



## **Flambeau, Inc. v. GDL Brokerage, Inc.**

2020 | Cited 0 times | W.D. Wisconsin | June 17, 2020

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

FLAMBEAU, INC.,

Plaintiff, v. GDL BROKERAGE, INC.,

Defendant.

OPINION and ORDER

19-cv-359-jdp

Plaintiff Flambeau, Inc. brings breach-of-contract and tort claims against its former Flambeau has moved for default timely answer the complaint and its See Dkt. 52 and Dkt. 58.

The court will deny the motion. GDL conduct warrants sanctions, but default judgment would be unduly harsh. The court will grant GDL leave to file an untimely answer, order GDL to produce any outstanding discovery or face contempt, impose a monetary sanction, deadline to move for summary judgment. The pretrial deadlines and trial date are struck, to be reset later on.

BACKGROUND GDL actively litigated this case at the beginning, filing a motion to dismiss or transfer this case. Dkt. 38. But when the court denied that motion, GDL missed its deadline to file an answer. Over six weeks later, in February 2020, Flambeau notified GDL of its default and

inquired whether GDL intended to file an answer. Dkt. 53, ¶¶ 3 try of default. Dkt. 52.

for almost three weeks, and only after the clerk of court took the unusual step of issuing a briefing schedule on the motion. GDL attributed its caused counsel to erroneously believe[] that an answer and affirmative defenses had already

57, ¶ 4. Even then, GDL did not include a proposed answer with its brief. Instead, it asked for a 30-day Id. ¶ 12.

Flambeau responded by asking the court to treat its filings as a motion for default judgment under



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Federal Rule of Civil Procedure 55(b). Flambeau relied not only on failure to file an answer but also on failure to comply with a prior court order granting

. Dkt. 58. In an April 1 order, the court concluded that default under Rule 55(a) request for an extension of time to file its answer as a motion to set that default aside under

Rule 55(c). Dkt. judgment to Flambea

ANALYSIS GDL . First, it contends that there has been no default, but if the court does construe its failure to answer as a default, then there is good cause for setting that default aside. Second, GDL contends that

a default judgment would be inappropriate because Flambeau has conducted itself equally poorly discovery misconduct. A. Default under Rule 55(a)

Flambeau contends that GDL defaulted when it failed to file an answer by the December 31, 2019 deadline. GDL contends that its failure to file standard ed smiss, engaging in

for purposes of Rule 55(a). See 10A Charles Alan Wright, et al., Federal Practice and Procedure § challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of

which might prevent a default if pursue GDL defaulted later on, when it failed to file an answer after its motion to dismiss was denied.

Authorities are split on this issue. Some courts in this circuit enter default when a defendant fails to answer after the denial of a motion to dismiss, even when that defendant has remained engaged in the case. See, e.g., J & J Sports Prods., Inc. v. Kotsopoulos, No. 1:13-CV-346- SLC, 2015 WL 5730343, at \*2 (N.D. Ind. Sept. 30, 2015); Haertle v. Brennan Inv. Grp., LLC, No. 14-cv-1347, 2015 WL 12964670, at \*1 (E.D. Wis. June 5, 2015); Silver, No. 11-cv-6332, 2013 WL 6353727, at \*2 (N.D. Ill. Dec. 4, 2013); McCarthy v. Fuller,

No. 1:08-CV-994WTLDML, 2009 WL 3617740, at \*2 (S.D. Ind. Oct. 29, 2009). Other courts

have taken a more flexible view , entry of default so long as the defendant has demonstrated by its conduct an intent to defend the case. See Cannon v. Washington 502 03 (7th Cir. 2009) (unpub.); Peters v. Astrazeneca, LP, No. 05-C-649-C, 2006 WL 1279058, at \*1 (W.D. Wis. Apr. 24, 2006), aff'd, 224 F. App'x 503 (7th Cir. 2007). The Seventh Circuit has yet to address the issue in a precedential opinion.

The court need not resolve this question here. Even assuming that GDL defaulted under Rule 55(a) by failing to answer, the court would set aside the entry of default, grant GDL leave to file an untimely



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answer, and motion for default judgment in this case is sanctionable, but, as explained below, default judgment would be too harsh a

sanction intermittent efforts to defend. So the court will give GDL a final opportunity to litigate this case on the merits. B. Sanctions

Flambeau contends that default judgment is appropriate in this case for two reasons. First, it says that GDL failed to comply with court orders regarding discovery. See Fed. R. Civ. P. 37(b)(2)(A)(vi) and 37(d)(3) (permitting default judgment as a sanction for violation of discovery orders). Second it says that GDL with the degree of diligence and expediency prescri Hal Commodity Cycles

Mgmt. Co. v. Kirsh, 825 F.2d 1136, 1138 (7th Cir. 1987) (citing C.K.S. Engineers, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202, 1205 (7th Cir. 1984)). The court concludes that GDL has failed to comply with a discovery order and has not acted diligently in litigating this case, so a sanction is warranted. But it also which the maximum penalty of default judgment is appropriate.

1. February 5, 2020 order granting its motion to compel discovery and requiring 44. This is based on Flambeau 18, 2019 discovery requests, which were due on December 2 by stipulation of the parties.

Dkt. 41, at 1, 3. GDL failed to comply with that deadline without seeking an extension from on that motion, GDL produced 33 pages of documents, which Flambeau described as

- f the material Flambeau would expect to see 43, at 3. Magistrate Judge Crocker without objection by February 14, 2020. Dkt. 44. On February 14, GDL produced seven

58, at 6.

Flambeau suspects that GDL is withholding responsive documents. Flambeau notes, for example, that GDL communications dated from February 2015 to the present the time period at issue in this

Id. dated before communications past this date many attempts, GDL has failed to explain why these documents are missing, provide any

document retention policies, or explain why it keeps documents more than five years old but Id. at 7 8. Case: 3:19-cv-00359-jdp Document #: 67 Filed: 06/17/20 Page 5 of 9 discovery abuse, it was unable to move for summary judgment, and the deadline for doing so has now passed.

ints a finger back at Flambeau,

-two pages of 62, at 10, 11. allegations



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are beside the point. It was Flambeau, not GDL, that sought and obtained an order from this court compelling discovery. Flambeau points to circumstantial evidence that suggests that are deficient; GDL makes no effort to refute that evidence.

2. Willful failure to litigate diligently Flambeau also Dkt. 58, at 5 (quoting *Davis v. Hutchins*, 321 F.3d 641, 646 (7th Cir. 2003)), as

demonstrated by its inexplicable delay in attempting to rectify its failure to answer. GDL says that it missed the answer deadline because of an inadvertent error by counsel. But GDL concedes that it learned of its error on February 12, 2020. See Dkt. 62-2, ¶ 6. For reasons that GDL has yet to explain, it then waited nearly six weeks until after Flambeau moved for entry of default and the court took the unusual step of setting a briefing schedule for the motion to make any response, Dkt. 57, and another three weeks to file a proposed answer, Dkt. 62-1.

of time from the court upon learning of its

mistake on February 12.

3. Appropriate sanction prescribed by the Federal Rules. There is no question that some sanction is warranted.

Flambeau asks the court to enter a default judgment. But default judgment is the harshest have proven unavailing. Although a district court has the default judgment readily available

within its arsenal of sanctions, it is a weapon of last resort, appropriate only when a party *Sun v. Bd. of Trustees of Univ. of Ill.*, 473 F.3d 799, 811 (7th Cir. 2007) (internal citations and quotation marks omitted). litigation of this case has been deficient, but the court cannot say that it has willfully disregarded the litigation in the sense that would warrant a default judgment. See, e.g., *id.* at 809 (even though defendant violated multiple court orders regarding discovery and waited months before moving to vacate The Seventh Circuit has a long-established policy

favoring trial on the merits over default judgment, , 726 F.2d at 1205 (collecting cases), and a lesser sanction may be adequate to redress the prejudice to Flambeau.

To impose a monetary sanction: GDL must cover the fees and expenses Flambeau incurred in bringing its default motion. The parties are encouraged to reach agreement on the amount. But if agreement is unattainable, Flambeau should submit its itemized list of fees and expenses by the deadline set out below. GDL will then have an opportunity to contest the reasonableness of the amount requested.

The court will also take measures to restore Flambeau to the position it would have had. The court will strike the pretrial deadlines and trial date, and it will extend the summary judgment deadline for



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Flambeau only. By the deadline set out below, GDL must produce any outstanding discovery in accordance with Because the document production deficiencies appear to be wide-ranging, GDL will need to supplement its response to requests for production. For each request for production, GDL must: (1) produce any outstanding unproduced documents or certify in writing that there are no additional responsive documents in its custody or control; and (2) describe in writing what requests (i.e., which physical or electronic databases were searched and how; which search terms or filtering criteria were used; what if anything those searches revealed; which of the resulting documents GDL produced; and, if GDL withheld any of the resulting documents, an explanation why). If, after , Flambeau has reason to believe that GDL is still withholding responsive documents, it may move for sanctions and the court will hold a contempt hearing.

Once GDL has supplemented its discovery responses, the court will set a scheduling conference at which Flambeau may indicate whether it wishes to move for summary judgment or proceed directly to trial. Judge Crocker will reset the schedule accordingly. Further misconduct by GDL will result in a default judgment.

ORDER IT IS ORDERED that: 1. and for default judgment,

Dkt. 52 and Dkt. 58, are DENIED. 61, is VACATED. 2. GRANTED. GDL should promptly file its answer as a separate docket entry.

3. If the parties are unable to agree on the amount, by July 2, 2020, Flambeau may

submit its itemized list of fees and expenses incurred in bringing its default motion. GDL may respond to this request by July 9, 2020. 4. By July 2, 2020, GDL must supplement its discovery responses in accordance with

Magistra and the instructions set out above. 5. The remaining pretrial deadlines and trial date are STRUCK. The clerk of court is

directed to set a telephone scheduling conference before Magistrate Judge Stephen Crocker, to b supplemental production.

Entered June 17, 2020.

BY THE COURT: /s/ \_\_\_\_\_ JAMES D. PETERSON District Judge

