



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
GUARANTEED POOL AND SPA, INC.,)
Respondent.)

Docket No. FIFRA-04-2009-3015

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ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT ORDER AND RE-INITIATING ALTERNATIVE DISPUTE RESOLUTION PROCESS

I. Background

On February 4, 2009, the United States Environmental Protection Agency, Region IV ("Complainant" or "EPA"), initiated this action against Respondent Guaranteed Pool and Spa, Inc., for alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136j(a). Respondent filed an Answer to the Complaint on April 3, 2009.

Thereafter, the case was referred to the Office of Administrative Law Judges (OALJ) for adjudication. By letter dated April 16, 2009, OALJ offered the parties the opportunity to participate in alternative dispute resolution, to which the parties positively responded. As a result, on April 28, 2009, the case was referred to a ADR neutral.

The very next day, on April 29, 2009, OALJ received a copy of Complainant's Motion for Default ("Motion") which was apparently filed on April 24, 2009. Based upon the pendency of this Motion, on May 11, 2009, the neutral terminated the ADR process. The following day, the undersigned was designated to preside over this matter in litigation.

To date, no response to the Motion has been received from Respondent.

II. Discussion and Conclusion

The Rules of Practice provide at 40 C.F.R. § 22.17(a):

A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . Default by respondent constitutes, for the purposes of the pending proceeding only, an admission of all facts alleged in the complaint

and a waiver of respondent's right to contest such factual allegations.

The Rules further provide that "[w]hen the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party, as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued." 40 C.F.R. § 22.17(c).

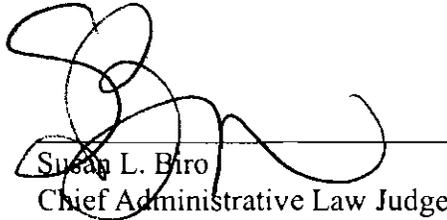
Default is a disfavored sanction, reserved only for the most egregious behavior. A default judgment is appropriate only where the party against whom the judgment is sought has engaged in willful violations of court rules, contumacious conduct, or intentional delays. *Forsythe v. Hales*, 255 F. 3d 487, 490 (8th Cir. 2001)(quoting *Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F. 3d 852, 856 (8th Cir. 1996)). Default judgment "is not an appropriate sanction for a marginal failure to comply with the time requirements [and] . . . should be distinguished from dismissals or other sanctions imposed for willful violations of court rules, contumacious conduct, or intentional delays." *Time Equipment Rental & Sales, Inc. v. Harre*, 983 F. 2d 128, 130 (8th Cir. 1993)(12 day delay in filing answer did not warrant entry of default). Moreover, Administrative Law Judges have broad discretion in ruling upon motions for default. Issuance of such an order is not a matter of right, even where a party is technically in default. *See, Lewis v. Lynn*, 236 F. 3d 766 (5th Cir. 2001). This broad discretion is informed by the type and the extent of any violations and by the degree of actual prejudice to the Complainant." *Lyon County Landfill*, EPA Docket No. 5-CAA-96-011, 1997 EPA ALJ LEXIS 193 * 14 (ALJ, Sept. 11, 1997).

In its Motion, Complainant represents that it served the Complaint in this case on Timothy R. Fiedler, Esquire, of Deland Florida, based upon Mr. Fiedler's representation that he would accept service of it on behalf of his client, Respondent Guaranteed Pool and Spa, Inc. Motion, Ex. A, C. Mr. Fiedler's office received the Complaint on February 9, 2009. Motion, Ex. B. Having received no answer thereto within the 30 day period provided for by the applicable Rule, 40 C.F.R. § 22.15(a), on March 13, 2009, Complainant attempted to contact Mr. Fiedler. Subsequently, by e-mail dated March 17, 2009, Complainant was advised that Mr. Fiedler had been hospitalized on February 14, 2009 at the Mayo Clinic and was currently awaiting transplant surgery, and that he had shut down his law practice on April 27th, at which point his office supposedly forwarded the Complaint to Mr. Haigh, at the Respondent company (apparently located in Florida) advising him to secure new counsel to file a response. *Id.* Still having not received an Answer, on March 19, 2009, Complainant contacted Mr. Haigh directly. During that telephone communication, Mr. Haigh indicated that he had not yet received the Complaint from Mr. Fiedler's office, but would and would file an Answer by March 23, 2009. In reply, Complainant advised Mr. Haigh as to the process for obtaining an extension of time to file the Answer and faxed him another copy of the Complaint. Motion, Ex. D. On March 23, 2009, Mr. Haigh faxed Complainant what appeared to be a copy of a motion for extension addressed to the Regional Hearing Clerk, without a certificate of service. The Motion was not served on the Clerk, and thus was not filed. Motion, Ex. F. However, on April 3, 2009, 23 days late, Mr. Haigh filed an Answer on behalf of Respondent.

In the Answer, Respondent states “we apologize for not responding sooner but under the circumstances, we feel we have been as prompt as can be expected.” The Answer suggests the “circumstances” being referred to include sales by a store which closed three years earlier as well as their attorney suffering a “life threatening accident” and financial limitations preventing the retention of new counsel.

Complainant is correct, Respondent is technically in default for its failure to meet the filing deadline for its Answer. However, Complainant has not shown that it has suffered any substantive prejudice due to the late submittal of the Answer, and such prejudice appears particularly unlikely where, as here, both parties are agreed to participating in OALJ’s ADR scheduled to proceed over several months and delay actively proceeding towards hearing. The Presiding Judge is charged with the responsibility not only to avoid delay, but also to conduct a fair and impartial proceeding. 40 C.F.R. § 22.4(c). It does not appear that Respondent willfully violated the Rules or Prehearing Order, or that it acted with contumacious conduct or using any willful delaying tactics. Entry of a default order is therefore not warranted. Nevertheless, Respondent is hereby advised to strictly follow the Rules of Practice and instructions set forth in orders issued in this proceeding from this day forward, as such leniency may not be shown again in this proceeding. Respondent is also advised to follow the rules regarding filing and service of documents, and to include a certificate of service with each document filed, showing that he mailed the Regional Hearing Clerk the original document and that EPA counsel and the undersigned each have been sent a copy.

Accordingly, Complainant’s Motion for Default Order is denied. This matter is hereby referred back to the Neutral for completion of the ADR process.

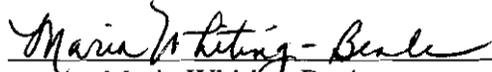

Susan L. Biro
Chief Administrative Law Judge

Dated: May 12, 2009
Washington, D.C.

In the Matter of Guaranteed Pool And Spa, Inc., Respondent
Docket No. FIFRA-04-2009-3015

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Complainant's Motion For Default Order And Re-Initiating Alternative Dispute Resolution Process**, dated May 12, 2009, was sent this day in the following manner to the addressees listed below:


Maria Whiting-Beale
Staff Assistant

Dated: May 12, 2009

Original and One Copy by Pouch Mail to:

Patricia Bullock
Regional Hearing Clerk
U.S. EPA
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy by Pouch Mail to:

Robert Caplan, Esquire
Assistant Regional Counsel
U.S. EPA
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61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy by Regular Mail to:

Wesley C. Haigh, Esquire
Guaranteed Pool & Spa
2350 Volusia Avenue
Orange City, FL 32763