UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NOELLE LeCANN, KRISTIN SELIMO, and TANIA FUNDUK, on behalf of themselves and others similarly situated, Plaintiffs, v. THE ALIERA COMPANIES, INC., formerly known as ALIERA HEALTHCARE, INC., Defendant.	Civil Action File No. 1:20-cv-2429-AT

PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION TO OPEN DEFAULT

Plaintiffs hereby submit this response to Defendant's Motion to Set Aside Default [Doc. 70], as directed by the Court on October 4, 2021 [Doc. 69].

I. Background

Aliera has consistently disregarded firm deadlines imposed by Court Orders, the Federal Rules of Civil Procedure, and this Court's local rules. Even where it has technically complied with some deadlines, it has done so in a manner that nevertheless evinces an intent to delay proceedings as much as possible and an intentional or at a minimum reckless disregard for the procedures, rules, and deadlines in this Court. When the Court ordered the parties to file a joint

preliminary planning report, undersigned counsel could not get a timely response from defense counsel and so were forced to file a unilateral proposed planning report. *See* [Doc. 50]. The Court ordered the parties to exchange initial disclosures within fourteen days after its order denying Aliera's motion to dismiss—i.e., by July 6, 2021—but Aliera did not serve its initial disclosures until after 8:00 p.m. on July 7, after undersigned counsel inquired that morning whether they still intended to do so. Aliera waited 28 days after the Court's Order denying its motion to file its notice of appeal, *see* [Doc. 58], and it waited another 20 days from that date to file its motion to stay pending appeal. [Doc. 63]. Aliera has never responded to document requests served by Plaintiffs on July 15, 2021, which was after the Court ordered that discovery should commence immediately and before Aliera filed its notice of appeal.

Most significantly for present purposes, after the Court denied Aliera's motion to dismiss on June 22, more than 100 days passed without Aliera filing the answer required by Rule 12(a)(4)(A). Plaintiffs even pointed out that Aliera was in default more than six weeks ago when opposing Aliera's motion for a stay, suggesting that Aliera's appeal was taken for a dilatory purpose:

> Aliera remains in default *to this day* in its responsibility to file an answer, which was due July 6, 2021, 14 days after its motion was denied. *See* Fed. R. Civ. P. 12(a)(4)(A).

[Doc. 65] at p.7 n.1. When Aliera filed its reply brief, it expressly addressed other matters raised in the same footnote, refuting any suggestion that it was not on notice of its default. *See* [Doc. 66] at pp.14–15 n.5. Still, Aliera inexplicably failed to acknowledge that fact or attempt to remedy it.

Plaintiffs suggest the foregoing makes clear that Aliera's default did not result from any clerical error or calendaring oversight. It was willful. It is telling that even now, when asking the Court to excuse its unreasonable delay and open default, Aliera offers ***no explanation*** whatsoever for its failure to file an answer. Nowhere in Aliera's brief does it claim that it did not realize it was in default, assert that the deadline for filing an answer was miscalendared, or offer any other factual explanation for its default. Yet, Aliera still asks the Court to jump to the remarkable and unsupported conclusion that the default "resulted from, at most, negligence on the part of counsel." [Doc. 70] at p.9 (alteration adopted) (quoting *S. Timber Co. v. Ellis*, No. 4:07-cv-215-HLM, 2008 WL 11470727, at *2 (N.D. Ga. Jan. 22, 2008)). Such a finding is wholly unsupported by the record in this case. Default was appropriately entered and should not be opened.

II. Discussion

A. Default Was Appropriately Entered Against Aliera

Aliera's persistent refusal to file an answer was at its own peril. Plaintiffs were well within their rights to move for entry of default against Aliera when more than 100 days passed after the deadline for Aliera to answer without it doing so. Aliera contends that the filing of its motion to dismiss evinced an intention to "otherwise defend" this case such that the entry of default was improper. But Rule 55's reference to "otherwise defend" does not mean that a Defendant who files a timely motion can thereafter ignore all other deadlines imposed by the Federal Rules. Rather, the phrase grants courts the ability to enter default against a defendant who *has* timely answered but who has *otherwise* failed to oppose claims against it, such as by failing to appear at a deposition or trial or dismissing counsel during litigation. *See*, *e.g.*, *City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 129 (2d Cir. 2011) (noting that Rule 55 allows default to be entered "because a defendant failed to file a timely answer" but that "a district court is also empowered to enter a default against a defendant that has failed to 'otherwise defend'") (internal punctuation omitted).[1]

[1] *Clowers Communications, LLC v. SkyCom USA, LLC*, No. 1:14-cv-291-ODE, 2014 WL 12629947 (N.D. Ga. Oct. 7, 2014), does not change this analysis. There, the defendants filed a pre-answer motion to stay the proceedings in their entirety on the same day they were served with

Once Plaintiffs moved for entry of default, the Clerk's Office appropriately entered default, a ministerial act it was bound to do by the mandatory language of Rule 55(a). *See Wilson v. Kelly*, No. 1:18-cv-5014-AT, 2019 WL 5485126, at *1 (N.D. Ga. Apr. 10, 2019); *accord Lakeview Loan Servicing, LLC v. Mobley*, No. 1:16-cv-4572-MHC, 2019 WL 3503733, at *2 (N.D. Ga. Feb. 7, 2019). Indeed, default could have been entered against Aliera even in the absence of a motion by Plaintiffs, as a court "may *sua sponte* direct the Clerk to enter a default as part of the Court's inherent power to manage its docket." *Codigo Music, LLC v. Televisa, S.A., de C.V.*, No. 15-21737-CIV-WILLIAMS, 2015 WL 13754256, at *1 (S.D. Fla. Aug. 3, 2015).

B. Aliera Has Failed to Show Good Cause to Open Default

1. Aliera's Default Resulted from Willful Conduct

Rule 55 provides that default may be set aside for "good cause." FED. R CIV. P. 55(c). The existence *vel non* of "good cause" is frequently determined by reference to numerous factors, including, without limitation, "whether the default was culpable or willful, whether setting aside would prejudice the adversary, . . .

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the summons and complaint. The plaintiff responded to that motion to stay, and then, when the defendants did not file an answer on the date it was due, filed a motion for entry of default on that day. The defendants responded to the motion. There was no evidence of the sort of delay that Aliera is guilty of in this case. The defendant in *Clowers Communications* acted at its first opportunity to prevent the entry of default; here, Aliera has had months to take the actions required of it to prevent the entry of default, but it chose not to, even after Plaintiffs put Aliera on notice that it was in default.

whether the defaulting party presents a meritorious defense," "whether the public interest was implicated, whether there was significant financial loss to the defaulting party, and whether the defaulting party acted promptly to correct the default." *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996). But a defendant cannot guarantee that default will be opened anytime it merely checks some proverbial boxes. As "liberal" as the standard for setting aside default may be, the Eleventh Circuit has cautioned that it is "not so elastic as to be devoid of substance" altogether. *Id.* "Whatever factors are employed, the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of 'good cause' to set aside a default." *Id.* Therefore, "if a party willfully defaults by displaying either an intentional or reckless disregard for the judicial proceedings, the court need make no other findings in denying relief." *Id.*; *see also Glock, Inc. v. Global Guns & Hunting, Inc.*, No. 1:12-cv-136-AT, 2017 WL 4334241, at *4 (N.D. Ga. June 30, 2017) ("[A] finding of willfulness alone permits the Court to decline setting aside the default.").

Here, there is ample evidence showing that Aliera has on numerous occasions acted intentionally, or at a minimum recklessly, to disregard this Court's deadlines, and that its default resulted from such willfulness. It delayed in

conferring on the joint planning report; it failed to serve its initial disclosures within the timeline prescribed by the Court; it waited until the eleventh hour to file its appeal and its motion to stay proceedings in this Court pending appeal; it has treated that motion to stay as self-executing, refusing to respond to Plaintiffs' discovery that was served in July, before the motion to stay was even filed; and despite Plaintiffs pointing out the default in their brief opposing the motion for a stay, Aliera did not even attempt to file its answer until after the Clerk entered default on October 4, some ninety days after the answer was due. The fact that Aliera did file its motion to dismiss makes its utter disregard of this Court's rules no less intentional. If anything, selective compliance with certain deadlines only underscores the willfulness of Aliera's behavior.

In the face of this evidence of intentional conduct, Aliera has not even proffered an explanation for its failure to file an answer. Perhaps Aliera's counsel finds themselves stuck between a rock and a hard place: unable to confess to having made a strategic decision to ignore deadlines, but unwilling to now blatantly misrepresent that intentional choice as mere oversight. Either way, it is axiomatic that a party who has failed to identify any factual "cause" for its default has also failed to show legal "good cause" for opening that default. This is no "technical error" or "slight mistake" by Aliera; its failure to file an answer in an

even remotely timely fashion is just another incidence in Aliera's "pattern of reckless disregard for court rules, court orders, and deadlines." *Grupo Rayco C.A. v. Delta Air Lines, Inc.*, No. 1:20-cv-1952-AT, 2021 WL 1351859, at *5 (N.D. Ga. Mar. 16, 2021); *see also Regent Insur. Co. v. Findlay Roofing & Constr., Inc.*, No. 1:16-cv-2602-RWS, 2017 WL 429415, at *3 (N.D. Ga. Jan. 31, 2017) ("A single instance of administrative error might be overlooked, but making the same mistake twice during the same dispute cannot.").

Aliera cites to Judge Murphy's opinion in *Southern Timber Company v. Ellis*, No. 4:07-cv-215-HLM, 2008 WL 11470727, at *2 (N.D. Ga. Jan. 22, 2008), for the proposition that default is inappropriate where "evidence in the record indicates that the alleged default resulted from, at most, negligence on the part of [a party's] counsel, and not from culpable or willful conduct." In that case, however, the party against whom default was sought "acknowledge[d] that he failed to file an Answer to the Counterclaim in a timely fashion, but state[d] that this failure was 'attributable to a mistake made by counsel for [that party] in transferring the response date noted in his 2007 calendar planner to his 2008 calendar planner.'" *Id.* Aliera has made no such acknowledgement or attribution here. There is no "evidence in the record" to suggest that the default resulted from mere negligence.

Even if there were evidence that mere negligence or oversight caused Aliera to find itself in default, other courts have held that "[n]egligence and oversight is not good cause" sufficient to open default. *Weinstein Grp., Inc. v. O'Neill & Partners, LLC*, No. 1:19-cv-1533-SCJ, 2021 WL 2652331, at *4 (N.D. Ga. May 6, 2021). Particularly when coupled with the other evidence cited above demonstrating Aliera's lack of concern for deadlines, the evidence here shows that the default resulted from an intentional, strategic decision to delay proceedings as much as possible. When faced with consequences for its dilatory actions, Aliera is fully capable of responding to deadlines, as evidenced by its ability to file its motion and proposed answer on the same day the Court ordered it to show cause. There is no reason it could not have filed that same answer months earlier, including as recently as August, when it was unquestionably on notice that it was in default. Aliera chose not to do so, and now it cannot cry foul for being held to the consequences of its decisions.

This case stands in stark contrast with virtually every other case undersigned counsel has located involving a motion to open default, in that there is strong evidence here that the party in default wound up there after willfully ignoring the rules of this Court. *Cf.*, *e.g.*, *Ochoa v. Principal Mut. Ins. Co.*, 144 F.R.D. 418, 420 (N.D. Ga. 1992) ("Although plaintiff did not answer the counterclaim,

plaintiff did not willfully ignore the rules of this court . . . ."); *Bruce v. PharmaCentra, LLC*, 2008 WL 1902090 (N.D. Ga. Apr. 25, 2008) (noting that the defaulting party's "excuse was plausible, as the removal of the action, and, thus, the procedural timeline required for a response changed at the beginning of the holiday season, and his failure to answer appears to be the result of neglect rather than willfulness"); *In re Bailey*, 411 B.R. 492, 496 (S.D. Ga. Bankr. 2009) ("However, if the Plaintiff has shown that Defendant's delay was willful or grossly negligent, that will definitely weigh in favor of denying Defendants motion" to open default.).

This case is instead more akin to *Weinstein Group*, No. 1:19-cv-1533-SCJ, in which Judge Jones entered default judgment against a defendant who had (1) removed a case to federal court from superior court [Doc. 1]; (2) moved to dismiss or transfer the case [Doc. 5]; (3) opposed the plaintiff's motion for jurisdictional discovery [Doc. 10]; (4) twice responded to orders to show cause why default should not be entered against it [Doc. 22 & Doc. 43]; and otherwise evidenced some desire to defend itself against the plaintiff's claims while still failing to comply with numerous court orders pertaining to the requirement that it secure replacement counsel. There, the defendant even offered excuses for failing to comply: it claimed its failure was the result of "inadvertent oversight," that it had "dedicated over two months in an attempt to find replacement counsel and was

unable to find affordable counsel that was willing to represent it," and that the pandemic "imposed logistical hurdles to meeting with potential counsel and negatively impacted Defendant's business." 2021 WL 2652331, at *4 (N.D. Ga. May 6, 2021).

To be clear, although the evidence here would support a finding that Aliera intentionally ignored certain deadlines, such a finding is not necessary to nevertheless categorize Aliera's conduct as willful. "Most failures to follow court orders are not 'willful' in the sense of flaunting an intentional disrespect for the judicial process. However, when a litigant has been given ample opportunity to comply with court orders but fails to effect any compliance, the result may be deemed willful." *Compania Interamericana*, 88 F.3d at 952. Default might be characterized as an "extreme" or "drastic" remedy, but this case involves an extreme and drastic disregard of proceedings by Defendant as well as a "clear record of delay or contumacious conduct." *United States v. Varmado*, 342 F. App'x 437, 441 (11th Cir. 2009).

2. Even if Aliera's Conduct Were Not Willful, It Cannot Satisfy the Factors that Would Make Opening Default Appropriate

Even apart from the willfulness and culpability of Aliera, there are other factors that weigh in favor of denying the motion to set aside default. With respect to the merit of Aliera's defenses, it is not sufficient to offer just "general denials

such as 'an affirmative showing of a defense that is likely to be successful.'" *Glock, Inc.*, 2017 WL 4334241 at *4 (quoting *Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc.*, 803 F.2d 1130, 1133 (11th Cir. 1986)). "The showing of a meritorious defense that is necessary to set aside a default requires more than the bare legal conclusions set forth in defendants' proposed answer." *Breuer Elec. Mfg. Co. v. Toronado Sys. of Am., Inc.*, 687 F.2d 182, 186 (7th Cir. 1982). In denying Aliera's motion to compel arbitration, the Court considered and rejected many of Aliera's defenses, including its arguments that its plans are not "insurance" and are valid HCSMs. Given the deference that the appeals court gives to findings of fact made in connection with an order on a motion to compel arbitration, it cannot be said that Aliera's defenses are likely to prevail here. This is particularly true in light of the "higher burden" that a party faces "once default has been entered than if it filed a timely answer." *Grupo Rayco*, 2021 WL 1351859, at *4.

There is also a likelihood that Plaintiffs will suffer prejudice from setting aside the default. *See Glock, Inc.*, 2017 WL 4334241 at *5 ("A party only must demonstrate the likelihood it would suffer prejudice if the default is set aside."). The prejudice need not be "particularly pronounced," so long as it exists in some form. *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1297 (11th Cir. 2003). Aliera's disregard of numerous deadlines in this case, including its disregard of the

deadline to file an answer after its motion to compel was denied, has already prejudiced Plaintiffs by causing Plaintiffs' counsel to spend time addressing Aliera's dilatory behavior, depriving Plaintiffs' counsel of discovery responses to which they are unquestionably entitled. Aliera has also failed to come forward with evidence of a meritorious defense, further prejudicing Plaintiffs. *Grupo Rayco*, 2021 WL 1351859 at *6; *see also G&G Closed Circuit Events, LLC v. IceBar Atlanta, LLC*, No. 1:19-cv-1639-LMM, 2020 WL 10142208, at *4 (N.D. Ga. Oct. 28, 2020) (finding arguable prejudice to plaintiffs where the plaintiffs had previously consented to the set aside of an earlier default and in the intervening time had "expended resources attempting to move forward with the case despite Defendants' eventual unresponsiveness and failure to articulate a meritorious defense"). Aliera, meanwhile, has suffered no consequences for its behavior, despite all evidence tending to show that it is intentional or at a minimum reckless.

Although Aliera unquestionably acted promptly in moving to set aside default, that, again, only underscores its ability to act expeditiously when it wants to. More importantly, in the absence of good cause, this factor loses its importance. "[P]romptness in response alone is not enough to set aside a default as the defendant must make a further showing of good cause to excuse its failure to timely answer the complaint." *Grupo Rayco*, 2021 WL 1351859 at *6.

C. Aliera's Mistaken Belief That None of This Matters

One sentence in Aliera's brief provides key insight into Aliera's thought process about all proceedings before this Court since June 22. Despite not being able to satisfy the legal standards for overturning this Court's well-reasoned decision on appeal, Aliera believes that there is no sense paying attention to these proceedings in light of the appeal: "If the Eleventh Circuit disagrees with this Court's order denying Aliera's Motion to Dismiss or Compel Arbitration, then all on-going proceedings in this Court while the appeal is pending—including any Answer served by Aliera—would have been for naught." [Doc. 70] at p.10. Even if Aliera were correct, that would provide no excuse for Aliera's disregard of these proceedings, but here, Aliera is wrong.

This Court has already "separately and specifically [found] that Plaintiff Selimo is not required to arbitrate any of her claims based on Aliera's conduct while she was a Trinity member from November 15, 2019 to May 14, 2020 because Aliera has presented no evidence that the operative member guide contract for that timeframe includes any alleged agreement to arbitrate at all." [Doc. 49] at p.82. Aliera glosses over this critical finding in the Court's June 22 Order in an attempt to cast all of Plaintiffs' claims in the same light, despite this distinction. Every day that Aliera delays Plaintiffs' ability to pursue Selimo's claims and conduct

discovery relevant to those claims and to class certification, Plaintiffs suffer prejudice.

III. Conclusion

Aliera ignored Rule 12's deadline for filing an answer at its own peril, and now it is stuck with the consequences of that decision because it cannot satisfy Rule 55(c)'s standard for setting aside default. Aliera's motion to open default should be denied.

Submitted this 7th day of October, 2021.

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CERTIFICATE OF SERVICE

I certify that on the date below, I served a true and correct copy of PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO OPEN DEFAULT on Defendant by filing it using the Court's Case Management and Electronic Case Filing (CM/ECF) system, which will automatically serve all counsel of record.

This 7th day of October, 2021.

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