

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

|                                    |   |                              |
|------------------------------------|---|------------------------------|
| <b>TERESA A. CURTIN,</b>           | ) |                              |
|                                    | ) |                              |
| <i>Plaintiff</i>                   | ) |                              |
|                                    | ) |                              |
| v.                                 | ) | <i>Docket No. 01-269-P-C</i> |
|                                    | ) |                              |
| <b>PROSKAUER, ROSE GOETZ &amp;</b> | ) |                              |
| <b>MENDELSON GROUP LONG TERM</b>   | ) |                              |
| <b>DISABILITY PLAN, et al.,</b>    | ) |                              |
|                                    | ) |                              |
| <i>Defendants</i>                  | ) |                              |

**MEMORANDUM DECISION ON DEFENDANT NATLSCO'S MOTION  
TO LIFT DEFAULT**

At the request of the plaintiff, default was entered by the clerk of this court against Natlsco, Inc., one of four defendants in this action seeking to recover long-term disability benefits, on January 25, 2002. Docket No. 8 and endorsement thereon. The record reflects that Natlsco was served with a summons and a copy of the complaint on November 20, 2001. Accordingly, Natlsco's answer or other responsive pleading was due to be filed in this court no later than December 10, 2001. Natlsco's answer was filed on January 28, 2002 and the pending motion to set aside the default was filed on January 29, 2002. Docket Nos. 9 & 10.

**BACKGROUND**

Natlsco relies on the affidavits of Charles Harvey, attorney for the plaintiff, and the affidavit of John Tejjido, filed with its motion. Those affidavits establish the following facts. On November 28, 2001 Tejjido, in-house counsel for Natlsco, eight days after service of the complaint, contacted

Harvey by telephone. Affidavit of John Tejjido (“Tejjido Aff.”), Exh. B to Defendant Natlsco, Inc.’s Motion to Lift Default (“Motion”) (Docket No. 10), ¶ 1; Affidavit of Charles Harvey (“Harvey Aff.”) (Docket No. 6), ¶ 4. Harvey “agreed to” an extension of 30 days beyond the date on which Natlsco’s answer would otherwise be due. Harvey Aff. ¶ 4; Tejjido Aff. ¶ 3. Tejjido “promptly” informed “other parties and insurance companies whom [he] believed responsible for answering the Complaint on behalf of Natlsco, regarding the Complaint and the due date for the Answer.” Tejjido Aff. ¶ 4. Tejjido “tendered the defense” to an unnamed reinsurer to which he had tendered the defense of other litigation in the past with no resulting problems with timely filing of answers to complaints. *Id.* ¶¶ 5-6. The reinsurer represented to Tejjido that counsel would be retained to answer the complaint on behalf of Natlsco. *Id.* ¶ 7. No request for an extension of time in which to answer was filed by or on behalf of Natlsco. After the agreed 30-day period had expired, Harvey called Tejjido, who told Harvey that counsel had been retained by Highmark, an insurance company that apparently had taken over responsibility for the disability insurance policy at issue. Harvey Aff. ¶ 5. Harvey informed Tejjido that no attorney had entered an appearance for Natlsco. *Id.*

This court issued on January 11, 2002 an order to show cause why the action should not be dismissed due to the failure of Natlsco to plead and the failure of the plaintiff to seek entry of default against Natlsco. Docket No. 4. Upon receiving the order, Harvey called Tejjido on January 14, 2002 and told him that Natlsco needed to take action. Harvey Aff. ¶ 6. Tejjido said that he would get back to Harvey. *Id.* Having heard nothing, Harvey again called Tejjido on January 22, 2002. *Id.* ¶ 7. Tejjido then informed Harvey that neither Highmark nor Natlsco had yet obtained counsel. *Id.* Tejjido maintains that “[v]arious persons at Natlsco . . . relied upon the mistaken belief that someone else had undertaken the task of ensuring that” counsel for Massachusetts Mutual Life Insurance Company, another named defendant, “was defending and answering the Complaint on behalf of

Natlsco.” Tejjido Aff. ¶ 9. He states that unidentified individuals made assurances to unidentified Natlsco employees that the complaint had been answered. *Id.* He apparently first learned that this was not the case from Harvey’s January 14 telephone call. *Id.* ¶¶ 9-10. Between Harvey’s January 14 and January 22 telephone calls “Natlsco internally attempted to sort out the responsibilities of the named defendants and to take steps to see that an answer was filed on behalf of Natlsco.” *Id.* ¶ 10. Tejjido blames the delay on the fact that the attorney who had filed an answer for Massachusetts Mutual Life Insurance Company was out of her office “until January 23.” *Id.* Tejjido spoke with this lawyer on January 25 and, upon being informed that she could not file an answer on behalf of Natlsco, retained on that date the attorneys who filed an answer on behalf of Natlsco, *id.* ¶ 12, on January 28, as well as the pending motion the next day.

### **DISCUSSION**

Federal Rule of Civil Procedure 55(c) provides that an entry of default may be set aside “for good cause shown.” Action on such a motion is discretionary with the court, “bounded by the specific circumstances of each case.” *Coon v. Grenier*, 867 F.2d 73, 75 (1st Cir. 1989). Early in the case, the court should resolve doubts in favor of the party seeking relief from the entry of default. *Id.* at 76. The court must consider whether the default was willful, whether a meritorious defense is presented, and whether setting aside the default would prejudice the plaintiff. *Id.* The court may also examine the proffered explanation for the default, the good faith of the parties, the amount of money involved and the timing of the motion. *Id.*

In this court, the moving party’s burden is first to show good cause for the default and the existence of a meritorious defense. If that showing is made, the court will then consider the remaining factors. *Wayne Rosa Constr., Inc. v. Hugo Key & Son, Inc.*, 153 F.R.D. 481, 481 (D. Me. 1994) (three week delay not excusable). Carelessness in clerical or technical practices does not constitute

good cause. *Grover v. Commercial Ins. Co.*, 108 F.R.D. 366, 368 (D. Me. 1985). The recitation of the sequence of events set forth above shows little other than carelessness by Natlsco. *See Phillips v. Weiner*, 103 F.R.D. 177, 180 (D. Me. 1984) (sloppy handling of complaint within insurance company “not a strong” excuse for failing to answer complaint until 21st day after service). *See also Morgan v. Hatch*, 118 F.R.D. 6, 9 (D. Me. 1987) (6 weeks constitutes excessive delay). Here, Natlsco first filed an answer seven weeks after it was due. *See Maine Nat’l Bank v. F/V Cecily B*, 116 F.R.D. 66, 69 (D. Me. 1987) (“the relevant date for purposes of evaluating the equities of the situation is the date on which the answer was due rather than the date on which the default was actually entered”). While Tejjido did not simply ignore the complaint that was served on Natlsco — nor could he, given Harvey’s repeated telephone calls — he made no effort to determine that the unidentified reinsurer followed through on its representation that it would obtain counsel for Natlsco and see that a timely response was filed. Nor did Tejjido make any attempt to seek a court order enlarging the answer deadline or to obtain leave of court to file a late answer; in this court, counsel may not extend deadlines imposed by court rule merely by their own agreement. Particularly after Harvey’s second telephone call, before he received this court’s order to show cause and then called again to inform Tejjido of its existence, Tejjido was on notice and under an obligation to obtain counsel and file an answer immediately — not some twenty days later. *See Grover*, 108 F.R.D. at 371 (“The Court cannot find good faith in a party’s lackadaisical attitude toward the rules of procedure, which are designed to facilitate and expedite trials on the merits.”).

In order to show the existence of a meritorious defense, a party seeking relief from entry of default must present more than general denials or conclusory statements. *Maine Nat’l Bank*, 116 F.R.D. at 69. Natlsco has met this requirement, although not until it submitted a supplemental affidavit from Tejjido with its reply memorandum. *See Defendant Natlsco, Inc.’s Reply Memorandum in*

Support of Its Motion to Set Aside Default (Docket No. 18) & Second Affidavit of John Teijido, attached thereto. The parties have made no showing of the amount of benefits at issue in this proceeding. Granting the motion would result in little prejudice to the plaintiff; it is far from clear that the plaintiff could obtain any damages from Natlsco while the action remains pending against the other defendants. These factors weigh in favor of granting the motion.

The timing of the pending motion weighs against granting it, and Natlsco has failed to demonstrate good faith on the showing made. Natlsco's proffered explanation for its delay is weak. Still, while this is a very close question, I cannot conclude that Natlsco's conduct was so egregious as to constitute willfulness. My reluctant decision to grant the motion in this case should not be taken as an indication that the conduct described by Teijido is in any sense acceptable to this court. Much greater diligence is expected of attorneys, whether in-house counsel or litigators, than that which was demonstrated in this case.

### **CONCLUSION**

For the foregoing reasons, the motion of defendant Natlsco, Inc. to set aside the default is **GRANTED**.

Date this 27th day of February, 2002.

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David M. Cohen  
United States Magistrate Judge

TERESA A CURTIN  
plaintiff

CHARLES A. HARVEY, JR.

HARVEY & FRANK  
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v.

PROSKAUER, ROSE GOETZ &  
MENDELSON GROUP LONG TERM  
DISABILITY PLAN  
defendant

PROSKAUER, ROSE, LLP  
fka  
PROSKAUER, ROSE, GOETZ &  
MENDELSON  
defendant

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