UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant v. Dubois Farms, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100179.

ORDER DENYING DEFAULT JUDGMENT
(August 29, 1990)

Having been served on June 14, 1990 with the Complaint in this case, Respondent was obligated to answer not later than July 16, 1990. 28 C.F.R. §§ 68.7(a), 68.8(a), 54 Fed. Reg. 48593 et seq., Nov. 24, 1989, to be codified at 28 C.F.R. Part 68. No answer having been filed by that date, by motion filed July 25, 1990 Complainant moved for default against Respondent for its failure to timely answer the Complaint.

On July 27, 1990 I issued an Order To Show Cause Why Judgment By Default Should Not Issue, to allow Respondent, by motion, to show cause why default should not be entered against it. Any such filing was to explain Respondent's failure to have timely answered the Complaint and also to include a proposed answer.

On July 31, 1990 Respondent filed an Answer to the Complaint accompanied by its Reply To Motion For Summary Judgment Upon Default. On August 1, 1990 Respondent filed a Motion To Accept Reply To Motion For Summary Judgment Upon Defendant [sic] And To Accept Respondent's Answer To Administrative Complaint And Affirmative Defenses. Respondent also filed a Memo And Citations In Support Of Respondent's Motion In Response To Order To Show Cause. On August 8, 1990 Complainant filed a Memorandum of Law in support of its motion.

The Rules of Practice and Procedure of this Office (Rules) make clear that the administrative law judge may enter a judgment by default where respondent fails to file an answer within the time provided. 28 C.F.R. § 68.8. Whether or not to enter a default judgment is within the discretion of the administrative law judge.

Although our Rules are silent as to what factors should be considered in determining whether or not default judgment is warranted in a particular case, both the Federal Rules of Civil Proce-

dure (FRCP)[1] and the precedents in the Office of the Chief Administrative Hearing Officer (OCAHO) provide guidance. Rule 55(c) of the FRCP states that ``[F]or good cause shown the court may set aside an entry of default . . . .'' Fed. R. Civ. P. 55(c); E.E.O.C. v. Mike Smith Pontiac, 896 F.2d 524, 527-28 (11th Cir. 1990); U.S. v. Shine Auto Service [Shine II], OCAHO Case No. 89100180 (Oct. 11, 1989), aff'd by CAHO (Nov. 8, 1989) at 4.

On review of a denial of default, the CAHO has held that as a condition precedent to allowing a respondent to file a late answer upon motion for default, the administrative law judge must find good cause for failure to file a timely answer. U.S. v. Shine Auto Service, [Shine I] OCAHO Case No. 89100180 (June 16, 1989) (Order Denying Default); vacated by CAHO (July 14, 1989) at 3. IRCA practice, consistent with the FRCP, requires that good cause be found before a late answer will be accepted in the face of a timely motion for default judgment.[2]

Complainant's reliance on OCAHO precedents in which defaults were entered overlooks the seriousness of failure in those cases to file timely answers in contrast to the instant case. See U.S. v. Nu Line Fashions, Inc., OCAHO Case No. 89100566 (March 30, 1990) (basing default, pursuant to 28 C.F.R. § 68.35(c), on respondent's failure to respond to a pretrial order, treating it as a failure to appear for hearing); U.S. v. Martinez Cleaning Co., OCAHO Case No. 89100370 (Jan. 4, 1990) (granting respondent's leave to file a late answer and denying motion for default judgment where respondent filed motion for leave to file late answer more than one month after answer was due, the ALJ issued an order to show cause and then found no prejudice to complainant); U.S. v. Harrold, OCAHO Case No. 89100470 (Dec. 14, 1989) (granting default where respondent failed to timely answer despite having been granted an extension of time to answer and after repeated warnings that default could be entered); U.S. v. Salido, OCAHO Case No. 89100023

[1]Title 28 C.F.R. § 68.1 provides that the FRCP ``shall be used as a general guideline in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation.''

[2]The Fed. R. Civ. P. 55(c) analog to cases before administrative law judges is understood to premise relief from entry of default by the clerk of court, a ministerial act, for ``good cause shown.'' The more stringent standard of ``excusable neglect'' relied on in part by Complainant is used only in the setting aside by the court of a judgment of default, a standard not applicable here. Fed. R. Civ. P. 60(b); Mike Smith Pontiac, 896 F.2d at 528; Meehan v. Snow, 652 F.2d. 274, 276 (2d Cir. 1981). I understand Shine I to be to the same effect, i.e., that in the face of a motion for default where an untimely answer lacks a showing of good cause, the judge may not entertain the late-filed answer without utilizing a show cause procedure. The Shine I paradigm is not reached where the judge finds good cause shown on the pleadings.

(August 8, 1989) (finding default appropriate where respondent failed to answer the complaint or to respond to the order to show cause); U.S. v. Dolphin Auto Beauty Salon, OCAHO Case No. 88100137 (January 25, 1989) (issuing default where respondent moved for leave to file answer but failed to file an answer).

The federal court cases Respondent cites are also distinguishable in that they involve situations where there were numerous or egregious violations of pretrial orders or deadlines. See Chrysler Credit Corp. v. Mancino, 710 F.2d 363 (7th Cir. 1983) (failure to file answer for over two months after defendant had been granted an extension); Dolphin Plumbing Co. of Florida v. Financial Corp. of North America, 508 F.2d 1326 (5th Cir. 1975) (defendant disobeyed pretrial orders and did not respond to the complaint until after final hearing and entry of a default judgment); Gulf Oil Corp. v. Bill's Farm Center, Inc., 449 F.2d 778 (8th Cir. 1971) (failure to comply with pretrial orders and discovery); System Industries, Inc. v. Han, 105 F.R.D. 72 (E.D. Pa. 1985) (no answer three months after complaint served); Titus v. Smith, 51 F.R.D. 224 (E.D. Pa. 1970) (motion to set aside default filed one year and 10 months after default entered, despite numerous attempts by plaintiff to contact defendant); Canup v. Mississippi Valley Barge Line Co., 31 F.R.D. 282 (W.D. Pa. 1962) (``constant and flagrant violations of our rules.''); Residential Reroofing Union Local 30-B v. Mezzico, 55 F.R.D. 516 (E.D. Pa. 1972) (motion to set aside default filed two months after default entered, after defendant repeatedly ignored prior notices).

In the present case, there is neither a total failure to answer the Complaint nor are these such egregious circumstances as to mandate a default judgment. Here, where an answer was due by July 16, 1990, Complainant moved on July 23 for default. On July 31, 1990 Respondent filed an Answer with accompanying Reply to Complainant's motion for default, such motion received by Respondent's counsel on July 30. On August 1, one day after Respondent filed its Answer, Respondent filed its Motion to accept its reply to Complainant's motion and Answer dated July 31 in response to the Order to Show Cause.

Unlike the OCAHO cases cited by Complainant, Dubois Farms has filed its Answer, provided a reasonable and prompt explanation for its untimeliness, and has moved that I accept both to prevent the issuance of a default judgment. Respondent has not violated any pretrial orders other than its failure to answer the Complaint in the required time period. The judge is obliged to enforce compliance with regulatory deadlines in the efficient and sound dispatch of the tribunal's business. In determining whether or not to issue a default judgment under the good cause standard set out

in FRCP 55(c), however, the judge must also consider whether the default was willful, whether the party in default has presented a meritorious defense, and whether the party seeking default has been prejudiced. Sony Corp. v. Elm State Electronics, Inc., 800 F.2d 317, 320 (2d Circ. 1986); Marziliano v. Heckler, 728 F.2d 151, 156 (2d Cir. 1984); Meehan, 652 F.2d at 277.

In its Reply to the motion for default, counsel for Respondent states that failure to timely answer the Complaint was due to the fact that the Notice of Hearing and Complaint had been inadvertently filed by his staff before he had seen them and ``without the matter ever having been docketed or `tickled' as per office policy.'' Reply at 1. Counsel contends further that he ``was unaware that a document requiring action by the Respondent's counsel had been received . . . [or] that such document had ever been filed,'' until he received Complainant's motion for default. Id. at 1-2.

Respondent has not demonstrated any willful misbehavior, such as refusing to answer or ignoring the complaint or any other pretrial orders. Willfulness has been found where such actions are intentional, knowing, or voluntary, but do not exist here. See, e.g., Marziliano, 728 F.2d at 156 (defendant failed to notify court of stipulation with plaintiff regarding the time to respond to plaintiff's motion for attorney's fees); Residential Reroofing Union Local 30-B, 55 F.R.D. 516 (defendant repeatedly ignored notices and refused to comply with order to pay award to plaintiffs); Titus v. Smith, 51 F.R.D. 224 (defendant failed to act for one year and 10 months in spite of numerous attempts by the plaintiff to contact him).

In addition, I find that Respondent has presented meritorious defenses, i.e., supported by underlying facts, Sony Corp., 800 F.2d at 320-21, which, if established at trial, would constitute a complete defense to the action. U.S. v. $55,518.05 in United States Currency, 728 F.2d 192, 195 (3d Cir. 1984); U.S. v. Properties Described in Complaints, 612 F. Supp. 465, 469 (D.C. Ga. 1984). Rather than merely denying the allegations in the Complaint, Respondent has alleged specific facts which, if proven, might reasonably be expected to relieve it of liability.

As to the final factor to be considered on evaluating a potential default, I do not find prejudice to Complainant sufficient to permit a default judgment. The only case Complainant cites on this point, Residential Reroofing, 55 F.R.D. 516, involved a situation where the defendant had a history of ignoring all notices and refusing to accept certified mail from plaintiff's attorneys. The court found an ``utter and hostile disregard for judicial proceedings'' in addition to

stating that the defenses presented were merely conclusionary and failed to set forth any factual basis.

The facts here are quite to the contrary. I do not find creditable Complainant's suggestion that it is prejudiced when a complaint is answered two weeks late, delaying its discovery initiatives. The claim that delay of a year between the service of the underlying Notice of Intent to Fine, on January 7, 1990, and likely trial dates turns in any significant way on the lateness of the Answer is no reason to reject Respondent's proffer. Relationships between the parties prior to filing the Complaint is irrelevant to any issue before the judge. Complainant's effort before me would have been better served had the record shown that its counsel had made some effort to contact Respondent in the interim, and not initiate this motion practice five business days after the answer was due.[3]In fact, the prejudice Respondent would suffer should default issue by depriving it of its right to have its case heard on the merits would clearly be much greater than the inconvenience Complainant may experience from denial of its motion for default.

Defaults are generally not favored; doubts are to be resolved in favor of trial of the merits. $55,518.05, 728 F.2d at 194; Inryco, Inc. v. Metropolitan Engineering Co., Inc., 708 F. 2d 1225, 1230 (7th Cir. 1983), cert. denied, 464 U.S. 937 (1983); Residential Reroofing Union Local 30-B, 55 F.R.D. 516; Meehan, 652 F.2d at 277; Frank Keevan & Son, Inc. v. Callier Steel Pipe & Tube, 107 F.R.D. 665 (S.D.Fla. 1985). Under the FRCP courts enforce compliance with time limits by various means, acknowledging, however, that the extreme sanction of default judgment is one of last, rather than first, resort. Meehan, at 277. Preference for a hearing on the merits is also reflected in OCAHO cases. See, e.g., Martinez Cleaning Co.; Shine II; U.S. v. Tiki Pools, Inc., OCAHO Case No. 89100250 (August 1, 1989).

Complainant points out that on review of U.S. v. Koamerican Trading Corp., OCAHO Case No. 89100092 (May 19, 1989) (Order Granting Motion for Leave to File an Answer and Denying Motion for Order of Default), vacated by CAHO (June 19, 1989), the Acting CAHO rejected respondent's rationale for late filing, i.e., that the complaint was not served upon respondent personally, as being a legally sufficient reason for failure to file a timely answer. I note that although in Koamerican I questioned the failure to serve the

[3]The Fed. R. Civ. P. 55(c) analog to cases before administrative law judges is understood to premise relief from entry of default by the clerk of court, a ministerial act, for ``good cause shown.'' The more stringent standard of ``excusable neglect'' relied on in part by Complainant is used only in the setting aside by the court of a judgment of default, a standard not applicable here. Fed. R. Civ. P. 60(b); Mike Smith Pontiac, 896 F.2d at 528; Meehan v. Snow, 652 F.2d. 274, 276 (2d Cir. 1981). I understand Shine I to be to the same effect, i.e., that in the face of a motion for default where an untimely answer lacks a showing of good cause, the judge may not entertain the late-filed answer without utilizing a show cause procedure. The Shine I paradigm is not reached where the judge finds good cause shown on the pleadings.

complaint directly on the respondent, that consideration is not the basis of the denial in the present case. I do not understand Koamerican to preclude the discretion of the trial judge to determine in a given case whether or not to deny a motion for default and put the moving party to its proof.

I hold and conclude that Respondent has shown the requisite good cause to file a late answer. There is no reason to reject the explanation by Respondent's counsel, the bona fides of which find support in the prompt responses both to Complainant's motion and to the Order by the bench. Moreover, I find Respondent's late filing neither willful, prejudicial to Complainant, nor lacking of meritorious defenses.

I therefore deny Complainant's motion for default judgment, and accept the Answer dated July 30, 1990, filed July 31, 1990. Accordingly, consistent with our usual practice, the parties may expect that my staff will arrange within the next few weeks for a telephonic prehearing conference pursuant to 28 C.F.R. § 68.11.

SO ORDERED.
Dated this 29th day of August, 1990.

MARVIN H. MORSE
Administrative Law Judge