No. 16-4076

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY OF LABOR
U.S. DEPARTMENT OF LABOR,

Plaintiff-Appellee,

v.

DT & C GLOBAL MANAGEMENT LLC, a limited liability company,
doing business as TOWN & COUNTRY LIMOUSINE, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division,
Honorable Virginia M. Kendall

RESPONSE BRIEF OF THE SECRETARY OF LABOR

NICHOLAS C. GEALE
Acting Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

MELISSA A. MURPHY
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

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RESPONSE BRIEF OF THE SECRETARY OF LABOR

On behalf of the United States Department of Labor ("Department'), the Secretary of Labor ("Secretary") submits this brief in response to the brief filed by DT & C Global Management, d/b/a Town & Country Limousine ("Town & Country"), John Jansen, and William Lynch (collectively, "Defendants").

JURISDICTIONAL STATEMENT

Appellants' jurisdictional statement is largely correct. For the sake of completeness, however, the Secretary sets out the following statement. This case arises under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq*. The

district court had jurisdiction over this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 217; 28 U.S.C. 1331 (federal question); and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States). This Court has jurisdiction to review the November 7, 2016 ruling of United States District Court Judge Virginia Kendall pursuant to 28 U.S.C. 1291 (final decisions of district courts). Appendix ("App.") 29. The district court denied Defendants' motion to vacate the default judgment, leaving no open claims. Dkt. No. 39, Case No. 15-2010 (N.D. Ill.) (Notification of Docket Entry).[1] Defendants filed a timely Notice of Appeal on December 2, 2016.

STATEMENT OF THE ISSUE

Whether the district court properly exercised its broad discretion in determining that Defendants failed to establish the requisite criteria under Federal Rule of Civil Procedure 60(b) for relief from the default judgment that had been entered against them.

STATEMENT OF THE CASE

A. Statement of Facts

Defendants provide corporate ground transportation in the Chicago area, employing approximately 100 employees. The Secretary's complaint named three

[1] On November 7, 2016, the district court placed a minute entry on the docket denying Defendants' Federal Rule of Civil Procedure 60(b) motion to vacate its default judgment of December 14, 2015 for the reasons it set forth in open court at the hearing held on that motion on November 7, 2016.

defendants: Town & Country, the corporate entity, and individual defendants John Jansen and William Lynch. Dkt. No. 1, Case No. 15-2010. Chief Executive Officer John Jansen and Chief Operating Officer William Lynch were both responsible for overseeing Town & Country's business operations. *Id.* at 2-3. Jansen was a majority owner of Town & Country, while Lynch owned five percent of the business and hired employees, resolved customer complaints, and supervised all drivers, dispatchers, and reservationists. *Id.*

B. Procedural History

The Wage and Hour Division conducted an investigation, which covered the period from March 1, 2012 through March 1, 2014. Its investigation revealed that Defendants paid thirty-four chauffeurs straight time (as opposed to time and one-half) for all overtime hours worked. Dkt. No. 1, Case No. 15-2010. Additionally, Wage and Hour found that Defendants failed to compensate its employees for hours worked spent traveling from and back to the garage (before picking up their first customer and dropping of their last customer, respectively); prepping, maintaining, and cleaning Defendants' vehicles; and waiting for their customers to arrive. *Id.* at 3-4. The Wage and Hour Division also found that Defendants failed to properly record and maintain records of the chauffeurs' time, in violation of the FLSA. *Id.* at 4.

On March 14, 2015, the Secretary filed a complaint against Defendants for violations of the overtime compensation and recordkeeping provisions of the FLSA. Dkt. No. 1, Case No. 15-2010. The Secretary requested that all back wages be paid and sought liquidated damages and injunctive relief. *Id.* at 4-5. On May 5, 2015, Defendants answered the complaint, admitting that they did not pay Plaintiffs one and one-half times their regular rate for the time they worked in excess of forty hours per week, but denying all other allegations. Dkt. No. 10, Case No. 15-2010, 3-4.

On July 16, 2015, Defendants were served with a request for discovery. Several extensions were granted to Defendants. Dkt. No. 15, Case No. 15-2010, 2-3. On October 9, 2015, the Secretary filed a motion to compel. Dkt. Nos. 15, 17, Case No. 15-2010. On October 22, 2015, Defendants' attorneys filed a motion to withdraw as counsel because they had been unable to communicate with Defendants for several weeks; this motion was granted. Dkt. No. 18, Case No. 15-2010. On November 16, 2015, the court issued a minute entry directing Defendants to appear in court on November 23, 2015. Dkt. No. 23, Case No. 15-2010. Defendants did not appear or otherwise respond. On November 23, 2015, the court issued another minute entry, directing Defendants to appear on December 7, 2015; Defendants did not appear. Dkt. No. 24, Case No. 15-2010. On December 14, 2015, upon motion by the Secretary, the district court entered a

default judgment against Defendants, ordering it to pay $190,716 in back wages and an equal amount in liquidated damages. Dkt. Nos. 30, 31, Case No. 15-2010.

Over ten months later, on October 26, 2016, Defendants filed a motion to vacate the default judgment pursuant to Federal Rule of Civil Procedure 60(b) Dkt. No. 36, Case No. 15-2010. In its motion and two supporting affidavits from Jansen and Lynch, Defendants argued that vacatur of the default judgment would be appropriate due to the "confluence" of the health problems of Jansen, various issues with attorneys retained, and Jansen moving. Dkt. No. 36, Case No. 15-2010, at 5. In both affidavits, Jansen and Lynch admitted to learning about the judgment in January 2016 from a news release issued by the Department's Wage and Hour Division; both stated in their affidavits that they did not believe they were liable for the money damages portion of the judgment. *Id.* at 15, 25.[2]

On November 7, 2016, Judge Virginia M. Kendall held a hearing on Defendants' Rule 60(b) motion. Ruling from the bench, Judge Kendall denied the

[2] The January 21, 2016 news release to which Jansen and Lynch referred is to the U.S. Dep't of Labor, Wage & Hour Div. News Release: Federal Judge Orders Chicago Limo Company to Pay More Than $381K in Back Wages Damages (Jan. 21, 2016) available at: www.dol.gov/newsroom/releases/whd/whd20160121. Notably, the news release contains a hyperlink to the district court's judgment, which stated that *all* Defendants are liable for the back wage payments and liquidated damages.

motion. It is from this decision (memorialized in a minute entry on the docket) that Defendants now appeal.[3]

C. The Rule 60(b) Hearing and the District Court's Denial of Defendants' Motion to Vacate the Default Judgment

At the hearing, counsel for Defendants gave as the reason for moving to vacate the default judgment "excusable inattention," again pointing to a "confluence" of events—breakdown in attorney-client communications, not "receiv[ing] certain notices," "pretty significant health issues," and "seek[ing] to retain an attorney who, unbeknownst to him, passed away." App. 23, 11-24.

At that same hearing, counsel for the Secretary argued that Defendants were requesting "extraordinary relief" and that they had not met their "high burden." App. 24, 8-9. Counsel for the Secretary contended that the Secretary would be prejudiced by a vacatur of the default judgment at this stage, when the motion to vacate was not made until almost eleven months after entry of the judgment; this would mean not being able to locate witnesses or to rely on the recall of those witnesses who could be located after the passage of such a lengthy period of time. App. 24, 10-18. Counsel for the Secretary further pointed to Defendants' failure to respond to discovery (which necessitated a motion to compel), withdrawal of

[3] This case has been consolidated with Case No. 16-4077, a similar case involving an action brought by private individuals against Defendants for FLSA violations, in which a default judgment was granted on essentially the same grounds. The Department is a party only to Case No. 16-4076, and therefore addresses only that case.

Defendants' counsel because of Defendants' failure to communicate with them, Defendants' failure to defend the case (which led to the Secretary filing a motion for default judgment), and Defendants having no viable reason for not filing their Rule 60(b) motion promptly, as they were aware of the Department's January 21, 2016 news release announcing the default judgment of December 14, 2015, yet did not file the Rule 60(b) motion until October 26, 2016. App. 24-25. Finally, counsel for the Secretary, referring to Defendants, stated that "I think that they've been completely careless, they've exhibited a lack of diligence and attentiveness to this case, and they've also been obstructionists in the delays to date." App. 25, 13-17.

In denying Defendants' Rule 60(b) motion, Judge Kendall noted, among other things, that Defendants had not presented a meritorious defense, that there had been a long delay in filing the Rule 60(b) motion (having acknowledged in their affidavits that they were aware of the default judgment much earlier through the Wage and Hour news release), and that Defendants had not been diligent. App. 26-27. The district court also noted that many of Jansen's health problems discussed in his affidavit (e.g., back surgery and heart surgery) preceded the litigation. App. 28. The district court concluded by explaining that because there had not "been a showing of extraordinary circumstances beyond just mere

negligence" and because "they should have come in much, much earlier" the motion to vacate would be denied. App. 29.

SUMMARY OF ARGUMENT

On December 14, 2015, the district court entered a default judgment against Defendants, ordering them to pay $190,716 in back wages and an equal amount in liquidated damages. Dkt. No. 31, Case No. 15-cv-2010. Defendants concede they learned of the judgment in January 2016. Approximately ten months later, Defendants moved for relief from the default judgment pursuant to Rule 60(b) on the basis of excusable neglect. The district court denied the motion, concluding that Defendants had not met the high standard required for vacating a default judgment under Rule 60(b).

The district court properly exercised its considerable discretion in denying Defendants' motion to vacate the default judgment. There are three requirements a defendant must satisfy in order for a court to vacate a default judgment; Defendants here fail to satisfy any of the three criteria. Defendants are unable to demonstrate good cause for the default, instead relying upon unsupported assertions—reasons of ill health, which in fact largely preceded the litigation, and not being adequately represented, which Defendants did nothing to affirmatively rectify although it was in their power to do so. Defendants also did not act quickly to correct the default, instead waiting over ten months to request relief. Finally,

Defendants do not offer any defense to the underlying merits of the complaint; rather, they state in a conclusory fashion, i.e., without any supportive reasoning whatsoever, that they have defenses of good faith, that the award of back wages was excessive and did not reflect credits they were owed, and that the employees were exempt from the overtime requirements. For these reasons, the district court's decision denying the motion to vacate the default judgment should be affirmed.

STANDARD OF REVIEW

This Court reviews a grant or denial of post-judgment relief under Rule 60(b) for abuse of discretion. *See Cent. Ill. Carpenters Health & Welfare Trust Fund v. Con-Tech Carpentry, LLC*, 806 F.3d 935, 937 (7th Cir. 2015); *see also Castro v. Bd. of Educ. of Chi.*, 214 F.3d 932, 935 (7th Cir. 2000) ("A district judge's ruling on a Rule 60(b)(1) motion will stand unless no reasonable person could have acted as the judge did.") (internal quotation marks omitted).

ARGUMENT

THE DISTRICT COURT PROPERLY EXERCISED ITS BROAD DISCRETION IN DENYING DEFENDANTS' MOTION TO VACATE THE DEFAULT JUDGMENT, WHICH WAS FILED ALMOST A YEAR AFTER ENTRY OF THAT JUDGMENT

Federal Rule of Civil Procedure 60(b)(1) authorizes relief from a final judgment for "(1) mistake, inadvertence, surprise, or excusable neglect." Fed. R.

Civ. P. 60(b)(1). The rule "establishes a high hurdle for parties seeking to avoid default judgments," *Jones v. Phipps*, 39 F.3d 158, 162 (7th Cir. 1994), and, as noted above, the district court's disposition of the Rule 60(b) motion is reviewable only for abuse of discretion. *See Cent. Ill. Carpenters Health & Welfare Trust Fund*, 806 F.3d at 937. Although relief from a final judgment may be granted pursuant to Rule 60(b) under exceptional circumstances, this Court has "characterized the district court's considerable latitude in making its decision as 'discretion piled on discretion.'" *Wehrs v. Wells*, 688 F.3d 886, 890 (7th Cir. 2012) (quoting *Swaim v. Moltan Co.,* 73 F.3d 711, 722 (7th Cir.1996)); *see Williams v. Edgeton*, 53 F.3d 334 (Table), 1995 WL 242337, at *2 (7th Cir. 1995) (review is "exceedingly deferential") (citing *Jones*, 39 F.3d at 162). "Only if no reasonable person could agree with the district court's decision will it be disturbed. Though this is a nearly insurmountable hurdle, limited review is not the same as *no* review, and the possibility always portends that the district court erred in refusing to vacate a default judgment." *Jones*, 39 F.3d at 162 (citations omitted) (emphasis in original). Additionally, in cases such as this one, in which the denial of a Rule 60(b) motion is the sole reviewable question on appeal, appellate review does not "reach the merits of the underlying judgment." *Soler v. Waite,* 989 F.2d 251, 253 (7th Cir.1993) (citation omitted).

In order to have a default judgment vacated under Rule 60(b), the moving party must demonstrate: "(1) good cause for the default; (2) quick action to correct it; and (3) a meritorious defense to the complaint." *Sun v. Bd. of Trs.,* 473 F.3d 799, 810 (7th Cir. 2007) (citation omitted); *see Wehrs*, 688 F.3d at 890. Here, Defendants fail to meet any of the criteria for vacating a default judgment and, as such, the district court properly denied their motion.

A. Defendants Failed to Demonstrate Good Cause for the Default.

Significantly, Defendants acknowledge that "[w]hile any one or two" of the circumstances they identify as constituting good cause "may not provide a sufficient basis for vacating the judgments," the "confluence of events" does warrant such vacatur. App. Br. 15. Defendants' argument is not persuasive.

As the basis for its Rule 60(b) motion, Defendants rely upon excusable neglect or, as characterized by their counsel during oral argument, "excusable inattention." App. 23. The relevant reasons Defendants rely upon for this alleged excusable neglect are that defendant Jansen suffered serious health problems and that Defendants thought a newly retained attorney would be defending the case, but apparently did not do so, something which Defendants were not aware of because they did not attempt to contact the attorney.

Regarding Jansen's health issues, as District Court Judge Kendall noted, the back surgery relied upon by Jansen in his affidavit took place in 2011, "long before

the litigation." App. 28. Similarly, the heart surgery noted by Jansen in his affidavit took place in 2014, also before the litigation was even commenced. There is a single hospitalization noted in April 2016 for neurological issues, but as the court noted and as counsel for Defendants conceded during argument, there were no medical records submitted concerning this medical problem. App. 28-29.

Defendants point to their difficulties with representation by attorneys as part of their excusable neglect resulting in the default judgment. Although Defendants may have assumed that a new attorney was actively handling their case (previous counsel having withdrawn due to lack of communication), they failed to communicate with that attorney from September 2015 to March or April 2016 (a period during which there was outstanding discovery), i.e., even after learning about the judgment in January 2016. App. 28.[4] For purposes of excusable neglect, "a lawyer's errors are imputed to the client" and a defendant "must show that both its own conduct and its lawyer's fit the category of excusable neglect." *Moje v. Fed. Hockey League, LLC*, 792 F.3d 756, 758 (7th Cir. 2015) (internal quotation marks omitted). Therefore, to the extent that the new attorney was not providing the quality of representation that Defendants thought should have been provided, it was incumbent upon them to rectify the situation, certainly by, at minimum,

[4] Jansen learned that the new attorney, unbeknownst to him, had passed away in late March or early April, 2016. App. Br. 8.

contacting the attorney; given the facts of this case, any inaction on the part of the attorney is necessarily imputed to Defendants, who essentially allowed it to happen.

Accordingly, the district court did not abuse its discretion in concluding that Defendants did not establish good cause for their failure to defend or respond to this lawsuit.

B. Defendants Failed to Demonstrate Quick Action to Correct the Default.

Turning to the second requirement for having a default judgment vacated under Rule 60(b), the district court appropriately exercised its discretion in finding that Defendants did not demonstrate "quick action to correct" the default. *Sun*, 473 F.3d at 810.[5] Here, Defendants acknowledge that they learned of the December 14, 2015 default judgment in January 2016, yet did not file their Rule 60(b) vacatur motion until October 2016.[6] Defendants also contend that they did not initially

[5] Federal Rule of Civil Procedure 60(c)(1) states that "[a] motion under Rule 60(b) must be made within a reasonable time – and for reasons (1) [encompassing "excusable neglect"], (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."

[6] Defendants were served with the default judgment at their last known addresses provided by their attorney, as well as being served by U.S. Marshals at several other addresses identified through further research by the Department. App. 28. That Jansen moved to Michigan without notifying the district court or the Department of his current address does not constitute good cause. *Cf. Chi. Area I.B. of T. Pension Trust Fund v. S.J. Piraino, Inc.*, No. 93-C-4252, 1993 WL 515498, at *2 (N.D. Ill. Dec. 7, 1993) (finding good cause when defendant did not receive notice of the default motion and of the default hearing because defendant's

understand that the judgment applied to the individual defendants. Even accepting Defendants' contention that they did not appreciate the full consequences of the judgment until several months later, Defendants admit it still took an additional "two, three months" to move to vacate the default judgment. App. 27. As the district court noted, "two, three months is not quick." *Id.*

"The 'reasonableness' of a delay does vary between cases, but to be reasonable a delay ought to have a good explanation." *Casio Comput. Co. v. Noren*, 35 F. App'x 247, 250–51 (7th Cir. 2002) (citing *Berwick Grain Co. v. Ill. Dep't of Agric*., 189 F.3d 556, 560 (7th Cir.1999)). Indeed, this Court has held that far shorter periods than the one that exists here did not constitute a reasonable amount of time. *See, e.g.*, *Casio Comput. Co.*, 35 F. App'x at 250–51 (fifty-five days not a reasonable amount of time); *Jones*, 39 F.3d at 165 (7th Cir. 1994) (less than five weeks not a reasonable amount of time); *C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co*., 726 F.2d 1202, 1208 (7th Cir.1984) (two-month delay not reasonable). Here, Defendants have offered no good explanation for why, upon learning of the judgment in January 2016, they waited over ten months to file their motion to vacate. Even if they believed the monetary portion of the judgment did

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corporate secretary "took reasonable steps to assure that she would receive the Company's mail at her home address"). In any event, Jansen was actually aware of the default judgment in January 2016.

not apply to the individual defendants, both individual defendants were partial owners of Town & Country.[7]

Thus, the district court did not abuse its discretion in concluding that Defendants failed to act sufficiently quickly in moving to vacate the district court's default judgment.

C. Defendants Failed to Offer a Meritorious Defense to the Complaint.

Finally, Defendants must demonstrate "a meritorious defense to the complaint" in order to have a default judgment vacated under Rule 60(b). Here, Defendants' make scant mention on appeal of any defense regarding the alleged violations of the overtime compensation and recordkeeping provisions of the FLSA, simply repeating the cursory statements from the two affidavits attached to their Rule 60(b) motion. In those affidavits submitted to the district court, Defendants stated, without any details or additional documentation, only that they have defenses of good faith, that the amount of back wages awarded were excessive and did not reflect "credits" owed, and that employees were exempt from the overtime requirements. App. Br. 9, 13; Dkt. No. 36, Case No, 15-2010, Jansen Aff. 4-5; Lynch Aff. 3. Indeed, Judge Kendall, at the November 7, 2016 hearing, stated to Defendants' counsel that "you have to show a meritorious defense, and I haven't seen that in the papers." App. 26, 4-5. Defendants' counsel, while

[7] Jansen was a majority owner and Lynch was a minority owner of the corporate defendant. Dkt. No. 36, Case No. 15-2010, Jansen Aff. 1, Lynch Aff. 1.

responding to Judge Kendall that "I understand" (App. 26, 24), addressed only why he thought there was excusable neglect for Defendants' activity that led to the default judgment, but offered no defense as to the underlying merits of the case. A "meritorious defense is not necessarily one which must, beyond a doubt, succeed in defeating a default judgment, but rather one which at least raises a serious question regarding the propriety of a default judgment and which is supported by a developed legal and factual basis." *Jones*, 39 F.3d at 165 (7th Cir. 1994). By contrast, the perfunctory and unsupported statements offered here by Defendants are insufficient to show a meritorious defense to the complaint.

In sum, Defendants are unable to establish any of the three requirements to support a conclusion that the default judgment should be vacated under Federal Rule of Civil Procedure 60(b), and the district court properly exercised its discretion in reaching that same conclusion.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the district court's order denying Defendants' motion to vacate the judgment.

Respectfully submitted,

NICHOLAS C. GEALE
Acting Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

s/Melissa Ann Murphy
MELISSA ANN MURPHY
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave. NW,
Room N-2716
Washington, DC 20210
(202) 693-5555
Murphy.melissa@dol.gov

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 3,655 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit R. 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, using Microsoft Word 2010 utilizing Times New Roman, in 14-point font in text and 14-point font in footnotes.

s/Melissa Ann Murphy
Melissa Ann Murphy
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N2716
Washington, D.C. 20210
(202) 693-5555

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017 a copy of the Secretary of Labor's re-submitted Response Brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system.

s/Melissa Ann Murphy
Melissa Ann Murphy
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
Room N2716
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5555