

In re: Robbins, Barbara) Case No. 05-40334-EEB
Debtor)
Karen Dudnikov,)
Michael Meadors) **RE: Adversarial Proceedings**
) **# 06-1225-EEB**
vs

Barbara Robbins
Defendant

MOTION TO VACATE DEFAULT AND DEFAULT JUDGMENT

COMES NOW, Barbara A. Robbins, debtor pro se, and makes motion to this Court to have the judgment listed herein: namely Park County Combined Court, Case # 01CV120, nullified for cause. and in support does hereby state and aver:

BACKGROUND INFORMATION

1. On October 7, 2005, Barbara Robbins, (Debtor) filed a voluntary petition for bankruptcy. It was assigned case number 05-40334-EEB.
2. On February 2, 2006, Karen Dudnikov and Michael Meadors (Plaintiffs) filed an adversarial proceeding with a Memorandum in Support. It was assigned case number 06-1225-EEB.
3. On March 2, 2006, Debtor filed a response to the complaint and a Response to the memorandum.
4. This motion to nullify springs from the Plaintiff's claim that the above captioned judgment is valid and final and Plaintiff is using said judgment as a means to deny the discharge of this bankruptcy.
5. This Debtor only received notice of the default judgment after receiving a copy in the Plaintiff's package in March, 2006.
6. This Debtor will show that due process was denied to her, and justice cannot be served by failing to disclose all facts surrounding this case.

FURTHER BACKGROUND INFORMATION - DEFAULT

7. This Debtor, then Plaintiff, (on behalf of her company, and jointly with her ex-husband) filed complaint against Plaintiff in June, 2001 for breach of contract in County Court in Park County, Colorado.
8. Plaintiff (then Defendant) responded and transferred the case to District Court in Park County, Colorado in July, 2001

9. Personal reasons (the death of my father) forced this Debtor to spend vast amounts of time in Pueblo dealing with probate issues and left a great deal of this issue to her ex-husband. (July-Dec 2001)
10. Notification was received by this Debtor from Plaintiff's attorney that this Debtor could not represent a corporate entity, and called for a default judgment. No case was heard.
11. A review of the court docket reveals many hearings between late 2001 and late 2002 that this Debtor (then Plaintiff) never received notice of. Mail service worked, even though I had moved twice by that date. A default (failure to defend) judgment was placed on my (former) company.
12. This Debtor received notice of hearing to show cause why the (failure to defend) default judgment should not be placed on her personally. (March 2003)
13. Hearings were set and vacated several times before February 2004 when this Debtor received another notice of hearing scheduled for March 1, 2004.
14. This Debtor appeared at the Combined Court in Park County, only to be told that there was no hearing, again. No mention of a March 19th date was made, though the Court Clerk did say that Mr. Johnson (Plaintiff's atty) would have to send notice of a new hearing date.
15. No scheduling notice was received, because the hearing took place without benefit of notice.
16. Considering the amount of time and effort that this Debtor (then Plaintiff) spent on collecting the debt from this Plaintiff (then Defendant), any reasonable person would believe that it was the intent of this Debtor to attend the hearing.

JURISDICTION

4. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. ss 157, 1334 and 1409 as well as FRBP 7001, and 11 U.S.C. ss 523. The United States District Court for the District of Colorado has jurisdiction to hear and decide this matter pursuant to 28 U.S.C. ss 1334 because this matter arises in and is related to a case filed under title 11, U.S.C.
5. This Court has subject matter jurisdiction to dismiss this claim as a result of the voluntary petition to this Court; whereby Debtor – in petitioning for protection from the court – submitted her financial matters to the discretion of this Court.
6. The claim at bar is a default (failure to defend) judgment; and as such is an interlocutory order that, alone, determines no rights or remedies. Interlocutory orders are left to the sound discretion of the court, which retains jurisdiction to modify or reconsider such orders prior to the entry of a final judgment. (Sumler v. District Court (Colo 1995)) (Battaglia v. Moore, (Colo. 1953))
7. This Honorable Court has the jurisdiction to determine the outcome of this matter. A second court judge may rule on a matter that was previously ruled upon by another judge.. if sufficient new facts are alleged in the second motion to allow the second judge to enter a different ruling than that of the first judge, in the same manner that judge could have, had he been apprised of the new facts. (Joufflas v. Wyatt (Colo App 1982))
8. A successor judge may vacate a default judgment when the original judge would have had an adequate legal basis to do so. (Sunshine v. Robinson (1969))

DUE PROCESS VIOLATED

7. A default is appropriate as an affirmative relief against a party who has failed to plead or otherwise defend as provided for (CRCP 55); however, this Debtor did not fail to plead or

defend, but through a due process violation was denied the opportunity to present evidence at hearing that would have prevented the default.

- a. A Summons was served upon this Debtor, signed by the Court on December 22, 2003, demanding this Debtor appear at a hearing on March 1, 2004. Actual hearing date was March 19, 2004. A careful review of the text indicates (at least to this Debtor) that the summons was tampered with, or altered, prior to service on this Debtor. This Debtor makes no allegations as to who tampered with the document, whether it was the Defendant (Plaintiffs herein), their legal counsel, or the process server. The result was the same regardless, in that this Debtor appeared at the wrong date and time and was not notified of the correct date and time. This Debtor has no doubts about the intent of that act. *ORDER Attached*
 - b. Plaintiffs indicate in their most recent response that this Debtor did appear in the Park County Courthouse on the day of March 1, 2004, and indicated that "the Court Clerk stated to Judge Mayhew that the clerk specifically told Ms. Robbins that the hearing date was March 19, 2004. That claim was false, and hearsay evidence is of no value in these proceedings. The actual conversation went much differently, but is still hearsay.
 - c. If the above statement had actually been made by the Court Clerk, it still would not have fulfilled the requirement to notify. The rules of service and notification are specific; and though lenient, do not include casual conversations with clerks.
8. Failure to give notice violates the most rudimentary demands of due process of law. (Simer v. Rios (7th Cir. 1981)).
 9. A default judgment was rendered without proper notice (to this Debtor,) violating due process, and thus should be void (Sonus Corp. v. Matsushita Elec. Indus. Co Ltd D.Mass.1974)). This sentiment is confirmed again (Ken-Mar Airpark, Inc v. Toth Aircraft & Accessories Co. W.D.Mo. 1952)) holding that a failure to provide notice is a failure of due process rendering the default judgment a 'nullity'.
 10. The rationale for finding a due process violation herein is that the failure to provide adequate notice is a violation of the original purpose behind the notice requirement of CRCP 55(b). (Memphis Light, Gas & Water Division v. Craft, (1978))

RELIEF SHOULD BE GRANTED

11. The notice provision of CRCP 55(b) functions to insure fairness to a party who has expressed an interest in defending a lawsuit brought against him. Not surprisingly, the courts have long required fastidious compliance with CRCP 55(b) before allowing a default judgment to stand. Proper notice, and an opportunity to be heard are the touchstones of procedural due process. A default judgment is void if the court has acted in a manner inconsistent with due process. (Bass v. Hoagland (5th Cir, 1949))
12. This Debtor's right to due process was violated when the offending party (unnamed) chose to alter the summons to the hearing, thus causing this Debtor to appear at the wrong date and time. My rights were unfairly compromised by that lack of notice. In addition, due process of this Debtor was violated in 2001 and 2002 when notice(s) of hearings were not delivered to this Debtor (then Plaintiff) as required by Fed.R.Civ.Pro. Relief under Fed R. Civ. Pro. 60(b) should be mandatory, and not discretionary, and any judgment that occurred as a result of these violations should be vacated or nullified. (Carter v. Penner (5th Cir. 1998)) (Small v. Batista (SDNY 1998)) (United Natl Ins. Co v. Waterfront NY Realty Corp (SDNY 1995))

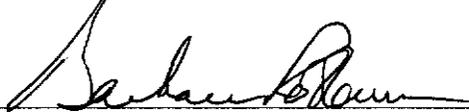
13. The relief granted as a result of that violation of my rights should be that the judgment is void, because it was from its inception a complete nullity and without legal effect. (Lubben v. Selective Serv Sys Local Bd No 27 (1st Cir. 1972))
14. Colo.R.Civ.Pro 60(b) sets forth a three pronged test to determine whether to vacate a default judgment:
 - a. whether the neglect that resulted in entry of judgment by default was excusable
 - b. whether the moving party has alleged a meritorious defense; and
 - c. whether relief from the challenged judgment would be consistent with equitable considerations.

and clearly this Debtor meets all three of those requirements. The 'neglect' was not on the part of this Debtor. I clearly wanted to attend the hearing. I certainly had a meritorious defense, and I believe that justice always favors full disclosure. The Plaintiffs could not be unduly prejudiced because of setting aside, or vacating, the default judgment.

THERE is no question that, assuming all things explained herein are correct, a violation of Debtor's due process has occurred. The facts as stated above are clear. One of the many privileges of living in this county is that we are all to be treated fairly in the eyes of the law. A violation as basic and fundamental as due process cannot be treated lightly. No justice can exist in a situation where the facts are never heard, and trickery must be used to obtain the judgment. A reasonable, clear thinking, person would have no choice but to conclude that sufficient cause exists to set aside or vacate the default against this Debtor (and thereby nullify the default judgment).

WHEREFORE, this Debtor prays that after a careful review of the facts presented herein, this Honorable Court will find sufficient grounds to vacate the default currently against this Debtor, and thereby nullify the default judgment that was forced upon this Debtor with no chance to contest.

Respectfully submitted this 21st day of April, 2006.



Barbara Robbins

1440 Main Street
Woodland Park CO 80863

Certificate of Service

I hereby certify that a copy of this response was mailed, postage prepaid, to the following address on April 21, 2006.

Karen Dudnikov
Michael Meadors
PO Box 87
Hartsel CO 80449



Barbara Robbins, pro se

Attached
REF 7 (a)

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| <p>DISTRICT COURT, PARK COUNTY, COLORADO Court Address: 300 4th Street, P.O. Box 190 Fairplay, CO 80440 Phone Number: 719-836-2940 Fax Number: 619-836-2892-</p> <hr/> <p>Plaintiffs\Counterclaim Defendants: NorthStar Companies International, LLC NorthStar Design & Construction, LLC, d/b/a NorthStar Home Sales, d/b/a NorthStar Construction,</p> <hr/> <p>Defendants\Counterclaim Plaintiffs: Michael Thomas Meadors and Karen Dudnikov,</p> <hr/> <p>Attorney for Defendants: Anthony A. Johnson, #4990 RETFERFORD, MULLEN, JOHNSON & BRUCE, LLC Plaza of the Rockies, South Tower 121 S. Tejon Street, Suite 601 Colorado Springs, CO 80903 Telephone: (719) 475-2014 Facsimile: (719) 630-1267 Email: ajohnson@rmjblaw.com</p> | <p>FILED IN COMBINED COURT</p> <p>NOV 10 2003</p> <p>PARK COUNTY, COLORADO</p> <hr/> <p>△ COURT USE ONLY △</p> <hr/> <p>Case Number: 01 CV 120 Div.: Ctrm.:</p> |
| ORDER | |

THIS MATTER, coming on before the Court on Defendants/Counterclaimants/Judgment Creditors Motion for Order to Show Cause Why the Judgment in This Case Should Not Be Entered Against Barbara Robbins, Individually, and the Court being fully advised in the matter.

IT IS HEREBY ORDERED THAT Barbara A. Robbins shall appear before this Court on March 1, 2004, to show cause as to why the judgment of \$28,477.15 heretofore entered in this matter should not be entered against her jointly and severally.

1:00 pm DONE this 22nd day of Dec, 2003.

By The Court:



District Court Judge