IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

In Re SLEP-TONE ENTERTAINMENT CORP. consolidated cases.	**CASE NO. 5:11cv32-RS/CJK**

RESPONSE IN OPPOSITION TO MOTION OF DEFENDANT ROBERT PAYNTER, SR. TO SET ASIDE DEFAULT JUDGMENT

The Plaintiff, Slep-Tone Entertainment Corporation ("Slep-Tone"), by its undersigned counsel, hereby responds to the Letter to the Court from Defendant Robert Paynter, Sr., dated November 14, 2011, which in substance appears to be an informal motion to set aside the default judgment (Doc. No. 87) entered against Mr. Paynter in this matter on November 2, 2011.

Slep-Tone strongly opposes Mr. Paynter's effort to have the default judgment set aside, for two principal reasons. First, Mr. Paynter has utterly failed to mount any sort of defense in this action, nor to present any evidence supporting an articulable basis for relief from the judgment, and he should not now be allowed to reopen proceedings based upon his unsworn word alone. Second, the reasons Mr. Paynter has articulated as purported grounds for setting aside the default judgment are based upon Mr. Paynter's materially, provably false statements. Slep-Tone respectfully suggests, based upon those latter statements, that the Court

order Mr. Paynter to show cause why he should not be held in contempt of court for making those false statements.

I. Mr. Paynter's accusations of misconduct by Slep-Tone and its attorneys are utterly without an evidentiary foundation and run contrary to the truth.

In his letter, Mr. Paynter accuses Slep-Tone of "circumventing due process in order to expedite this matter through the court," of "taking advantage of my inability to secure an attorney," and of failing to serve him with notice of pleadings or with process to bring him before the Court. These charges are categorically false and offensive to Slep-Tone and its counsel, and they represent a craven attempt by Mr. Paynter to make a mockery of the judicial system in order to escape liability for his clear and intentional acts of infringement.

In order to demonstrate the falsity of Mr. Paynter's statements, it is unfortunately necessary to guide the Court through the history of this matter and of the Plaintiff's contact with Mr. Paynter.

The subordinate case in which Mr. Paynter was sued, No. 5:10cv71-RS, was commenced on April 2, 2010. Consistent with its practice at the time, counsel for Slep-Tone sent Mr. Paynter a packet of information that included a cover letter, a copy of the complaint, a Notice of Lawsuit and Request for Waiver of Service, a letter discussing settlement options, and other documents. (Exh. A, Declaration of

Michelle Harrington, ¶ 4.) That packet was deposited with the U.S Postal Service on April 3, 2010, and was addressed to Mr. Paynter's attention at his address at 9083 Seafair Lane, Tallahassee, FL 32317. (Exh. A, ¶ 4 and Exhibit 1 thereto.) That letter was confirmed by the U.S. Postal Service as having been delivered on April 5, 2010. (Exh. A, ¶ 5, and Exhibit 2 thereto.) The address was taken from a Facebook page associated with Mr. Paynter's karaoke operations. (Exh. A, ¶ 6 and Exhibit 3 thereto.) The settlement letter requested a response within 10 days. (Exh. A, ¶ 4.)

On April 13, 2010, Mr. Paynter called the Plaintiff's "settlement hotline," a toll-free number (888-854-2792) established by Slep-Tone's counsel to encourage defendants to call to discuss the case. (Exh. A, ¶ 9.) Mr. Paynter's hotline call was answered by Glen A. Cipriani, then a partner at the law firm, and in a 15-minute, 27-second call, Mr. Paynter admitted two facts of interest to the Court in connection with this matter: first, that he had received the letter (addressed to him at 9083 Seafair Lane), and second, that his parents live with him. (Exh. A, ¶ 10.) A recording of the telephone call was made and will be made available to the Court if desired.[1]

[1] A caller to the settlement hotline is informed at the beginning of the call that calls may be recorded. (Exh. A, ¶ 9.) Additionally, North Carolina law, where the hotline is based, provides for "one party" consent to recording, whether such an announcement is made or not.

On April 15, 2010, Attorney James Harrington emailed a detailed settlement proposal to Mr. Paynter at his confirmed email address, *callbigbob@comcast.net*. (Exh. B, ¶ 3.) No email response was received. (Exh. B, ¶ 3.)

On April 21, 2010, Mr. Harrington telephoned Mr. Paynter and spoke with him in a telephone call that lasted 48 minutes, 15 seconds. (Exh. B, ¶ 4.) A recording of that call was also made and will be made available to the Court if desired.[2] The conversation was substantively about Mr. Paynter's inability to pay what Slep-Tone was asking in settlement due to financial reverses. (Exh. B, ¶ 4.) In the call, Mr. Paynter again confirmed that his parents lived with him. (Exh. B, ¶ 4.)

Slep-Tone's counsel, who routinely logs each contact with defendants, has no record of any contact with Mr. Paynter after that lengthy telephone call until October 18, 2010, when Slep-Tone's process server, David K. Righi, effected service of process upon Mr. Paynter. (Exh. B, ¶ 5.) Mr. Righi's Proof of Service indicates that service of process was made "at the individual's residence or usual

[2] The call in question was not prepended with an announcement regarding recording, but insofar as it originated in North Carolina and crossed state lines, the recording was likely subject to the federal law governing the recording of telephone calls, which requires only one party's consent. Since the recording was made by Mr. Harrington, a party to the call, the recording was legally made according to federal law. *See* 18 U.S.C. § 2511(2)(c). The call in question was also likely legally recorded and disclosed under Florida law, even if Mr. Paynter did not consent, because the call was recorded using Mr. Harrington's telephone emulator software, furnished by his communications provider, which included a mechanism for recording telephone calls, during the ordinary course of business. (Exh. B, ¶ 6.) Making and disclosing recordings under those circumstances is firmly within an exception, the "business extension exception," to the Florida Security of Communications Act. *See* Fla. Stat. § 934.02; *Royal Health Care Services, Inc. v. Jefferson-Pilot Life Ins. Co.*, 924 F.2d 215, 217 (11th Cir. 1991).

place of abode with ... Jack Paynter, a person of suitable age and discretion who resides there, on 10/18/10 ... ." (Doc. No. 23.) The Proof of Service is signed with a declaration by Mr. Righi under penalty of perjury. (*Id*.) Attached to the Proof of Service as filed was a supplemental "Report of Service of Process," which verifies the place of service at 9083 Seafair Lane, Tallahassee, on October 18, 2010, at 11:23 a.m.; identifies the person receiving service as "Jack Paynter," who is described as a white person having black and grey hair, "5'10 (maybe)" and 185 pounds; and indicates that Jack Paynter resides at the location of service. (*Id.*)

At the same time, Mr. Righi also filed a proof of service upon "Big Bob's Music Machine," which is apparently a fictitious business name for Mr. Paynter or a partnership in which he is a general partner, indicating service at the same time. (Doc. No. 22.) The supplemental report attached to that Proof of Service also reports service upon Jack Paynter, but expressly identifies him as the father of Mr. Paynter, the defendant. (*Id.*)

On October 19, 2010, Stuart R. Harrington, an attorney then working in Slep-Tone's counsel's office, telephoned Mr. Paynter and left a voice mail message informing Mr. Paynter that Slep-Tone was about to proceed with the lawsuit and urging Mr. Paynter to contact Slep-Tone's counsel to discuss a settlement. (Exh. A, ¶ 11.) Mr. Paynter's telephone apparently "pocket dialed" in

response, because Stuart Harrington's notes reflect a return call in which only "faint talking of what sounded like a lecture" could be heard. (Exh. A, ¶ 11.)

Mr. Paynter never responded to the suit. On February 4, 2011, the Plaintiff applied for entry of default against Mr. Paynter. (Doc. No. 41.) The Plaintiff's application for entry of default includes a certificate of service upon Mr. Paynter at his Seafair Lane address. (*Id.*) On February 7, 2011, the Clerk entered default against Mr. Paynter. (Doc. No. 43.)

During the summer of 2011, the Court raised the issue of possible misjoinder of defendants, and progress in this matter was halted while the Court received briefing on that issue and ruled. After the question of joinder was answered and the various cases pending in this District were consolidated, the substantive matters of the case were again taken up. On September 29, 2011, Slep-Tone filed a motion for default judgment against Mr. Paynter. (Doc. No. 78.) The Certificate of Service for that motion also indicates service upon Mr. Paynter. (*Id.*)

In his letter, Mr. Paynter states, "I have never been served notice concerning any court proceedings in this case," and "I have never been served notice about any pending court dates concerning this matter." These statements are simply false. At the outset of this case, Mr. Paynter provided with the Notice of Lawsuit and a request for a waiver of formal service, in which he was given a 30-day deadline for response. (Exh. A, ¶ 4.) When he was served with process—in a manner that was

fully effective under Rule 4 of the Federal Rules of Civil Procedure—he was given 21 days to answer the Complaint. (Doc. No. 10-6, Summons to Robert L. Paynter Sr.) He was routinely provided with service under Rule 5 of documents filed in this case after he was served and before his default was entered. He was served with the motion for default judgment. (Doc. No. 78.)

Mr. Paynter also asserts that he did not live at 9083 Seafair Lane until May 2011. This statement is also false. Around the time the lawsuit was filed, Mr. Paynter listed that address—a residential property—as the address for Big Bob's Music Machine, his business. (Exh. A, Exh. 3.) For the entire pendency of this lawsuit, he has been a record owner of that address. (Exh. A, ¶¶ 7-8, and Exhs. 4 and 5 thereto.) He received correspondence there at the outset of this litigation and responded to that correspondence without indicating a different address. In that response, he indicated that his father lived with him there. Six months later, when service was attempted, his father was present in the home, confirmed that he lived there, and accepted substituted service of process.

Mr. Paynter states as follows:

> In the last conversation that I had with them, they indicated to me that they would review my offer and get back in touch with me. The next thing I know, I received a notice of summary judgment in the mail that this case had proceeded to court and a ruling was made against me.

Mr. Paynter's characterization of the state of matters suffers from a severe compression of the timeline. The last telephone conversation between him and an attorney for Slep-Tone occurred in April 2010. Judgment was not entered until November 2011, some 18 months later. In the interim, Mr. Paynter was served with process, received copies of numerous pleadings, and received both the application for entry of default and the motion for default judgment. Default judgment could hardly have been the surprise that Mr. Paynter makes it out to be.

Mr. Paynter's allegations are serious, and allegations of that type should be investigated by the Court in order to safeguard the integrity of the judicial process. The headlines of late are replete with stories of plaintiffs filing false paperwork as a short-cut to accomplishing the goals of the litigation they initiate. But in this case, the evidence is conclusive: Slep-Tone has followed the due process of law, Mr. Paynter has been put on notice of this litigation, Mr. Paynter has had a full and fair opportunity to defend himself, and Mr. Paynter has simply not treated this matter with the seriousness it demands.

More importantly, the integrity of this Court requires that Mr. Paynter be called to account for his statements. Mr. Paynter's actions and his statements reflect contempt for this Court and its proceedings. It is bad enough that Mr. Paynter chose to ignore an important matter to which is attention was required. He is now, on the back of a lie, demanding that the Court excuse his inattention and

give him a fresh opportunity to contest a matter that has already been finally decided. The Court should punish, not reward, this behavior.

II. Defendant Paynter has not presented support for any reasonable basis for setting aside the default judgment.

Leaving aside the fraudulent basis on which Mr. Paynter asks for relief, he does not, in his letter, cite to any controlling legal authority or to any rule of civil procedure on which he is basing his request. Given that Mr. Paynter is a *pro se* litigant, he should be afforded *some* latitude with respect to the formality of his filings, even though he is ultimately bound to follow all of the applicable rules. *See GJR Invs., Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir. 1998) (courts "show a leniency to *pro se* litigants not enjoyed by those with the benefit of a legal education").

Slep-Tone presumes that the Court intends to construe Mr. Paynter's letter as a motion to reconsider or set aside the default judgment, either under Rule 59(e) or Rule 60(b). If it is construed as a Rule 59(e) motion, the letter is insufficient to justify relief from the judgment. "The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (alteration in original, quotation marks omitted); *see also Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005) ("a Rule 59(e) motion [cannot be used] to relitigate old

matters, raise argument or present evidence that could have been raised prior to the entry of judgment"). Mr. Paynter has not identified any newly discovered evidence or any manifest errors of law or fact in the judgment, and as such, his letter cannot serve as a proper, grantable Rule 59(e) motion.

With regard to Rule 60(b), Mr. Paynter's letter is likewise deficient. Mr. Paynter appears to be asserting the grounds listed in Rule 60(b)(3) as the basis for his motion. Rule 60(b)(3) provides relief from final judgment due to "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Overall, Rule 60(b)(3) "is aimed at judgments which were unfairly obtained, not at those which are factually incorrect." *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978). "To prevail on a 60(b)(3) motion, the movant must prove by clear and convincing evidence that an adverse party has obtained the verdict through fraud, misrepresentation, or other misconduct." *Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007). "The moving party must also show that the conduct prevented the losing party from fully and fairly presenting his case or defense." *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1287 (11th Cir. 2000).

Here, Mr. Paynter has presented no evidence, let alone *clear and convincing* evidence, that Slep-Tone obtained its default judgment through fraud, misrepresentation, or other misconduct. All that is present in his letter are his bare

assertions, unaccompanied by any affidavit or unsworn declaration, and without any documentary evidence supporting his claim. His assertions are contrary to the factual record before the Court as described above.

Mr. Paynter has also not shown that he was prevented from fully and fairly presenting his defense. In the letter, he admits being aware of the case and having had discussions with the Plaintiff's counsel. He also admits that the address to which pleadings and papers were mailed is the address at which he resides. He filed a motion (Doc. No. 91) to extend the time to respond to the motion for default judgment—well after the time for filing a response, and after judgment had in fact been entered—and does not, in that motion, cite any fraud, misrepresentation, or other misconduct by Slep-Tone as grounds for needing the extension of time.

Ultimately, the default judgment was entered against Mr. Paynter because of his own failure to attend to a matter, of which he was aware, that a reasonable and responsible businessperson would attend to on a timely basis. That he does not believe he can afford counsel is unfortunate, but there is no evidence of record that Mr. Paynter made any serious effort to obtain any help in this matter at all. Hoping that a lawsuit will go away and complaining about the lost opportunity to defend the case once it is brought to a logical conclusion is not a reasonable litigation strategy.

III. Conclusion

Mr. Paynter has been derelict in his attention to this case, and he now wishes to lay the blame at the feet of Slep-Tone. Mr. Paynter is the author of his own misfortunate. It would be unreasonable and unfair to allow Mr. Paynter to skate through life, profiting from his use of and doing serious damage to Slep-Tone's intellectual property, without being required to adhere to the rules that every other litigant must follow or to give basic and prompt attention to the dispute. It would likewise be unreasonable and unfair, based upon a set of self-serving falsehoods, to set aside all of the work done by Slep-Tone and its attorneys, in good faith, in an attempt to bring this matter to a conclusion.

The Court should always strive to do what justice requires. Here, justice requires that Mr. Paynter's motion be denied.

Respectfully submitted this the 7th day of December, 2011.

HARRINGTON LAW, P.C.

By: s/James M. Harrington
James M. Harrington, N.C. State Bar No. 30005
jharrington@harringtonlawpc.com
Attorney for the Plaintiff

HARRINGTON LAW, P.C.
P.O. Box 403
Concord, NC 28026-0403
Telephone: 704-315-5800
Facsimile: 704-625-9259

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document is being filed on the date indicated below using the Clerk's CM/ECF System, which will send a Notice of Electronic Filing to counsel of record in this matter:

WEYMAN W MCCRANIE, JR - billmccranie@wrightgreen.com
KARL JEFFREY REYNOLDS - kjreynolds924@earthlink.net
VINCENT BRIAN LYNCH - vlynch@floridalawyer.com
STEVEN MITCHELL DEVER - mitchdever@comcast.net
PATRICIA ROE FITZGERALD - pfitzgerald@floridalawyer.com

CM/ECF non-participants are being served on the date indicated below by depositing copies thereof as First Class Mail, postage prepaid, addressed as follows:

BRANDON LYNCH
BRAND X ENTERTAINMENT
69 MARIE CIR
CRAWFORDVILLE FL 32327-2248

KEVIN SHORETTE
PO BOX 1784
BRONSON FL 32621-1784

ROBERT L. PAYNTER, SR.
9083 SEAFAIR LN
TALLAHASSEE FL 32317-8188

Date: December 7, 2011 s/ James M. Harrington