

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action No. 5:24-cv-00456

RYAN BAILEY and RKB, INC.,

Defendants.

**PLAINTIFF UNITED STATES OF AMERICA’S MEMORANDUM
IN OPPOSITION TO DEFENDANT RYAN BAILEY’S MOTION
TO SET ASIDE ENTRY OF DEFAULT BY CLERK AND
MOTION OF THE DEFENDANT, RKB, INC., TO SET ASIDE
ENTRY OF DEFAULT PURSUANT TO RULE 60 OF THE WEST
VIRGINIA RULES OF CIVIL PROCEDURE**

I. FACTUAL AND PROCEDURAL BACKGROUND

The Complaint was filed in this civil action on August 28, 2024. *See* ECF No. 1. Summonses were issued by the Clerk for defendants Ryan Bailey and RKB, Inc., on August 29, 2024. *See* ECF Nos. 5, 5-1. A copy of the summons and complaint was served upon the Secretary of State of West Virginia as statutory attorney-in-fact for RKB, Inc., and the Secretary of State of West Virginia filed a notice on September 11, 2024, indicating that service had been accepted on behalf of RKB, Inc., by the Secretary of State of West Virginia as statutory attorney-in-fact for RKB, Inc. *See* ECF No. 6. A return of service showing service on Ryan Bailey on September 11, 2024, was filed with the Court by Deputy United States Marshal Justin Ford of the United States Marshals Service on September 12, 2024. *See* ECF No 7. A return of service showing service on RKB, Inc., by service on Ryan Bailey as President of RKB, Inc., on September 11, 2024, was filed with the Court by Deputy United States Marshal Justin Ford of the United States Marshals Service

on September 12, 2024. *See* ECF No 8. The above services were all valid pursuant to Fed.R.Civ.P. 4 and applicable federal law.

Defendants Ryan Bailey and RKB, Inc., failed to appear, plead, or otherwise respond to the Complaint filed in this civil action within the time required by law (which was, October 2, 2024). *See* Fed.R.Civ.P. 12. The United States met the procedural requirements for obtaining entry of default as demonstrated by the record before the Court, namely ECF Nos. 1, 6, 7, and 8, and the failure of defendants Ryan Bailey and RKB, Inc., to appear, plead, or otherwise respond to the Complaint filed in this civil action within the time required by law. Accordingly, the Clerk of the Court entered default against defendants Ryan Bailey and RKB, Inc., pursuant to Fed.R.Civ.P. 55(a) on October 16, 2024. *See* ECF No. 10. Defendants Ryan Bailey and RKB, Inc., received notice of the entry of default against them on October 19, 2024, and October 21, 2024, respectively. *See* ECF Nos. 11 and 12.

On October 24, 2024, the Court entered an order in *United States of America v. Ryan Bailey*, Criminal Action No. 5:24-cr-00106 and in this civil action. *See* ECF No. 13. According to that order, the Court found defendant Ryan Bailey eligible for representation by appointed counsel in the criminal action and in a civil forfeiture action styled *United States of America v. \$66,506.26 Seized from Truist, Account Number XX6412 et al*, Case No. 5:23-cv-00406, pursuant to Guide to Judiciary Policy Vol. 7A, Ch. 2 §§ 210.20.30 and 210.20.40. *Id.* at pp. 2-4. The Court then stated “Therefore, it is **ORDERED** G. Todd Houck, CJA Panel Attorney, is **APPOINTED** to represent the Defendant in both **Criminal Action No. 5:24-cr-106** and **Civil Action No. 5:24-cv-00456.**” *Id.* at p. 4. However, Civil Action No. 5:24-cv-00456 is this action and not the forfeiture action previously referenced in the Order (“Case No. 5:23-cv-0006.”). *Id.*

Defendant Ryan Bailey then filed a motion on November 15, 2024, to set aside the entry of default in this civil action. *See* ECF No. 15. According to Defendant Ryan Bailey, he was requesting that the entry of default be set aside because “Defendant Bailey was in transition of attorney’s representation during the times in question and undersigned was not appointed Defendant Bailey’s counsel until October 24, 2024....” *Id.* at p. 1. Defendant Ryan Bailey did not proffer or make a showing of a potential meritorious defense in his motion to set aside the entry of default. *Id.*

On November 26, 2024, Defendant RKB, Inc., filed a motion to set aside the entry of default. *See* ECF No. 17. According to that motion, Defendant RKB, Inc., was requesting that the entry of default be set aside because “Inasmuch as the sole shareholder of RKB, Inc. was without counsel, he had no legal representation to advise him of the legal ramifications related to Codefendant, RKB, Inc., of which he is the sole shareholder” and “Codefendant, RKB, Inc., respectfully represents that the Plaintiff herein is not prejudiced by entry of an Order setting aside the Default Judgment.” *Id.* at p. 1. Defendant RKB, Inc. did not proffer or make a showing of a potential meritorious defense in its motion to set aside the entry of default. *Id.*

Plaintiff United States believes that the entry of default against both Defendants should stand because neither Defendant has proffered or made a showing of a potential meritorious defense to the allegations asserted in the Complaint. Accordingly, the United States respectfully requests that the Defendants’ respective motions to set aside the entry of default be denied.

**II. THE DEFENDANTS' MOTIONS TO SET ASIDE THE ENTRY OF
DEFAULT SHOULD BE DENIED BECAUSE THEY HAVE FAILED
TO SHOW GOOD CAUSE AS REQUIRED BY FED.R.CIV.P. 55(C) SINCE
THEY HAVE NOT PROFFERED A MERITORIOUS DEFENSE TO
THE CLAIMS ASSERTED IN THE COMPLAINT**

The standard for setting aside the entry of default and default judgment is set forth in Fed.R.Civ. P. 55(c) which states:

c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

Id.

Since the entry of default is at issue in this case (and not default judgment), the Defendants are required to show “good cause” for setting aside the entry of default against them. “The court should not reopen a default judgment merely because the party in default requests it, but should require the party to show both that there was good reason for the default and that he has a meritorious defense to the action.” *McGrady v D’Andrea Electric, Inc.*, 434 F.2d 1000, 1001 (5th Cir. 1970). In this case, default judgment has not yet been entered against the defendants. Thus, the applicable standard is under Fed.R.Civ.P. 55(c) rather than Fed.R.Civ.P. 60(b). “Under Rule 55(c), the principal factors bearing on the appropriateness of relieving a party of a default are whether setting it aside would prejudice the adversary and whether a meritorious defense is presented.” *Armor v. Michelin Tire Corp.*, 113 F.3d 1231 *2 (4th Cir. May 13, 1997). *See also* 10A Fed. Prac. & Proc. Civ. § 2697 (4th ed. 2024) (“Generally, a federal court will grant a motion under Rule 55(c) only after some showing is made that if relief is granted the outcome of the suit may be different than if the entry of default or the default judgment is allowed to stand; the showing should underscore the potential injustice of allowing the case to be disposed of by default. In most

cases, therefore, the court will require the party in default to demonstrate a meritorious defense to the action as a prerequisite to vacating the default entry or judgment.”) (footnotes omitted).

In *United States v. Moradi*, 673 F.2d 725 (4th Cir. 1982), the Fourth Circuit held that to establish the existence of a “meritorious defense” the defaulting party must make “a presentation or proffer of evidence, which, if believed, would permit either the Court or the jury to find for the defaulting party....” *Id.* at 727. The failure to proffer a meritorious defense is fatal to a motion to set aside an entry of default. Even if the defendant moves quickly to set aside the entry of default, the entry of default should not be set aside when the defendant cannot proffer a meritorious defense. *See South Carolina National Bank v. Baker*, 941 F.2d 1207 *2 (4th Cir. Aug. 1991) (Fourth Circuit affirmed denial of motion to set aside default, stating: “While Baker may have acted with reasonable promptness by filing a responsive pleading within twelve days of its due date, we concur with the district court's determination that Baker failed to allege a meritorious defense.”). Further, the proffer must be more than a bare allegation of a meritorious defense. *See Consolidated Masonry & Fireproofing, Inc. v. Wagman Const. Corp.*, 383 F.2d 249, 252(4th Cir. 1967) (“We are not persuaded that a bare allegation of a meritorious defense precludes the court, in its discretion, from requiring disclosure of facts to support such a conclusory assertion. We find that the court did not abuse its discretion, under the circumstances. The defendant did no more than state that plaintiff breached the contract, a mere conclusion which fell far short of providing the court with a satisfactory explanation of the merits of the defense.”).

Here, the Defendants do not proffer any meritorious defenses to the claims asserted by the United States in its complaint. They did not present any proffer of evidence that they might succeed on the merits. They presented no defense that the outcome of this civil action would be different if the entry of default would be set aside. Rather, the Defendants only alleged that they were in

“transition” regarding appointment of counsel. *See* ECF Nos. 15 at p. 1; 17 at p. 1. Moreover, that excuse obviously does not apply to Defendant RKB, Inc., as that defendant is not a defendant in the underlying criminal action and was not part of the application by Defendant Ryan Bailey for seeking appointment of counsel by the Court.¹ Furthermore, that “excuse” does not satisfy the Defendants’ lack of a proffer of a meritorious defense in their motions to set aside the entry of default. Since neither Defendant proffers a meritorious defense in their respective motions to set aside the entry of default, they have failed to meet their burden to set aside an entry of default under Fed.R.Civ.P. 55(c). *See Carbon Fuel Co. v. USX Corporation*, 153 F.3d 719 *4 (4th Cir. Aug. 6, 1998) (affirming denial of motion to set aside entry of default where defendant’s motion to set aside entry of default failed to include a proffer of a meritorious defense and holding that omission indicated that “USX failed to carry its burden of establishing a meritorious defense.”); *South Carolina National Bank*, 941 F.2d 1207 *2 (affirming denial of setting aside motion for entry of default stating, “We therefore conclude that the district court's determination that Baker had not asserted a meritorious defense was properly made within its discretion.”).

III. CONCLUSION

The entry of default against each Defendant was properly entered pursuant to Fed.R.Civ.P. 55. While the Defendants have moved to set aside the entry of default, their motions fail to include a proffer of a meritorious defense as required under Fed.R.Civ.P. 55(c). Therefore, their motions should be denied because they have failed to meet their respective burdens for setting aside entry of default under Fed.R.Civ.P. 55(c). The United States also respectfully requests such other and further relief as permitted by the Court.

¹ It is unclear to the United States how Defendant Ryan Bailey, due to his financial condition could have court appointed counsel to defend him in his criminal action, and, presumably, this civil action filed against him, and the civil forfeiture action, but, as sole shareholder, be able to afford counsel to defend RKB, Inc.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, Fred B. Westfall, Jr., Assistant United States Attorney for the Southern District of West Virginia, hereby certify that on November 27, 2024, I electronically filed the foregoing **PLAINTIFF UNITED STATES OF AMERICA'S MEMORANDUM IN OPPOSITION TO DEFENDANT RYAN BAILEY'S MOTION TO SET ASIDE ENTRY OF DEFAULT BY CLERK AND MOTION OF THE DEFENDANT, RKB, INC., TO SET ASIDE ENTRY OF DEFAULT PURSUANT TO RULE 60 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE** with the Clerk of the Court, with the Clerk of the Court using the CM/ECF system which will send notification to the following CM/ECF participant, and that I also served a copy thereof upon the following person and entity who are not CM/ECF participants by United States mail, postage prepaid:

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