

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1809

EMERSON RADIO CORPORATION

v.

EMERSON QUIET KOOL CO. LTD.; HOME EASY LTD.,
Appellants

Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1-20-cv-01652)
District Judge: Honorable Leonard P. Stark*

Submitted Under Third Circuit L.A.R. 34.1(a)
July 10, 2023

Before: SHWARTZ, RESTREPO, and CHUNG, Circuit Judges.

(Filed: July 11, 2023)

OPINION**

* The Honorable Leonard P. Stark, United States Circuit Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(b).

** This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

SHWARTZ, Circuit Judge.

Emerson Quiet Kool Co. Ltd (“EQK”) and Home Easy Ltd. (“Home Easy”) (collectively, “Defendants”) appeal the District Court’s entry of default judgment in favor of Emerson Radio Corporation (“Emerson”) on its trademark infringement claims. Because the District Court did not abuse its discretion in entering default judgment, we will affirm.

I

Emerson, a seller of consumer products, owns and has continuously used several trademarks, including EMERSON and EMERSON (with a G-Clef design), since the early 1900s. From 1953 to 1980, Emerson’s predecessor sold air conditioners under the mark QUIET KOOL by EMERSON RADIO. In 2017, EQK, another seller of consumer appliances, launched a series of air conditioners and dehumidifiers under the trademark EMERSON QUIET KOOL¹ Like Emerson, EQK’s goods are low to moderately priced and sold through big box and online retailers. EQK promotes its goods through a website at the domain emersonquietkool.com. Despite being incorporated in 2014, the website stated that EQK was founded in 1949 and was “one of the oldest and well respected brands in the air conditioner industry,” and included images of several of Emerson’s

¹ Home Easy provides warranty services for EQK’s goods.

historical products.²

In July 2017, Emerson filed suit against Defendants asserting trademark infringement and false advertising claims under the Lanham Act, Anticybersquatting Consumer Protection Act, New Jersey Trademark Act, and New Jersey common law. It sought cancellation of EQK's trademark registration for EMERSON QUIET KOOL, damages, and a permanent injunction requiring Defendants to, among other things, halt their use of the Emerson trademarks, trade name, and domain name, transfer the domain name to Emerson, and recall all inventory and promotional material bearing the Emerson trademarks.

After losing their motion to dismiss, Defendants filed their answer late and thereafter repeatedly failed to timely respond to written discovery requests, follow counsel's advice, and pay counsel's fees. Defendants' conduct led its counsel, Weiner Law Group, LLP ("WLG"), to move to withdraw in July 2019. Because Defendants are corporations and cannot represent themselves,³ the motion requested that the proceedings be stayed for thirty days to allow Defendants to retain new counsel. Emerson opposed the stay, asserting that Defendants had engaged in numerous delay tactics causing Emerson prejudice.

² EQK removed the information and images relating to Emerson from its website after Emerson sent a cease-and-desist letter and filed this suit but asserted that its "use of every mark and image" was permitted. App. 88.

³ See Simbraw, Inc. v. United States, 367 F.2d 373, 374 (3d Cir. 1966) (holding a corporation must be represented by counsel).

The District Court, recognizing that “[D]efendants’ failure to cooperate with their counsel has unreasonably delayed these proceedings,” App. 370, ordered Defendants to have substitute counsel enter an appearance by August 20, 2019 or face the entry of default. Defendants failed to meet this deadline, and on September 10, 2019, the Court issued an order to show cause why default should not be entered. Panitch, Schwarze, Belisario & Nadel, LLP (“PSBN”) then entered an appearance as counsel for Defendants and the order to show cause was vacated.⁴

The parties cross-moved for summary judgment and, as relevant here, the District Court denied Emerson’s motion for summary judgment as to its trademark infringement claims and as to Defendants’ affirmative defenses of waiver, estoppel, and consent.

Thereafter, by order dated May 4, 2021, the District Court scheduled the final pretrial conference for December 21, 2021, and trial for January 10, 2022. After two joint extension requests on November 23, 2021, PSBN moved to withdraw as counsel, explaining, among other things, that Defendants “refuse[d] to engage [PSBN] on discussions for presenting their case at trial,” “repeatedly ignore[d] [PSBN’s] advice,” and stopped paying PSBN. App. 559-61. Although PSBN did not provide the required fourteen-day written notice of the motion to Defendants, PSBN asserted that the disagreements began in early 2020, that it had informed Defendants of these

⁴ In December 2020, the case was transferred from the District of New Jersey to the District of Delaware.

“fundamental disagreements” in a February 2020 letter, and that it had engaged in “countless” communications with Defendants regarding these issues with no resolution, particularly in the several weeks leading up to the motion. App. 541-42. Emerson opposed the motion because trial was then only six weeks away, or in the alternative asked the Court to set an immediate deadline for the appearance of new counsel, which would result in default if missed.⁵

On December 8, 2021, the Court (1) granted PSBN’s motion to withdraw, (2) ordered that substitute counsel for Defendants enter an appearance no later than December 15, 2021, (3) stated that the “failure to do so will result in entry of default,” (4) rescheduled the final pretrial conference for January 13, 2022 and the trial for January 24, 2022, (5) precluded Defendants from serving any motions in limine or from opposing Emerson’s motions in limine that were already served, and (6) ordered that Defendants “may not seek any extension of any deadline set out in this Order without the consent of Plaintiff.” App. 584.

On December 14, 2021, Defendants requested a thirty-day extension to obtain counsel, stating they had interviewed three law firms but that the firms all required more time to review the court documents and perform conflict checks. Emerson opposed the

⁵ Emerson timely served Defendants with its pretrial documents, including the proposed joint statement of undisputed facts, statement of contested facts, statement of issues of law, trial exhibit list, motions in limine, and deposition designations. Defendants failed to provide their pretrial documents or respond to these filings and Emerson’s meet and confer requests.

extension, noting that it would require further trial delay, and requested the entry of default. On December 16, 2021, the Court denied the extension request, “given that trial [was] approximately five weeks away, as well as Defendants’ pattern of failure to timely secure substitute counsel,” App. 601, and directed the Clerk of the Court to enter default against Defendants. On December 23, 2021, Emerson moved for entry of default judgment. Defendants failed to respond to the motion by the required deadline.

On January 10, 2022, Devlin Law Firm (“DLF”) filed a letter informing the District Court that it had been retained by Defendants and that it was prepared to respond to the motion for default judgment within one week and proceed with the January 24, 2022 trial. The Court then cancelled the pretrial conference and trial, ordered that DLF enter an appearance, and gave DLF until January 21, 2022 to respond to the motion for default judgment. DLF then entered an appearance, the parties briefed the default judgment motion, and the Court held oral argument.

The Court concluded that the relevant factors weighed in favor of entering default judgment, finding (1) Emerson had demonstrated prejudice because Defendants’ conduct “render[ed] it impossible for the Court to conduct the trial on the rescheduled date,” and “impeded [Emerson’s] ability to prepare a full and complete trial strategy,” Emerson Radio Corp. v. Emerson Quiet Kool Co. Ltd., No. 20-1652, 2022 WL 1156194, at *2 (D. Del. Apr. 19, 2022), App. 17-18, and (2) although Defendants had a meritorious defense to Emerson’s claims, Defendants’ culpable conduct, which included both their inability to

obtain substitute counsel and their “pattern of delay and lack of representation” throughout the litigation, weighed in favor of default judgment, id. at *4. Thus, the Court entered default judgment, awarded Emerson \$6.5 million in damages, issued a permanent injunction enjoining Defendants and their related companies from using the EMERSON trademark, and directed the United States Patent and Trademark office to cancel Defendant’s trademark for EMERSON QUIET KOOL.

Defendants appeal.⁶

II⁷

⁶ Defendants filed emergency motions to stay the injunction pending their appeal in both the District Court and our Court, which were denied. Emerson has since moved for civil contempt based on Defendants’ alleged failure to comply with the terms of the injunction. That motion is still pending.

Emerson asserts that Defendants should be estopped from pursuing this appeal because in their motions to stay the injunction, they argued that a failure to stay the injunction would “effectively depriv[e] Defendants of any ability to appeal” because they would “be forced to either seek bankruptcy protection or pursue dissolution.” Appellee’s Br. at 51 (quoting App. 670, 682, 692). “Judicial estoppel prevents parties from taking different positions on matters in litigation to gain advantage.” Whiting v. Krassner, 391 F.3d 540, 543 (3d Cir. 2004). However, “judicial estoppel is generally not appropriate where the defending party did not convince the District Court to accept its earlier position,” G-I Holdings, Inc. v. Reliance Ins. Co., 586 F.3d 247, 262 (3d Cir. 2009), as amended (Dec. 4, 2009); see also Whiting, 391 F.3d at 544 (expressing doubt that arguing “for a stay based on the likelihood that [a] claim could be held to be moot is the type of ‘position’ that should work an estoppel”). Because the Court did not adopt Defendants’ position, we decline to bar Defendants’ appeal based on judicial estoppel.

⁷ The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1338, and 1367. We have jurisdiction under 28 U.S.C. § 1291.

“We review the District Court’s entry of a default judgment for an abuse of discretion.” United States v. \$487,825.00 in U.S. Currency, 484 F.3d 662, 664 n.2 (3d Cir. 2007) (citing United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984)). “A district court abuses its discretion if it ‘bases its ruling on an erroneous

In determining whether to enter default judgment, a district court must consider “(1) prejudice to the plaintiff if default is denied, (2) whether the defendant appears to have a litigable defense, and (3) whether defendant’s delay is due to culpable conduct.”⁸ Chamberlain v. Giampapa, 210 F.3d 154, 164 (3d Cir. 2000) (citation omitted). Because we prefer to decide cases on their merit, we do “not favor entry of defaults or default judgments,” and “require doubtful cases to be resolved in favor of the party moving to set aside the default judgment.” United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 194-95 (3d Cir. 1984) (quotations and citation omitted).

Although Defendants survived Emerson’s summary judgment motion, and thus arguably have a meritorious defense, see Briscoe v. Klaus, 538 F.3d 252, 263 (3d Cir. 2008); see also \$55,518.05 in U.S. Currency, 728 F.2d at 195 (stating that a defendant has a meritorious defense where “its allegations, if established at trial, would constitute a complete defense” to the action), the District Court did not abuse its discretion in concluding that the prejudice Emerson would suffer and Defendants’ culpable conduct outweigh it.

view of the law or on a clearly erroneous assessment of the evidence.” McLaughlin v. Phelan Hallinan & Schmieg, LLP, 756 F.3d 240, 248 (3d Cir. 2014) (quoting Grider v. Keystone Health Plan Cent. Inc., 580 F.3d 119, 134 (3d Cir. 2009)).

⁸ A district court need not find that all three factors are satisfied to enter default judgment. See, e.g., Hritz v. Woma Corp., 732 F.2d 1178, 1184 (3d Cir. 2014) (stating it is not an abuse of discretion to enter default against a party “who has callously disregarded repeated notices of a judicial proceeding,” even though the party has a meritorious defense).

As to prejudice, the District Court appropriately found that Emerson would be prejudiced absent the entry of default judgment. Prejudice “is not limited to ‘irremediable’ or ‘irreparable’ harm,” but also includes “the burden imposed by impeding a party’s ability to prepare effectively a full and complete trial strategy.” Briscoe, 538 F.3d at 259 (citation omitted).⁹ A party’s failure to attend or to present all of its evidence at the final pretrial conference prejudices the opposing party in their trial preparations. Id. at 260; see also Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 920 (3d Cir. 1992) (holding plaintiffs were prejudiced because they were “required to expend significant time and costs in attempting to secure responses to their discovery requests,” forced to prepare their pretrial memorandum without key information, and never received the defendants’ pretrial memorandum, “further prejudicing their ability to prepare an effective trial strategy”). As the District Court observed, Defendants’ repeated failure to meet the pretrial deadlines and lack of representation weeks before trial was no different from a case where a defendant fails to appear at trial and “which routinely results in a default upheld on appeal.” Emerson Radio Corp., 2022 WL 1156194, at *3 (citing Hoxworth, 980 F.2d at 918).

⁹ Briscoe considered the factors for entry of default as a sanction under Rule 37, rather than Rule 55, and applied the factors laid out in Poullis v. State Farm Fire and Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984). Despite this distinction, several of the factors from the Poullis test, such as prejudice, mirror the factors considered for entry of default judgment under Rule 55.

Furthermore, the prejudice to Emerson goes beyond delay in realizing satisfaction on its claim, as Defendants' actions have impeded its "ability to litigate the merits of the case." Id. at *3; cf. Hoxworth, 980 F.2d at 921 ("[T]he prejudice flowing from failure to proceed with a scheduled trial after the case had been pending for more than three years is apparent."). Thus, Emerson would have been prejudiced if default had not been entered.

Moreover, both the prejudice to Emerson and Defendants' default were caused by Defendants' own culpable conduct. The standard for culpable conduct is "the 'willfulness' or 'bad faith' of a non-responding defendant." Hritz v. Woma Corp., 732 F.2d 1178, 1182 (3d Cir. 1984). This requires "more than mere negligence," but may encompass "[r]eckless disregard for repeated communications from plaintiffs and the court." Id. at 1183.

Although Defendants assert that the sole cause of the default was their inability to timely obtain substitute counsel, that inability occurred as "part of a pattern of delay and lack of representation that ha[d] plagued this litigation," Emerson Radio Corp., 2022 WL 1156194, at *4, including by failing to timely file their answer and respond to discovery, repeatedly seeking extensions, ignoring orders, disregarding discovery obligations,¹⁰

¹⁰ Defendants contest the District Court's characterization of the events, asserting (1) the District Court's seven-day deadline to find new counsel was unreasonable, (2) Defendants tried in good faith to retain new counsel as quickly as possible, (3) DLF offered to keep the January 24, 2022 trial date, and (4) the District Court exaggerated the

causing WLG to withdraw because of their unwillingness to follow its advice, missing the thirty-day deadline to substitute WLG with new counsel, engaging in the same uncooperative behavior with PSBN, and missing all deadlines associated with the pretrial order.¹¹

As the District Court noted, Defendants’ “unwillingness to follow the advice of counsel, participate in the defense of the matter, and honor their financial obligations” caused two law firms to withdraw and “evinces a pattern of willful refusals to participate in this case in good faith.” *Id.* Because Defendants’ inability to retain counsel was

extent of Defendants’ prior delays and noncompliance and the relevance of that conduct to the entry of default.

These arguments are unpersuasive. First, although the Court imposed a seven-day deadline for Defendants to retain new counsel, Defendants were on notice of PSBN’s intent to withdraw by November 22, 2022, at the latest, and therefore had at least three weeks to obtain new counsel. Second, even if Defendants had demonstrated a good faith effort to obtain new counsel, this argument ignores the fact that Defendants needed to seek new counsel on the eve of trial only because they refused to cooperate with PSBN in the first place. Third, DLF’s offer to proceed to trial on January 24, 2022, was unrealistic because Defendants had already missed the deadline for pretrial disclosures and the pretrial order, which were necessary for the trial to proceed, and at that point, trial was only two weeks away.

¹¹ Defendants’ reliance on *Pecarsky v. Galaxiworld.com, Ltd.*, 249 F.3d 167 (2d Cir. 2001), is misplaced. In *Pecarsky*, the Court of Appeals for the Second Circuit reversed the entry of default where, following the substantial completion of discovery, defense counsel withdrew, and the defendants failed to obtain new counsel within five days. *Id.* at 169-70. The court concluded that due to the defendants’ “repeated contact with the district court and apparent efforts to retain new counsel, [it] cannot say that [the defendants] deliberately chose not to appear.” *Id.* at 172. Unlike the Defendants here, the *Pecarsky* defendants did not have a pattern of failing to comply with court deadlines, and the default occurred well before trial. Thus, *Pecarsky* does not demonstrate that the District Court’s entry of default was in error.

“attributable to Defendants’ own conduct,” the District Court appropriately discounted “Defendants’ eventual efforts to overcome challenges of their own making,” *id.* at *5, and correctly concluded that Defendants’ pattern of behavior reflected willful noncompliance with their court obligations and lack of cooperation with their various counsel. Thus, the District Court did not abuse its discretion in concluding that alternative measures would be insufficient to avoid further prejudice.

In summary, although Defendants have a meritorious defense, the prejudice to Emerson and Defendants’ culpable conduct warranted the entry of default judgment.¹²

III

For the foregoing reasons, we will affirm.

¹² While consideration of alternative sanctions is part of the test for dismissal under Rule 41(b), *see Poulis*, 747 F.2d at 867, it is not a required factor for default under Rule 55, *see, e.g., Hritz*, 732 F.2d at 1181. That said, the District Court here did consider lesser sanctions, for example, precluding Defendants from opposing Emerson’s motions in limine, but concluded that this sanction was “not nearly adequate under the present circumstances.” *Emerson Radio Corp.*, 2022 WL 1156194, at *2.