

**United States Bankruptcy Court  
Western District of Wisconsin**

Cite as: [Unpublished]  
[aff'd, Case No. 88-C-43-C (W.D. Wis. April 11, 1988)]

**Cosmos Trust, Plaintiff, v.  
United States of America and State of Wisconsin,  
Department of Revenue, Defendants, v.  
Carlton J. West, Counterclaim Defendant**  
(In re Cosmos Trust, Debtor)  
Bankruptcy Case No. 84-00339-11, Adv. Case. No. A86-0237-11

United States Bankruptcy Court  
W.D. Wisconsin, Eau Claire Division

December 18, 1987

James C. Ritland, for debtor.

Mary E. Bielefeld, for United States of America (defendant).

Thomas S. Utschig, United States Bankruptcy Judge.

**MEMORANDUM OPINION, FINDINGS OF FACT,  
AND CONCLUSIONS OF LAW**

The debtor (plaintiff), by James C. Ritland, filed the above entitled adversary proceeding seeking to have the court declare that certain tax liens are not valid in the debtor's bankruptcy case. The United States of America (defendant) appears by Mary E. Bielefeld and contests the complaint. The defendant has asserted a counterclaim in this proceeding to which the plaintiff has failed to timely answer. The defendant seeks to have the Court enter default judgment in its favor with respect to said counterclaim. This issue has been submitted to the Court for determination through briefs.

The plaintiff filed this adversary proceeding on August 25, 1986. The defendant filed an answer to the complaint on October 6, 1986. Subsequently, on October 22, 1986, the defendant filed an amended answer which included a counterclaim against the plaintiff. Said amended answer was entitled "AMENDED ANSWER AND COUNTERCLAIM." The plaintiff did not file an answer to the counterclaim. On June 1, 1987, the defendant filed a motion for entry of default and a request for entry of judgment by default on its counterclaim. The plaintiff filed a motion for denial of default judgment on June 4, 1987.

The plaintiff in its memorandum in support of motion for denial of default judgment basically argues three reasons why default should not be entered. The plaintiff initially argues that Rule 13(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Bankruptcy Rule 7013, does not allow counterclaims such as the plaintiff's. The Court disagrees with the plaintiff's first argument. There is

nothing in the language of Fed. R. Civ. P. 13(b) that would seem to preclude the defendant's counterclaim. Further, the plaintiff should have made any such argument in a timely filed response to the counterclaim.

The plaintiff's second argument is that the Court should construe the defendant's counterclaim to be an answer or an affirmative defense. The plaintiff then asserts that no answer should be required to the newly reclassified answer or affirmative defense. The plaintiff cites Fed. R. Civ. P. (8)(f) in support of the above requested construction. Bankruptcy Rule 7008 makes Fed. R. Civ. P. (8)(f) applicable to this proceeding. This rule mandates pleadings to be construed so as to do substantial justice. However, the Court is of the firm belief that it is not in the interest of substantial justice, or appropriate for that matter, to apply the construction that the defendant requests.

The plaintiff argues thirdly that this case should be decided after a trial on its merits rather than on procedural technicalities. The Court does note that there is an over-arching policy concern in favor of deciding cases on their merits. Sutton Place Dev. Co. v. Abacus Mortg. Inv. Co., 826 F.2d 637, 640 (7th Cir. 1987). Regardless, the time requirements of procedural rules cannot simply be ignored. The bare assertion that cases ought to be tried on the merits, without more, is not sufficient to avoid default judgment. Otherwise, procedural rules would be ignored on a regular basis.

Finally, the plaintiff argues by implication that excusable neglect exists for its failure to timely respond to the counterclaim. Bankruptcy Rule 9006(b)(1) allows the Court to permit an act to be done on motion after the expiration of a specified period only where the failure to act was a result of excusable neglect. In order to show excusable neglect the movant must demonstrate circumstances beyond the control of the party who had the duty to perform. In re South Atlantic Financial Corp., 767 F.2d 814 (11th Cir. 1985).

Rule 9006(b) makes it clear that, when a party moves for an extension of time after the expiration of the time period, it must show that its failure to act before the court's deadline was the result of excusable neglect.

Courts have interpreted "excusable neglect" under Rule 9006(b) and its identically worded predecessor, Rule 906(b), as requiring the movant to show that the failure to timely perform a duty was due to circumstances which were beyond the reasonable control of the person whose duty it was to perform. (citations omitted) (emphasis added)

Id. at 817. See also Redfield v. Continental Casualty Corp., 818 F.2d 596 (7th Cir. 1987); Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western R.R. Co., 539 F.2d 1107 (7th Cir. 1976). The plaintiff has not shown any circumstances beyond its control; nor, has the plaintiff demonstrated anything else that could be considered to be excusable neglect.

It is the conclusion of the Court that the defendant's motion for default with respect to its counterclaim should be granted. The plaintiff has not demonstrated any good reason why default should not be entered in this matter.

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.