

U.S. Department of Labor

Office of Administrative Law Judges
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Washington, DC 20001-8002

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Issue Date: 24 May 2013

Case Number: 2012-DBA-00010

In the Matter of:

Proposed debarment for labor standards violations by:

**WHITE STAR COMMERCIAL, INC. d/b/a
WHITE STAR PLUMBING, INC.**
Subcontractor,

and

JOSEPH WALTER LEWIS, JR.,
Individually,

Respondents,

With respect to employees and plumbers employed by the Subcontractor under Contract No. 5380 for construction services at the C.J. Peete public housing development located in New Orleans, Louisiana.

**ORDER DENYING RESPONDENTS' MOTION TO
VACATE/SET ASIDE DEFAULT JUDGMENT**

This matter arises under the Reorganization Plan No. 14 of 1950, (64 Stat. 1267); the Davis-Bacon Act, as amended, 40 U.S.C. § 3141, *et seq.* (DBA); the Housing and Community Development Act of 1974 (secs. 110, 802(g), 88 Stat. 649, 724; 42 U.S.C. 5310, 1440(g)); and the applicable regulations issued thereunder at 29 C.F.R. Parts 5 and 6. A default judgment was issued by me against Respondents on April 9, 2013. Respondents thereafter filed a motion to set aside the judgment on May 14, 2013. The Acting Deputy Administrator of the Wage and Hour Division, through counsel, then filed an opposition to the motion on May 17, 2013. For the reasons set forth below, I find the motion should be denied.

Procedural History

Although much of the procedural history of this case was set forth in my Order of Default Judgment, it bears repeating here.

By letter dated October 13, 2011, the Acting Deputy Administrator of the Wage and Hour Division, United States Department of Labor (ADA) notified the above-named Respondents that

they breached a contract with the United States government and violated the aforementioned Acts and regulations.

On August 10, 2012, the ADA filed an Order of Reference with the Office of Administrative Law Judges (OALJ) requesting debarment proceedings against Respondents.

On August 16, 2012, this Office issued a Prehearing Order instructing the ADA to furnish Respondents with certain information, including a list of employees who were allegedly underpaid and the amount of the alleged underpayments. Pursuant to the Prehearing Order, Respondents were required to file an answer admitting or denying the information within 20 days from receipt thereof.

On September 4, 2012, the ADA filed a copy of her Prehearing Exchange information with this office and served Respondents with a copy at the same time. Respondents, however, failed to file an answer to the ADA's Prehearing Exchange.

On November 16, 2012, based on Respondents' failure to file an answer, the undersigned issued an Order to Show Cause directing Respondents to explain within 30 days thereafter why a default judgment should not be entered against them. To date, Respondents have neither responded to my Order to Show Cause, nor have they filed an answer responding to the ADA's Prehearing Exchange.

Based on the foregoing sequence of events, I instructed my law clerk on or about March 11, 2013 to contact Respondents to determine whether they intended to comply with my Prehearing Order or to respond to the ADA's Prehearing Exchange.

On March 25, 2013, George Gates, IV, Respondents' attorney, filed a "Motion to Set for Status Hearing" with attached correspondence in which he requested that this "matter be set for a hearing for the purpose of moving this matter forward." However, no response to my Prehearing or Show Cause Orders was ever filed.

After receiving Mr. Gates' correspondence and motion, I instructed my law clerk to contact Respondents' counsel to: (1) inform him that responses to my Prehearing Order and Order to Show Cause Order were required before any further action in the case would be taken, and (2) instruct Mr. Gates to contact OALJ immediately. Although Respondents' attorney subsequently indicated in emails received by OALJ on March 26 and 27, 2013 that he would contact OALJ, he never did. My law clerk thereafter attempted to contact Respondents' attorney via telephone and email several times to determine whether Respondents intended to file an answer to Plaintiff's Prehearing Exchange information or respond to my Order to Show Cause, all to no avail.

On April 8, 2013, my law clerk was informed by counsel for the ADA that she had not communicated with Mr. Gates after my Show Cause Order was issued and did not know if he planned to file an answer to her Prehearing Information or respond to my Show Cause Order.

Given Mr. Gates' consistent failure to respond to, or comply with, my prior orders, I entered an Order of Default Judgment on April 9, 2013. I noted therein that Respondents were approximately six months overdue in responding to my Prehearing Order, and nearly four months overdue in filing a response to my Order to Show Cause.

On May 14, 2013, Mr. Gates filed a Motion for Leave to File [Respondents'] Motion to Set Aside/Vacate Default Judgment on behalf of Respondents. The Motion requested that I vacate my Order of Default Judgment because (1) "debarment would cause permanent damage" to Respondents, (2) Respondents were given payment instructions by the prime contractor, (3) the Order violated Respondent's Sixth Amendment right to confront their accusers, (4) the provisions of the DBA conflict with Louisiana State law, and (5) Respondents have information to prove that they are innocent of all allegations made by the ADA in the Order of Reference.

On May 17, 2013, counsel for the ADA filed a Motion Opposing Respondents' Motion to Set Aside/Vacate Default Judgment. Counsel stated therein that Mr. Gates has been counsel for Respondents since at least September 18, 2012, when he called and introduced himself as Respondents' attorney, she informed him at that time that she had filed her Response to my Prehearing Order, and she cautioned him that the deadline to file Respondent's Answer was fast approaching. The ADA's Counsel further noted that I had given Respondents more than enough time to comply with my Prehearing and Show Cause Orders, but Respondents simply never responded. She further stated that Respondents are not entitled to the rights afforded by the Sixth Amendment inasmuch as the Confrontation Clause of the Sixth Amendment only applies to criminal prosecutions, not civil actions such as this, and the other arguments raised by Respondents in support of their motion to set aside the default judgment were insufficient, irrelevant and unavailing.

DISCUSSION

OALJ's rules provide that if a party fails to comply with any order of an ALJ, the ALJ may rule "that a decision of the proceeding be rendered against the non-complying party. . ." in order to permit "resolution of the relevant issues and disposition of the proceeding without unnecessary delay." 29 C.F.R. § 18.6(d)(2)(v).

Inasmuch as OALJ's rules do not address requests to set aside a default judgment, I must look to the Federal Rules of Civil Procedure for guidance. See 29 C.F.R. § 18.1(a) ("The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation."). Fed. R. Civ. P. 60(b) provides that a court may set aside its judgment because of, *inter alia*, "mistake, inadvertence, surprise, or excusable neglect . . . [and] any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1)-(6).

I find Respondents have failed to establish, or for that matter to even allege, that their consistent and willful failure to respond to my Prehearing Order and Order to Show Cause was the result of a "mistake, inadvertence, surprise, or excusable neglect." Respondents' counsel was clearly aware of the issuance of, and requirements contained in, my August 16, 2012 Prehearing Order, yet he never responded to the Order. Counsel also knew of my Order to Show Cause, yet

he again failed to respond to the Order despite repeated calls and emails from my law clerk. Even now, in his motion to vacate the default judgment, Mr. Gates has failed to provide *any* explanation regarding why he could not file an answer in response to the ADA's Prehearing Submission or to respond to my Show Cause Order. Instead, he simply argues that Respondents should be forgiven for their lack of diligence because: "debarment would cause permanent damage" to Respondents; they relied on instructions from the prime contractor; they will not have an opportunity to confront witnesses at trial; there is a conflict between federal and state laws; and they can prove they are innocent of the alleged violations of the DBA. These arguments are neither relevant to, nor supportive of, the relief Respondents seek.

As the OALJ's rules make clear, default judgment is a necessary tool enabling ALJs to ensure that their cases are disposed of "without unnecessary delay." 29 C.F.R. § 18.6(d)(2). "If an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissals or default judgments must be available when parties flagrantly fail to comply." *Supervan, Inc.*, ARB Case 00-008, ALJ Case 94-SCA-14 (ARB Sept. 30, 2002) (quoting *Cynthia E. Aiken*, BSCA No. 92-06 (July 31, 1992)). As noted above, Respondents have failed to provide *any* reason for disobeying my prior orders. Instead, their counsel simply bemoans the harm caused to his clients, proffers potential trial defenses and makes irrelevant legal arguments.

With regard to Respondents' argument that default judgment in this case should be set aside because "debarment would cause permanent damage" to the company, it goes without saying that an adverse judgment necessarily harms the party against whom it is entered. Otherwise, default judgment would hardly be an effective tool to force compliance with a judge's pre-trial orders.

Similarly, Respondents' arguments that they relied on the prime contractor for advice and have information to prove their innocence are totally irrelevant to the issue of why Respondents willfully and consistently failed to comply with or respond to my Orders. Their opportunity to present facts such as these to excuse or ameliorate the DBA violations they were charged with committing was to be the formal hearing that would have been scheduled had Respondents complied with the simple, yet necessary, requirements set forth in my Prehearing Order. Having failed to do so, they have now lost that opportunity.

Finally, regarding Respondents' argument that their Sixth Amendment right to confront their accusers has somehow been violated as a result of the default judgment I issued on April 9, 2013, they should note that the Confrontation Clause of the Sixth Amendment applies only in *criminal* cases. U.S. Const., Amdt. VI ("In all *criminal prosecutions*, the accused shall enjoy the right . . . to be confronted with the witnesses against him") (emphasis added). A DBA debarment action is a *civil* action, and neither this nor any of the other grounds Respondents have offered in support of their motion are sufficient to establish mistake, inadvertence, surprise, excusable neglect, or another reason that justifies relief pursuant to Fed. R. Civ. P. 60(b)(1)-(6).

For the foregoing reasons, Respondents' motion to set aside the Default Judgment entered against them on April 9, 2013 is hereby **DENIED**.

SO ORDERED.

STEPHEN L. PURCELL
Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within forty (40) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 6.34. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue. *See* 29 C.F.R. § 6.34. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

When a Petition is timely filed with the Board, the administrative law judge's decision is inoperative until the Board either (1) declines to review the administrative law judge's decision, or (2) issues an order affirming the decision. *See* 29 C.F.R. § 6.33(b)(1).

At the time you file the Petition with the Board, you must serve it on the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. *See* 29 C.F.R. § 6.34.