

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

In re:

TRI-STATE HOMES, INC.,
Debtor.

In Bankruptcy:

No. WF11-82-00488 ✓

TRI-STATE HOMES, INC.,
Plaintiff,

vs.

Adversary Proceeding
Case No. 82-0149

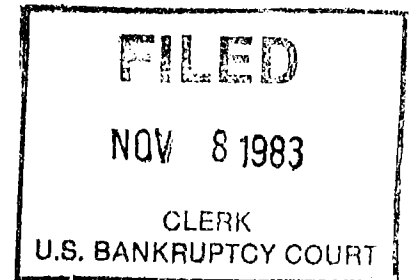
DONALD MEARS and ELNA MEARS,

Defendants and
Third Party
Plaintiffs,

vs.

EDWARD ALVEY and MARGARET ALVEY,

Third Party Defendants.



ORDER DENYING MOTION TO STRIKE PLEADINGS

AND

ORDER DENYING MOTION FOR DEFAULT JUDGMENT

The application of the defendants and third party plaintiffs, Donald Mears and Elna Mears, to strike the answer and for default judgment on their counterclaim having been filed by their attorney, John E. Danner; and the debtor, Tri-State Homes, Inc., by its attorney, Robert E. Hackett, Jr., and the third party defendants, Edward Alvey and Margaret Alvey,

by their attorneys, Dennis Burgy and Michael E. Stroh, having opposed said motions; and the matters having come on before the Court for hearing, and said attorneys having appeared from time to time; and the Court having considered the arguments of counsel, the memorandums and the affidavits and the entire record and proceedings herein, FINDS:

1. That the debtor, Tri-State Homes, Inc., filed a petition for relief under Chapter 11 of the Bankruptcy Code on the 24th day of March, 1982, and that said matter is now pending in this Court.

2. That on the 15th day of June, 1982, Tri-State Homes, Inc., filed a complaint in an adversary proceeding to void stock purchase by the debtor corporation, referring to Statute 28 U.S.C. 1471 (Supp. IV. 1980) to establish the jurisdiction of this Court.

3. That the defendants Donald Mears and Elna Mears filed a counterclaim and third party complaint and answer on July 22, 1982.

4. That on August 26, 1982, an answer of the third party defendants to the counterclaim and third party complaint was filed herein.

5. That on August 31, 1982, the defendants and third

party plaintiffs moved for default judgment against the plaintiff and said matter was duly set for hearing on September 15, 1982.

6. That the basis of the motion for striking was the failure of the debtor, Tri-State Homes, Inc., to file within the time provided by law its answer to said counterclaim.

7. That on September 7, 1982, an answer and counterclaim and third party complaint was received from Robert E. Hackett, Jr., the attorney for the debtor, with a letter requesting permission to file late as he was on vacation and had taken a deposition on August 19 and 20, 1982, and had just received it from the reporter.

8. That on September 15, 1982, a pre-trial conference was held relative to the motion for default judgment and the same was adjourned by the Court awaiting determination of the Marathon case. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ___U.S.___, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). (October 4, 1982, deadline for amending law.)

9. That on November 15, 1982, a hearing on the motions for default and to strike a pleading was held in Wausau. Mr. Danner, for the Mears, argued that Tri-State Homes, Inc., had not moved for an enlargement of time to file and that its Answer was untimely. Mr. Hackett, for Tri-State Homes, Inc., acknowledged the failure to file in a timely fashion but argued that no party was damaged by the fault. Mr. Burgy, for the Alveys, stated

his position that the motions should be denied.

10. That the attorney for the debtor stated that he was on vacation at the time that the answer became due and that he thereafter filed the same, and that no party was damaged by said delay in answering.

11. That the affidavit of the attorney for the Mears states that the time for answering expired on August 2, 1982, and that the answer was not made until September 3, 1982, when it was mailed to the said defendants' attorney, and more than one month after the deadline for filing the responsive pleading; and that the answer to the counterclaim and third party complaint not being filed timely constituted an insufficient defense pursuant to Rule 12 of the Federal Rules of Civil Procedure and Rule 712 of the Bankruptcy Procedure, and said pleading should be stricken.

12. That on February 10, 1983, the Court dismissed said action for want of jurisdiction of the subject matter (Marathon case).

13. That on August 11, 1983, the United States District Court for the Western District of Wisconsin reversed the February 10, 1983, order of the Bankruptcy Court dismissing said action. Tri-State Homes v. Mears (In re Tri-State Homes) Case No. 83-C-493-S (W.D. Wis. August 11, 1983).

14. That following said reversal the Court held a telephone conference relative to consideration of the motion for default judgment and motion to strike answer, which were reinstated by said reversal.

15. That the United States Supreme Court Order prescribing the new Bankruptcy Rules provides:

2. That the aforementioned Bankruptcy Rules shall take effect on August 1, 1983, and shall be applicable to proceedings then pending, except to the extent that in the opinion of the court their application in a pending proceeding would not be feasible or would work injustice, in which event the former procedure applies.

Order Adopting Bankruptcy Rules, April 25, 1983.

16. That former Bankruptcy Rule 712 sets forth time limits for serving answers and essentially incorporates Federal Rule of Civil Procedure 12 (b-h) dealing with other procedural aspects of defenses and objections. Rule 712's replacement, Bankruptcy Rule 7012, is identical for purposes of this case: Although the time to answer a counterclaim is extended from 10 to 20 days, the answer at bar was served more than 30 days after the counterclaim.

17. That former Bankruptcy Rule 755(a) provides for a default judgment when a party has failed to plead without sufficient excuse. Rule 755's replacement, Bankruptcy Rule 7055, incorporates Federal Rule of Civil Procedure 55. Rule 55(a) does not, on its face, provide the Court with discretion. Thus, a party may not avoid default by showing "sufficient excuse." However, a court may prevent harsh results by granting an enlargement of time to answer under Bankruptcy Rule 9006 or by setting aside a default judgment for "good cause" under Rule 55(c).

18. That under former Bankruptcy Rule 906(b), the Court in its discretion may, "upon application" and a showing of excusable neglect, permit tardy service of a pleading. Rule 906's replacement, Bankruptcy Rule 9006, is identical for purposes of this case except that the phrase "upon application" is replaced with "upon motion."

19. That the tests for excusable neglect set out in In re Kelly Lyn Franchise Co., Inc., 26 B.R. 441, 448 (Bankr. M.D. Tenn. 1983) are: (1) good faith by the party seeking the extension of time; (2) a reasonable basis for non-compliance; and (3) a lack of prejudice to the opposing party. Of course, the application of this test must be tempered by the policies favoring decisions on the merits over adherence to procedures. In re Murphy, 1 B.R. 736,

739 (Bankr. S.D. Cal. 1979).

20. That the record in this case demonstrates that the failure to request an enlargement prior to the deadline for service was the result of human error. An isolated incident of human error may form a reasonable basis for noncompliance.

21. That following the Marathon decision on June 28, 1982, the Court had delayed actions on various cases such as this and involving state law issues, awaiting the October 4, 1982, deadline set in the decision; that many courts were awaiting clarification, and that it appears to this Court that to grant a default judgment herein would be unreasonable and improper, and that in the interest of justice the motion for default judgment should be denied.

CONCLUSIONS OF LAW

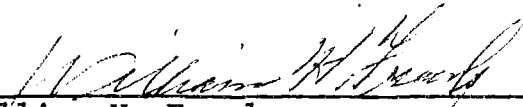
That orders be entered authorizing the filing of the answer to the counterclaim of the defendant, denying the motion to strike the pleading and denying the motion for default judgment.

NOW, THEREFORE, IT IS ADJUDGED, That Tri-State Homes, Inc., is granted the necessary enlargement of time to file its answer to the counterclaim of Donald and Elna Mears as it was filed in this proceeding, and

IT IS FURTHER ORDERED, that the motions to strike said pleading and for default judgment are hereby denied, without costs to any of the parties.

Dated: November 8 , 1983.

BY THE COURT:



William H. Frawley
Bankruptcy Judge