

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

O'MARA MOVING SYSTEMS, INC.,

Plaintiff,

v.

MED-FIT SYSTEMS, INC.,

Defendant.

OPINION & ORDER

13-cv-238-wmc

Yesterday the court received plaintiff O'Mara Moving Systems, Inc.'s motion to convert today's hearing on its motion for default judgment to a scheduling conference. (Dkt. #23.) That motion was granted, although the motion to set aside default judgment (dkt. #13) that apparently prompted plaintiff's motion was not. (Dkt. #24.) On the contrary, the papers submitted by defendant Med-Fit Systems, Inc. confirm on their face not only that default was properly entered by the clerk on July 12, 2013, but that there is no good cause to vacate the default. Indeed, even taking at face value all of the excuses provided in multiple affidavits by defendant, the "dog ate my homework" (not just once but three times), the quality of that motion reads hollow. In any event, the affidavit submitted by Med-Fit's Corporate Secretary Alex Sbragia (a/k/a Alex Abrego Marquez) establishes that service of the summons and complaint *was* accomplished by June 13, 2013, as represented in plaintiff's original motion for default. The court finds reopening the question of default on liability would work an injustice against plaintiff. The purpose of this short opinion and order is to memorialize in greater detail the reasons for the court's denial of defendant's motion to vacate the entry of default, as well as to set forth in writing the deadlines established by the court at today's scheduling conference.

BACKGROUND

Med-Fit's California counsel, William Reavey, acknowledges by affidavit that he began "extended settlement negotiations with O'Mara's Wisconsin counsel, Barrett Van Sicklen, on or about February 5, 2013, and continued until March 20, 2013." (Affidavit of William A. Reavey (dkt. #15) ¶ 4.) On March 20, Reavey avers that Van Sicklen sent him an e-mail acknowledging receipt of "the settlement offer that [he] had sent him on behalf [of] Med-Fit, along with a 3-ring binder containing 200+ emails between Med-Fit's employees and plaintiff's employees." (*Id.*) According to Reavey's sworn affidavit, which the court accepts on face value for purposes of Med-Fit's motion, he never heard directly from Attorney Van Sicklen again until after entry of default. Nevertheless, Reavey does acknowledge receipt of a copy of the summons and complaint from Med-Fit in late June of 2013, at which time he "made a routine check of the court's electronic docket in order [to] check on the status of the case," representing that he somehow confirmed online that the complaint had been filed on April 18, 2013, "but the Summons had not been served."¹ (*Id.* at ¶ 3.) In the first of "the dog ate my homework" excuses, the court will also accept on face value Attorney Reavey's extraordinary representation that electrical service to his office was "temporarily disrupted by a local electrical outage that affected most of the buildings in [the office's] vicinity, causing the computer server serving [his] office to completely fail" on or about June 27, 2013, *and* that full computer service was not again achieved until mid-July 2013. (*Id.* at ¶ 3.) (Reavey neither avers nor explains how this catastrophic failure also

¹ The court assumes Reavey means that proof of service had not yet been filed not a motion for default yet pursued, though neither should have caused Reavey *any* assurance that his client had not been served.

denied Reavey all internet access until mid-July including the ability to check the court's electronic docket but the court will assume that as well for the purposes of Med-Fit's motion.) About the same time, Mr. Reavey also acknowledges receiving from Mr. Van Sicklen a copy of the court's order entering default against Med-Fit on July 17, 2013. (*Id.*)

Between April 24 and May 15, 2013, O'Mara's process server, Douglas Randall, attempted service on Med-Fit's CEO "Brian" Sbragia at: (1) Med-Fit's Fallbrook, California office on four occasions and (2) Sbragia's Fallbrook residence on five occasions. (Pl.'s Aff. of Service (dkt. #3).) Mr. Randall's notes also reflect that he spoke with a "Sean Smith, CFO" on three occasions.

Dean Sbragia, the CEO of Med-Fit and its "registered agent" for service of process, avers that he (1) was unaware of anyone attempting to serve him personally during this period; (2) has never used the name "Brian Sbragia"; and (3) understands "on or about June 13, 2013," the summons and complaint was "allegedly left at the unattended desk of Med-Fit's office support person Janai Stouffer," who was "not in the office on that date." (Affidavit of Dean Sbragia ("Dean Sbragia Aff.") (dkt. #21) ¶¶ 3-5.) Michael Sean Smith, Med-Fit's COO, avers that he also never spoke to the process server and that he was out of state on two of the purported conversations and out of the city on the third. (Affidavit of Michael Sean Smith (dkt. #22) ¶¶ 2, 11.)

Fortunately, there appears to be a consensus that the process server, Douglas Randall, *was in fact* at Med-Fit's offices on June 13, 2013, seeking to accomplish service. Randall indicates that on that date he "sub-served to Alex Abrego, Person in Charge." (Pl.'s Aff. of Service (dkt. #3).) In her affidavit, Alex Sbragia acknowledges that (1) her maiden name is Alex Abrego Marquez and she occasionally uses Alex Abrego; and (2) "a person,

who she assumes to have been Mr. Randall, entered Med-Fit's building on that date without being invited in or introducing himself." (Affidavit of Alex Sbragia (dkt. #20) ¶¶ 2, 3.) Ms. Sbragia goes on to aver as follows:

Mr. Randall asked for Sean Smith and I told him that Mr. Smith was not in the office. Mr. Randall then asked me if I was authorized to accept legal papers for Med-Fit and wanted me to sign the paperwork. I said that I worked in the sales for Med-Fit Medical Division and was not authorized to accept any legal papers on behalf of the company or employees of the company. I also said that the only person authorized to accept the legal papers was the company's agent for service of process.

(*Id.*) Ms. Sbragia denies that Randall handed her the paperwork, but admits that he ultimately "put the paperwork on an empty desk near the entry door." (*Id.* at ¶ 4.)

OPINION

After Attorney Reavey was served by mail with the motion for default judgment on July 18, 2013, Med-Fit claims in its brief to have worked "diligently" to obtain local counsel, file an answer and move to set aside the default. (Def.'s Br. (dkt. #14) 3.) Despite this, Med-Fit did not file its motion to set aside default until the day before the scheduled hearing on the motion for default judgment. Fortunately, for purposes of resolving the motion to set aside default, the court need not try to unravel the many inconsistencies and representations by the process server and various officers of Med-Fit. This is because the statement of information filed with the Office of the Secretary of State for California and attached as Exhibit A to CEO Dean Sbragia's affidavit, establishes that Alex Sbragia is Med-Fit's Corporate Secretary and an officer of the company. (Dean Sbragia Aff., Ex. A (dkt. #21-1).) Contrary to the representation she made to the process server, this means she was *as a matter of law* authorized to accept service under Fed. R. Civ. P. 4(h)(1)(B), as well as

under California law, *see* Cal. Civ. Pro. § 416.10(b), which Fed. R. Civ. P. 4(e)(1) instructs is an independent way to accomplish service on a corporation.²

This leaves only the averment by Med-Fit's Secretary that the process server did not actually, formally hand her the summons and complaint on June 13, 2013, but rather left it at an empty work station. Even if we accept that at face value, no doubt this was because Ms. Sbragia refused to accept service and the process server was forced to set it down before leaving. This is still effective service on Ms. Sbragia and, as an officer of Med-Fit, on the corporation as well.

Even if this were not sufficient, Fed. R. Civ. P. 4(e)(1) allows not only for service under the state law where made, in this case California, but also "where the district court is located." Under Wisconsin law, service can also be accomplished by leaving a copy of the summons in the office of an "officer, director, managing agent with the person who is apparently in charge of the office." Wis. Stat. § 801.11. Again, Ms. Sbragia fits this description even if she refused to accept, touch or (as she also avers) even look at the summons and complaint.

Having found effective service was accomplished at least by June 13, 2013, there is no excuse and certainly no showing of good cause for Med-Fit to have waited until after entry of default on July 15, must less the *last* day before the hearing on plaintiff's motion for default judgment to suddenly appear with a convoluted set of affidavits trying to explain the unexplainable. Taking only the affidavits filed on behalf of Med-Fit, it is clear to the court that defendant's officers intentionally ignored or recklessly disregarded evidence of a lawsuit

² For purposes of this motion, the court assumes that Ms. Sbragia was stating the company's policy regarding accepting process. All the same, she was mistaken as to the legal consequence of service on her.

proceeding here in the Western District of Wisconsin until the last possible moment for no other purpose than to delay the disposition of this lawsuit. That is not conduct this court will countenance. Accordingly, the court's earlier entry of default will stand.

ORDER

IT IS ORDERED that:

- 1) defendant's motion to set aside default judgment (dkt. #13) is DENIED;
- 2) plaintiff may file not later than August 28, 2013, any affidavits or other evidence it may wish to make a part of the record in response to defendant's motion to set aside default;
- 3) following receipt of those materials, not later than September 4, 2013, defendant has leave to file a motion to reconsider the court's denial of its motion to set aside default judgment;
- 4) an evidentiary hearing on damages is set for Thursday, October 17, 2013, at 9:00 a.m. In advance of that hearing, the court sets forth the following deadlines and guidelines on pre-trial submissions:
 - a) counsel are expected to cooperate on any discovery necessary;
 - b) on or before October 7, 2013, the parties shall file any motions in limine;
 - c) on or before October 10, 2013, the parties shall file responses to motions in limine and a trial brief, if any; and
 - d) on or before October 16, 2013, the parties shall file an exhibit list and a witness list, with the witnesses listed in the order to be called.

Entered this 21st day of August, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge