

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

ROBERT H. BRAVER, )  
 )  
 Plaintiff, )  
 )  
 v. ) Case No. CIV-05-210-T  
 )  
 NEWPORT INTERNET MARKETING )  
 CORPORATION, et al., )  
 )  
 Defendants. )

**ORDER**

Before the Court is Defendants’ Motion to Set Aside Default Judgment, filed by Newport Internet Marking Corporation and Robert Alan Soloway. Defendants seek relief pursuant to the Fed. R. Civ. P. 55(c) from the judgment entered against them on September 22, 2005, awarding damages and a permanent injunction. They contend, and present the affidavit of Mr. Soloway to show, that they received no notice of the default proceedings until September 23, 2005. Plaintiff Robert Braver opposes the motion and presents considerable evidence to show that Mr. Soloway’s testimony is false and Defendants actually knew of the motion for default judgment before the September 22 hearing. For reasons that follow, the Court denies Defendants’ motion.

Rule 55(c) provides: "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c). Because Defendants seek relief from a judgment, this rule expressly requires that they meet the standards of Fed. R. Civ. P. 60(b). Defendants neither acknowledge Rule 60(b) nor provide any facts to satisfy its requirements.


“Courts have established three requirements which must be met when setting aside a default judgment under Rule 60(b): (1) the moving party's culpable conduct did not cause the default; (2) the moving party has a meritorious defense; and (3) the non-moving party will not be prejudiced by setting aside the judgment.” *United States v. Timbers Preserve*, 999 F.2d 452, 454 (10th Cir. 1993). “Generally a party's conduct will be considered culpable only if the party defaulted willfully or has

no excuse for the default.” *Id.* Culpability may be shown by a defaulting party’s disregard for the court, such as a voluntary decision to become a fugitive or to avoid the litigation. *Id.* at 454-55.

Regardless whether Mr. Soloway has perjured himself, as Plaintiff contends, the Court finds Defendants have wholly failed to justify relief from the default judgment under applicable standards. They provide no excuse for their default, that is, their failure to answer the Amended Complaint. Moreover, the record demonstrates their culpability. They removed the case to federal court through counsel but then ended the legal representation and ignored their obligations. The corporate defendant, which could not appear *pro se*, failed to obtain substitute counsel. *See* Local Court Rule LCvR17.1. Mr. Soloway reportedly elected to proceed *pro se* but then failed to comply with court rules. *See Oklahoma Federated Gold & Numismatics, Inc. v. Blodgett*, 24 F.3d 136, 139 (10th Cir. 1994) (*pro se* litigant must follow the same rules of procedure that govern represented parties); *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir.1992) (same). Assuming Mr. Soloway’s affidavit testimony is true, he managed to avoid receipt of default papers forwarded by his former counsel on September 13, 2005, by four different means – electronic mail, facsimile, U.S. Postal Service, and Federal Express. (Notice of Transmittal of Default Papers to Defendants, filed Sept. 21, 2005.) Also important for purposes of Rule 60(b), Defendants do not identify in their motion any possible defense to Plaintiff’s claims.

Therefore, because Defendants have failed to demonstrate entitlement to the relief sought, their Motion to Set Aside Default Judgment [Doc. 21, 22] is DENIED.

IT IS SO ORDERED this 8<sup>th</sup> day of December, 2005.

  
RALPH G. THOMPSON  
UNITED STATES DISTRICT JUDGE