

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, SS.

SUPERIOR COURT
CIVIL ACTION NO. 1879CV00344

RIAN WATERS)
Plaintiff)
vs.)
AIDAN KEARNEY,)
WORCESTER DIGITAL MARKETING, LLC)
TURTLEBOY ENTERPRISES, LLC AND)
SAMANTHA CARDIN)
Defendants)

HAMPDEN COUNTY
SUPERIOR COURT
FILED

OCT 18 2018


CLERK OF COURTS

**DEFENDANTS', AIDAN KEARNEY, WORCESTER DIGITAL MARKETING, LLC,
AND TURTLEBOY ENTERPRISES, LLC, MEMORANDUM IN SUPPORT OF THEIR
EMERGENCY MOTION TO REMOVE THE DEFAULT AND REQUEST FOR LEAVE
TO FILE ANSWER LATE**

The defendants, Aidan Kearney, Worcester Digital Marketing, LLC, and Turtleboy Enterprises, LLC (“Defendants”), moves this Honorable Court to remove the default entered on or about September 18, 2018, pursuant to Mass. R. Civ. P. 55(a) and to allow the Defendants to file late its Answer. Alternatively, the Defendants request that a hearing on this matter be scheduled. As grounds therefor and in support thereof, the Defendants state the following:

FACTUAL BACKGROUND

The Plaintiff filed his Complaint on or about May 16, 2018. (Paper No. 3). The Complaint, alleges that “At about 5pm on December 31, 2016, the Plaintiff was arrested for animal cruelty, and assault and battery.” Further, “On or about January 6, 2017, Turtleboy Sports published an article covering the December 31, incident on their website, and Facebook. (Paper No. 3 at ¶ 20).

The Plaintiff alleges numerous false statements were made about him. (Paper No. 3 at ¶28). The Complaint also alleges the Defendants caused him harm and damage. (Paper No. 3 at ¶ 30).

Following the filing of the Complaint service was made on the Defendants on June 1, 2018. (Paper Nos. 5-7). Following service of the Complaint the Defendants received numerous emails from the named Plaintiff attempting to extort money in lieu of proceeding with the Complaint. (Affidavit of Aidan Kearney attached hereto as Exhibit A, ¶ 3). On July 26, 2018 the Defendants received an email from the Plaintiff stating that in exchange for cash the Plaintiff would dismiss the lawsuit. In that same email the Plaintiff told the Defendants to “take your time to figure what is best for you and TBS”. (Exhibit A ¶ 4). On July 26, 2018, the Defendants filed a Police Report with the Holden Police Department reporting the attempted extortion. (Exhibit A ¶ 5). The Plaintiff’s continued emails distracted the Defendants attention from this civil matter. A Default order was entered on September 18, 2018. (Paper Nos. 12-13). Upon receipt of the Default Order, the Defendants contacted counsel for representation. (Exhibit A ¶ 7).

ARGUMENT

Under Mass. R. Civ. P. 55(c), “[f]or good cause shown the court may set aside an entry of default and, if a judgment has been entered, may likewise set it aside in accordance with Rule 60(b).” The Court has broad discretion in removing or setting aside a default. *Greenleaf v. Mass. Bay Transp. Auth.*, 22 Mass. App. Ct. 426, 429 (1986). It has generally been stated that a Court should resolve any doubts in favor of a trial on the merits. See *Smith and Zobel*, 8 Mass. Prac. § 55.8 and cases cited therein. In *Berube v. McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426 (1979), the Court provided six considerations:

(1) whether the offending party has acted promptly after entry of judgment to assert his claim for relief therefrom; (2) whether there is a showing either by way of affidavit, or otherwise apparent on the record, that the claim sought to be revived has merit; (3) whether the neglectful conduct occurs before trial, as opposed to

during, or after the trial; (4) whether the neglect was the product of a consciously chosen course of conduct on the part of counsel; (5) whether prejudice has resulted to the other party; and (6) whether the error is chargeable to the party's legal representative, rather than to the party himself; for the courts have been reluctant to attribute to the parties the errors of their legal representatives.

Id. at 430-431 (internal quotations and citations omitted); see also *Jerry Martin Co., Inc. v. Hyannis Marina, Inc.*, 3 Mass. App. Ct. 746 (1975); *Lye v. Lye*, 322 Mass. 155, 157-158 (1947).

The Defendant respectfully submits that based on these considerations the Court should remove the default and allow the Defendants to answer the Plaintiff's complaint. First, the Defendants acted promptly after they received notice of the Default Order to assert its defense. Also, there is evidence to show that the Defendants' failure to respond to the Complaint was not a chosen course of action, but the result of neglect due to extenuating circumstances resulting from the Plaintiff's email correspondence to the Defendants and subsequent filing of the Police Report. Rules 55 and 60 of the Massachusetts Rules of Civil Procedure contemplate situations just like this one where the party seeks relief due to "circumstances that are unique or extraordinary, [and] not any 'garden-variety oversight.'" *Tai v. City of Boston*, 45 Mass. App. Ct. 220, 222 (1998) citing *Felch v. General Rental Co.*, 383 Mass. 603, 613-614 (1981); see also *Tai*, 45 Mass. App. Ct. at 222 n.4 (noting that the terms "inadvertence" and "excusable neglect" are often used interchangeably). The Defendant asserts that these facts meet that burden.

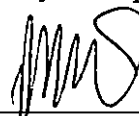
The Defendants have meritorious defenses to the Plaintiff's claims. In this case, the Defendants are not posting the alleged statements, rather a third party posts their blogs to the website. Moreover, truth is always a defense to the Plaintiff's allegations.

This matter has been filed with the Court for only three months, and there has been no trial assigned, nor has there been any discovery. *Berube*, 7 Mass. App. Ct. at 430-431. The Plaintiff will suffer no prejudice by virtue of the removal of the default and late filing of the Answer. Delay alone does not constitute prejudice. See *KPS & Assocs., Inc. v. Designs by FMC, Inc.*, 318 F.3d

1, 15 (1st Cir. 2003); see *id.* (internal citations omitted) (“The issue is not mere delay, but rather its accompanying dangers: loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion.”). In this case, the Plaintiff only filed his Complaint on May 16, 2018, and would be hard pressed to claim prejudice as a result of a short delay.

WHEREFORE, based upon the foregoing, the Defendants respectfully requests that this Court remove the default entered against it pursuant to Mass. R. Civ. P. 55(a), and allow the Defendants to file the Answer within twenty days. Alternatively, the Defendant requests that a hearing on this matter be scheduled.

Respectfully submitted,
Attorney for Aidan Kearney,
Worcester Digital Marketing, LLC
Turtleboy Enterprises, LLC



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EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS
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SAMANTHA CARDIN)
Defendants)

AFFIDAVIT OF AIDAN KEARNEY

1. I am the named defendant in the above captioned matter; I am also the Manager for Worcester Digital Marketing, LLC and Turtleboy Enterprises, LLC.
2. I was served with the Complaint in this matter on or about June 1, 2018;
3. Following service of the Complaint I received numerous emails from the named Plaintiff attempting to extort money in lieu of proceeding with the Complaint;
4. On July 26, 2018 I received an email from the Plaintiff stating that in exchange for cash the Plaintiff would dismiss the lawsuit. In that same email the Plaintiff told me to "take your time to figure what is best for you and TBS".
5. On July 26, 2018, I filed a Police Report with the Holden Police Department reporting the attempted extortion. Exhibit A.
6. The Plaintiff's continued emails distracted my attention from this civil matter;
7. On or about September 18, 2018 I received notice of a default order, I immediately contacted counsel for representation in this matter.
8. The Defendants have meritorious defenses to the Plaintiff's claims

Signed under the pains and penalties of perjury this 24th day of September, 2018.

Aidan Kearney 
Aidan Kearney