UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE:	:	CASE NO. 01-40209
	:	
GREEN BARRY SANDLIN aka GREEN BARRY SANDLIN, JR.	:	CHAPTER 7
	:	ADVERSARY PROCEEDING
Debtor.	:	NO. 00-4016
	:	
MICHAEL P. CIELINSKI, TRUSTEE,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
GREEN BARRY SANDLIN, SR.	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

On August 13, 2001, the court held a preliminary pre-trial conference on the complaint of Trustee Michael P. Cielinski ("Trustee"). At the pre-trial conference, the court also held a hearing on the motion of Defendant Barry Green Sandlin, Sr. ("Defendant") to set aside the entry of default. At the conclusion of the hearing, the court took Defendant's motion under advisement. After considering the parties' oral arguments and the applicable statutory and case law, the court will grant Defendant's motion to set aside the entry of default.

FACTS

On September 8, 1998, Defendant used the proceeds from the sale of his residence to open a certificate of deposit ("CD") account in the amount of $43,000.00. The CD had a three-year term with a maturity date of September 8, 2001. (Compl.,Doc. #1, Exh. "A"). The CD account document provided that the ownership of the CD was "joint - with survivorship. . ."[1] with Defendant's son, Green Barry Sandlin, Jr. (Id.) As further evidenced by the account document, only Defendant signed this document. (Id.) At the hearing, the parties stipulated that Debtor had no ownership interest in the $43,000.00 prior to the opening of the CD account.

On March 10, 2001, Defendant withdrew the funds from the CD and rolled them over into an annuity with Jackson National Insurance Company. (Tr. Of Hr'g, Doc. #18, pp. 13). Defendant testified that he intends to keep the funds in the annuity for at least six years. (Id. at pp. 13, 15).

On January 25, 2001, Defendant's son, Barry Green Sandlin, Jr. ("Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code. On May 14, 2001, Trustee filed his complaint

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[1] Pursuant to the Terms and Conditions of the account, a "Joint Account - With Survivorship (And Not As Tenants in Common) - is owned by two or more persons. Each of you intend that upon your death the balance in the account (subject to any previous pledge to which we have consented) will belong to the survivor(s). If two or more of you survive, you will own the balance in the account as joint tenants with survivorship and not as tenants as common." (Exh. "A").

for turnover of funds. Because Debtor was a joint owner of the CD at the time he filed his petition, Trustee contends that Debtor possessed a one-half interest in the CD. Therefore, Trustee asserts that this one-half interest in the account is property of the estate. Trustee also seeks injunctive relief to prohibit Defendant from using or dissipating funds which Trustee alleges are estate property.

On May 24, 2001, the court held a hearing on the temporary injunction portion of the complaint. The court entered an order restraining Defendant from using the funds withdrawn from the CD account on March 10, 2001 until the court rules on the ownership of the funds. (Doc. #7). Also, because Defendant was proceeding *pro se*, the court instructed Defendant that he would need to file an answer to the complaint and serve it upon Trustee no later than June 21, 2001.

However, in spite of the court's instruction, Defendant failed to file his answer timely. On July 5, 2001, Trustee filed his motion for an entry of default. On July 6, 2001, the clerk's entry of default was filed. (Doc. #13). On July 9, 2001, Defendant, through counsel, filed his answer and motion to set aside the entry of default. (Doc. #14).

On August 13, 2001, the court conducted a preliminary pre-trial conference. At this conference, the court heard from both parties on Defendant's motion to set aside the entry of default.

Defendant contends that he did not know that he had to file an answer. He maintains that he understood the summons as requiring him only to appear at preliminary injunction hearing. Defendant further argues that he has an absolute defense to Trustee's complaint.

Trustee, however, rejects Defendant's argument that he did not know that he needed to file an answer. In addition to the detailed instructions by the court, Trustee relies on a letter that Defendant received from Debtor's attorney instructing Defendant that he needed to file an answer before the deadline. (August 13, 2001 hrg., Pl.'s Exh. 3).

DISCUSSION

Setting aside an entry of default is governed by Federal Rule of Civil Procedure 55(c) which is made applicable to adversary proceedings in bankruptcy cases by Federal Rule of Bankruptcy Procedure 7055. In order for a court to set aside an entry of default, "good cause" must be shown. FED. R. BANKR. P. 7055; see also EEOC v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524, 527-28 (11th Cir. 1990)(holding that "good cause" is the standard for setting aside an entry of default and "excusable neglect" is the standard employed in setting aside a default judgment). Moreover, the "good cause" standard is less rigorous than the "excusable neglect" standard. See Cielinski v. Kitchen

(In re Tires and Terms of Columbus, Inc.), 262 B.R. 885, 888 (Bankr. M.D. Ga. 2000)(Laney, J.).

The decision to set aside a default is within the sound discretion of the court. See Turner Broadcasting System, Inc. v. Sanyo Electric, Inc., 33 B.R. 996, 1001 (N.D. Ga. 1983), aff'd sub nom. Turner Broadcasting System, Inc. v. Rubin, 742 F.2d 1465 (11th Cir. 1984). However, defaults are not generally favored because of the strong policy of deciding cases on their merits. See Gulf Coast Fans, Inc. v. Midwest Electronics Importers, Inc., 740 F.2d 1499 (11th Cir. 1984). Therefore, "as a general rule, any doubts should be resolved in favor of permitting a hearing on the merits." Rasmussen v. Hutton, 68 F.R.D. 231, 233 (N.D. Ga. 1975)(citing Davis v. Parkhill-Goodloe Co., 302 F.2d 489, 495 (5th Cir. 1962). When a court refuses to set aside a default which precludes consideration of the merits of a case, "'even a slight abuse [of discretion] may justify reversal.'" Bavely v. Powell (In re Baskett), 219 B.R. 754, 757 (B.A.P. 6th Cir. 1998)(alteration in original)(quoting Williams v. New Orleans Public Serv., Inc., 728 F.2d 730, 733-34 (5th Cir. 1984). In the case where the defaulting party is appearing *pro se*, the court should freely grant leave to set aside the entry of default. See Fleet Factors Corp. v. Roth (In re Roth), 172 B.R. 777, 780 (Bankr. S.D.N.Y. 1994).

Although the court has discretion in determining whether

"good cause" exists, courts in this circuit have developed a four prong test:

> (1) whether the defaulting party took prompt action to vacate the default;
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> (2) whether the defaulting party provided a plausible excuse for the default;
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> (3) whether the defaulting party presented a meritorious defense; and
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> (4) whether the party not in default will be prejudiced if the default is set aside.

Turner, 33 B.R. at 1001.

Under the first factor, a party in default "need only to act to set aside the default within a reasonable time after the entry of default." In re Tires and Terms, 262 B.R. at 888 (citing Rogers v. Allied Media, Inc. (In re Rogers), 160 B.R. 249, 252 (Bankr. N.D. Ga. 1993)). Furthermore, a court's refusal to set aside an entry of default based solely on an untimely response in the case of a *pro se* litigant constitutes an abuse of discretion. See Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993). In the case before the court, the clerk entered the default on Friday, July 6, 2001. On Monday, July 9, 2001, Defendant filed his answer and motion to set aside the entry of default. Given the fact that Defendant moved to set aside the default within three days, two of which were the weekend, the court finds that Defendant acted promptly.

As to the second factor, the court must consider the

possible culpable conduct of the party in default. See American Express Travel Related Services, Inc. v. Jawish (In re Jawish), 260 B.R. 564, 568 (Bankr. M.D. Ga. 2000)(Walker, J.); In re Rogers at 253. At the hearing on May 24, 2001, the court told Defendant that he needed to file an answer by June 21, 2001. Because Defendant was proceeding *pro se*, the court gave Defendant detailed instructions on how to draft the answer – i.e., that he would need to admit or deny each numbered paragraph of the complaint. Furthermore, in a letter dated June 4, 2001, Debtor's attorney instructed Defendant that he had "a deadline in filing an answer." (Pl.'s Exh 3).

Nevertheless, Defendant failed to file a timely answer. Given the instructions from the court and the Debtor's attorney, the court finds it astounding that Defendant failed to file a timely answer. However, Defendant testified that he did not intend to purposely avoid filing an answer. Based on this testimony, there is a little culpable conduct on the part of Defendant. Consequently, there is conflicting evidence whether Defendant has provided a plausible excuse for his default. Therefore, because of the conflicting evidence and the fact that Defendant was *pro se*, the court must resolve this conflict in favor of Defendant as to this factor. See In re Roth, 172 B.R. at 780; Rasmussen, 68 F.R.D. at 233.

Under the third factor, Defendant must present a meritorious

defense. As this court has previously held, "[g]eneral denials and conclusive statements are insufficient; [Defendant] must present a factual basis for his claim." In re Tires and Terms, 262 B.R. at 889.

At the hearing, Defendant argued that he had an absolute defense to Trustee's complaint. Relying on O.C.G.A. § 7-1-812(a), Defendant asserted that Debtor had no ownership interest in the CD.[2] Defendant also cited the case of Caldwell v. Walraven, 268 Ga. 444, 490 S.E.2d 384 (1997). In Caldwell, the court applied O.C.G.A. § 7-1-812(a) to the ownership of a CD created as a joint account, with right of survivorship. The evidence demonstrated that the appellant who was the co-owner of the CD provided all the funds in creating the CD. Because, there was no "clear and convincing evidence" rebutting the presumption that the appellant did not intend to make an inter vivos gift from the CD proceeds, the court held that the appellant was the owner of the CD. Caldwell, 268 Ga. at 449, 490 S.E.2d at 388.

In the instant case, the court finds that Defendant's submission of the above authority satisfies Defendant's obligation to present a meritorious defense. In fact, based on this authority when applied to the facts of this case, it appears to be established that the Debtor has no ownership interest in

[2] "A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." O.C.G.A. § 7-1-812(a).

the CD. See also Parker v. Kennon, 242 Ga. App. 627, 530 S.E.2d 527 (2000). No evidence has been presented to rebut the statutory presumption.

As to the fourth factor, the court must consider whether setting aside the default will prejudice Trustee. Generally, the threat of prejudice to the party not in default is substantially reduced when a meritorious defense has been established. See Turner, 33 B.R. at 1003. Given the likelihood of Defendant's success on the merits, the court finds that setting aside the default in this case would not prejudice Trustee.

Accordingly, the court finds that "good cause" is present in this case. Although Defendant's excuse for the delay in filing an answer is questionable, the strength of Defendant's meritorious defense outweighs the weakness of his excuse. Therefore, the court will set aside the entry of default.

An order in accordance with this Memorandum Opinion will be entered.

DATED this ____ day of February, 2002.

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JOHN T. LANEY, III
UNITED STATES BANKRUPTCY JUDGE