

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
ROBERT DAVID STAPLES and)	CASE NO. 06-30136 HCD
LISA JUANITA STAPLES,)	CHAPTER 13
)	
DEBTORS.)	
)	
)	
ROBERT DAVID STAPLES and)	
LISA JUANITA STAPLES,)	
PLAINTIFFS,)	
vs.)	PROC. NO. 06-3052
)	
DEBT RELIEF OF AMERICA, INC.,)	
DEFENDANT.)	

Appearances:

Debra Voltz-Miller, Esq., counsel for plaintiffs, 1951 East Fox Road, South Bend, Indiana 46613; and

Patrick J. Schurr, Esq., counsel for defendant, Steef & Stone, LLP, 2601 Network Boulevard, Suite 102, Frisco, Texas 75034.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 2, 2007.

Before the court are the Defendant's Motion to Vacate Entry of Default, Amended Motion for Leave to File Answer, and Amended Motion to Transfer Venue and Original Answer Subject Thereto, all with memoranda in support thereof. The motions were filed by the defendant Debt Relief of America, Inc. ("DRA"), on August 28, 2006, three days after this court had denied the defendant's original three motions for failure to file a brief or materials in support of the motions, in violation of the court's local motion practice rule. The court took the motions under advisement. After reconsidering the Clerk's Entry of Default and the court's Order of August 25, 2006, which denied the original three motions, the court denies the defendant's amended motions.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for determination. The court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(O) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

Debtors Robert David Staples and Lisa Juanita Staples commenced this adversary proceeding on April 24, 2006, by filing a Complaint for Turnover of Funds and Damages in Core Adversary Proceeding. *See* R.1. The complaint stated that the debtors had entered into an agreement with DRA on April 13, 2005, authorizing DRA to transfer money from their bank account on a monthly basis to pay the debtors' creditors. According to the complaint, DRA made monthly withdrawals from the debtors' account, beginning on April 18, 2005. It transferred a total of \$8,525.30 from the debtors' account, but failed to pay any of their creditors. The debtors continued to receive delinquent payment statements from their creditors during the period in which DRA had agreed to pay their creditors. The debtors terminated their agreement with DRA on February 8, 2006, and filed their chapter 13 petition on February 23, 2006. The complaint alleged that, on March 17, 2006, DRA refunded \$4,374.30 to the debtors and "paid itself \$4,151.00 as an enrollment fee in violation of the automatic stay." *Id.* at 3, ¶ 19.

In Count I, the debtors alleged that the defendant's action, after receiving notice of the bankruptcy petition, violated the automatic stay pursuant to 11 U.S.C. § 362(a)(6).¹ In Count II, they alleged that DRA failed to execute the terms of its contract with the plaintiffs. Under that contract, it had a duty "to negotiate the terms of the Plaintiffs' debts with their creditors and pay agreed amounts on behalf of the Plaintiffs." *Id.* at 4 ¶ 24. According to the debtors, DRA withdrew money from the debtors' bank account but neither paid their creditors nor told the debtors that they were not paying the creditors. They alleged that DRA's actions, in "paying itself at the end of the contract term while completely failing to uphold its end of the agreement originally executed between the parties," constituted constructive fraud. *Id.* at 4 ¶ 29. They sought to recover actual and punitive damages as well as fees and expenses.

The summons issued on April 24, 2006, notified DRA that an answer to the complaint was due on or before May 24, 2006. The defendant was duly served, both by certified and first class mail, to the corporation and also to its registered agent. *See* R. 3-6. The Clerk's Entry of Default (prematurely issued on May 22, 2006, two days before the bar date) and the Order of June 12, 2006, which vacated and set aside the Clerk's Entry of Default, were mailed to the defendant, as well. *See* R. 7-10. However, none of those documents caused DRA to file an answer, a responsive pleading, or a request for extension of time in which to file.

Counsel for DRA entered his appearance in the case on June 16, 2006, but did not respond to the debtors' complaint. He then filed a motion to appear *pro hac vice* for the defendant but still failed to file a response. On August 3, 2006, 71 days after the bar date for filing an answer, the court's Entry of Default was entered against the defendant. *See* R. 17.

¹ Section 362(a)(6) of the Bankruptcy Code provides, in pertinent part:

(a) . . . [A] petition . . . operates as a stay, applicable to all entities, of –

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(6).

On August 10, 2006, DRA filed numerous motions:

- (1) “Defendant’s Motion to Transfer Venue and Original Answer Subject Thereto.” *See* R. 19.
- (2) “Defendant’s Motion to Set Aside Entry of Default.” *See* R. 21.
- (3) “Motion for Leave to File Answer,” with attached exhibit “Defendant’s Motion to Transfer Venue and Original Answer Subject Thereto.” *See* R. 22.

The court denied those motions on August 25, 2006, on the ground that the defendant violated the court’s local rules by failing to file a brief or materials in support of the motions along with the motions. *See* R. 23. In response, without asking leave of court, DRA re-filed the three motions three days later, somewhat revised and with memoranda of law attached to each of them. *See* R. 25-30.

Discussion

By filing motions to vacate the court’s entry of default and for leave to file an answer, the defendant essentially asks the court to allow it to participate belatedly in this adversary proceeding. The court construes those re-filed motions to be requests for reconsideration of the court’s Entry of Default issued on August 3, 2006, and court’s Order of August 25, 2006, denying the defendant’s motions. Because no final order or judgment of default has been entered in this case, and because the entry of default must be set aside before the other motions (to file an answer and to change venue) can be considered, the court focuses first on the defendant’s motion to vacate the entry of default pursuant to Federal Rule of Civil Procedure 55(c).² *See Davis v. Hutchins*, 321 F.3d 641, 646 n.2 (7th Cir. 2003) (treating motion to reconsider as a Rule 55(c) motion rather than a Rule 59 or 60 motion).

Rule 7055 of the Federal Rules of Bankruptcy Procedure, which makes Federal Rule of Civil Procedure 55 applicable in adversary proceedings, sets forth the rule for defaults: “When a party against whom

² If the court were to review DRA’s request as a motion to reconsider under Rule 59(e) of the Federal Rules of Civil Procedure (made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 9023), it would find that DRA did not even mention “a manifest error of law or an intervening change in the controlling law or [] newly discovered evidence,” criteria which the rule requires the moving party to establish. *Romo v. GulfStream Coach, Inc.*, 250 F.3d 1119, 1121 n.3 (7th Cir. 2001).

a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Fed. R. Civ. P. 55(a). The defaulting party may succeed in setting aside the entry of default only by showing "good cause." Fed. R. Civ. P. 55(c). The factors required for relief under Rule 55(c) are essentially the same as those under Rule 60(b), but the Rule 55(c) standard is easier to satisfy.³ See *Sims v. EGA Prods, Inc.*, 475 F.3d 865, ___ (7th Cir. 2007) (citing *Redfield v. Continental Casualty Corp.*, 818 F.2d 596, 601 (7th Cir. 1987)). The Seventh Circuit requires the defaulting party to show "(1) good cause for the default; (2) quick action to correct it; and (3) a meritorious defense to the complaint." *Sun v. Board of Trustees*, 473 F.3d 799, 810 (7th Cir. 2007) (citing *Pretzel & Stouffer, Chartered v. Imperial Adjusters, Inc.*, 28 F.3d 42, 45 (7th Cir.1994)). The court's decision is within its sound discretion. See *id.*

The defendant asserted that its demonstration of "good cause" for the default can be measured by liberally applying Rule 60(b) to the defendant's circumstances. It claimed that "'excusable neglect' . . . was the cause of its failure to respond to Plaintiffs' complaint in a timely manner and thus the cause of the Clerk's Entry of Default." R. 26 at 3. The defendant acknowledged that it was negligent in failing to respond to the complaint, but insisted that "ordinary negligence, rather than some extraordinary circumstance over which the Defendant did not have control, does not preclude this court from finding that Defendant's actions constitute excusable neglect and therefore warrant relief under FRCP 55(c)." *Id.* at 4.

In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d. 74 (1993), the Supreme Court considered "whether an attorney's inadvertent failure to file a proof of claim within the deadline set by the court can constitute 'excusable neglect' within the meaning"

³ Rule 60(b) of the Federal Rules of Civil Procedure, made applicable in bankruptcy under Rule 9024 of the Federal Rules of Bankruptcy Procedure, allows the court to relieve a party from a final judgment, order, or proceeding for such reasons as "mistake, inadvertence, surprise or excusable neglect." Fed. R. Civ. P. 60(b)(1).

of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure.⁴ *Id.* at 383, 113 S. Ct. at 1492. It presented “a range of possible explanations for a party’s failure to comply with a court-ordered filing deadline.” *Id.* at 387, 113 S. Ct. at 1494.

At one end of the spectrum, a party may be prevented from complying by forces beyond its control, such as by an act of God or unforeseeable human intervention. At the other, a party simply may choose to flout a deadline. In between lie cases where a party may *choose* to miss a deadline although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse, as well as cases where a party misses a deadline through inadvertence, miscalculation, or negligence.

Id. at 387-88, 113 S. Ct. at 1494. The Court concluded that, “at least for purposes of Rule 60(b)(1), ‘excusable neglect’ is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Id.* at 394, 113 S. Ct. at 1498. Nevertheless, the rule requires “that the party’s neglect of the bar date be ‘excusable.’” *Id.* at 395, 113 S. Ct. at 1498; *see also Mommaerts v. Hartford Life & Accident Ins. Co.*, 472 F.3d 967, 968 (7th Cir. 2007) (stating that a party’s oversight in failing to meet filing deadline must be excusable). In *Pioneer*, for example, after a thorough analysis of the circumstances surrounding the attorney’s failure to file by the bar date, the Supreme Court agreed with the appellate court that the neglect was excusable in part because the court employed an unusual form of notice, one with an inconspicuously placed bar date. *See Pioneer*, 507 U.S. at 398-99; 113 S. Ct. at 1500. In *Sun*, the Seventh Circuit affirmed the district court’s decision to vacate its default judgment because it determined that the sanction was unduly harsh in the circumstances. *See Sun*, 473 F.3d at 811-12. In *Mommaerts*, the circuit court agreed with the district court that the party’s late filing of an answer was excusable for numerous reasons – service had been effective, delay was short, there was no prejudice to the plaintiff, the defendant did not engage in abusive tactics, and the case already had been decided on the merits. *See Mommaerts*, 472 F.3d at 968.

⁴Under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, a court, for cause shown, and “on motion made after the expiration of the specified period [, may] permit the act to be done where the failure to act was the result of excusable neglect.” Fed. R. Bankr. P. 9006(b)(1).

The defendant gave several reasons to justify his request for setting aside the default. He first asserted that the Clerk of the Court erred: “Despite the Defendant having entered an appearance in the case, the Clerk entered the entry of default on August 3, 2006.” R. 25 at 2; R. 27 at 2. As the court record shows, counsel for the defendant filed his notice of appearance on June 16, 2006, and his application to appear in this action *pro hac vice* on July 5, 2006. By so doing, he satisfied the court’s requirements for an attorney who is not a member of the bar of this court and who wants to appear in a specific proceeding in this court. *See* N.D. Ind. L.B.R. B-9010-1(c). However, counsel should have followed those filings with the filing of an answer, in order to place the material allegations of the complaint at issue,⁵ or with a request for extension of time to file an answer.⁶ It is the failure to file a response to the complaint that triggered the entry of default. *See* N.D. Ind. L.B.R. B-7007-1(a) (“The failure to respond or reply within the time required will be deemed a waiver of the opportunity to do so and may subject the motion to a ruling without further submission.”). After the court’s bar date of May 24, 2006, for filing an answer had passed, therefore, the defendant was in default and had waived its opportunity to answer. *See In re State Exchange Finance Co.*, 896 F.2d 1104, 1106 (7th Cir. 1990) (affirming that failure to file answer is an unexcused default).

Because the summons and complaint were properly served and no responsive pleading was filed, the Clerk entered the default. *See Burlingame Group v. Burlingame Joint Venture (In re Zorrilla)*, 115 B.R. 894, 896 (Bankr. W.D. Tex. 1990) (stating general rule that default is proper “where the defendant has failed to answer or otherwise defend as provided by the Federal Rules of Civil Procedure”). The defendant gives no legal justification for suggesting that the entry of counsel’s appearance would prevent the entry of default. *See, e.g.*,

⁵ *See* Rule 8(a), which requires that, in the answer or defensive pleading, the “party shall state in short and plain terms the party’s defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.” Fed. R. Civ. P. 8(a); Fed. R. Bankr. P. 7008(a).

⁶ The defendant had 30 days from service to answer the complaint. *See* Fed. R. Bankr. P. 7012(a); Fed. R. Civ. P. 12(a). Local rule B-7007-1 states: “Unless the court orders otherwise, the opposing party shall have thirty (30) days after service of the motion and official brief within which to serve and file a response. . . . Extensions of time shall only be upon order of the court, for good cause shown.” N.D. Ind. L.B.R. B-7007-1(a).

Cutting v. Town of Allenstown, 936 F.2d 18, 21 n.1 (1st Cir. 1991) (stating that when defendants “were served with the summons and do not appear and answer within the required period, they are ‘parties in default’”); *Travelodge Hotels, Inc. v. Taurus Hotels Corp.*, 179 F.R.D. 569, 571 (C.D. Ill. 1998) (concluding that defendant erred in believing that his *pro se* entry of appearance would prevent an entry of default). Moreover, once the clerk’s default is entered, the averments of the complaint are deemed admitted under Federal Rule of Civil Procedure 8(d).⁷ See *Ford Motor Credit Co. v. Hemsley (In re Bennett)*, 317 B.R. 313, 315 (Bankr. D. Md. 2004); *In re Johnson*, 228 B.R. 663, 665 (Bankr. N.D. Ill. 1999). Thus DRA, by not answering the complaint, admitted the complaint’s allegations.

The defendant’s second reason for claiming that the default should be vacated was that the entry of default “was not electronically served on the Defendant or its counsel.” R. 25 at 2, R. 27 at 2. The court’s records indicate that counsel in fact was served electronically.⁸ The “Notice of Electronic Filing” in the court’s Electronic Case Filing system [“ECF System”] stated that the Clerk’s Entry of Default as to Debt Relief of America, Inc., was entered on August 3, 2006, at 9:08 a.m. EDT and was electronically mailed to attorneys Patrick J. Schurr and Debra Voltz-Miller at their electronic mail addresses.⁹ See R. 17. The hyperlink to docket number 17 in the record of this adversary proceeding reflects that the court’s electronic filing system sent the notice of the Entry of Default; there was no evidence of failure in the court’s ECF System on that date. See *In re Sands*, 328 B.R. 614, 618-19 (Bankr. N.D.N.Y. 2005) (concluding that a court’s “Notice of Electronic Filing creates a rebuttable

⁷ Rule 8(b) of the Federal Rules of Civil Procedure, which applies in adversary proceedings under Rule 7008(a) of the Federal Rules of Bankruptcy Procedure, requires a party to “state in short and plain terms the party’s defenses to each claim asserted and . . . admit or deny the averments upon which the adverse party relies.” Fed. R. Civ. P. 8(b). If the party fails to respond in this manner, Rule 8(d) provides that the averments that are not denied are deemed admitted. See Fed. R. Civ. P. 8(d).

⁸ In addition, the Certificate of Service stated that the defendant DRA was served by first class mail. See R. 17.

⁹ In fact, the court’s internal records, of which it takes judicial notice, demonstrate that defendant’s counsel faxed his Application for Attorney Password for ECF System at 11 a.m. EDT on June 14, 2006, and that the approval of his application was electronically mailed to him at 1:28 p.m. that same day. He electronically filed his Notice of Appearance on June 16, 2006, and all documents thereafter, including the Clerk’s Entry of Default, were electronically mailed to him.

presumption” of filing and of transmission of documents in the court). The court expects attorneys trained in ECF to check e-mail daily. *See In re Nelson*, 2006 WL 2135883, at *2, n.3 (“How difficult can it be to activate a hyperlink (via a left mouse click) on an electronic docket or in a notice of electronic filing to open a document and read it?”).

The court finds it noteworthy that defendant’s counsel, in his Affidavit, presented a narrower statement: “[T]he certificate of service on the Entry of Default reflects that the Defendant was not served electronically with a copy of the default despite his notice of appearance in the case.” R. 26, Ex. B, ¶ 4.(A). It is true that the defendant corporation, DRA, was served by first class mail. It is also true, however, that DRA’s attorney, Mr. Schurr, received electronic notice of all court filings – as he requested. By applying for an Attorney ECF Password with our court, Mr. Schurr agreed to accept e-mail notification of all notices.¹⁰ In the view of this court, counsel’s claim that he did not receive an electronic transmission of the Entry of Default simply is not credible. *See In re Nelson*, 2006 WL 2135883, at *2, n. 4 (“Counsel’s attempt to lay the blame for his failure to comply with the court’s orders upon the clerk’s office is also unacceptable.”).

As the defendant’s third reason for setting aside the default, it blamed debtor’s counsel. It claimed that DRA’s counsel contacted plaintiffs’ counsel in order to settle the case or to transfer it to Texas. It stated that debtors’ counsel did not review the venue statute and telephone DRA’s attorney to discuss it. The court notes, however, that the defendant filed nothing concerning change of venue until after the entry of default. In addition, there is nothing in the record to apprise the court of ongoing negotiations or the possibility of a settlement. The defendant has not claimed that it had delayed filing the answer because settlement was close. *See AT&T*

¹⁰ Paragraph 5 of the Application for Attorney Password for ECF System states:

I understand that the issuance of a login and password to me constitutes a waiver of conventional service pursuant to the court's ECF general order. I agree to accept a Notice of Electronic Filing by authorized E-Mail in lieu of conventional services. I agree to receive all notices by electronic transmission and that this application constitutes my written request to receive electronic notices as called for in Rule 9036 of the Fed. R.B.P. Moreover, I will use the automatic E-Mail notification feature of the ECF System as the primary means of service.

Universal Card Serv. v. Bermingham (In re Bermingham), 201 B.R. 808, 813 n.1 (Bankr. N.D. Mo. 1996) (finding that failure to file an answer constituted excusable neglect because it appeared the parties had settled). In any case, settlement negotiations do not excuse a party's failure to file an answer. See *Chandler Leasing Corp. v. UCC, Inc.*, 91 F.R.D. 81, 83 n.3 (N.D. Ill. 1981) ("Settlement negotiations are not a sufficient reason for failure to appear or plead.").

In its legal memorandum in support of its motion to vacate the entry of default, the defendant admits that its failure to respond "was caused by ordinary negligence." R. 26 at 3-4. The question before the court is whether the defendant's neglect of the bar date was excusable. The *Pioneer* Court has taught that the underlying explanation for the negligence must be presented by the movant and considered by the court.

Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer, 507 U.S. at 395, 113 S. Ct. at 1498. In this case, however, the defendant gave the court no reason for the delay, no explanation of the conduct that it called "ordinary negligence." The court knows nothing of the relevant circumstances surrounding the defendant's omission. It simply knows that DRA failed to respond to the plaintiffs' complaint by the bar date and did not request an extension of time in which to file an answer, even after receiving the mistaken Clerk's Entry of Default on May 22, 2006 – a warning signal to a party if ever there was one, but one of no effect on the defendant. Even when counsel for DRA filed his notice of appearance and motion to appear *pro hac vice*, he did not attempt to remedy his lack of response to the complaint against the defendant he represents in this proceeding.

The Supreme Court, in *Pioneer*, found personal excuses to be inexcusable neglect: "In assessing the culpability of respondents' counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date." *Id.* at 398, 113 S. Ct. at 1499; see also *Lang v. Lang (In re Lang)*,

305 B.R. 905, 910 (10th Cir. B.A.P. 2004), *aff'd*, 414 F.3d 1191 (10th Cir. 2005) (finding that the pressure of litigation and business in other cases does not constitute excusable neglect); *Discover Bank v. Shreck (In re Shreck)*, 353 B.R.138, 140 (Bankr. N.D. W.Va. 2006) (“The court rejects the assertion that a backlog of cases would prevent the ministerial act of filing a previously prepared document.”). In this case, perhaps DRA’s counsel knew better than to proffer personal excuses, but the defendant was required to offer an explanation of its (and its counsel’s) conduct before the court could find its negligence excusable. “Good cause for the default,” in the form of “excusable neglect,” must be shown before the default can be set aside. Without any inkling of the relevant circumstances, the court has no information from which to determine whether the reason for the delay was within the defendant’s reasonable control, whether DRA acted in good faith, and whether its neglectful conduct was excusable. The defendant does not challenge service of the complaint and yet fails to explain why it did not respond within the 30-day period after service. DRA’s claim that the default was not electronically served (an assertion the court cannot accept) is, in any case, not a reason for its failure to file an answer. Nor can that failure be blamed on DRA counsel’s belated entry of an appearance or on plaintiffs’ counsel’s failure to return his telephone call to discuss venue. Nothing in the record explains or justifies the defendant’s failure to respond to the complaint. Moreover, nothing in the defendant’s conduct in this adversary proceeding justifies the amount of procedural delay the defendant has caused the court. The complaint, filed more than ten months ago, still awaits a response, and the defendant’s attempt to convince the court that it now should be allowed to file an answer fails to explain the “relevant circumstances surrounding the party’s omission” that the court must take into account in determining whether the defendant’s neglect is excusable.

The court must find, therefore, that the defendant has failed in its burden of showing that its “ordinary negligence” was good cause for the default. The court determines that the course of conduct of this corporate defendant and its experienced attorney cannot be considered a faultless or excusable omission. *See Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498 (finding that non-responsive conduct that was entirely within counsel’s control cannot constitute “excusable neglect”). Even if the defendant had blamed its counsel for the negligence admitted

in this case, the Supreme Court made clear that clients “must be held accountable for the acts and omissions of their attorneys.” *Id.* at 396, 113 S. Ct. at 1499.¹¹ The court determines, therefore, that the conduct of the defendant and its counsel does not constitute excusable neglect pursuant to Federal Rule of Civil Procedure 60(b)(1). It further finds that the defendant has not demonstrated that it has good cause for the default under Rule 55(c).

Because DRA has not established good cause for the default, the court finds it unnecessary to analyze the other two factors the defaulting party must show under the Seventh Circuit’s case law. *See Sun*, 473 F.3d at 810-11; *Pretzel & Stouffer*, 28 F.3d at 46 (stating that a party in default must meet all three requirements to vacate the default). The court points out, nevertheless, that it was not persuaded by the defendant’s arguments. For example, the defendant insisted that the plaintiffs would not be prejudiced if the entry of default was set aside because the defendant took “quick action to correct the default” and because the plaintiffs “have done nothing in this case since the filing of the adversary proceeding on April 24, 2006.” R. 26, Ex. B at 2 (Schurr Affidavit). In the view of this court, the period of three and one-half months between the plaintiffs’ filing of the complaint and the defendant’s filing of its motion to set aside the default does not represent “quick action.” It is true, of course, that the plaintiffs have “done nothing” after they filed the complaint; they are waiting for an answer, to see what issues are in contention. Counsel for the plaintiffs wisely has not wasted the plaintiffs’ scarce resources before it was necessary for the plaintiffs to respond.

In addition, the court does not find that the defendant has presented a meritorious defense. For example, one of the defendant’s arguments was that, because payments to the defendant were made pre-petition, the allegations of violations of the automatic stay “are patently erroneous as a matter of law.” R. 26, Ex. B at 3. The court finds, however, that the defendant has misconstrued the complaint. The complaint sought turnover of \$4,151.00 from the defendant. According to the plaintiffs, the defendant transferred \$8,525.30 from the plaintiffs’

¹¹ Counsel for the defendant was also required to be cognizant of the local rules of this court. *See Pioneer*, 507 U.S. at 392, 113 S. Ct. at 1496 (“ignorance of the rules . . . do[es] not usually constitute ‘excusable’ neglect”).

bank account pre-petition but did not use the funds to pay the debtors' creditors. Once the debtors terminated their agreement with DRA and filed bankruptcy, DRA refunded to the debtors only \$4,374.30 of the transferred funds. The plaintiffs alleged that DRA paid itself the remaining \$4,151.00, after the bankruptcy had been filed, as an enrollment fee. The plaintiffs asserted that such conduct constituted an "act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case" and therefore violated the automatic stay. The defendant did not assert a defense to that allegation of a post-petition violation.

The court is aware that defaults are generally disfavored by the Seventh Circuit. *See, e.g., Sims v. EGA Products, Inc.*, 475 F.3d 865, ___ (7th Cir. 2007) (concluding that entry of default, resulting in imposition of a multi-million-dollar award, "would be overkill"); *Sun*, 473 F.3d at 811 (stating that default judgments are "appropriate only when a party wilfully disregards pending litigation"); *Mommaerts*, 472 F.3d at 968 (stating that a default judgment "may be used to bring recalcitrant litigants to heel or penalize tactics designed to cause substantial prejudice to the adversary"). Nevertheless, after a thorough review of this record and of the case law on setting aside defaults, the court finds that the defendant has failed to sustain its burden of proving that the entry of default should be vacated. Indeed, because the defendant gave no reason at all to explain and excuse its negligent conduct, the court believes it would abuse its discretion if it were to vacate the Clerk's Entry of Default. Because the defendant's failure to file was not the act of excusable neglect, the court in its discretion declines to vacate the entry of default and declines to accept a belatedly filed answer or motion to change venue.

In summary, the court determines that the defendant failed to file an answer within the deadline set by the court and failed to show good cause for the default within the meaning of Federal Rule of Civil Procedure 55(a) and Federal Rule of Bankruptcy Procedure 9055. Accordingly, the Court denies the defendant's Motion to Vacate Entry of Default. Because the Clerk's Entry of Default against the defendant remains intact and is not set aside, the defendant cannot file a late answer or a motion to transfer venue. *Cf. Fingerman v. Harris-Hub Co. (In re Robert's Furniture, Inc.)*, 70 B.R. 29, 31 (Bankr. S.D. Ohio 1987) ("Defendant waived any right to object to venue when it failed to file a timely answer or motion in this court."). The court therefore denies as moot the

defendant's Amended Motion for Leave to File Answer and Amended Motion to Transfer Venue and Original Answer Subject Thereto.

Conclusion

For the reasons stated above, the court denies the Defendant's Motion to Vacate Entry of Default filed by the defendant Debt Relief of America, Inc. It also denies as moot the defendant's Amended Motion for Leave to File Answer and Amended Motion to Transfer Venue and Original Answer Subject Thereto.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT