

IN THE COUNTY COURT OF MADISON COUNTY, MISSISSIPPI

DOWNTOWN JACKSON PARTNERS  
AND DJP MARKETING CENTER, LLC

**FILED**  
MADISON COUNTY

PLAINTIFFS

VS.

JAN 10 2017  
ANITA WRAY, CIRCUIT CLERK

CAUSE NO. CO-2014-1131-JO

LINDA BRUNE

BY  D.C.

DEFENDANT

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**OPINION and ORDER**

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THIS DAY, this cause came on to be heard on the Defendant's Motion to Set Aside Default Judgment (Doc.#39) as well as the Plaintiff's renewal of their Motion for Default Judgment (Doc. #33) if necessary. This Court, finding that it has jurisdiction over the subject matter and the parties herein, hereby finds the following:

On November 29, 2016, the Plaintiffs, Downtown Jackson Partners and DJP Marketing Center, LLC, filed a Motion for Default against the Defendant, Linda Brune (Docket #33). The basis of this Motion was the allegation that "Plaintiff's counsel received absolutely no information from Defendant's counsel on" preparing a proposed pretrial order. Document #33 also alleges that the Defendant refused to be deposed. The Plaintiffs did not file a Notice of Hearing for their Motion (Doc. #33) prior to December 1, 2016.

Three days after the Plaintiffs filed their Motion (Doc.#33) there was a telephonic hearing with then County Court Judge Longwitz on December 1, 2016. This telephonic hearing was not noticed on the record nor was a court reporter on the phone call. At the hearing before this Court

on January 4, 2017, counsel for the Plaintiff acknowledged that the Defendant was not represented during the telephonic hearing on the Motion for Default Judgment.<sup>1</sup>

Pursuant to Rule 6(d) of the Mississippi Rules of Civil Procedure, a hearing on this matter should not have occurred until five days after the Motion was served upon the Defendant unless there was consent from both parties. Given the fact that there was no Notice of Hearing and the Defendant was unrepresented during this telephonic hearing, the Defendant's Motion to Set Aside the Default Judgment is well taken and will be **GRANTED**.

As such, the Plaintiffs have renewed their Motion for Default Judgment and it was properly noticed on December 9, 2016 for hearing on January 4, 2017. The Defendant was not present for this hearing but did contact the Court Administrator to inform the Court that she would be absent for medical reasons. In the absence of any documentation of a medical excuse, the hearing proceeded as noticed. The Court heard argument from the Plaintiffs on their Motion for Default Judgment and took the matter under advisement.

The Plaintiffs have moved this Court for a Default Judgment as a sanction for: 1) the Defendant's counsel's failure to cooperate in preparing a Pretrial Order, and 2) the Defendant's failure to appear for a deposition on November 1, 2016.

A review of the docket report in this matter reveals that the Plaintiffs have never filed a Notice of Deposition under Rule 30 in an attempt to take the oral deposition of the Defendant. What may or may not have happened over phone calls, messages or email is not sufficient for this Court to grant such a severe sanction as default judgment. The docket reveals that the Plaintiffs filed a Motion to Compel written discovery, which was properly noticed and heard by

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<sup>1</sup> Flechas Litigation Group had previously made a limited appearance for the Defendant and was heard on that specific matter on the same telephone conversation. Counsel for the Plaintiff conceded that this lawyer for the Defendant "remained silent" during the hearing on the Motion for Default Judgment.

Judge Longwitz on October 25<sup>th</sup>. The Defendant failed to appear for this hearing. At said hearing, Judge Longwitz ruled from the bench granting the Plaintiffs motion to compel but no written order was ever entered. Next, it appears that the Plaintiffs secured a witness room at the courthouse for a deposition of the Defendant on November 1<sup>st</sup> and sent a proposed order to Judge Longwitz that would have ordered the Defendant to appear and be deposed. Said proposed Order was never executed. Any attempt to sanction the Defendant for her specific failure to attend a deposition on November 1<sup>st</sup> is without merit since there was no Order for her to appear on that day and time nor was there a Notice of Deposition served upon her for that day and time. Finally, on November 9, 2016, Judge Longwitz executed an order that a warrant should be issued for the Defendant to be arrested for the purpose of deposing her on November 10<sup>th</sup> or other convenient time. To date, the Defendant has not been arrested.

While the Court is sympathetic to the Plaintiffs' difficulty in obtaining a deposition of the Defendant, and agrees that the Defendant acting *pro se* appears to have been extremely uncooperative in her dealings with Plaintiffs' counsel, this Court will not grant a Default Judgment to sanction a Defendant for failing to appear for a deposition that was never properly noticed or ordered.

As for the November 9, 2016 Order issuing a warrant for the arrest of the Defendant, said Order is hereby set aside and any warrant shall be cancelled. If after service of a Notice of Deposition, including the 30-day notice as required by the rules, the Defendant still refuses to appear for a deposition, then the Plaintiffs may seek reinstatement of the warrant. The parties should be advised that in light of the nature of the allegations in the Complaint, should the Defendant assert her 5<sup>th</sup> Amendment protections after appearing, the Court should be contacted

immediately to rule on any objections to this assertion while the parties are still together pursuant to the Notice of Deposition.

The remaining issue regarding Defendant's failure to participate in preparation of the proposed pretrial order is another mixture of emails and miscommunication. A Scheduling Order was entered *Sua Sponte* by Judge Longwitz on May 19, 2016 which ordered the parties to complete a pretrial order on November 28, 2016. The Defendant was a *pro se* Defendant and the record is unclear if she ever received a copy of this Order. Other Orders such as Document #18 have placed proof of U.S. Mail service upon the Defendant since she is not part of the electronic filing system. Whether or not the Defendant had notice of the requirement to participate in the proposed pretrial order is foundational to whether or not this Court will impose sanctions for the Defendant's failure to participate.

The Motion for Default Judgment specifically alleges that Defendant's *counsel* did not participate in the preparation of the proposed pretrial order. However, the Defendant was unrepresented. It appears that Plaintiffs' counsel attempted to communicate with the Defendant's previous attorney who had made a limited appearance on a different issue. There is no evidence that the Defendant was aware that she was under an Order to participate in the drafting of the pretrial order. Two days after the deadline to submit the pretrial order and one day *after* filing the Motion for Default Judgment based on this failure, Document #35 reveals that Plaintiffs' counsel realized he had mistakenly been communicating with the wrong person regarding a joint pretrial order.<sup>2</sup>

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<sup>2</sup> It is perplexing to this Court why Mr. Flechas sat silent rather than make it clear that he was not representing his client on the subsequent motion during the telephonic hearing on December 1<sup>st</sup> if indeed that is the case. It is further perplexing why Mr. Flechas did not respond to emails or phone calls to better inform Plaintiffs' counsel why he was not responding to

The Court finds that there is insufficient evidence that warrants the grant of a Default Judgment for the reasons stated above and the Motion for Default Judgment is hereby **DENIED**.

The Court does find that the Defendant has been uncooperative with these proceedings and has failed to appear for hearings where she did have proper notice. Therefore, the hearing set for February 8, 2017 before this Court shall be a "Show Cause Hearing" where the Defendant shall appear and show cause why she did not participate in the preparation of the Pretrial Order. If just cause cannot be established, the Defendant will be subject to sanctions as prescribed by Rule 37 of the Mississippi Rules of Civil Procedure.

Finally, the Defendant filed her Response to the Plaintiff's written discovery requests on October 12, 2016 objecting to any discovery based on her belief that to do so would put her in contempt of the Hinds County Circuit Court. In Document #22, the Defendant requested that all proceedings be delayed until after the trial of Benjamin Allen, who is the president of the Plaintiff Downtown Jackson Partners. At the hearing before this Court on January 4, 2017, Plaintiffs' counsel referred to the Defendant as the Hinds County prosecution's "star witness" against Mr. Allen. Counsel also represented during oral argument that the criminal matter in Hinds County was totally unrelated to the allegations in the instant case. The Defendant disagrees pursuant to Document #22. Although counsel represented to the Court that this matter is unrelated to the Hinds County prosecution, he did in fact serve a copy of a Notice of Hearing on the Hinds County District Attorney's Office. (Doc. #23). Both matters involve allegations of embezzlement of money from the Plaintiff. While one is a criminal prosecution and the other is a civil matter, it seems very likely that there are overlapping areas of testimony. The Defendant's

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requests that he participate in drafting the pretrial order if that is the case. Nevertheless, this Court will rule on what matters are in the record.

*pro se* request to stay this action while she is the “star witness” in a related criminal matter is reasonable under the circumstances. Especially in light of the concession of Plaintiffs’ counsel that it is unlikely that the Defendant has any assets should the Plaintiffs obtain a money judgment.

A hearing in this matter is now set for February 8, 2017. After the conclusion of the Show Cause portion of the hearing, the Defendant will be deposed by the Plaintiffs in a witness room at the Courthouse if the Plaintiffs still desire to do so. If the Hinds County trial now set for January 30<sup>th</sup> is continued or not concluded, then this deposition will not take place on this date. However, the “show cause” hearing will go forward.

IT IS, THEREFORE ORDERED AND ADJUDGED, that the Motion to Set Aside the Default Judgment (Doc. #39) is GRANTED.

IT IS, THEREFORE ORDERED AND ADJUDGED, that the Motion for Default Judgment (Doc. #33) is DENIED.

IT IS, THEREFORE ORDERED AND ADJUDGED, that the Bench Warrant issued for Linda Brune is rescinded until further notice.

IT IS, THEREFORE ORDERED that the Defendant shall appear on February 8, 2017 at 1:00 pm before this Court and show cause why she did not participate in the preparation of the pretrial order due November 28, 2016.

SO ORDERED, this the 10<sup>th</sup> day of January, 2017.

  
STACI B. O'NEAL, COUNTY COURT JUDGE