

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
BAY CITY**

IN RE: Kevin W. Kulek

Chapter 7 Petition
16-21030-dob
Honorable Daniel Opperman

_____/

RANDALL L. FRANK, TRUSTEE,
Plaintiff,

Adversary Case Number
16-2073
Honorable Daniel Opperman

V

AMANDA LYNN KULEK,
ALSO KNOWN AS
AMANDA L. KULEK AND
AMANDA KULEK,
Defendant.

_____/

Keith M. Nathanson, P41633
Special Litigation Counsel to Randall L. Frank, Trustee
Attorney for Plaintiff
Keith M. Nathanson, PLLC
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**ANSWER TO DEFENDANT'S MOTION TO SET ASIDE ORDER ENTERING
DEFAULT OF DEFENDANT, AMANDA KULEK AND INJUNCTIVE ORDER
RESTRAINING TRANSFER ENTERED ON APRIL 14, 2017**

NOW COMES Trustee, Randall L. Frank, by and through his Special Litigation Counsel, Keith M. Nathanson, PLLC, and for his response to Defendant's motion, states as follows:

1. Plaintiff admits the allegations contained in paragraph one, and states that Defendant's Counsel, on April 18, 2017, filed a **new** appearance in the matter, despite having advised this Court in the "Stipulation" filed on April 12, 2017 that there was a "breakdown of the attorney-client relationship".
2. Plaintiff admits the allegations contained in paragraph two, and states that the final pre-trial conference was scheduled pursuant to this Court's Order of November 18, 2017.
3. Plaintiff admits the allegations contained in paragraph three and states that Defendant's Counsel was served with the Scheduling Order and Defendant's Counsel has **admitted** receiving it.
4. Plaintiff is unaware of what Defendant may or may not have known, however her Counsel was notified and received notice of same and Defendant is charged with the knowledge of her Counsel.
5. Plaintiff admits that an affidavit was attached.
6. Plaintiff admits that F.R.Civ.P. Rule 55(c) provides for setting aside a default for good cause, and states that good cause does not exist here.
7. Plaintiff denies the allegations contained in paragraph seven, for the reason they are not true and states that Defendant is charged with the knowledge and actions of her Counsel, as is further shown in Plaintiff's Brief in Response.
8. Plaintiff denies the allegations contained in paragraph eight for the reason they are not true.
9. Plaintiff denies the allegations contained in paragraph nine for the reason they are not true.

10. Plaintiff denies the allegations contained in paragraph ten for the reason they are not true.
11. Plaintiff states that the date of filing of the motion speaks for itself, and denies the balance of the allegations contained in paragraph eleven, for the reason they are not true.
12. Plaintiff is unaware of what Defendant has “been provided” and cannot answer paragraph twelve.
13. Plaintiff admits it has not stipulated to an order setting aside the default.
14. Plaintiff is unaware of Defendant’s former Counsel and her actions and states that her Counsel has now withdrawn **twice** claiming a breakdown of the attorney-client relationship.

WHEREFORE Plaintiff moves this Honorable Court to deny Defendant’s Motion to Set Aside the Default, and to award Plaintiff his costs and attorney fees for the necessity of having to respond to this untimely, frivolous motion or in the alternative, should this Court decide to set aside same, to condition it upon immediate payment by Defendant of Trustees Counsel’s actual attorney fees in the amount of 17 hours at \$300 an hour, for a total of \$5,100.00.

Respectfully submitted,

/s/ Keith M. Nathanson
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Special Litigation Counsel for the Chapter 7 Trustee
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Dated: April 24, 2017

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
BAY CITY

IN RE: Kevin W. Kulek

Chapter 7 Petition
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Honorable Daniel Opperman

RANDALL L. FRANK, TRUSTEE,
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Attorney for Plaintiff
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**BRIEF IN RESPONSE TO DEFENDANT'S MOTION TO SET ASIDE ORDER
ENTERING DEFAULT OF DEFENDANT, AMANDA KULEK AND INJUNCTIVE
ORDER RESTRAINING TRANSFER ENTERED ON APRIL 14, 2017**

Facts:

Both Defendant and her Counsel have admitted that her Counsel received this Court's Scheduling Order on November 18, 2016 (Docket #13). Oddly enough,

Defendant's Counsel withdrew from the instant matter via a stipulation & order on April 12, 2017 (Docket #43 & 44). In the stipulation, Defendant's Counsel represented there was a "breakdown in the attorney-client relationship". Notwithstanding this "breakdown", Defendant's Counsel filed a "new" appearance on April 18, 2017 (Docket #51), only to be followed by a Stipulation & Order allowing her to withdraw again claiming, once again, a "breakdown in the attorney-client relationship" (Docket #55 & #56).

Defendant's Counsel originally filed the instant motion on April 18, 2017 (Docket #52), and then subsequently withdrew the pleading on April 21, 2017 (Docket #54). Defendant filed this motion on April 21, 2017 and simply copied her Counsel's motion.

Defendant's position in her other pleadings with respect to her answer to the complaint and affirmative defenses is that she had John Emaus (an attorney) draft same for her, she did not read them, and just signed and filed them. Presumably, Defendant will take the same position as to this motion, and will have no information about the case law provided in her motion.

Defendant's [once again 'former'] Counsel has admitted to receiving the Court's Scheduling Order (See Affidavit of Jaimie Knickerbocker, paragraph 4). Remarkably, Defendant's Counsel admits to misfeasance and malpractice (and violations of the Rules of Professional Responsibility) by:

- a. Failing to notify her Client of the dates. (paragraphs 5, 6 of her affidavit);
- b. Failing to docket the dates on her own calendar (paragraphs 7, 13 of her affidavit).

Defendant failed to appear at the final pre-trial conference. She also did not participate in the preparation of the joint final pre-trial order. Defendant claims she has

defended this case – however, the Court need not look far to see that Defendant's actions have been nothing short of non-compliant and dilatory:

- a. Defendant failed to file her 26(a) initial disclosures;
- b. Defendant failed to correct her answer and affirmative defenses even after being advised they violated F.R.Bank.P. 9011;
- c. Defendant has failed to provide discovery and now has been compelled to do same and still has not complied, nor paid the sanctions as ordered by the Court;
- d. Defendant failed to respond whatsoever to the Trustee's 'safe-harbor' notice necessitating the filing of the Motion for Sanctions;
- e. Defendant failed to amend her pleadings after knowing same were defective.

Law and Analysis:

Rule 55(c) of the Federal Rules of Civil Procedure indicates that the Court may set aside a default judgment using the factors contained in Rule 60(b). The Sixth Circuit recently specified that Rule 55(c) "permits a court to set aside a default or default judgment for good cause, versus the application of Rule 60(b), which grants relief from final judgments." *Dassault Systemes, SA v. Childress*, [663 F.3d 832, 838-9](#) (6th Cir. 2011). In *Dassault*, the Sixth Circuit also provided that, "[u]nder either [Rule 55(c) or Rule 60(b)], our review invokes the well-established factors set forth in *United Coin Meter Co. v. Seaboard Coastline Railroad*, which assess whether[:]

- 1) the default was willful,
- 2) A set-aside would prejudice plaintiff,
- 3) And The alleged defense was meritorious."

(the "*United Coin* factors") *Id.* (internal citations omitted). The Sixth Circuit noted that "[a]lthough the [*United Coin* factors] are the same [under either rule], the standard for applying them to a motion to set aside a final default judgment under Rule 60(b) is more demanding than their application in the context of a motion to set aside an entry of default under Rule 55(c)." *Id.*, citing *O.J. Distrib., Inc. v. Hornell Brewing Co.*, [340 F.3d 345, 352](#) (6th Cir. 2003).

The Sixth Circuit has held that relief under Rule 60(b) "is circumscribed by public policy favoring finality of judgment and termination of litigation." *Info-Hold, Inc. v. Sound Merch., Inc.*, [538 F.3d 448, 454](#) (6th Cir. 2008) (internal citations omitted); *see also Dassault* [663 F.3d at 839](#) (6th Cir. 2011). Additionally, the party seeking such relief from a final judgment "bears the burden of establishing the grounds for such relief by clear and convincing evidence." *Info-Hold, Inc.* [538 F.3d at 454](#) (internal citations omitted).

A. Defendant is responsible for the actions of her attorney.

Defendant claims she is not culpable due to her attorney's error.

A party in litigation is bound by the acts of her lawyer-agent, and is considered to have notice of all matters which the attorney can be charged with notice. If a lawyer's conduct is unreasonable in a given set of circumstances, the client's remedy is a

malpractice action. *Link v Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386 (1962). The *Link* court stated:

“There is certainly no merit to the contention that dismissal of the petitioner’s claim because of his counsel’s unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in this action, and he cannot avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have ‘notice of all facts, notice of which can be charged upon the attorney’.”

Id. At 633-34 (citing *Smith v Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955 (1879)). This has also been reaffirmed by the Supreme Court as late as 1993. See *Pioneer Investments Services v Brunswick Associates, Ltd.*, 507 U.S. 380, 397, 113 S.Ct. 1489 (1993).

In the 6th Circuit, the Court has made it clear that an attorney’s inexcusable neglect is normally attributed to his client. *Allen v Murphy*, 194 F.3d 722,723 (6th Cir. 1999).

Defendant chose this attorney. Counsel had notice of the dates, and simply did not appear. Defendant has lawyers prepare pleadings and then is quick to claim ignorance when it comes to the lawsuit. Defendant should be held culpable for the actions of her attorney.

The 6th Circuit has repeatedly analyzed this very scenario and has only found a basis for relief where there is intentional abandonment or sabotage of the case by Counsel. See *Fuller v Quire*, 915 F.2d 358 (6th Cir. 1990); *Valvoline v Auto Care Associates*, 173 F.3d 857 (6th Cir. 1999) (Table), 1999 WL 98590.

In *Soto v Mineta*, 2:01-cv-71244-AJT (E.D.M., Southern Division)¹, the Court correctly concluded that:

“I find the instant case is distinguishable from Plaintiff’s cited cases. [Lawyer’s] conduct, even if substandard, involved no criminal conduct and no subordination of her client’s interest for her own benefit. Nor does Plaintiff demonstrate any intentional abandonment or sabotage of his case by [Lawyer]. On the contrary, substantial administrative and discovery efforts were expended....”

This matter parallels *Soto*. Defendant has been represented, her Counsel participated in discovery, participated in drafting the 26(f) report.

As stated in *Soto, supra*, the Court must conclude that the behavior of Counsel in this matter is not “the type of extraordinary and egregious behavior that would warrant relief from its consequences under F.R.Civ.P. 60(b)(6).

B. This matter was previously set for trial and Defendant’s failure to participate has caused delays in this matter and is prejudiced.

The original trial dates have been cancelled by the Court, based upon the default of Defendant. Defendant has further failed to provide discovery and has done everything in her power to delay adjudication.

C. Defendant has no defense to the instant action.

¹ See Docket #74, Report and Recommendation Judge Donald a Scheer in response to Plaintiff’s Motion for Relief from Judgment for analysis.

Defendant's defenses are that she was "employed" by Debtor (and Skit-B); that her grandmother gave her the money used to buy the house (and that it was deposited into the Skit-B account to defraud Medicaid and the State of Michigan as Defendant and Debtor were receiving Medical and Welfare benefits from the State of Michigan. However, these defenses are wholly without merit.

Defendant in her deposition, testified that she had no records of any of the photographs taken for her husband and that she does not retain photographs. Attached to this response is a printout from Defendant's Facebook page dated December 6, 2016, which shows photos Defendant has taken and has retained. There are in excess of 9,000 photos listed there which Defendant has retained, yet she claims she retains now

Defendant also testified she "sold" a van to her husband for \$1,500.00 and had an undated "receipt" for same. However, Plaintiff has in his possession the check written for the "van purchase", and remarkably the check was for \$2,000.00, not \$1,500.00 as testified to by Defendant (along with the "receipt" she produced). Defendant could not provide any dates she did any "work" for her husband (Debtor), and had no W2's or 1099's to reflect any work performed.

Additionally, and perhaps more egregiously, Plaintiff has the bank records from Wildfire Credit Union, which show the transfer of \$28,200 by Debtor from his PayPal account to the checking account and then two days later, the cashier's check for the purchase of the home was written from the Skit-B checking account. Additionally, the day before closing, Debtor and Defendant prepared and signed a document removing

Debtor's name from the home². The Skit-B checking account had insufficient funds to cover the home purchase prior to that transfer.

Defendant has testified she has no records whatsoever of this alleged \$1,500 per month that her grandmother was giving to her.

Additionally, Defendant in her deposition testimony claimed she knew nothing about her husband or his business. Now, in **this** brief, Defendant apparently has knowledge that her husband took \$123,108.94 in wages. It should be further noted that the joint tax returns filed by Defendant and Debtor show that Debtor has had **zero income** since 2013.

Debtor has testified:

- a. That Debtor "pays for nothing" in the household (deposition, page 24);
- b. That she pays for "everything" (deposition, page 24);
- c. That she doesn't know anything (about her husband or the lawsuit) (deposition page 33);
- d. That she doesn't "know what any of the affirmative action [sic] are" (deposition page 40);
- e. She has no records of any money being deposited into the Skit-B checking account (deposition pages 47, 51);
- f. Neither she nor her relatives made any deposits into Debtor's PayPal account (deposition page 47);

² Defendant did not produce this document in her "closing package" and claimed it was not given to her. Testimony from Lawyer's Title at trial or hearing would show that in fact that document was given to Defendant and that she simply removed it from her closing package in the hopes that Plaintiff would not discover it.

- g. She does not know if her husband works at night, goes out at night or what he does (deposition, pages 56, 57):
- h. She has no records of any income ever declared from Debtor (deposition pages 57, 58);
- i. That she has no knowledge about anything related to her husband's business (deposition page 61 – “anything that related to my husband or my husband's business, I can't tell you anything about because I don't know”).

Despite her lack of knowledge, now, in this late stage of this proceeding, Defendant comes forward and states that “upon information and belief” her husband earned in excess of \$123,000.00);

j. That Debtor never paid for anything for the home; taxes, utilities and repairs included (deposition pages 64, 65) [Plaintiff has checks for payment of the property taxes, fuel oil, repairs to the furnace, and other utility bills paid for by Debtor].

The entire defense of Defendant is nothing more than a continuing, divisive sham by she and Debtor to conceal hundreds of thousands of dollars that Debtor bilked out of unsuspecting buyers of a pinball machine which Debtor had no license nor ability to manufacture.

Relief Requested:

Plaintiff moves this Honorable Court to deny Defendant's Motion to Set Aside the Default, and to award Plaintiff his costs and attorney fees for the necessity of having to respond to this untimely, frivolous motion or in the alternative, should this Court decide to set aside same, to condition it upon immediate payment by Defendant of Trustees

Counsel's actual attorney fees in the amount of 17 hours at \$300 an hour, for a total of \$5,100.00.

Respectfully submitted,

/s/ Keith M. Nathanson

Keith M. Nathanson, P41633

Special Litigation Counsel for the Chapter 7 Trustee

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Dated: April 24, 2017

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CERTIFICATE OF SERVICE

Keith M. Nathanson, being first duly sworn, states that on April 24, 2017, he did
serve by ECF/PACER notice/filing:

- Answer to Motion to Set Aside Default, Brief in Response to Motion, Certificate of Service.

Upon Amanda Kulek, 1301 Pine River Road, Midland, MI 48640 by placing same in an envelope, with postage duly pre-paid, and depositing same into a mail receptacle in Waterford, Michigan.

Respectfully submitted,

/s/ Keith M. Nathanson

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Amanda Kulek posts

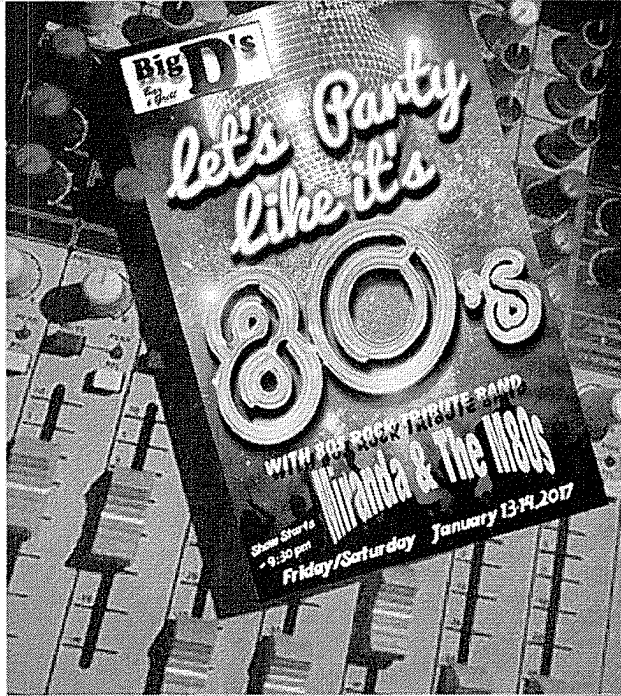


Keith

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HEY, Big D's.. me and my M80s are looking forward to this weekend, playing all the huge hit songs from the 1980's. So, it's time to get out those leggings' and those zuba pants and come party with us this weekend starting at 9:30 each night!

2

5 Comments

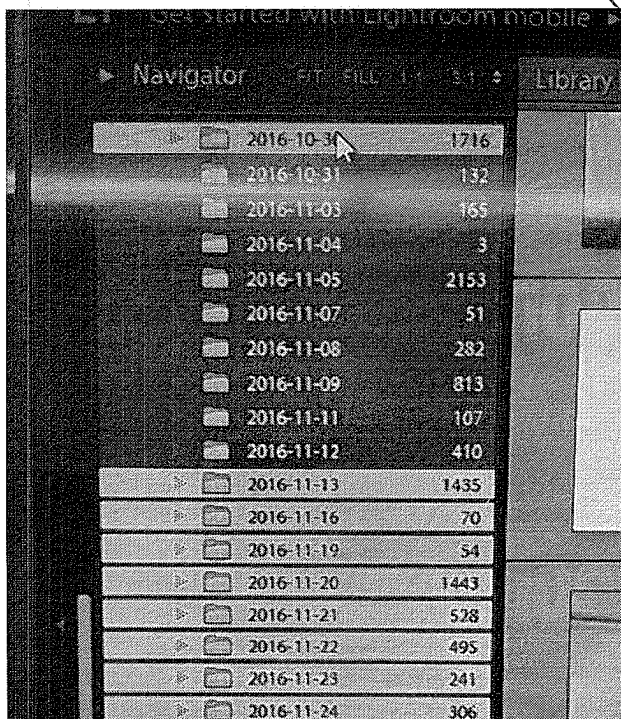
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Amanda Kulek

December 6, 2016 ·

The highlights are the ones I need to sort out and edited missing two days on here as well... I got this shit. Living on coffee for sure.



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Scott Freeman commented on Shelby Kile's post.



Tim Kasperek updated his profile picture.



Robert Menders shared Okinawa Karate Kobudo Bureau's photo, "Get ready...it's coming..."



Alan Nathanson added a new photo, "Good Riddance to this loudmouth racist...oh I heard his new book..."



Nicky Cairns commented on her own post.



Evan Scapelliti reacted to Abbie Lee's post.



Pat O'Hern likes Jeff Knick's post.



Celine Jonsson shared a link.



Alice Wolfe Spelce likes Ed Francis's post.



Adam Goldberg likes Mark Lemley's post.



Diane McClure investigated a crime scene on Criminal Case.

YOUR PAGES



Keith M. Nathanson, ... 1

CONTACTS



Harry Longton



Jim Davidson



Mar Grossman 5m



Adam Goldberg 15m



Manny Sosa



Jeremy Soronen



Laura Ledfoot



Robert Menders



Scott Freeman



Marie Marko

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