UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD,	)	
	)	**Docket Number CG S&R 99 0421**
	)	**Coast Guard Case No. PA 97 000196**
vs.	)	
	)	
LYLE D. CHATHAM,	)	
	)	
Respondent.	)	
	)	

DECISION ON RESPONDENT'S MOTION TO SET ASIDE DEFAULT

On June 8, 2000, Respondent requested that the April 18, 2000 Order Granting Motion for Default and which entered an order revoking Respondent's Merchant Mariner's license and document should be set aside, and that the license and document be restored, and he be awarded damages.

Respondent's request was treated as a motion to reopen as provided for in 33 CFR §20.904. The Coast Guard was served with a copy of Respondent's motion and given 10 days, or until July 3, 2000 to respond.

After the Coast Guard timely responded, this matter was assigned to this Judge for further proceedings and decision on the motion.

The motion to reopen was set for hearing on August 22, 2000 at which time both Respondent and the Coast Guard were heard on the motion. Respondent offered no witnesses, but was sworn and testified in his own behalf. Respondent did offer several exhibits in support of his motion all of which were marked and admitted.

The hearing was reconvened on September 12, 2000 with one Coast Guard witness and Respondent testifying. One additional exhibit for Respondent was admitted.

33 CFR § 20.310(e) provides: "For good cause shown, the ALJ may set aside a finding of default." The rules do not provide guidance on what constitutes good cause. Thus, absent a specific provision reference to the Federal Rules of Civil Procedure (FRCP) is controlling. 33 CFR § 20.103(c). Consequently, I will determine the merits of Respondent's motion for relief or to reopen the matter as a motion to set aside a default or as provided in FRCP 55(c) [*for good cause shown*].

The *good cause* that must be shown to set aside *entry* of default under FRCP 55(c) is essentially the same as the *mistake (law or fact), inadvertence, surprise or excusable neglect* required for vacating a default judgment under FRCP 60(b). See, *Hibernia National Bank v. Administracion Central Sociedad Anonima*, 776 F2d 1277 (5th Cir. 1985; and *Chrysler Credit Corporation v. Macino*, 710 F2d 363, 367 (7th Cir. 1983).

While the grounds for relief are basically the same, the standards are applied more stringently when considering a motion to vacate a default judgment under rule 60(b). *Chrysler Credit Corp v. Macino*, 710 F2d at 368. But that is because more has occurred in the usual civil proceeding, such as a hearing on damages.

Nothing like that has occurred in these type proceedings. Here there was a failure to answer the complaint. A motion for entry of judgment was made and Respondent made no response to that motion. No hearing was ever held.

Consequently, I will apply the factors in the more lenient manner similar to the application of them by the courts in FRCP 55(c) matters.[1]

Application of the Factors or Elements

Mistake. Relief may be granted on the showing of mistake by a party. Such mistake may be one of fact or law, but in either case it must *relate to respondent's duty to respond* to the complaint, rather than to the merits of the Coast Guard's complaint.

Because Respondent appears here *pro se*, and has not presented his case with clarity, or at times, civility, I have had to deduce from his testimony and comments, whether he means to assert mistake (law or fact) as a ground for relief.

Mistake of fact. The mistake of fact must be reasonable under the circumstances. This turns on the *justifiability* of respondent's failure to ascertain the correct facts. Relief will not be granted where the failure to respond reflects the conscious desire to avoid defending the action. See, *Taylor v. Boston & Taunton Transportation Co.*, 720 F2d 731 (1st Cir. 1983).

Mistake of fact also includes mistakes of the court that cause or contribute to causing a respondent's default (*e.g.* clerk mailed papers to wrong address). See *Brandon v. Chicago Board of Education*, 143 F3d 293, 295-296 (7th Cir. 1998).

Respondent says that he made clear to the Coast Guard his address had changed and he would not be found at the address they had. Apparently he left no new address despite the fact he is under a continuing duty to keep the Coast Guard informed of his

[1]. Thus, the proof required to set aside an entry of default is not as exacting on the various elements. See, *United States v. One Parcel of Real Property*, 763 F2d 181 (5th Cir. 1985); *Meehan v. Snow*, 652 F2d 274, 276 (2nd Cir. 1981).

current address. Nevertheless, he says that efforts of the New Orleans MSO to serve him with the complaint failed because they were sent to the wrong address.

I suppose this can be argued to be the functional equivalent of a Court clerk's mistake in mailing the papers to the wrong address. Even if we can equate the Coast Guard's mailing to an incorrect address to a court clerk's mistaken mailing, that mistake may only excuse the original efforts of the Marine Safety Office in New Orleans. But, those efforts were cured by forwarding the complaint to the Marine Safety Office in Seattle who served him with the complaint on December 16, 1999, which service he admits he acknowledged with his signature. See, Complaint at page. 3.

Respondent claims, however, that he never actually received any form of the complaint on December 16. He says that after he signed the acknowledgement portion of the original complaint, Lt. Rumazza left to make copies, returned, they talked briefly, and he left without any version.

Lt. Heidi Rumazza testified she is the person, who personally explained the complaint to Respondent and gave him the original to acknowledge. She also testified that she mistakenly gave him a copy (again which he denies), instead of the original, and later mailed to him the original by certified mail because she believed she was required to do so.[2] She said she included a note to that effect in the mailing. Respondent admitted he received the original by certified mail including the note (Respondent Exhibit No. 3).

If Respondent claims the mistake was from the mailing of the original complaint by certified mail (return receipt) to him on or about December 17, 1999, which he received on January 28, 2000. His actual receipt of the original complaint cured the mistake, if any was made.

But, none of this justifies Respondent ignoring the complaint for four months, after January 28, 2000, until about May 25, 2000, when his *curiosity* gets the best of him, and he goes to the Seattle MSO to learn the status of his license and documents. I would note here the motion for default was not made until April, 2000. He had ample time to answer the complaint, albeit late, or take other action to forestall any entry of a judgment against him. He did nothing. And, from his demeanor at the hearing when questioned about this, his responses suggested to me he frankly didn't much care.[3] I equate that attitude with a conscious desire to avoid defending the action. *Taylor v. Boston & Taunton Transportation Co.*, 720 F2d 731 (1st Cir. 1983).

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[2] The pre-printed form of the complaint has a legend at the bottom of each page which instructs the user that the original shall be given to the Respondent, a copy to the ALJ Docketing Center and a copy to be kept by the MSO. Respondent points to this language insisting, because he never received the original at the time of his acknowledgement service was defective. It is also this language that Lt. Rumazza is referring to when she says she mailed the original version of the complaint to Respondent thinking that cured her earlier mistake of serving him with a copy. Respondent's claim of defect in this respect is totally without merit.

[3] Respondent's credibility is also doubtful. His demeanor throughout the hearing was less than civil. His constant undercurrent of derogatory comment toward the Coast Guard, and regular interruptions of the ALJ and the witness suggested to me an effort at obscuring the truth.

In sum, I find no justifiability in Respondent's failure to ascertain the correct facts before May 25, 2000. Any claim of mistake of fact is therefore rejected.

Mistake of Law. Relief can be granted where a respondent who has been served with process is *reasonably* mistaken as to his duty to respond to the complaint. See, *Newhouse v. Probert*, 608 F.Supp 978 (WD MI, 1985); *Brien v. Kullman Industries*, 71 F3d 1073, 1078 (2nd Cir. 1995).

Here Respondent claims because he acknowledged receipt of the complaint on December 16, 1999 (although he says he never actually received a copy on that date) and since he had only twenty days to answer, and since he did not so answer, his receipt of the complaint on January 28, 2000 led him to believe he could not answer the complaint at all, because his time was already up. Respondent cites 33 CFR § 20.308(a) in support.

While that rule does say that an answer must be made within 20 days of receipt of a complaint (originally in December), it also supports the view, when Respondent received the complaint on January 28, 2000, he had 20 days from that date to answer.[4] But he made no effort to ascertain whether he had those 20 days or not. He made no effort to answer the complaint at all. He admits as much.

I cannot accept ignoring the complaint (especially when one's livelihood is at stake) after its receipt on January 28, 2000 is a reasonably mistaken belief that he had no lawful right to do anything to defend himself, let alone find out what to do.

Therefore, I must reject any claim of mistake of law as well.

Surprise, inadvertence or excusable neglect. Those terms boil down to excusable neglect, *i.e.*, has the moving party shown a reasonable excuse for the default. See, *Meadows v. Dominican Republic*, 817 F2d 517 (9th Cir. 1987). The term "neglect" implies carelessness or simple negligence. For example see, *Pioneer Investment Service co. v. Brunswick Assocs Ltd. Partnership*, 507 US 380, 394, 113 SCt 1489, 1497 (1993) [excusable neglect is understood to encompass the failure is due to negligence thus permitting the late filing of a creditor's claim under bankruptcy rules].

Non-action is not the same as negligence. *Pioneer Investment Servs Co. v. Brunswick Assocs. Ltd. Partnership,* 507 US at 394.

[4] The rule is not confusing. The time to answer is calculated from the date of actual receipt of the complaint. If Respondent did not actually receive the complaint in December as he claims, he surely received it on January 28, 2000, which he admits. He had 20 days from then to answer. He did nothing.

Respondent has made no showing how he was negligent in failing to answer the complaint, and if so negligent, how that negligence was "excusable."[5]

I cannot find where Respondent acted in "good faith" from the time he knew of the nature of the complaint against him on December 16, 1999 until May 25, 2000, to take any action to defend against an accusation he claims to be so abhorrent. He did nothing. He made no inquiries even though he clearly knew a complaint that sought to revoke his license was pending.[6]

I must conclude that Respondent knew of the accusations against him, knew the nature of the complaint, was properly served with the complaint at least on January 28, 2000 and indifferently or deliberately took no action to answer or defend.

Respondent's motion for relief, to reopen or to set aside the default is denied.

Service of this Decision upon you serves to notify you of your right to appeal as set forth in 33 CFR Subpart J, §20.1001. (Attachment A)

Dated: October 11, 2000.

Edwin M Bladen
Administrative Law Judge

[5] What constitutes "excusable" neglect is basically an equitable determination. As noted by the Supreme Court in an analogous context in Pioneer Investment Serv Co. v. Brunswick Assoc. Ltd Partnership, supra, Congress provided no guideposts for determining what sorts of neglect will be considered excusable. Thus the determination is equitable taking into account all relevant circumstances surrounding the omission including, danger of prejudice, length of delay, reason for delay, and whether the movant acted in good faith.

[6] Respondent was asked whether he was in the hospital, away from the country, or at sea, as possible good faith reasons why he did nothing between January 28, 2000 and the default judgment. He said none applied.