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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 84-413

BILL F. DICKERSON, ET AL.,

PLAINTIFFS,

VS:

REPORT AND RECOMMENDATION

SIPPLE OIL COMPANY, ET AL.,

DEFENDANTS.

INTRODUCTION

The present diversity action, in which monetary damages and an injunction were sought for problems caused by drilling operations conducted on the plaintiff's land, was initiated in November, 1984. A default judgment on the issue of liability was entered May 3, 1985 against the defendant Sipple Oil Company (hereinafter Sipple). After a hearing on the issue of damages before Judge G. Wix Unthank, the plaintiff was awarded \$15,000.00 in damages, costs, and interest against all defendants jointly. Currently before the undersigned is the motion of Sipple to set aside the default judgment.

FACTS

Although the judgment entered May 3, 1985 recites that Sipple was "personally served", upon close examination of the record (and essentially undisputed by the plaintiffs) it appears that no company employee or official was ever informed of the existence of the above-styled action. Rather, service was made upon Kentucky's Secretary of State, whose personnel then sent by certified mail a letter addressed to:

SIPPLE OIL COMPANY
% James M. Sipple
P. O. BOX 247 Court Street
Prestonsburg, Kentucky.

This letter was returned to the Secretary by the post office, with the notation that the forwarding order had expired two years beforehand.

The plaintiffs contend that this service of process was proper in that Sipple had failed to properly inform the Secretary of State of its process agent's new mailing address when the company headquarters (which James Sipple, the president and agent for process, had used as his mailing address) were moved to Beattyville in 1981. They argue, therefore, that service of process and the default judgment thereon were proper.

Sipple indicates that it had informed the Secretary of State of its address change, and tenders copies of its 1981, 1982 and 1983 Annual Reports, which have been marked as "received by the Secretary of State's Office"; these exhibits, Sipple contends, indicate that the Secretary learned of the change in 1981 and in subsequent years sent the Report form to the new address.

The three annual reports--apparently printouts from the Secretary which were sent to Sipple for verification--each contained the legend, "If you wish to change process agent or address please contact this office for appropriate forms". However, in the undersigned's view, the average layman would be unclear as to whether the "address" mentioned referred to the corporation's address or the process agent's address; the ambiguity is clarified only by reference to the pertinent Kentucky statutes, which set out special procedures for notification of address changes for process agents.

Additionally, the information printed onto the form by the Secretary of State's office may have created some confusion, at least initially. The 1981 Annual Report, contains a handwritten notation made by Alice Sipple, "Secretary", to the effect that the "mailing address" was changed to "Box 811, Beattyville, Kentucky 41311"; although she indicated no address change under "process agent", it should be noted that the printout had contained no separate listing for the address of the

"process agent". On subsequent Annual Report printouts, the fact that the corporation's mailing address had changed was noted, although the "process agent's" former address was now added to the printout as well; no corrections were made to the 1982 and 1983 printouts by Alice Sipple, however.

APPLICABLE LAW

Factors to be considered in ruling upon Rule 60(b) motions to set aside the entry of default judgments are: (1) whether the plaintiffs would be prejudiced; (2) whether the defendant has a meritorious defense (regardless of whether he is likely to prevail on the same); and (3) whether there has been "culpable conduct" by the defendant. United Coin Meter Company, Inc., 705 F.2d 839, 845 (6th Cir. 1983). A more recent decision by the Sixth Circuit Court of Appeals indicates that this standard is still applicable to both Rule 55 and Rule 60 motions and that the "culpable conduct" element is to be equated with willfulness, an intent to thwart judicial proceedings, or with a reckless disregard for the effect on judicial proceedings. Shepard Claims Service, Inc. v. Darrah, No. 85-1674, slip op. at 5, 8 (6th Cir. July 18, 1986).

The Kentucky statute relating to changing the process agent's address, which was cited by the plaintiffs provides:

- (1) A corporation may change its registered office . . . upon filing in the office of the secretary of state a statement setting forth:
 - (a) The name of the corporation;
 - (b) The address of its then registered office;
 - (c) If the address of its registered office is to be changed, the address to which the registered office is to be changed;
 - (d) The name of its then registered agent;
 - . . .
 - (e) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical; and
 - (g) That such change was authorized by resolution duly adopted by its board of directors.

- (2) Such statement shall be executed by the corporation by its president, or a vice president, and verified by him, and delivered to the secretary of state. If the secretary of state finds that such statement conforms to the provisions of this chapter, he shall file such statement in his office, and, upon such filing, the change of address of the

registered office. . .shall become effective.

KRS 271A.065.

Another pertinent provision states that:

(2) Whenever a corporation shall fail to appoint or maintain a registered agent in this state, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the secretary of state shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the secretary of state of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice, or demand is served on the secretary of state he shall immediately cause one of the copies thereof to be forwarded by certified mail, return receipt requested, addressed to the corporation at its registered office. Service on the corporation shall be deemed to have been made on the tenth day after the date when the process, notice or demand is served on the secretary of state in accordance with this section.

KRS 271A.070.

DISCUSSION

In assessing the factors cited in United Coin, *supra*, the undersigned first notes that the only prejudice which the plaintiffs cite is that it has already been forced to incur legal expenses in obtaining the default judgment, which would be the same argument raised in virtually any other default judgment case. Although the undersigned recognizes that a evidentiary hearing was necessary on the damage issue, which may have accounted for additional expenditures, this is not considered to be a particularly strong factor in favor of the plaintiffs' argument.

The defendant contends that it has meritorious defenses which can be raised. In a memorandum, counsel indicates that: (1) the company strenuously disputes that it conducted any activity or abandoned any equipment upon the land owned by the plaintiffs; (2) that part of the conduct complained of occurred on a right-of-way owned by Kentucky Utilities Company, which was certainly beyond Sipple's Control; (3) the company disputes that any damage--caused by whatever or whoever--could have been in the amount of judgment, since the land in question was actually a remote, weedy acreage with a long-uninhabited structure,

(3) the damage was established through the testimony of an expert witness who came from an area some distance from the location of the property in question and who was unlikely to have been familiar with pertinent property evaluations; and (5) the plaintiffs could easily have located the company had it made more diligent efforts. Thus, it appears that the defendant will have certain meritorious defenses to raise.

The main force of the plaintiffs' argument appears to be directed toward the third of the three factors, the "culpable conduct" of Sipple. Specifically, the plaintiffs point to the fact that Sipple failed to formally notify the Secretary of the change of address for its registered agent. However, although this is most certainly true and is evidence of negligence on the part of Sipple personnel, it fails to raise to the level of "willfulness" or "an intent to thwart judicial proceedings" as envisioned in Shepard Claims, supra.

RECOMMENDATION

Accordingly, an analysis of the three factors indicates that Sipple's motion to set aside the default judgment should be granted.

Objections to this report and recommendation must be filed within ten days of the date of same or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd _____ U.S. _____, 38 Cr. L. 3031 (December 4, 1985); Fed. R. Civ. P. 72(b).

This the _____ day of August, 1986.

JOSEPH M. HOOD,
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 84-413

BILL F. DICKERSON, ET AL.,

PLAINTIFFS,

VS:

ORDERS

SIPPLE OIL COMPANY, ET AL.,

DEFENDANTS.

* * * * *

Currently before the Court is the motion of the defendant Sipple Oil Company to set aside the default judgment entered May 3, 1985. The plaintiffs have filed a response, objecting to said motion. The undersigned having considered the matter,

IT IS HEREBY ORDERED that the matter be set for hearing at the hour of _____ on the _____ day of _____, 1986 in the Courtroom of the United States Courthouse in Pikeville, Kentucky.

This the _____ day of August, 1986.

JOSEPH M. HOOD,
UNITED STATES MAGISTRATE