

DISSENTING OPINION BY NAKAMURA, C.J.

The majority affirms the January 24, 2013, entry of default by the Clerk of the Circuit Court (Clerk's Entry of Default) that was based on Defendant-Appellant Ji Won Keeley's failure to file a timely answer to the amended complaint. In my view, the Circuit Court abused its discretion in failing to set aside the Clerk's Entry of Default and the ensuing default judgment. I believe the Circuit Court should have permitted Keeley to answer the amended complaint and to challenge the claims asserted against her on the merits. I therefore respectfully dissent from the majority's decision to affirm the Clerk's Entry of Default.

I.

The original complaint initiating this case was filed on October 16, 2012, but there is no indication that this complaint was served. A "First Amended Verified Complaint" (amended complaint) was filed on December 11, 2012, and served on Keeley on December 28, 2012. On January 24, 2013, Plaintiff-Appellee Thaddeus Ziemplak, as Successor Trustee of the Marguerite M. Ziemplak Revocable Living Trust (Thaddeus) requested entry of default against Keeley, pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 55(a) (2000), based on Keeley's failure "to answer [the amended complaint] or otherwise move[.]" On January 24, 2013, the Clerk of the Circuit Court entered the Clerk's Entry of Default against Keeley. On February 26, 2013, the Circuit Court entered a default judgment against Keeley with respect to both liability and damages.

On March 15, 2013, less than three months after she was served with the amended complaint, Keeley filed a motion to set aside the Clerk's Entry of Default and the entry of default judgment against her (Motion to Set Aside Default). Keeley attached her proposed answer to the amended complaint to this motion. On March 15, 2013, Joseph A. Kinoshita, Esq., also filed an appearance as counsel for Keeley. In her pleadings in support of her Motion to Set Aside Default, Keeley asserted, among other

things, that her failure to file a timely answer to the amended complaint was based on her inability to retain counsel. She further asserted that she had good and reasonable grounds to deny the claims made against her in the amended complaint; including that trust provisions relied upon by Thaddeus did not support his allegations of excessive withdrawals from the Marguerite M. Ziemplak Revocable Living Trust (Marguerite Trust); that Keeley was not responsible for the alleged excessive withdrawals from the Marguerite Trust; that Stanley F. Ziemplack (Stanley), the husband of Marguerite M. Ziemplak (Marguerite) and the then trustee of the Marguerite Trust, was responsible for the withdrawals; that Keeley did not influence Stanley about Stanley's property or Marguerite's property; and that the probate court was the more appropriate forum for the disputes raised in Thaddeus' amended complaint.

II.

It is well established that "defaults and default judgments are not favored and that any doubt should be resolved in favor of the party seeking relief, so that, in the interests of justice, there can be a full trial on the merits." BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 76, 549 P.2d 1147, 1150 (1976). The Hawai'i Supreme Court has established the following standard for evaluating a motion to set aside a default entry or a default judgment:

In general, a motion to set aside a default entry or a default judgment may and should be granted whenever the court finds (1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a wilful act. The mere fact that the nondefaulting party will be required to prove his case without the inhibiting effect of the default upon the defaulting party does not constitute prejudice which should prevent a reopening.

Id. at 77, 549 P.2d at 1150 (citations omitted).

In my view, Keeley satisfied the requirements for setting aside the Clerk's Entry of Default and the entry of default judgment against her. The only factor specifically addressed by the Circuit Court in its order denying Keeley's

Motion to Set Aside Default was the third factor -- whether the default was the result of inexcusable neglect or a wilful act. In support of its denial of the motion, the Circuit Court found that Keeley speaks and writes English, has some familiarity with the legal process, and had been reminded by Thaddeus' counsel to answer the complaint before entry of default was sought.

However, Keeley asserted that her failure to file a timely answer to the amended complaint was based on her inability to retain counsel. In my view, a short delay in filing an answer to a complaint due to the inability to retain legal counsel does not constitute "inexcusable neglect or a wilful act." I therefore conclude that the Circuit Court abused its discretion in denying Keeley's Motion to Set Aside Default, and I respectfully dissent from the majority's decision to affirm the Clerk's Entry of Default.

*Craig H. Nakamura*