings, and whether the movant
2 acted in good faith. Id. at 395.

3 For a Default Judgment to be vacated, the moving party must
4 present specific facts which would constitute a defense. This
5 burden is not especially high, and a party must only demonstrate
6 facts or law showing that "a sufficient defense is assertable."
7 In re Stone, 588 F.2d 1316, 1319 n.2 (10th Cir. 1978). Here,
8 WFHM has a potential defense under 11 U.S.C. § 550(b), as the
9 transfers received allegedly were not directly from the debtor.

10 To be prejudicial, the setting aside of a Default Judgment
11 must "result in greater harm than simply delaying resolution of
12 the case." TCI Group Life. Ins. Plan, 244 F.3d at 701. Rather,
13 the delay must result in some form of tangible harm (e.g. loss of
14 evidence, increased difficulty of discovery, greater opportunity
15 for fraud, etc.). Thompson v. American Home Assurance, 95 F.3d
16 429, 433-44 (6th Cir. 1996). A party being forced to litigate on
17 the merits of the case is not considered prejudiced for the
18 purposes of vacating a Default Judgment.

19 There would be no prejudice to the nonmoving party here.
20 On October 21, 2010, counsel for the Trustee suggested combining
21 WFHM issues into the mediation with Wells Fargo. This indicates
22 that the nearly year-long delay in filing has not stopped the
23 parties from engaging in settlement discussions. Rather, the
24 only potential prejudice would be the litigation cost of deciding
25 the matter on the merits. As previously stated, being forced to
26 litigate on the merits is not prejudice to the nonmoving party.

1 Culpable conduct as a factor of Fed. R. Civ. P. 60(b)(1) and
2 the reason for delay as a factor of excusable neglect must both
3 be considered in the context of Pioneer's lenient standard of
4 neglect, allowing simple, faultless omissions to act as well as
5 omissions caused by carelessness. In this context, for conduct
6 to be considered culpable it must be "willful, deliberate, or
7 evidence of bad faith." TCI Group Life Ins. Plan, 244 F.3d at
8 696. A moving party's conduct, under the Pioneer standard, is
9 considered culpable where there is no explanation for the Default
10 Judgment inconsistent with a devious, deliberate, willful, or bad
11 faith failure to respond. See, e.g., Kingvision Pay-Per-View
12 Ltd. v. Lake Alice Bar, 168 F.3d 347, 350 (9th Cir. 1999)
13 (defendant bar owners filed false affidavits claiming they had
14 not been served); Pena v. Seguros La Comercial, 770 F.2d 811, 815
15 (9th Cir. 1985) (defendant insurer had an incorrect address,
16 thereby precluding service of process); Benny v. Pipes, 799 F.2d
17 489, 494 (9th Cir. 1986) (defendants' failure to answer complaint
18 was culpable when defendants had first filed motions to extend
19 their time to answer, indicating an ability to deal with legal
20 requirements).

21 WFHM's conduct may be considered culpable. Although the
22 failure to respond to the Complaint was not willful or
23 deliberate, as required by the lenient Pioneer standard of
24 neglect, large companies are often held to a higher standard
25 regarding the workings of their internal organizational
26 structure. Bankruptcy law demands that companies must

1 have in place procedures to ensure that formal
2 bankruptcy notices sent to an internally improper, but
3 otherwise valid corporate address are forwarded in a
4 prompt and timely manner to the correct
5 person/department. As a consequence, [a] . . . defense
6 that its . . . [actions] . . . were merely the result
7 of a flaw in its internal organizational structure --
8 the argument that the right hand does not know what the
9 left hand is doing -- falls on deaf ears.

6 In re Baker, 321 B.R. 864, 868 (Bankr. N.D. Ohio 2004) (quoting
7 In re Perviz, 302 B.R. 357 (N.D. Ohio 2003) ("A creditor's
8 election to operate through a complex system of distant agents
9 must be responsible for consequences of breakdowns in that
10 system")). Large companies should not be permitted to use their
11 size and complexity as a shield against litigation. In re Baker,
12 321 B.R. at 868.

13 Also to be considered is the length of delay in filing.
14 FRCP 60(c)(1) requires that a motion to set aside a Default
15 Judgment under Rule 60(b) must be made "within a reasonable time"
16 and "no more than a year after the entry of the judgment."
17 FED. R. CIV. P. 60(c)(1). WFHM first learned of the Default
18 Judgment entered against it in late September 2010, but no motion
19 to set aside the Default Judgment was filed until April 2011.
20 The standard for determining the timeliness of a motion requires
21 a case-by-case analysis. In re Williams, 287 B.R. 787, 792
22 (B.A.P. 9th Cir. 2002).

23 While the filing of the present motion is nearing the one
24 year deadline imposed by Rule 60(c)(1), WFHM informed counsel
25 for the Trustee that their failure to respond was an oversight
26 and requested that the Default Judgment be set aside as early

1 as October 2010, less than a month after first learning of the
2 entry of Default Judgment.

3 No evidence of bad faith in WFHM's conduct has been alleged
4 or presented, nor does it seem that WFHM willfully or
5 deliberately failed to answer the Complaint, or that WFHM would
6 have failed to answer had they realized they were party to a
7 second case. In an analogous case regarding the setting aside of
8 an entry of default, counsel claimed that the second lawsuit was
9 "erroneously believed to be just another copy of the first
10 lawsuit." Hart v. Parks, 2001 U.S. Dist. LEXIS 24331 (C.D. Cal.
11 May 2001). While the court found defendants' counsel to be
12 "sloppy" and "incompetent," there was no evidence of bad faith
13 and the entry of default was set aside. As in Hart, the failure
14 here to answer the Complaint appears to have been an honest
15 mistake, with no evidence of bad faith.

16 The lack of prejudice to the nonmoving party, lack of bad
17 faith, existence of a possible meritorious defense, and the short
18 time between the discovery of the Default Judgment and the
19 notification to Trustee's counsel that the failure to respond was
20 an oversight all weigh heavily towards vacating the Default
21 Judgment against WFHM. While it is possible that WFHM's conduct
22 could be considered culpable, the determination of what
23 constitutes excusable neglect is an equitable one, "taking
24 account of all relevant circumstances," Pioneer Inv. Servs. Co.,
25 507 U.S. at 395, rather than focusing on one determinative
26 factor.

1 For the aforementioned reasons, the Default Judgment entered
2 against Wells Fargo Home Mortgage, Inc. shall be, and hereby is
3 vacated.

4 IT IS SO ORDERED.

5 DATED: JUN 29 2011

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8 PETER W. BOWIE, Chief Judge
9 United States Bankruptcy Court
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