

In the United States Court of Federal Claims

MICHAEL J. FORBES, *pro se.*)
)
 Plaintiff,)
)
 v.)
)
 THE UNITED STATES)
)
 Defendant.)

No. 1:2024-cv-01953
(Judge Hadji)

RESPONSE TO DEFENDANT’S MOTION FOR ENTRY OF SCHEDULING ORDER

BACKGROUND

1. On December 9, 2024 the Plaintiff filed an Amended Complaint (ECF No. 5). On January 27, 2025, the deadline under CFC Rule 12 passed for the Defendant to respond to the Complaint, hence the Plaintiff *pro se* subsequently moved that a default be entered in the case. On February 5, 2025, the Clerk of the Court of Federal Claims (CFC) entered an Entry of Default (ECF No. 8). Later that day, the Defendant entered an appearance (ECF No. 9) and moved the Court to vacate the Entry of Default and grant the Defendant an extension of time to answer. (ECF No. 10). The Plaintiff responded and opposed any vacation of the Entry of Default (ECF No. 13) and the Defendant replied (ECF No. 14). Recently, the Defendant submitted another out of time MOTION TO AMEND SCHEDULE for the Court to approve changes in a nonexistent prior schedule under the Rules of the Court of Federal Claims (RCFC), Appendix K (ECF No. 15).

RESPONSE TO DEFENDANT'S MOTION TO AMEND SCHEDULE

2. In the Defendant's out of time motion requesting approval of an Appendix K scheduling order (ECF No. 15), the Defendant stated a reliance on their partially out of time omnibus motion (ECF No. 10), as a circular justification with, and as 'on par' with, the RCFC. This implies an exalted or elevated status of the omnibus MOTION TO VACATE.... (ECF No. 10), which is presumptive on its face. This unfounded inference that the prior un-adjudicated motion (ECF No. 10) is 'on equal footing' with the RCFC is invoked via the out of time motion's (ECF No. 15) stated opening sentence, "**Pursuant to our motion to vacate default and motion out of time for an enlargement of time to file response to complaint and Appendix K of the Rules of the United States Court of Federal Claims....**" (emphasis added, ECF No. 15 at 1). This couldn't be further from the facts because the prior motion described "excusable neglect" (ECF No. 10 at 3, 4, & 5), as the government's "failure to calendar the correct date to respond" (ECF No. 10 at 3) after being "assigned the case in December 2024" (ECF No. 10 at 3), all of which has been argued and has NOT been adjudicated by this Court; it may also be moot pursuant RCFC 6(b)(2).

3. Given the Defendant's recent, and aforementioned, exaltation of their prior motion (ECF No. 10), the Plaintiff uses that new stance to further clarify its opposition to that motion by persuasive example. The Supreme Court of Indiana addressed the difference between "excusable neglect" and "neglect" in its August 21, 2015 ruling in the case of *Huntington Nat'l Bank v. Car-X Assoc. Corp.* 39 NE 3d 652 (Ind. 2025), quoting from *Smith v. Johnston*, 711 N.E.2d 1259, 1262 (Ind.1999), where the Court identified the "fact sensitive" nature of

“claims of excusable neglect” and exemplified contributing factors of counsel’s failure to answer merely due to Defendant-suppressed notifications as “not excusable:”

*By their nature, cases involving claims of **excusable neglect** are highly fact sensitive. Here, the record reveals that the **source of Huntington's untimely response** was that, in the absence of the employee who typically received service, a supervisor failed to refer the summons and complaint to counsel until after the deadline had passed. “**This is neglect, but not excusable neglect** as appears in Rule 60(B)(1).”*

The Plaintiff respectfully adds this opposing argument to his prior Response arguments (ECF No. 13) associated with the Defendant’s now-exalted omnibus motion (ECF No. 10), which relied on RCFC 60(b)(1) and associated standards of excusable neglect; also, the Plaintiff respectfully reminds the Court of RCFC 6(b)(2) pertaining to disallowed extensions.

APPENDIX K ANALYSIS

4. With respect to the proposed “Appendix K” (Military Pay cases) scheduling, it clearly states:

In lieu of the United States filing an answer to the complaint under RCFC 12(a)(1), the parties must file a joint motion for entry of a scheduling order within 60 days after service of the complaint (emphasis added)

The phrase “in lieu of” is a Latin phrase which means “instead of.” The Defendant failed both, to answer the Complaint on time, or “in lieu of” that, to file a joint motion for a scheduling order. In this case, the Defendant had the same 66 days after service to decide to accomplish either one; ultimately, the Defendant failed to decide either way.

5. Moreover, pursuant to the RCFC, an Appendix K joint scheduling order has the exact same 60-day time requirement as the Defendant’s answer, which indicates the framers of the rules

expected the Defendant to weigh these decisions concurrently; i.e., the Defendant was required to decide to either: 1) answer the Complaint, 2) apply for a Motion to Dismiss the Complaint, 3) apply for an extension to answer or dismiss the Complaint, OR 4) confer and jointly proceed straight to Appendix K procedure scheduling, with each choice to be made in advance of the 60-day deadline. The Defendant did NONE of these, which renders this Defendant's out of time MOTION TO AMEND SCHEDULE (ECF No. 15) moot.

OUT OF TIME MOTIONS

6. In fact, this latest motion is another out of time motion (ECF No. 15) the content of which again redirects the Court's attention to arguments or aspects of this case that are not presently at issue before the Court. This case's pressing issue is the sum of: the Defendant's Default (ECF No. 8); the MOTION TO VACATE DEFAULT (ECF No. 10); and the out of time extension request (ECF No. 10); which is pending adjudication. Moreover, the pressing issues are: not jurisdiction; not the military pay aspect (or other aspects) of case; and certainly not Appendix K procedures. The latter of which is separate and independent of a decision on a Default Judgment scheduling order, which differs in many ways as it would likely include a 'hearing, or referrals' or both, that may become apropos at the discretion of the Court; the appropriateness being dependent, once again, on the adjudicative outcome of the Defendant's omnibus MOTION TO VACATE (ECF No. 10).

CONCLUSION

7. In sum, the Plaintiff's opposition motion (ECF No. 13), with the added argument above, remains equal before the Court with the Defendant's omnibus MOTION TO VACATE

DEFAULT... (ECF No. 10) and the Defendant's associated Reply (ECF No. 14). Hence, the Plaintiff and the Defendant await a ruling and the Defendant's scheduling order is moot.

8. The Plaintiff believes that the RCFC rules at issue provide a fair amount of time and ample opportunity for the Defendant to have responded to the Plaintiff's Complaint and to have protected its rights in Court; it simply failed to do so. Therefore, Plaintiff requests that the Court adjudicate and deny the Defendant's omnibus MOTION TO VACATE DEFAULT AND MOTION OUT OF TIME FOR AN ENLARGEMENT OF TIME TO FILE RESPONSE TO COMPLAINT (ECF No. 10) in consideration of the Plaintiff's RESPONSE arguments (ECF No. 13) and the Defendant's REPLY (ECF No. 14). Plaintiff also requests the Court adjudicate the out of time MOTION TO AMEND SCHEDULE (ECF No. 15) as moot. The Plaintiff requests this due to the 'injuries and prejudices' assumed by the Defendant as evidenced by the default in the record (ECF No. 8) and as argued in the Plaintiff's RESPONSE in opposition (ECF No. 13); the Plaintiff's damages are growing daily and "the passage of time would increase the potential liability of the United States for back pay and would make the availability of corrective action more difficult to effect (*see Martinez v. U.S.* 333 F.3d 1295 (Fed. Cir. 2003))¹

MARCH 14, 2025

Date

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¹ The Federal Circuit held in this case, "Thus, it might be relatively easy to effectuate corrective action — such as directing that an officer be reinstated and reconsidered for promotion — within a short period after the officer's improper discharge, but it would ordinarily be much more difficult to unravel the effects of an improper discharge many years after the fact."