UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 02-22046-CIV-LENARD/BANDSTRA

OSCAR REYES, GLORIA REYES, JANE DOE I, JANE DOE II, ZENAIDA VELASQUEZ, HECTOR RICARDO VELASQUEZ

Plaintiffs,

v.

JUAN EVANGELISTA LOPEZ GRIJALBA (GRIJALVA)

Defendant.

PLAINTIFFS' NOTICE OF SHOWING GOOD CAUSE
<u>OR, IN THE ALTERNATIVE, MOTION FOR DEFAULT JUDGMENT</u>

Plaintiffs, by and through their undersigned counsel, pursuant to the Federal Rules of Civil Procedure, and in response to the Court's October 30, 2003, Order Striking Defendant's Answer and Affirmative Defenses and Order to Show Cause, Plaintiffs Oscar Reyes, Gloria Reyes, Jane Doe I, Jane Doe II, Zenaida Velasquez and Hector Ricardo Velasquez respectfully file their Notice of Showing Good Cause or, in the Alternative, Motion for Default. As grounds thereof, Plaintiffs state:

INTRODUCTION

Plaintiffs' complaint alleges that Defendant is liable for acts constituting torture,

disappearance and extrajudicial killing. Defendant was personally served with the summons and complaint on July 15, 2002, as evidenced by the Return of Service of summons on file with this Court. *See* Declaration of Benjamine Reid, ¶ 2 (“Reid Decl.”). Defendant entered an appearance through his attorney, Kurt R. Klaus on July 29, 2002. He answered the complaint and asserted affirmative defenses on August 2, 2002. Reid Decl., ¶4.

The Court granted Mr. Klaus’ motion to withdraw as Defendant’s counsel on June 20, 2003. The Court, through its July 3, 2003, Order Denying Without Prejudice Plaintiffs’ Motion to Revise Scheduling Order, ordered Defendant to obtain new counsel or to file a *pro se* appearance within thirty days. Defendant failed to obtain new counsel, file a *pro se* appearance or otherwise respond to the Court’s order. On July 14, 2003, the Court ordered Defendant to file a response to Plaintiffs’ Motion for Protective Order. Again, Defendant failed to respond to the Court’s order. On August 19, 2003, the Court gave Defendant thirty additional days to obtain new counsel or file a notice of a *pro se* appearance. Defendant did not respond to the Order. Then on October 7, 2003, the Court gave Defendant ten additional days to obtain counsel, file a *pro se* appearance or show cause why his answer should not be stricken. Defendant did not respond or show cause, and the Court struck his answer and affirmative defenses. Through that October 30, 2003, Order Striking Defendant’s Answer and Affirmative Defenses and Order to Show Cause, the Court gave Defendant a final deadline of November 28, 2003, to obtain counsel or file a *pro se* appearance. Defendant has not responded. Reid Decl., ¶4.

However, Defendant has cooperated with Plaintiffs’ counsel and has participated in the ongoing discovery process. Defendant attended the depositions of two witnesses, Leopoldo Aguilar and Julio Vasquez, and asked questions of the deponents on cross-examination. *See*

Reid Decl., ¶5 and appendices A and B thereto. He also reviewed and signed the Amended Joint Scheduling Report which was submitted to the Court on October 3, 2003. *See* Reid Decl., ¶5 and appendix C thereto. Finally, Defendant reviewed and agreed to the selection of a mediator by signing the letter sent by Plaintiffs' counsel on October 21, 2003. *See* Reid Decl., ¶5 and appendix D thereto. These actions demonstrate that this case should not be resolved by a default judgment, but rather should proceed to a trial on the merits.

Plaintiffs' complaint sets forth specific allegations of Defendant's liability for torture, disappearance and extrajudicial killing. Accordingly, this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1350 (the "Alien Tort Claims Act," or "ATCA"), *see Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996), and under 28 U.S.C. § 1331, by virtue of Plaintiffs' claims under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note.

MEMORANDUM OF LAW

I. GOOD CAUSE WHY THIS CASE SHOULD NOT BE DISMISSED FOR LACK OF PROSECUTION

While Federal Rule 41(b) authorizes courts to dismiss cases for lack of prosecution, involuntary dismissal "is a drastic remedy to which a court may resort only in extreme circumstances." *Silas v. Sears, Roebuck & Co., Inc*., 586 F.2d 382 (5th Cir. 1978). In fact, only where there is "a clear record of delay or contumacious conduct by the plaintiff" is an involuntary dismissal appropriate. *Durham v. Florida East Coast R. R. Co.*, 385 F.2d 366, 368 (5th Cir. 1967). *See also, e. g., Graves v. Kaiser Aluminum & Chemical Co.*, 528 F.2d 1360 (5th Cir. 1976)

In the present case, the record is devoid of "delay or contumacious conduct" by Plaintiffs to warrant the grave sanction of an involuntary dismissal. Rather, Plaintiffs have been steadfast

in their attempts to prosecute this case, to the point of traveling to Honduras to procure witnesses and evidence as well as conducting depositions at Krome Detention Center where Defendant Grijalba is currently detained. Based on these efforts alone this case should not be dismissed for lack of prosecution.

Defendant Grijalba should not be held to the same standards as trained practitioners. As the Eleventh Circuit explained:

> [A] district court which holds pro se litigants to the same standards as trained practitioners may end up routinely rejecting meritorious claims for failure to prosecute. This course we cannot approve. Unless the court is willing to guide pro se litigants through the obstacle course it has set up, or to allow them to skip some of the less substantive obstacles, it should not erect unnecessary procedural barriers which many pro se litigants will have great difficulty surmounting without the assistance of counsel.

Kilgo v. Ricks 983 F.2d 189, 193-94 (11th Cir. 1993).

Despite Defendant's failure to respond to the court's orders that he hire an attorney or enter a *pro se* appearance, his filing of an answer and subsequent participation in the case demonstrate that a trial on the merits is more appropriate than a default judgment. "[P]rior cases leave some doubt as to whether a party's failure to appear for trial after an answer and appearance have been filed constitutes a default under Rule 55, Fed.R.Civ.P…" *Franks v. Thomason*, 4 B.R. 814, 821-22 (N.D.Ga. 1980) (*citing Bass v. Hoagland*, 172 F.2d 202 (5th Cir.), *cert. denied*, 338 U.S. 816 (1949). In fact, several 11th Circuit and pre-division 5th Circuit cases have held that once a defendant has answered and entered an appearance, a default judgment should not be entered.[1]

[1] Although Defendant's answer has been stricken pursuant to the Court's order of October 30, 2003, this does not negate the fact that Defendant did at one time answer the complaint and enter an appearance in the case through his now-withdrawn attorney.

Rule 55, which governs default judgments, is not applicable when the defendant has answered the complaint and otherwise participated in the case. *Solaroll Shade and Shutter Corp., Inc. v. Bio-Energy Systems, Inc.*, 803 F.2d 1130 (11th Cir. 1986). The Eleventh Circuit explained:

> Thus a court can enter a default judgment against a defendant who never appears or answers a complaint, for in such circumstances the case never has been placed at issue. If the defendant has answered the complaint but fails to appear at trial, issue has been joined, and the court cannot enter a default judgment. However, the court can proceed with the trial. If plaintiff proves its case, the court can enter judgment in its favor although the defendant never participated in the trial.

Id. at 1134. (*citing Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 400 n. 2 (11th Cir. 1981); *Bass*, 172 F.2d 209-10). In *Bass*, the Fifth Circuit held that the district court erred by entering default judgment against a defendant whose counsel withdrew and who failed to appear at trial. The court ruled that the withdrawal of the defendant's attorney did not constitute "withdrawal of the defendant's appearance and pleading and demand for a jury." 172 F.2d at 208.[2]

In addition to *Solaroll*, the Eleventh Circuit confirmed the continued validity of the *Bass* court's reasoning in *Seven Elves*. Although the language is *dicta*, the court found, "Under the existing case law of this circuit it is highly doubtful that a defendant's failure to appear for trial under the circumstances here presented would constitute a default at all within the meaning of Rule 55." 635 F.2d at 401. Moreover, "a default judgment entered upon the failure of the appellants or their attorney to appear at trial might well be found to have been erroneously

[2] The circuit's jurisprudence on this subject is not without confusion. *See McGrady v. D'Andrea Electric, Inc*., 434 F.2d 1000, 1001 (5th Cir. 1970) (holding that a district court has power to enter default for failure to appear at a pretrial conference); *Gulf Coast Fans, Inc. v. Chan Kan Ping*, 740 F.2d 1499 (11th Cir. 1984) (finding, although the district court was in err in entering a default judgment, "The failure to appear at a duly scheduled trial after months of preparation by the parties and by the trial court is a serious offense for which the entry of default is

entered as a matter of law under Fed.R.Civ.P. 55." *Id.* Despite Defendant Grijalba's failure to respond to the Court's orders on entering a *pro se* appearance, his filing of an answer, entry of appearance through Mr. Klaus and his continued participation in discovery show that he has, in fact, defended the case. In this circumstance, the most appropriate avenue is to proceed to a trial on the merits, rather than entry of default judgment.[3]

II. IN THE ALTERNATIVE, PLAINTIFFS MOVE THE COURT TO GRANT DEFAULT JUDGMENT IN FAVOR OF THE PLAINTIFFS

As evidenced by the facts described above, Defendant has repeatedly failed to respond to the Court's orders and therefore has not defended the case. Default judgment should therefore be entered against him pursuant to Rule 55 of the Federal Rules of Civil Procedure.

Plaintiffs request compensatory and punitive damages in this matter. As Plaintiffs' damages are not for a sum certain or an amount that can be made certain by computation, Rule 55(b) of the Federal Rules of Civil Procedure requires Plaintiffs to make this application to the court for a default judgment. Default judgment is appropriate here because Defendant, who was properly served with the summons and complaint, failed to defend. Plaintiffs have established this fact by affidavit. *See* Reid Decl. Finally, Defendant is not an infant or incompetent person. Reid Decl., ¶3.

As Plaintiffs' claim for compensatory and punitive damages is not for a sum certain, plaintiffs hereby request an evidentiary hearing pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure to establish their entitlement to damages. Plaintiffs' complaint reserves their

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appropriate.")

[3] *See, e.g., Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322 (N.D.Ga. 2002). In *Mehinovic*, when the defendant failed to appear for trial, the court "declared [him] in default and struck his answer," but nonetheless held a "trial on the merits." *Id*. at 1329.

right to trial by jury.

CONCLUSION

Plaintiffs respectfully request that the Court accept this notice of showing good cause and permit this case to proceed to a trial on the merits as scheduled. However, if the Court finds that a trial on the merits is not appropriate in these circumstances, Plaintiffs respectfully request that the Court grant default judgment in favor of the Plaintiffs and set an evidentiary hearing to establish the amount of damages.

Counsel for Plaintiffs

____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via fax and U.S. Mail on this ________ day of December, 2003, to: Juan Evangelista López Grijalba, Alien No: A 94 265 485, Krome Service Processing Center, 18201 Southwest 12th Street, Miami, FL 33194.

By: ______________________________
BENJAMINE REID