

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES SECURITIES AND)
EXCHANGE COMMISSION,)
)
Plaintiff,)
)
vs.) IP 00-C-1265-T/K
)
KENNETH R. PAYNE, JOHANN M.)
SMITH, CONSTANCE BROOKS-)
KIEFER, HEARTLAND FINANCIAL)
SERVICES, INC., JMS)
INVESTMENT GROUP,)
)
Defendants.)

ENTRY ON DEFENDANT PAYNE'S MOTION TO SET ASIDE DEFAULT¹

¹ Though this Entry is a matter of public record and is being made available to the public on the court's web site, it is not intended for commercial publication either electronically or in paper form. The reason for this caveat is to avoid adding to the research burden faced by litigants and courts. Under the law of the case doctrine, the ruling or rulings in this Entry will govern the case presently before this court. See, e.g., *Trs. of Pension, Welfare, & Vacation Fringe Benefit Funds of IBEW Local 701 v. Pyramid Elec.*, 223 F.3d 459, 468 n.4 (7th Cir. 2000); *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995). However, a district judge's decision has no precedential authority and, therefore, is not binding on other courts, on other judges in this district, or even on other cases before the same judge. See, e.g., *Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358, 359 (7th Cir. 1998) ("a district court's decision does not have precedential authority"); *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 697 (7th Cir. 1998) ("district court opinions are of little or no authoritative value"); *United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 571 (7th Cir. 1987) ("A single district court decision . . . has little precedential effect. It is not binding on the circuit, or even on other district judges in the same district."). Consequently, though this Entry correctly disposes of the legal issues addressed, this court does not consider the discussion to be sufficiently novel or instructive to justify commercial publication of the Entry or the subsequent citation of it in other proceedings.

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Defendant, Kenneth R. Payne, filed a Motion to Set Aside a Default Judgment. The Plaintiff, the United States Securities and Exchange Commission ("SEC"), opposes the motion. For the foregoing reasons, this court **DENIES** Defendant's motion.

I. Factual Background

On August 10, 2000, the SEC filed a complaint alleging that Payne and the other Defendants engaged in a 29.1 million dollar Ponzi scheme. Attorney Fred Scott represents Payne in this matter and entered his appearance in this case. On August 21, the court entered an order of a preliminary injunction against Payne. Shortly thereafter, the SEC and Payne, through his attorney, engaged in settlement discussions. Those discussions ended unsuccessfully in January 2001. In the interim, Payne found his way to Mexico where he was arrested as a fugitive, based on an indictment alleging that certain of his activities, related to the matters that are the subject of this suit, were violations of federal criminal law. Payne was ordered detained while awaiting trial on the criminal charges and has been held in a "lockdown" status at various times during his incarceration. Payne has written directly to the court on several occasions in connection with the criminal case and has attended several hearings in that case in person.

At no time after settlement negotiations ceased, did Payne or his attorney successfully file an answer to the complaint. In addition, the SEC was not served with a copy of any answer. Payne did however file an answer to a related case in this court.

On June 5, 2001, an entry of default was entered against Payne.² He now moves to set aside that entry.

II. Discussion

Federal Rule of Civil Procedure 55(a) states that an entry of default shall be entered by the clerk “[w]hen the party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules.” However, Rule 55(c) then provides “[f]or good cause shown the court may set aside an entry of default.” Payne does not contest the ability of the clerk to make the entry of default but now claims that it should be set aside.

In order to vacate an entry of default, Payne must show (1) good cause for default, (2) that quick action was taken to correct the default, and (3) a meritorious defense to the SEC’s complaint. *Pretzel & Stouffer v. Imperial Adjusters, Inc.*, 28 F.3d 42, 45 (7th Cir. 1994). Because Payne cannot establish any of the above, his motion to set aside the entry of default must be denied.

Payne claims that he was unable to file an answer due to circumstances not under his control, that he was unaware that the default had been entered against him until he retained his current counsel, and that he “believes he has meritorious defenses to the complaint.” (Mot. to Set Aside Default J. at 1.) Specifically, Payne notes that he has been in Marion County Jail, under “lockdown” conditions since September 2000.

²Although Payne’s motion is to set aside a default judgment, it appears that there has only been an entry of default thus far in this case.

Therefore, he has no access to telephones or copiers, no visitation, and limited access to the law library. Because he was aware that Scott had never filed an answer to the complaint, in December of 2000, Payne claims that he prepared and filed a handwritten pro se response to the complaint which he mailed (albeit without copies) to the United States District Court.

This is insufficient to establish “good cause” for the default. At all times, Payne was represented by counsel. He provides no reason why Scott did not file an answer. Furthermore, Payne admits “that not all of his letters were received.” (Payne Aff. ¶ 11.) A reasonable person in his position would have attempted to contact his attorney, the SEC, or this court to determine whether his answer was filed. Finally, Payne was in “lockdown” because of his own journey to Mexico. This court finds it hard to find good cause for failure to file an answer due to circumstances the Defendant himself created.

Also, Payne has not established that quick action was taken to rectify the default. He claims he did not know of the default until August 23, when his current attorney informed him of it. This was almost three months after the default was entered. Scott, Payne’s counsel during this time, was served with a request for entry of default on May 31.³ The Seventh Circuit has held that notice to a party’s attorney constitutes notice to that party. *United States v. Di Mucci*, 879 F.2d 1488, 1495 (7th Cir. 1989). The court further noted that:

³ It should also be noted that Mr. Scott continues as an attorney of record for Payne. No request to withdraw has ever been filed.

Although [the plaintiff] blames her lawyer for the failure, a litigant is bound by his lawyer's acts Holding the client responsible for the lawyer's deeds ensures that both clients and lawyers take care to comply. If the lawyer's neglect protected the client from ill consequences, neglect would become all too common. It would be a free good—the neglect would protect the client, and because the client could not suffer the lawyer would not suffer either The court's power to dismiss a case is designed both to illicit action from the parties in the case at hand and to induce litigants and lawyers in other cases to adhere to timetables A court cannot lightly excuse a litigant because of the lawyer's neglect without abandoning the pursuit of these objectives. [The plaintiff] does not suggest that supplying answers was not "within the meaningful control of the defaulting party, or its attorney." . . . She says only that her attorney was asleep on the job.

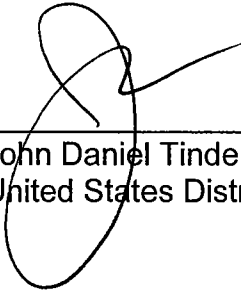
Di Mucci, 879 F.2d at 1495-96 (citations omitted). Payne cannot escape the entry of default when his attorney has notice of the default at least three months before Payne filed his motion to set aside the default.

Finally, Payne has failed to establish that he has a meritorious defense to the claims in the complaint. In his affidavit supporting his motion to set aside the default, Payne merely alleges that "[h]e feels he has legitimate answers and defenses to the matters set forth in the complaint." (Payne Aff. ¶ 15.) He does not provide any support for this "feeling" or give this court any clue as to what those meritorious defenses might be. A showing of a meritorious defense requires more than a "general denial" and "bare legal conclusions." *Pretzel & Stouffer*, 28 F.3d at 46. Because Payne has not done this, even if he had established the other two requirements for setting aside an entry of default, his request for relief must be denied.

III. Conclusion

For the foregoing reasons, Defendant's motion is **DENIED**.

ALL OF WHICH IS ORDERED this 18th day of December 2001.



John Daniel Tinder, Judge
United States District Court

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