

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 96-1104-CIV-KING

Magistrate Stephen T. Brown

DOBSON COLLINS, an individual
on behalf of himself and others
similarly situated,

Plaintiffs,

-vs-

FLAGSHIP AIRLINES, INC.,
a Delaware corporation,

Defendant.

FILED BY JHJ D.C.
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CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA.-MIAMI

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENT**

Defendant, Flagship Airlines, Inc. ("Flagship"), pursuant to Local Rule 7.1.C,
files this memorandum of law in opposition to plaintiff's Motion for Entry of Default Judgment
("Motion for Default").

INTRODUCTION

On April 29, 1996, plaintiff served Flagship with the complaint in this action.
The complaint in part alleges violations of Title VII based on an EEOC charge filed by plaintiff
against defendant on May 12, 1994, and later amended on December 14, 1994. Defendant has
been represented by undersigned counsel and plaintiff has been represented by his counsel in
connection with that charge for almost two years. Counsel for plaintiff and defendant, therefore,

MORGAN, LEWIS & BOCKIUS LLP

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have been working on this matter for almost two years. In addition, as part of the relationship of cooperation which existed between the counsel for the parties, Flagship and undersigned counsel offered plaintiff and his counsel the unusual opportunity and professional courtesy of extensive pre-litigation discovery in connection with the investigation of various workplace wrongs plaintiff claims to have suffered.

Since this complaint was filed, counsel for plaintiff and defendant frequently communicated with each other and agreed to various extensions of time, on both sides, including (1) an extension of time for defendant to respond to the complaint prior to its filing of the motion to dismiss, (2) an enlargement of time by twenty-one (21) days for plaintiff to file a memorandum in response to a motion to dismiss filed by the defendant, and (3) an extension of time for plaintiff to move for a determination whether the case was to be maintained as a class action. In fact, the plaintiff's motion for an extension of time to move for class certification, which was served by plaintiff's counsel on July 24, 1996, also requested an extension of time to file the scheduling report required by Local Rule 16.1 at the suggestion of defendant's counsel. When plaintiff's counsel called to ask for the extension of time on the issue of class determination, defendant's counsel advised plaintiff's counsel that the time for filing the joint scheduling report, for which plaintiff is responsible for scheduling, was approaching and suggested that the plaintiff request an extension of time to file the scheduling report.

On July 29, 1996 this Court entered an order granting in part and denying in part defendant's Motion to Dismiss. Upon receipt of the order, undersigned counsel focused on

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certain substantive issues relating to the dismissal of the class allegations and the Court's decision on the Title VII claims and, through inadvertence, did not enter in his calendar the time set forth by the Court for answering those portions of the complaint which had not been dismissed. As a result and in the midst of an extensive travel schedule on other litigation as well as personal matters, defendant failed to serve or file its answer and defenses to Count I and Count II of plaintiff's complaint by August 19, 1996.^{1/} Despite the history recited above, counsel for plaintiff filed and served his Motion for Entry of Default without the courtesy of a call. Indeed, on August 20, 1996, prior to service of the Motion for Default, counsel for the parties spoke by telephone to discuss the necessity for a Rule 16 meeting. At no time did counsel for plaintiff mention that the answer was late or inquire as to whether there was a problem. Instead, on August 23, 1996, plaintiff served his Motion for Default. Defendant's counsel received the Motion for Default on August 26, 1996, while completing a trial in another matter, and has now proffered for filing and has served its answer contemporaneously with this memorandum of law, making plaintiff's Motion for Entry of Default moot.

MEMORANDUM OF LAW

The law disfavors motions for default, preferring to decide cases on the merits. See Florida Physicians Co., Inc. v. Ehlers, 8 F. 3d 780, 783 (11th Cir. 1993) (default judgments are viewed with disfavor as a result of strong policy of determining cases on their merits). A

^{1/} The Court dismissed Count III of plaintiff's Complaint, seeking class status for his claims.

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default judgment will be entered only where the defendant's conduct shows "a clear record of delay or contumacious conduct." E.F. Hutton & Co., Inc. V. Moffat, 460 F.2d 284, 285 (5th Cir. 1972). See also, Momah v. Albert Einstein Medical Center, 161 F.R.D. 304, 308 (E.D. Pa. 1995) (to justify default, defendants conduct must be willful, intentional, reckless or in bad faith).

Factors governing the disposition of a motion for default judgment include 1) whether the plaintiff will be prejudiced if the default is denied; 2) whether the defendant has a meritorious defense; and 3) whether the default was the product of defendant's culpable conduct. See, Spurio v. Choice Security Systems, Inc., 880 F. Supp. 402, 404 (E.D. Pa. 1995). A party seeking a default is not entitled to a default judgment as of right even "when the defendant is technically in default." Id. citing 10 Charles A. Wright, Arthur R. Miller and Mary K. Kane, Federal Practice and Procedure, § 2685 (1983).

Where, as here, the default has not yet been entered and defendant has immediately filed an answer after becoming aware that the answer was due, a default should not be entered. See Dr. Ing. h.c.f. Porsche AG v. Zimm, 481 F. Supp. 1247 (N.D. Tex. 1979) (default would not be entered where defendant failed to answer after the complaint was amended but filed answer four days after plaintiff's request for default and no default judgment had been entered at the time the answer was filed.) Moreover, because under Rule 55(b)(2) a party moving for a default judgment against a defendant who has appeared must serve written notice of the application for judgment at least three days prior to any hearing on the issue and the answer has been filed before the three days have expired, a default should not be entered.

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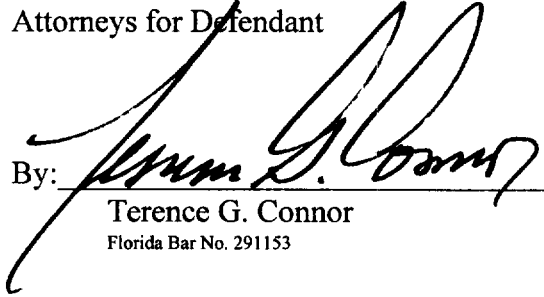
This case is in its earliest stages. Plaintiff has not alleged and cannot show any prejudice as a result of the answer being filed one week late. The defendant has served its answer, placing plaintiff's claims at issue, and stating meritorious defenses, and has otherwise acted diligently to move this matter, and particularly to correct counsel's mistaken failure to enter the court date in his calendar. The failure to serve the answer in this matter was inadvertent, not willful or intentional. Despite prior mutual courtesies, and the ongoing dialogue between counsel concerning the necessity that plaintiff commence work on the scheduling conference in the matter, plaintiff's counsel regarded it as inappropriate even to mention in that dialogue that he had not received service of an answer. Instead, despite two years of prior dealings on this matter, counsel decided to move unilaterally for a default judgment. Prior to filing this motion, defendant's counsel also sought plaintiff's agreement to the granting of the instant motion, but he has declined. In the absence of willful delay or any prejudice to the plaintiff, and in view of the contemporaneous filing of an answer, defendant requests that plaintiff's motion for default should be denied.

Defendant's counsel regrets any inconvenience to the Court and opposing counsel as a result of the late filed answer. As previously stated, counsel has acted diligently to correct the inadvertent calendar error in this case. Counsel assures the Court and opposing counsel that he has taken steps to ensure that there will be no recurrence of this error in the future.

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For the foregoing reasons, defendant respectfully requests that the Court deny plaintiff's Motion for Default.

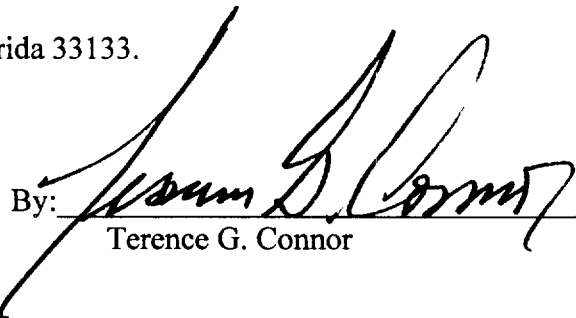
MORGAN, LEWIS & BOCKIUS LLP
Attorneys for Defendant

By: 

Terence G. Connor
Florida Bar No. 291153

CERTIFICATE OF SERVICE

We hereby certify that a true copy of the foregoing was hand-delivered this 28th day of August, 1996, to Ira J. Kurzban, Esquire, Kurzban, Kurzban, Weinger & Tetzeli, P.A., 2650 S.W. 27th Avenue, Second Floor, Miami, Florida 33133.

By: 

Terence G. Connor